



REPUBLIC OF KENYA



KENYA LAW
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Mburugu & 6 others v County Government of Meru (Environment and Land Appeal E69 of 2022) [2023] KEELC 17186 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E69 OF 2022**

CK NZILI, J

APRIL 26, 2023

BETWEEN

**DANIEL KINOTI MBURUGU 1ST APPELLANT
KARANGA SELF-HELP GROUP (SUING THROUGH GEORGE MANEN
RITARA) 2ND APPELLANT
CHWAA UKAEWA SELF HELP GROUP (SUING THROUGH DICKSON
GITONGA) 3RD APPELLANT
ROBERT KIRIMI EDWARD 4TH APPELLANT
DAVID KIAMBI 5TH APPELLANT
GILBERT KINYUA MURIIRA 6TH APPELLANT
DAVID GITONGA GIKUNDA 7TH APPELLANT**

AND

COUNTY GOVERNMENT OF MERU RESPONDENT

RULING

1. The court by an application dated 28.11.2022 is asked to issue inhibition orders against LR no Nkuene/Mitunguu/198 and its resultant subdivisions namely LR no.s' Nkuene/Mitunguu/646, 652, 658, 663, 668, 669, 670 & 698 and secondly; a temporary injunction against the respondents barring them from evicting or in any way whatsoever interfering with the applicant's possession, use and enjoyment of the suit properties pending the hearing and determination of this appeal. The grounds of the application are contained on its face and in the supporting affidavit sworn by Daniel Kinoti Mburugu on his behalf and that of the other applicant. It is the applicant's averment that they are the sole lawful owners of the suit properties as per copies of letters of allotment and ownership documents issued by the respondent together with approved developments plans. That in February 2019 the respondent threatened to



illegally evict them from the suit property whereof they filed a suit at Nkubu Law Courts which was dismissed on 10.11.2022.

2. That the suit properties are developed from which the respondent has continued to draw rents and rates from. That the applicants stand to suffer untold loss, damage and prejudice if the respondent is not restrained from further interfering with the suit properties. The applicants have attached copies of the ownership documents as DKM 1 (a) – (m), pleadings at the lower court as annexure DKM 3 (a) & (b), proceedings and judgment thereof as annexure DKM 4 (a) & (b) and photographs showing developments thereto as DKM “5”.
3. The application is opposed by the respondent through a replying affidavit sworn by Rufus Miriti on 2.2.2023 on the basis that it lacks merits; is an abuse of the court process; bad in law; incurably defective and based on new issues that were never raised or challenged at the trial court such as the falsification, tampering of the official land records, alleged threats by area MCA, Nkubu Criminal Case no 1063 of 2016; new photographs and lastly; it is based on premature grounds.
4. Further, the respondent averred that there was neither a negative nor positive order made in favour of the respondent worthy executing, since the judgment was not monetary in nature and hence the application is based on unsubstantiated fear without basis or foundation in both fact and law.
5. Additionally, the respondent averred that land title entries if made were reversible, should the appeal be allowed. Moreover, the respondent averred that the application was speculative; litigation must come to an end; no substantial loss is demonstrated and the court should find no merit in the application.
6. In a supplementary affidavit sworn on 9.2.2023, Daniel Kinoti Mburugu averred that no new evidence had been introduced since DKM 1 (a) – (m) were produced at the hearing, there were available documents to demonstrate the conditions under *Giella v Cassman Brown* (1973) E.A 358; eviction was imminent; the respondent has not stated any prejudice it was likely to suffer if the orders sought were granted and that even though no decree had been issued from the respondent, its official had issued verbal threats to evict.
7. Following leave of court, parties agreed to canvass the application through written submissions dated 9.2.2022 and 10.2.2023. It is the applicants submissions that after the suit was dismissed, the respondent through its officers have verbally threatened to evict them from the suit land and that they have discharged the ingredients for the grant of temporary orders under *Giella (supra)*, given their threatened rights to land and developments thereon, exclusive rights to possession through which if not preserved by way of injunction they will be left at the mercy of the respondent and be exposed to irreparable loss, damage and suffering. Regarding the replying affidavit, the applicant submitted that the respondent was attacking the main appeal instead of the application based on misinformation that the application was seeking a stay of execution, yet at this stage the onus on them was merely to satisfy the principles in *Giella (supra)*.
8. Additionally, the applicant submitted that the judgment of the lower court has profound implications with the likelihood of the respondent unilaterally taking advantage to irregularly evict them from the suit land. The applicant urged the court to find that it was in the interest of substantive justice to grant the orders sought since there will be no prejudice to the respondent even if the order of *status quo* was granted.
9. The respondent, on the other hand, submitted that the applicants have not met the conditions for granting the temporary injunction as set out in *Giella (supra)* and [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR, since the photographs produced did not depict any developed buildings and further that the crops and plants shown therein were quantifiable in monetary terms. As to the new



- evidence the respondent submitted that under Order 42 Rule 27 of the [Civil Procedure Rules](#), the court should be reluctant to rely on it as held in *Fibre Link Ltd v Star Television Production Ltd* [2015] eKLR & *Wanjie & another v Sakwa & others* [1984] KLR 275.
10. On the aspect of a positive or negative order, the respondent submitted that the trial court merely dismissed the applicants suit with costs. So, since there was nothing any party was ordered to do or refrain from doing, a negative order could not be executed as held in *Jennifer Akinyi Osodo v Boniface Okumu Osodo* [2021] eKLR which cited with approval *Western College & Arts & Applied Science v E.P Oranga and others* [1976] eKLR and *Austin Pyan Maranga* Kisii HCCA no 15 of 2010.
 11. Coming to the order for inhibition, the respondent submitted that the applicants had failed to demonstrate substantial loss and hence deserved no order of inhibition or stay. Reliance was placed on *Catherine Njeri Maranga v Serab Chege & another* [2017] eKLR, which cited with approval *KCB Ltd v Tamarind Meadows Ltd & others* [2016] eKLR, *Luka Ruteere & 2 others v Marcella Kinaitore Mwimbi* [2022] eKLR.
 12. Order 42 Rule 6 (6) [Civil Procedure Rules](#) is the operative procedure in which a High Court in the exercise of its appellate jurisdiction can grant a temporary injunction pending the hearing and determination of an appeal emanating from a subordinate court or tribunal, on such terms as it thinks just. While expounding on this power in the case of *Faraj Maharus v J.B Martin Glass Industries & another* [1998] eKLR, the court granted an injunction pending appeal after being satisfied that the applicant had an arguable appeal and since he was living on the suit land together with his family, it would have been unacceptable that they should just be thrown into the cold without being told where they should go.
 13. Further, in the case of *Munge v Munge* (Civil Appeal) Application 36 of 2020 [2023] KECA 75 (KLR) 3 February 2023 (Ruling), the court held that for an applicant to be entitled to an injunction pending appeal has to first demonstrate that the appeal was arguable and that unless the orders sought were granted, the appeal if successful shall be rendered nugatory. The court on the first limb held that a memorandum of appeal will not be enough but an applicant must establish at least one sufficiently plausible ground that was likely to succeed upon the hearing of the appeal and whose effect would likely overturn the impugned decision.
 14. Additionally, in the case of *Nyaboke v NCBA Bank Kenya PLC & another* (Civil Application E308 of 2021 (2021) KECA 323 (KLR) (20 December 2021) (Ruling), the court cited with approval *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR, where it was stated that as to whether the appeal would likely be rendered nugatory, each case must depend on its own facts and its peculiar circumstances since the word nugatory means worthless, futile, invalid and or trifling.
 15. Further, in *Meso Multipurpose Society Ltd v Luore Nyoiro Co. Ltd & 2 others* [2020] eKLR the court cited with approval *Welso Andai Traoi v LSK & 3 others* [2018] eKLR, that what the court needs to consider is that in absence of an order of injunction, the appeal would be rendered nugatory, if it were to succeed. Additionally, the court said the party had on a *prima facie* basis demonstrated a bonafide interest that ought to be protected and secondly; that its members who were in occupation, if evicted from the suit property, the appeal was going to be rendered nugatory with the effect that the applicant and its members being unable to recover the suit property or any of its developments, should the property be disposed off to a third party.
 16. As to inhibition orders, such orders are in the nature of prohibitory injunction aimed at preserving the suit property under Sections 68 of the [Land Registration Act](#) 2012, until the occurrence of such an event for a given or specified period of time. See *Dorcas Muthoni & 2 others v Michael Ireri Ngari* [2016] eKLR, *Samuel Njeru Daniel v James Njeru Nthiga & 2 others* [2017] eKLR, *RW v JMN* [2022]



eKLR, *Elly Jepkoech Limo v Susan Wamgoi Kibe & another* [2020] eKLR & *Kaimuri Nccene v Peter Kailemia Amburukua* [2021] eKLR.

17. Applying the foregoing caselaw and principles, at issue in this application is that the trial court found no merits in the appellants claim to public land which is held in trust for the local residents held by the respondent. The basis of the appellants claim was the amended plaint dated 6.12.2019. They had sought for a declaration that they were the legal owners of LR no Nkuene/Mitunguu/198, as subdivided into Plot No.'s 669, 695, 670, 658, 668, 646, 652 and 663 hence deserving general damages. The respondent by a defence dated 14.5.2019 had denied the claim in its entirety.
18. In his evidence, DW 1 had termed the allotment letters held by the applicants before the court as irregular, unaccompanied by minutes approving them, as lacking a subdivision scheme or a change of user and therefore was based on illegal acts which it had not sanctioned.
19. The trial court agreed with the respondent and made a finding that the respondent's green card which was produced as D. Exh no (3) was proof enough that the land belonged to the respondent, was intact with no subdivisions or entries as alleged by the applicants.
20. In this appeal, the applicants fault the trial court *inter alia* for blaming and punishing them for the conflicting incoherent and or inconsistent records prepared, generated and issued by the respondent, which were either tampered, interfered with and or doctored over the suit plots. Further, the applicants blame the respondent for dumping them through unscrupulous officials on top of allowing them to extensively occupy and develop the suit properties.
21. For the applicants to succeed for an order of temporary injunction pending appeal, they must as indicate in the case law above, demonstrate the twin issues namely; the arguability of the appeal and secondly; the nugatory aspect of their appeal if the orders do not issue. As to what amounts to an arguable appeal, courts have termed it as one which need not succeed, but one which ought to be argued before the appellate court. In *Kampala International University v HFCK* petition (application 34 (E035) of (2022) [2023] KES (KLR) 27 January [2023] Ruling, the court held that it did not need to call for the interrogations of the merits of the appeal or the making of a definitive finding of either fact or law, to establish an arguable appeal. The court cited with approval *Tanad Transporters Ltd & 2 others v Laiser Communication Ltd & 2 others* S.C Petition no 7 (E009) of 2022 and *George Boniface Mbugua v Mohamed Jawayd Iqbal* [2021] eKLR and found the appeal arguable and the nugatory aspect applicable since the amount in issue was colossal, there was imminent danger of eviction and irreparable harm was likely to be occasioned. Lastly, the court also found the appeal raising sufficient public interest element touching on the inalienable right to a fair hearing, application of the doctrine of stare decisis and the role of arbitrators in both the HighCourt & the Court of Appeal in the dispensation of justice.
22. In this application, the grounds of appeal raised by the appellants cannot be termed as frivolous for this court's interrogation given that the appellants have an undoubted right to appeal. So, I find the 1st hurdle as crossed by the applicants.
23. Turning to the nugatory aspect, the appellants have to, as held in *Madhupaper International Ltd v Kerr* [1995] eKLR, prove the ingredients under *Giella (supra)*. In *Mrao Ltd v First American Bank of Kenya & 2 others* [2003] eKLR, it was held that a *prima facie* case is established where given the material placed before the court a right has been established that calls for the rebuttal from the opposite side. Similarly, in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court held that any alleged irreparable loss or damage must not be speculative or based on mere fear or apprehension, but there must be real and eminent danger.



24. In this application what the applicants have placed before the court are unsubstantiated, unverified and an unauthenticated document, which in my considered view do not prove *bonafide* interest on L.R no Nkuene/Mitunguu/198. Above all, no recent official searches have been provided to show that there exists LR No's. Nkuene/Mitunguu/646, 652, 658, 663, 668, 699, 670 and 695 issued from the land registrar or from a land surveyor in line with the *Land Act*, *Land Registration Act* and the *Survey Act*. Inhibition orders being prohibitory in nature must only be issued to registered titles that exist in law. In this instance the allotment letters purporting to grant the applicants some beneficial interests or rights to the suit land have not been authenticated by either the district land surveyor, district land registrar, and or the county land officials.
25. Additionally, on the issue of irreparable loss and damage, the imminent danger of eviction, and the alleged substantial loss or damage not compensable by way of damages, has not been demonstrated. More importantly, the law of eviction as per Sections 152 A, B, C, D and E of the *Land Registration Act* protects the applicants on the alleged threat on occupying public land. No evidence has been tendered that the respondent has served the applicants with the mandatory statutory notice of eviction.
26. It is not enough to state that the notices have been issued verbally since the law on eviction no longer grants the registered owner an absolute discretion on when to evict. The law as held in *Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR, has to be adhered to with the applicants upon being served with the notices, having an option of moving to court.
27. Due to the foregoing, I find that the applicants have failed to surmount the nugatory aspect of their appeal. The upshot is I find the application lacking merits. The same is dismissed with costs. Lower court file be availed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 26TH DAY OF APRIL, 2023

In presence of:

C/A: John Paul

Gatwiri Mwiti holding brief for Ndubi for applicant

Mr. Ashaba for respondents

HON. C.K. NZILI

ELC JUDGE

