



REPUBLIC OF KENYA



**KENYA LAW**  
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**Manyara & another v Manyara & 3 others (Environment and Land Appeal  
E039 of 2023) [2024] KEELC 4331 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4331 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

**CK NZILI, J**

**MAY 22, 2024**

**BETWEEN**

**EVERLYN NKATHA MANYARA ..... 1<sup>ST</sup> APPELLANT**

**EDINAH MWENDWA MANYARA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JULIUS KIGUNDA MANYARA ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON KITHINJI MUNGANIA ..... 2<sup>ND</sup> RESPONDENT**

**I & M BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**PURPLE ROYAL AUCTIONEERS ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The court, by an application dated 27.11.2023 is asked to stay the sale of LR No. Nyaki/Mulathankari/3625 by the 3<sup>rd</sup> respondent pending the hearing and determination of this appeal. The grounds are contained on the face of the application and in a supporting and supplementary affidavit sworn by Evelyn Nkatha Manyara on 27.11.2023 and 19.12.2023. Briefly, the applicants state that the 1<sup>st</sup> respondent, as the registered owner of the suit land, illegally charged it with the 2<sup>nd</sup> respondent; it is a residential house occupied by them as daughters of the 1<sup>st</sup> respondent; he defaulted in repaying the loan, and statutory sale is imminent, the sale had been challenged in Meru ELC No. 49 of 2022 now appealed against following dismissal of the applications and that auctioneers have issued a notice dated 15.12.2023, to proceed with the auction sale.
2. The applicants aver that they were never aware of the charge and was only fair, just and equitable to grant the orders sought in the supplementary affidavit. The applicants have attached a copy of the ruling made by the trial court on 2.10.2023, where they had sought temporary orders of injunction to stop any interference with the suit property.



3. The application is opposed through a replying affidavit sworn by Joshua Ngari, an assistant manager credit department of the 3<sup>rd</sup> respondent, confirming that the 3<sup>rd</sup> respondent was advanced Kshs. 2,000,000/= by a letter of acceptance dated 26.8.2019 gave a collateral with a guarantor the 1<sup>st</sup> respondent using the suit land as per a 1<sup>st</sup> charge and personal guarantors dated 26.9.2019, a further facility was advanced of Kshs. 500,000/= by a letter of offer and an acceptance dated 26.6.2020.
4. It was averred that the credit facility was repayable in monthly installments of Kshs.30,724/= and a further charge was made on 25.7.2020. The 3<sup>rd</sup> respondent averred after default demand notices were sent to the principal debtor and the guarantors for an outstanding loan of Kshs.5,080, 220.38/= leading to a request for indulgence in default of which statutory notices were issued under Sections 90 (1) & (3) of the Land Act followed by a 40 days redemption notice under Section 96 (3) of the Land Act, a notification to redeem and of sale under Rule 15 of the Auctioneers' Rules.
5. The 3<sup>rd</sup> respondent denied infringing any of the plaintiff's rights for the suit property solely was registered under the 2<sup>nd</sup> respondent's name, who had the capacity and legitimacy to create the legal charge without any alleged customary trust rights or interests.
6. The 3<sup>rd</sup> respondent averred that an application in Meru ELC No. 106 of 2021 was dismissed on 6.12.2021. Further, that in Meru ELC No. E049 of 2022, an application dated 7.6.2022, was dismissed on 2.10.2023, and therefore, the issues herein are subject to the two pending suits.
7. Similarly, the 3<sup>rd</sup> respondent attached copies of the letter of offer/acceptance 1<sup>st</sup> charge and guarantee loan, two letters of offer and acceptance 2<sup>nd</sup> loan, further charge loan statements, statutory notices and certificates of postage, redemption notice and certificate of postage, notification to redeem and sale official search pleadings and orders in previous suits as annexures J.W. 1, 2 (a) & (b), 3, 4(a) & (b), 5 (a) – (d), 6, 7 (a) & (b), 8 (a) & (b), 9 (a) & (b), 10, 11, 12 (a) & (b), 13, 14 (a) & (b) respectively.
8. The 3<sup>rd</sup> and 4<sup>th</sup> respondents relied on written submissions dated 4.3.2024, isolating two issues for determination.
9. On whether the order dated 2.10.2023 is executable, it was submitted that the order was negative in nature and hence incapable of execution. Reliance was placed on Kanwal Singh Dhiman vs Keshavji Jivray Shab (2008) eKLR. The 3<sup>rd</sup> & 4<sup>th</sup> respondents submitted that it was unclear what the applicants were seeking before this court, and if the same is to be taken as an order for the maintenance of the status quo, it will be prejudicial and oppressive to the 3<sup>rd</sup> respondent, who has an undoubted statutory right of sale which has crystallized and become exercisable.
10. The 3<sup>rd</sup> & 4<sup>th</sup> respondents submitted that as a court of equity, the applicants have come with unclean hands with the sole aim of delaying the realization of the charge, which is an abuse of the court process for equity abhors any wrongdoing.
11. The appeal before this court is with regard to a ruling made on 2.10.2022 dismissing the applicant's application dated 7.6.2022 for a temporary injunction. By any chance and stretch of the imagination, the dismissal was a negative order that is incapable of being stayed, as held in Kanwal Singh Dhiman v Keshavji Jivray Shab (supra).
12. There is more to that. In prayers numbers 2 & 3, the court is also asked to stay the auction sale, privately or publicly, of LR No. Nyaki/Mulathankari/3625 pending the hearing and determination of this appeal. The reason advanced by the appellants is that they were never aware of the charge their father had over the suit land now occupied by them and that a customary trust is a protectable right to property under the law.



13. The 3<sup>rd</sup> & 4<sup>th</sup> respondents have denied knowledge of or the existence of the alleged customary rights or interests by the applicants since the 2<sup>nd</sup> respondent had the capacity and legitimacy to deal with the land as it pleased him and was wholly aware of his obligations which, upon default, he was notified of the attendant consequences.
14. Order 42 Rule (6) of the *Civil Procedure Rules* grants the court powers to issue a stay or temporary injunction pending hearing and determination of the appeal. The principles to apply in such circumstances were set out in *Madhupaper International Limited v Tony Keter* (1985) KLR 840 and *Patricia Njeri & others vs National Museums of Kenya* (2004) eKLR. The courts said that an injunction pending appeal was a discretionary order exercisable where the appeal is arguable and not frivolous. There must be a reasonable argument to be put forth in support of the appeal, and that it should be refused if it would inflict more hardship than it would avoid. The applicant must show that to refuse the injunction would render the appeal nugatory and that the principles in *Giella vs Cassman Brown* (1973) EA 358 must also be met.
15. The 3<sup>rd</sup> & 4<sup>th</sup> respondents have narrated how the 2<sup>nd</sup> respondent took up loan facilities and consciously executed the letters of offer, acceptances, two charges, and personal guarantees in line with the law. The documentation and the outstanding loan are not disputed by the applicants as well as the 1<sup>st</sup> & 2<sup>nd</sup> respondents. The pendency of the two suits at the lower court and the outcome of the previous applications to forestall the auction sale was not disputed by the applicants.
16. In *Stanley Kangethe Kinyanjui vs Tony Keter & 5 others* (2013 eKLR, the court observed that there must be an arguable appeal, which means that it may not necessarily succeed but deserves to be considered by a court. As to the nugatory aspect, in *George Gathura Karanja vs George Gathuru Thuo & another* (2019) eKLR, nugatory was said to occur if the effect is likely to be irreversible. The court in *Madhupaper International vs* (supra) held that it would be wrong to grant the injunction where the appeal is frivolous or where it would inflict more significant harm or hardship than it would avoid. In *Charter House Investment Ltd vs Simon K. Sang & others* (2010) eKLR, the court held an injunction is an equitable and discretionary remedy, given when the subject matter before the court requires protection and maintenance of the status quo, it is not a matter of right and that the court must balance the convenience of the parties as well as the possible injuries to them and third parties.
17. The appeal before the court is based on the exercise of discretion to grant or refuse a temporary injunction regarding the statutory power of sale by the 3<sup>rd</sup> respondent. There must be a demonstration that the trial court did not adhere to known principles on the grant or refusal of a temporary injunction. Evidence must also be adduced that the court misapplied the law, and the decision it made would not have been made by a court based on the facts and the circumstances. The applicants have to demonstrate arguable points as to why the trial court was plainly wrong and reached an unjust decision. That should form the basis of arguable appeal.
18. Looking at the appealed decision, the pending previous suits and the determinations, an earlier similar application had been raised. The same issues are raised before this court. The pending suits have been attached to the replying affidavit. The applicants did not bother to address the issues of res judicata, delaying tactics and an abuse of the court process by way of supplementary affidavits. On that account alone I find the appeal not arguable.
19. Turning to the questions of the exercise of a statutory power of sale, the alleged rights of the applicants have not been pronounced with finality by a court of competent jurisdiction. They are yet to crystallize, unlike the undoubted right of a statutory sale by the 3<sup>rd</sup> respondent, which the 1<sup>st</sup> & 2<sup>nd</sup> respondents have not challenged. The law only acknowledges spousal consent and not children's consent. The



nature of the occupation of the land by the applicants and any of their developments on the land is unclear in the supporting affidavit. Substantial loss or irreparable damage has not been demonstrated.

20. The upshot is that I find the application lacking merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22<sup>ND</sup> DAY OF MAY, 2024**

**HON. C K NZILI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In presence of

C.A Kananu

Mahinda for 3<sup>rd</sup> & 4<sup>th</sup> respondent

