



REPUBLIC OF KENYA



**Njuki & 3 others v Njuki (Environment & Land Case 5 of 2020)
[2023] KEELC 15905 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15905 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 5 OF 2020
EC CHERONO, J
FEBRUARY 28, 2023**

BETWEEN

**JANE WAMBUI NJUKI 1ST APPLICANT
ALICE WATHITHA NGUNJIRI 2ND APPLICANT
JOYCE WANJA NDERITU 3RD APPLICANT
SOPHIA MUTHONI GICHOBI 4TH APPLICANT**

AND

TERACIRA MICERE NJUKI RESPONDENT

RULING

1. By a Notice of Motion brought under certificate of urgency and dated August 9, 2021, Taracira Micere Njuki who is the applicant herein sought the following orders; -
 1. Spent
 2. That the honourable court be pleased to grant leave to the firm of R. Muthike Makworo & Company Advocates to be placed on record for the applicant in place of Wanjiru Waweru & Company Advocates
 3. That the honourable court be pleased to order temporary stay of execution of the judgment delivered on July 23, 2021 pending hearing and determination of prayer 4 and 5 of the application
 4. That the Honourable court be pleased to grant stay of execution of the judgment delivered on July 23, 2021 pending the filing, hearing and determination of the appeal
 5. That the costs of this application be in the cause



2. The application is premised on grounds apparent on the face of the said application supported by the affidavit of the applicant sworn on even date.
3. By way of a response, the respondent filed Grounds of opposition dated August 23, 2021 raising eight (8) grounds.
4. When the said application came up for directions on October 4, 2021, the parties agreed to converse the same by written submissions.

Applicants Summary Of Facts And Submissions

5. The applicant in her supporting affidavit deposed that she was dissatisfied with the judgment of this honourable court delivered on 23/8/2021 and intends to file an appeal. She further deposed that the Respondents are in the process of executing the judgment and unless stay of orders are issued, the Appeal will be rendered nugatory.
6. The applicant further contends that the respondents might transfer the said portion to other third parties. She annexed a copy of a Notice of Appeal filed under Rules 75(1) of the *Court of Appeal Rules*. The applicant through the firm of R. Muthike Makworo & Co. Advocates filed submissions in further support of the application on 1st November, 2021. She cited the following cases; *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 others* (2012) eKLR, *Jecinta Wanjiku Njukiv Jane Wambura Mugo & 3 other* (2021)eKLR.
7. The respondent filed grounds of opposition in response to the said application raising the following eight grounds; -
 1. That The appellant's application dated 9/8/2021 is an abuse of court process, un-procedural, fatally defective and devoid of merit
 2. That the judgment delivered on 23/8/2021 was procedurally and lawfully entered against the applicant
 3. That the applicant has not offered security that may be binding upon her for the due performance of the decree
 4. That the applicant has failed to establish the prerequisite conditions to warrant grant of stay orders
 5. That in particular, the applicant has failed to demonstrate that the appeal is arguable with likelihood of success.
 6. That the applicant has failed to demonstrate that the appeal is likely to be rendered nugatory if the stay orders are not granted since the subject matter is ancestral land.
 7. That the orders sought are discretionary and to that effect the applicant has failed to demonstrate she is deserving of this court's discretion
 8. That the application is a delaying tactic designed to bar the respondents from realising the fruits of their judgment delivered on August 23, 2021
8. The respondent through the firm of Millimo, Muthomi & Co. Advocates filed their written submissions on 26/10/2021 in further opposition to the said application. They cited the following cases; *Machira T/a Machira & Company Advocates v East African Standard (no.2)* (2002)2klr 63, *Congress Rental South Africa v Kenya International Convention Centre; Cooperative Bank of Kenya Limited & another* (2019) eKLR, *Equity Bank Ltd v Taiga Adams Company Ltd* (2006) eKLR, and *John Odongo v Joyce Irungu Mubatia* (2019) eKLR.



Legal Analysis And Decision

9. I have considered the Notice of Motion application dated August 9, 2021, grounds on the face of application, the supporting Affidavit, the Replying affidavit, the submission by counsel and the applicable law. The first prayed is for the application to be certified urgent and to have it heard on priority basis. When the said application was placed before me sitting as the Duty Judge, I certified the same as urgent. As such, the first prayer is spent.
10. The second prayer is for the Firm of R. Muthike Makworo & Company Advocates to come on record for the applicant in place of Wanjiru Waweru & Company Advocates. Order 9 Rule 9 [*Civil Procedure Rules*](#) makes it mandatory for a party to seek leave to change advocate or act in person where he/she was previously represented by an advocate after judgment has been passed. From the court record, the Defendant/Applicant was previously represented by the firm of Wanjiru Waweru & Company Advocates. The mischief for that requirement is to expose litigants who engage new Advocates in the process of execution to avoid payment of legal fees. There is no Affidavit of service indicating that the Firm of Wanjiru Waweru & Company Advocates were served with this application. There is also no consent duly signed by the outgoing Firm of Wanjiru Waweru signifying their no objection to the new Firm of R. Muthike Makworo & Company Advocates Coming On record in their place. Failure to serve the said firm with the application or secure a consent of no objection makes that prayer a mirage.
11. The third prayer is for stay of execution pending hearing of this application and/or intended Appeal. Order 42 Rule 6(2) [*CPR*](#) provide three condition an applicant must establish before stay of execution is granted as follows;
 - a. The application has been brought without unreasonable delay.
 - b. The applicant will suffer substantial loss unless the application is granted and
 - c. The applicant has provided security for the due performance of the decree that will be binding on him
12. On the first condition, the present application was filed on 11/08/2021 while the impugned judgment was delivered on July 23, 2021. It took the applicant one month to file the application. No explanation has been given for the delay. The delay for almost one month without any reasonable explanation in my view is inordinate.
13. As regards the second requirement, the applicant at paragraph 5 of the supporting affidavit deposed that the respondents are in the process of executing the Judgment unless stay of execution orders are issued. Execution of a Judgment or Decree issued by a court of competent jurisdiction is a lawful process and one cannot suffer substantial loss unless the applicant establishes other factors which can render the intended appeal nugatory. The applicant has not shown or demonstrated that the respondent is about to execute or that the respondent will dispose of the disputed land once execution is done and the title to the disputed parcel of land will be out of his reach. Those are the factors which the Applicant must prove that the intended Appeal will be rendered nugatory. There is no other way an Appeal can be rendered nugatory in a non-pecuniary decree such as land. On this second condition, I also find that the applicant has failed miserably.
14. The third and final condition is whether the Applicant has offered security for the due performance of the decree that will be binding on him. At paragraph 8 of the supporting affidavit, the applicant deposed that he is ready and willing to abide by any terms and conditions in furnishing security that the court may order. On this last limb, I am satisfied that his willingness to offer/provide security as the court may order is sufficient. However, the first two requirements are mandatory.



15. Since this application was filed almost one month after the impugned judgment and no plausible explanation has been given and substantial loss has not been demonstrated to the satisfaction of this Honourable court, the said application must fail.

16. Consequently, and with a heavy heart, the Notice of Motion dated August 9, 2021 is hereby dismissed with costs to the respondent.

Orders accordingly.

**READ, SIGNED AND DELIVERED IN THE OPEN COURT VIRTUALLY AT BUNGOMA THIS
28TH FEBRUARY, 2023**

HON. E.C CHERONO ELC JUDGE

In the presence of;

M/S Ndungu H/B for Mrs Makworo for Applicant

Respondent/Advocate-absent

