



**Muriuki v Muriuki & 2 others (Environment and Land Appeal
2 of 2017) [2023] KEELC 15841 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 2 OF 2017
EC CHERONO, J
FEBRUARY 28, 2023**

BETWEEN

MERCY NJERI MURIUKI APPLICANT

AND

JANE WANGARI MURIUKI 1ST RESPONDENT

SARAH WAGATWE 2ND RESPONDENT

ROBERT NYAGA IRUAI 3RD RESPONDENT

RULING

1. By notice of motion dated March 4, 2022, the applicant seeks the following orders;
 - a) (Spent).
 - b) That this Honourable court be pleased to grant a temporary stay of execution of the Judgment of the learned Resident Magistrate Honourable Y. M. Barasa in Kirinyaga Civil Suit No. 214 of 2015 between Mercy Njeri Muriuki and Jane Wangari Muriuki delivered on 21st day of March 2017 in respect of plot No. General/ kiosk/Githure Market pending the interparties hearing of this application.
 - c) That this Honourable court be pleased to grant a temporary stay of execution of the Judgment of the learned Resident Honourable Y. M. Barasa in Kerugoya Civil Suit No. 214 of 2015 between Mercy Njeri Muriuki and Jane Wangari Muriuki delivered on March 21, 2017 in respect of plot No. General/kiosk/Githure Market pending hearing of the Appeal.
 - d) That this honourable court do issue a temporary injunction restraining the respondents by themselves, servants, agents, employees and/or anybody else claiming through them from entering, developing, transferring or in any other way interfering with plot No. Geneal/kiosk Githuri Market pending the hearing of the application interparties.



- e) That This honourable court do issue a temporary injunction restraining the Respondents by themselves, servants, agents, employees and/or anybody else claiming through them from entering, developing, transferring or in any other way interfering with Plot No. General Kiosk/ Githure Market pending the hearing of the appeal.
 - f) Costs of this application be provided for.
2. The application is supported with an affidavit sworn by Mercy Njeri Muriuki and the following grounds;
1. That on March 21, 2017, a judgment was delivered by the learned Resident Magistrate Honourable Y.M Barasa in Civil Suit No. 214 of 2015 between Mercy Njeri Muriuki and Jane Wangari Muriuki which was against the applicant herein.
 2. That immediately, the Appellant filed a Notice of Appeal on April 27, 2017 in E.L.C.A No. 2 of 2017 against the said judgment.
 3. That the respondents are now erecting a building on the suit plot No. General/kiosk/Githure Market despite being aware that there is an Appeal and unless they are restrained by an order staying the lower court's decision and an injunction sought herein, the respondents will adversely interfere with the plot and defeat the substratum of the appeal.
 4. That the applicant has an arguable appeal with high chances of success.
 5. That unless the orders sought herein are granted, the applicant's Appeal shall be rendered nugatory.
 6. That it is in the interest of justice that this application be allowed

Applicant's Summary of Facts

3. In the supporting affidavit, the applicant deposed as follows;
1. That this matter was heard in the lower court vide suit No. 214 of 2015, Mercy Njeri Muriuki and Jane Wangari Muriuki and in which judgment was delivered on March 21, 2017. (Annexed and marked MNM-1 is a copy of the judgment).
 2. That being aggrieved by the said judgment, I immediately appealed by filing a notice of appeal through Kerugoya E.L.C A No. 2 of 2017. (Annexed and marked MNM-2 is a copy of the Notice of Appeal).
 3. That the respondents are now in advanced stage of construction of a building at plot No. General/kiosk/Githure Market despite their knowledge that I applied for an appeal after the lower court judgment was delivered. (Annexed and marked MNM-3 is a photograph showing the ongoing construction on the said plot0.
 4. That I have been advised by my advocates on record which advise I verily believe to be true that the respondent's current actions on the suit plot are illegal since there is an appeal pending.
 5. That I am now requesting this honourable court to refrain the Respondents on the developments they are undertaking until the appeal is heard and concluded.
 6. That I also urge this honourable court to stay the lower court's judgment till the final determination of the Appeal



7. That if the orders I am seeking are not granted, my appeal shall be rendered nugatory.
8. That my appeal has high chances of success on the grounds inter-alia stated in memorandum of appeal. (Annexed and marked MNM-4 is a copy of the memorandum of appeal).
9. That I stand to lose irreparably if the subject matter Plot No. General/kiosk Githure Market is not preserved pending the hearing of the appeal
10. That it is only just and expedient that this application be allowed.

1st, 2nd & 3rd Respondents Summary of Facts

4. The 1st respondent on her own behalf and on behalf of the 2nd & 3rd respondents filed a replying affidavit in opposition to the said application and deposed as follows;
 1. That the application herein is bad in law, frivolous, vexatious, an abuse of the court process and an afterthought.
 2. That Plot No. General/kiosk/Gathure Market was in the names of the 2nd and 3rd defendants even before the hearing of the lower court matter sought to be appealed against.
 3. That the judgment sought to be stayed herein has already been executed and permanent structure erected on the subject property which are almost being completed. (Annexed and marked JWM-1 is a bundle of copies of photographs).
 4. That this application has been brought too late to warrant the orders sought to be granted.
 5. That the judgment herein was delivered way back on March 21, 2017 almost five years down the line and the applicant went to sleep and had all along been aware over the development being carried on.
 6. That filing a notice of appeal herein does not mean a stay of execution.
 7. That the 2nd and 3rd respondents were not in any way prevented from undertaking their development over the subject matter property by any orders of the court.
 8. That the applicant has not shown the irreparable loss tht she stands to lose if the orders herein are not granted.
 9. That there are constructors on site completing the developments undertaken and the applicant has not offered security in case the orders are granted hence does not deserve the said orders,

Analnsis and Decision

5. I have considered the notice of motion application dated March 4, 2022, the supporting affidavit, the replying affidavit, the annexures thereto and the rival submissions as well as the applicable law. Order 42 rule 6(2) which is the applicable law sets out three conditions for the grant of stay pending appeal as follows;
 1. The application must be brought without unreasonable delay from the date the decree/order appealed against was delivered/issued.
 2. The applicant must show that He /She will suffer substantial loss unless the application is granted and



3. The applicant must give security for the due performance of the decree/order that may ultimately be binding on him/her should the intended Appeal not succeed.
6. Regarding the first condition, it is not in dispute that the impugned Judgment by the trial Magistrate Honourable Y.M BARASA was delivered on 21st day of March 2017 and the present application was filed on March 4, 2022, almost five years down the line. It behoves the applicant to give a reasonable explanation or excusable reasons for the delay. None has been proffered by the Applicant.
7. The second prerequisite is whether the applicant will suffer substantial loss unless the orders sought in the application are granted. Substantial loss has been described in numerous decisions by the superior courts as the cornerstone for stay pending appeal. Substantial loss is the loss the applicant will suffer if the intended appeal succeeds and the Applicant/intended Appellant reaps a barren judgment. The duty of this Honourable court is to prevent the intended appeal being rendered superfluous or nugatory should the intended appeal succeed. In this regard, the applicant must establish factors that would render the intended appeal nugatory if the stay of execution order is not granted and the intended appeal succeeds. The Applicant has annexed photographs showing ongoing construction on site marked MNM-3. That is confirmed by the 1st respondent at paragraph 6 of her Replying affidavit. From a copy of the Judgment annexed to the supporting affidavit, the applicant's/appellant's claim before the trial court was for orders of inter-alia a declaration that the 1st defendant/respondent was registered as proprietor of the suit land parcel No.General/Kiosk/Gathure to hold in trust for herself, the plaintiff and other sisters. The plaintiff/1st respondent had also sought an order compelling the defendant/respondent to transfer 1/4 share of the suit plot in her name. In his Judgment delivered on March 21, 2017, the trial Magistrate dismissed the claim on technicality. At page 4 of the impugned Judgment, the learned Magistrate stated as follows;

“It is therefore, clear that a claim for adverse possession ought to be brought by way of originating Summons and the same be filed in the land and environment court.

In the end, I find no reason to interfere with the defendant's ownership of the suit plot. The plaintiff has failed to prove her case on a balance of probability as required. I dismiss this suit but with no order as to costs since the parties are related. I also dismiss the defendant's counter-claim for non-attendance and order each party to bear its own costs.”

8. From the pleadings and the impugned judgment, it is apparent that the suit was dismissed on technicality without considering the merits or otherwise of the case. This, in my view, raises a serious triable issue that may require determination on appeal. I therefore find that should the suit property be transferred to third parties; the intended appeal would be rendered nugatory.
9. The third and final condition for the grant of stay pending appeal is the giving of security by the applicant for the due performance of the decree/order that may ultimately be binding on her. Though the applicant did not give any security or undertaking, it is imperative to note that this Honourable court is not bound to accept any offers made by the applicant but may also demand additional security and other terms as it may deem fit.
10. The present application is brought more than four years down the line. There is also no reasonable explanation given by the Applicant for the delay. Since the applicant has raised arguable and not idle grounds in her Memorandum of appeal dated April 11, 2017 which if not considered, may render the intended appeal nugatory.
11. The upshot of my finding is that the application dated March 4, 2022 is merited and the same is allowed in the following terms;



1. The Judgment, Decree and all consequential proceedings issued by Hon. Y.M Barasa, Resident Magistrate in CMCC No. 214 of 2015(Kerugoya) be and are hereby stayed pending hearing and determination of this appeal.
2. The respondents by themselves, servants, agents, employees and/or anybody else claiming through them from further developing, transferring, or in any other way interfering with Plot No. General/Kiosk/Githure Market pending hearing and determination of this Appeal.
3. The applicant to take pragmatic steps to prosecute this appeal within nine (9) months from the date of this ruling failing which the same shall stand dismissed for want of prosecution
4. The costs of this application shall abide the Appeal.

READ SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2023.

HON. E.C CHERONO ELC JUDGE

In the presence of;

1. Igati Mwai for Respondent

2. Jepkorir fo Applicant

3. Joy C/A

