



Otieno & 9 others v Wagude & another (Environment & Land Case 46 of 2020) [2023] KEELC 16339 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 46 OF 2020**

**E ASATI, J
MARCH 23, 2023**

BETWEEN

- RICHARD OTIENO 1ST PLAINTIFF**
- JOSEPH OGUTU 2ND PLAINTIFF**
- PAMELA ATIENO ODHIAMBO 3RD PLAINTIFF**
- PATRICK OUMA 4TH PLAINTIFF**
- MILKA OUTA 5TH PLAINTIFF**
- JOSEPH OGADA 6TH PLAINTIFF**
- NICHOLAS OTIENO 7TH PLAINTIFF**
- MONICA AWUOR 8TH PLAINTIFF**
- GODFREY ONYANGO 9TH PLAINTIFF**
- PAMELA ATIENO 10TH PLAINTIFF**

AND

- MICHAEL OTIENO WAGUDE 1ST DEFENDANT**
- THE LAND REGISTRAR, KISUMU COUNTY 2ND DEFENDANT**

RULING

Introduction

1. This ruling is in respect of the plaintiffs’ notice of motion application dated January 30, 2023 brought pursuant to the provisions of sections 1A, 1B, 3, 3A, 63(e) of the *Civil Procedure Act* and orders 42 rule 6(1) & 40 rule 1 of the *Civil Procedure Rules, 2010*. The application seeks for orders that;



- a. The application be certified urgent
 - b. Pending the hearing and determination of the application, the Respondents, their employees, workers, agents and/or whoever be restrained from advertising for sale, auctioning, selling, disposing, transferring and/or interfering with the 1st Appellant's property Kisumu Municipality Block 7/92.
 - c. Pending the hearing and determination of the appeal, the Respondents, their employees, workers, agents and/or whosoever, workers, agents and/or whosoever be restrained from advertising for sale, auctioning, selling, disposing, transferring and/or interfering with the Appellants' property Kisumu Municipality Block 7/92.
 - d. The costs of the application be provided for.
2. The grounds upon which the application was based as shown on the face of the notice of motion were that in its ruling of December 8, 2022, the court struck out the applicants' suit. That up until the date of the Ruling striking out the suit, the applicants were enjoying temporary orders restraining the respondents from disposing off, selling, further sub-dividing or interfering with the suit property being Kisumu/Dago/4721 and Kisumu/Dago/4722 which are the resultant titles from the original suit parcel No Kisumu/Dago/566. That following the ruling, which the applicants have since appealed against, the suit property is now exposed to sale by the respondents any time thus rendering the application and the appeal nugatory. That the 1st respondent has brought buyers to the suit property to negotiate the sale. That the suit property is the applicants'. That the application has been brought without undue delay.
 3. The application was supported by the averments contained in the Supporting Affidavit sworn by Richard Otieno on January 30, 2023 and the annexures thereto.
 4. The 1st respondent in opposition to the application filed Notice of Preliminary Objection dated February 16, 2023 and a Replying Affidavit sworn by Michael Otieno Wagude on February 16, 2023 to which there were annexures.
 5. When the matter came up for hearing, counsel for the respondent withdrew the preliminary objection and proceeded to argue the application on the basis of the contents of the replying affidavit.
 6. The application was argued orally on February 20, 2023.

Submissions

7. It was submitted on behalf of the applicants that the applicants are entitled to orders of stay of execution pending appeal as they are likely to suffer substantial loss. That the suit land is the only home that the applicant have known. That unless the orders sought are granted, the appeal will be rendered nugatory. That the applicants are ready to deposit security and comply with any condition the court may give. That there has not been inordinate delay in bringing the application. That the appeal was filed in time since under order 50 rule 2 [Civil Procedure Rules](#), Sundays and Public Holidays are not to be taken into account in the computation of time and that under section 57 of the [Interpretation and General Provisions Act](#), cap 2 Laws of Kenya, the period between 21st December and 13th January is omitted from computation of time. That the Notice of Appeal was duly received, signed and stamped by the court's Deputy Registrar.
8. It was submitted on behalf of the respondent that order 50 rule 2 [Civil Procedure Rules, 2010](#) was only applicable in computation of time, where the time limited is less than 5 days. That section 75 rules 1



and 2 of the *Court of Appeal Rules* is clear that Notice of appeal should be filed within 14 days of the decision. That notice of appeal herein was filed on January 17, 2023 and that as at the date of arguing the application herein the Notice of Appeal had not been served upon the respondents.

That the Notice of Appeal is not dated and that the earliest court stamp on it is dated 1/2/2023 by which time the period for filing notice of appeal had lapsed. That it was not clear as to when the Notice was lodged in the Court of Appeal. That there is no Memorandum of Appeal filed as the one annexed to the application is only a draft which is not even dated and has no court case number.

That the applicants have not demonstrated that they are in possession of the suit property hence there is no substantial loss demonstrated. That while the application in prayer 2 refer to land No. Kisumu/ Municipality Block 7/92, the grounds of the application and Supporting Affidavit refer to Kisumu/dago/4721 and 4722. That the application is incompetent and an abuse of the court process because the property the subject matter of the ruling was different from the property mentioned in the application.

Determination

9. Since prayer 1 and 2 of the application are spent, the outstanding prayer for this court's consideration is prayer 3. Prayer 3 of the application is a prayer for an order restraining the Respondents, their employees, workers, agents and whosoever from advertising for sale, auctioning, selling, disposing off, transferring and or interfering with the 1st Appellant's property Kisumu Municipality Block 7/92. It is a prayer for temporary injunction pending appeal. The application was, however, argued as an application for stay of execution pending appeal.
10. The law on temporary injunctions pending appeal is found in order 42 rule 6 (6) *Civil Procedure Rules, 2010*, which provides;

"Notwithstanding anything contained in sub-rule (1) of this Rule the High Court shall have powers 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".
11. The condition set in order 42 rule 6(6) for the grant of temporary injunction pending Appeal is that firstly, the court must be exercising its appellate jurisdiction and secondly, the procedure for instituting an appeal must have been complied with. In the case of *Patricia Njeri & 3 others v National Museums of Kenya* [2014] eKLR the court gave the following guidance on grant of temporary injunctions pending appeal:
 - a. An order of injunction pending appeal is a discretionary matter which will be exercised against an applicant whose appeal is frivolous. (Also see case of *Venture Capital & Credit Limited v Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)
 - b. The discretion should be refused where it would inflict great hardship than it would avoid
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory
 - d. The court should also be guided by the principles in *Giella v Cassman Brown & Co Ltd*.
12. The principles for grant of temporary injunctions as were settled in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 are that an applicant must firstly show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly if the court is in doubt, it will decide an application on the balance of convenience.



13. In the present case the court finds that the grounds for grant of temporary injunction pending appeal have not been demonstrated as firstly, court is exercising original and not appellate jurisdiction. The intended appeal is an appeal against decision of this court to the Court of Appeal. Secondly, there is no evidence that the applicants have occupation of the suit land. The contention of the respondent was that the applicants together with their father were evicted from the suit land in execution of the judgement in KSM ELC Case No 13 of 2015. This contention was not discounted by the applicants. The applicants have not demonstrated a prima facie case with a probability of success or that they will suffer irreparable injury if the orders sought are not granted.
14. Even if the application was to be treated as an application for stay of execution of the court order appealed against, as per the submissions made, the grounds for grant of an order of stay of execution have not been demonstrated. The order appealed against is an order striking out the suit hence a negative order and incapable of being stayed.
15. I find no merit in the application and dismiss it with costs to the 1st respondent.
16. It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 23RD DAY OF MARCH 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Omondi Advocate for the Plaintiffs/Applicants.

Ariho Advocate for the 1st Defendant/Respondent

