



Ngugi & 2 others v Ngugi & 2 others (Environment and Land Appeal E093 of 2024) [2024] KEELC 13972 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E093 OF 2024**

**BM EBOSO, J
DECEMBER 10, 2024**

BETWEEN

**MICHAEL KINYANJUI NGUGI 1ST APPELLANT
ROSEMARY WAMAITHA 2ND APPELLANT
HENRY NGUGI 3RD APPELLANT**

AND

**JOHN NJOROGE NGUGI 1ST RESPONDENT
MARY WAMAITHA NJOROGE 2ND RESPONDENT
JULIA WAMBUI NGUGI 3RD RESPONDENT**

(Being an Appeal against the Judgment of Hon Joseph Were, Chief Magistrate, delivered on 16/8/2024 in Ruiru Chief Magistrate Court E & L Case No E122 of 2024)

RULING

1. The appellants initiated this appeal through a memorandum of appeal dated 26/8/2024. The appeal challenges the ruling of Hon Were, Chief Magistrate, rendered in Ruiru CMC E & L Case No. E 122 of 2024. Through the impugned ruling, the Ruiru Chief Magistrate Court struck out the appellants' suit on the ground that the suit was res judicata. The lower court found that the appellants had previously litigated over the issue of ownership of land parcel number Ruiru/Mugutha Block 1/3887 in Ruiru SPMC E & L Case No. E010 of 2020 and in Thika ELC Appeal No. E020 of 2022.
2. Alongside the memorandum of appeal, the appellants brought a notice of motion dated 26/8/2024, seeking the following verbatim orders pending the hearing and determination of the appeal:-
 - a. Spent



- b. Spent
 - c. That the Honourable Court be pleased to issue an order of prohibition to the 1st and 2nd respondents not to sale, alienate or lease and/or engage any Police Station to seek to supervise eviction of the applicants on L.R No. Ruiru/Mugutha Block 1/3887 pending the hearing and determination of intended appeal to the High Court of Kenya at Thika.
 - d. That costs of this application be provided for.
3. The application was supported with the affidavit of Henry Ngugi Sworn on 26/8/2024. It was canvassed through written submissions dated 11/10/2024, signed by Henry Ngugi.
 4. The case of the applicants is that the 1st and 2nd respondents held land parcel number Ruiru/Mugutha Block 1/3887 in trust for all the parties to this appeal. They contend that parties to this appeal are relatives. It is their case that the lower court erred in holding that the suit before it was res judicata, adding that their claim in the lower court was that of trust, and that the issue of trust had never been litigated by the parties to this appeal.
 5. The applicants further contend that because there are no “conservatory orders” in force to protect them against eviction, there is imminent danger of the title holders evicting “other family members” from the suit land. They urge the court to grant them the above orders.
 6. The respondents opposed the application through a replying affidavit sworn by John Njoroge Ngugi. The case of the respondents is that the notice of motion dated 26/8/2024 is a plea for an order staying execution of the decree in Ruiru ELC No. E10 of 2020 which was the subject of appeal in Thika ELC Appeal No. E020 of 2022 which the applicants lost. They contend that to that extent, the order of stay of execution is not available to the applicants.
 7. The respondents further contend that the order striking out the suit in the lower court is not capable of attracting an order of stay of execution. The respondents contend that the application is an abuse of the process of the court, adding that the applicants have not satisfied the criteria for grant of an order of stay of execution pending appeal. They add that the court would be endorsing “the recalcitrant conduct of the appellants” were it to grant the application.
 8. The court has considered the application, the response to the application, and the parties’ respective submissions. Through the application, the appellants seek an order prohibiting the 1st and 2nd respondents against selling, alienating, leasing and/or engaging any Police Station to supervise eviction of the appellants from the suit land. The two key issues that fall for determination in the application are: (i) Whether the application meets the criteria for grant of a prohibitory injunction by the Environment and Land Court, and (ii) Whether the application meets the criteria for grant of an order of stay of execution by the Environment and Land Court.
 9. This court’s jurisdiction to grant an injunction in exercise of its appellate jurisdiction is donated by Order 42 rule 6(6) of the Civil Procedure Rules which provides as follows:

“Notwithstanding anything contained in subrule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
 10. The principle upon which the above jurisdiction is exercised was outlined in Patricia Njeri & 3 others v National Museums of Kenya [2004] eKLR as follows:



- a. The discretion will not be exercised against an applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840.
 - b. The applicant must state that a reasonable argument can be put forward in support of his appeal (*J K Industries v KCB* (1982 – 88) KLR 1088.
 - c. The discretion should be refused where it would inflict greater hardship than it would avoid.
 - d. The applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417.
 - e. The court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & others* (1986) KLR 445.
11. In the present application, the applicants have approached the court against a background where the question of ownership of the suit land has been litigated by the parties to this appeal in Ruiru SPMC E & L Case No E010 OF 2020 and has been determined on merit through a Judgment of the said court rendered on 1/3/2022. The said Judgment culminated in Thika ELC Appeal No E020 of 2022 in which this court, in exercise of its appellate jurisdiction, similarly rendered a conclusive Judgment dated 3/7/2024 in which it made a finding upholding the findings of the lower court on the question of ownership of the suit land.
 12. Given the above circumstances, it would be outrageous for this court to issue a prohibitory injunction restraining the decree holders against enjoying what the two tiers of courts have decreed to belong to them. Without saying more, I do not think the present application meets the criteria for grant of a prohibitory injunction in a pending appeal. That is the finding of the court on the first issue.
 13. On whether the application meets the criteria for stay of execution, it is clear from the impugned ruling that the lower court did not issue any positive order capable of attracting an order of stay of execution. What it issued was an order striking out the applicants’ suit for being *res judicata*.
 14. Kenya’s superior courts have been emphatic that in the absence of a positive order, there is nothing to stay. In *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal rendered itself on this principle as follows:-

“Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & Anor.* [2005] 1 E.A. 53 where it was stated: ‘... The order which dismissed the suit was a negative order which is not capable of execution...’”
 15. Similarly, in *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR the Court of Appeal stated as follows:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from



doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

16. Regrettably, the ruling giving rise to the application under consideration bears all the features of a negative order. It therefore follows that the application under consideration does not satisfy the criteria for grant of an order of stay of execution pending appeal.
17. In light of the above findings, the application dated 26/8/2024 is rejected and dismissed for lack of merit. The applicants will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF DECEMBER 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Lokitano for the Respondent

Court Assistant: Hinga

