



**Mwaniki v Kimani (Environment and Land Appeal E017 of 2022)
[2023] KEELC 16451 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

**YM ANGIMA, J
MARCH 16, 2023**

BETWEEN

MAEY WANGECHI MWANIKI APPELLANT

AND

MARGARET WAMBUI KIMANI RESPONDENT

RULING

A. The Appellant's Application

1. By a notice of motion dated September 27, 2022 the appellant sought the following orders.
 - (a) Spent;
 - (b) Spent;
 - (c) That pending hearing and determination of this appeal, the temporary injunction order given on September 1, 2022 in Nyahururu CM ELC Case No E028 of 2022 be suspended or stayed.
 - (d) That pending hearing and determination of the instant appeal, there be a stay of proceedings in Nyahururu CM ELC Case No E028 of 2022.
 - (e) That costs of the application do abide determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the appellant on September 28, 2022 and the exhibits thereto. It was contended that the appellant had been in occupation of the title No Sipili/Donyo Loip Block 2/1396 (the suit property) since 2015 and she was at risk of being evicted therefrom before the instant appeal is heard and determined. She further contended that unless the orders sought were granted her intended appeal might be rendered nugatory.



3. The appellant further contended that the suit property constituted her matrimonial property and that he had filed an originating summons in Nyahururu matrimonial property cause No 1 of 2019 seeking a portion of thereof as one of the properties acquired during the subsistence of her marriage to one, Luka Kagimbi. The said matter was said to be pending hearing before the High Court.
4. The appellant stated that during the pendency of the matrimonial property cause the respondent had filed Nyahururu CM ELC Nos E028 of 2022 against her and obtained an interim injunction her on September 1, 2022 which amounted to an eviction order or mandatory injunction in the circumstances.

B. The Respondent's Response

5. The respondent filed a replying affidavit sworn by on October 14, 2022 in opposition to the application. She stated that she was the registered proprietor of the suit property having bought it from Luka Kagimbi in 2018. She disputed that the appellant was in occupation at the time of purchase since she was resident in Mbogoini area. The respondent further stated that the appellant had lost her prayer for an interim order against the suit property in the matrimonial property cause pending before the High Court.
6. It was the respondent's case that although she had obtained an *ex parte* order against the appellant on April 25, 2022 which was confirmed on September 1, 2022 the appellant had continued interfering with the suit property and had even planted maize and beans thereon in violation of the orders. It was contended that the appellant had not made out a case for the orders sought and that she was not entitled to them because he had come to court with unclean hands.

C. The Appellant's Rejoinder

7. The appellant filed a supplementary affidavit sworn on December 8, 2022 in reply to the respondent's replying affidavit. She stated that the respondent's registration as proprietor was obtained in violation of a court order issued by the High Court in the matrimonial property cause. She denied having been a resident of Mbogoini Village and insisted that she had always resided on the suit property. She further stated that it was the respondent who burnt down her house on October 22, 2022 after obtaining interim orders before the trial court.

D. Directions on Submissions

8. When the application was listed for *inter partes* hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on December 8, 2022 whereas the respondent's submissions were filed on December 14, 2022.

E. The Issues for determination

9. The court has considered the appellant's notice of motion dated September 27, 2022, the respondent's replying affidavit in opposition thereto, as well as the appellant's supplementary affidavit. The court is of the opinion that the following issues arise for determination:
 - (a) Whether the interim injunction granted by the trial court on September 1, 2022 should be stayed or suspended.
 - (b) Whether the suit or proceedings before the trial court should be stayed.



- (c) Who shall bear costs of the application.

F. Analysis and Determination

(a) – Whether the interim injunction granted by the trial court on September 1, 2022 should be stayed or suspended

10. The court has considered the material and submissions on record on this issue. It is evident that the appellant is claiming a share of the suit property as matrimonial property. In that regard she filed a suit before the High Court against Luka Kagimbi and the respondent as well. She also filed a notice of motion dated February 8, 2021 before the High Court seeking, *inter alia*, a temporary injunction to restrain the respondents in the cause from entering, remaining, cultivating, demolishing buildings or in any other manner interfering with her use and possession of the suit property pending the hearing and determination of the suit.
11. In dismissing the appellant’s application for a temporary injunction, the High Court held that she had failed to satisfy the requirements for the grant of an injunction as set out in the cases of *Mrao Limited v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 and *Nguruman Limited v Jan Bonde Nielson & 2 others* [2014] eKLR among other cases. The High Court further held that “In any case, she has the opportunity to recover in damages from the proceeds of sale from the defendant should the main suit succeed”.
12. On the issue of the appellant’s alleged possession of the suit property, the High Court stated as follows:
- “...In the instant suit, the suit land had been sold to the 2nd interested party long before the plaintiff instituted the main suit. In any case, the applicant has not proven on a balance of probabilities that she was indeed in occupation of the said land. she did attach photos of the suit land which indicate that the suit land had been ploughed, a fact that the 2nd interested party admits to have done but there is no proof that the plaintiff has been in exclusive use and occupation of the suit land.”
13. It is thus clear from the above excerpt that the High Court was not satisfied that the appellant was in occupation or exclusive use of the suit property. The court has also perused the ruling of the trial court dated September 1, 2022 which is the subject of the instant appeal. It is evident that the trial court was not satisfied that the appellant was in occupation of the suit property apart from the entry which precipitated the filing of the suit.
14. This court, too, is not satisfied on a balance of probabilities that the appellant has been in occupation of the suit property. The photographs she attached to her supplementary affidavit only showed a new up-coming structure on the land which was not even habitable. The court is unable to accord much probative value to the assistant chief’s letter on the issue of occupation since such evidence was neither availed before the High Court nor the trial court.
15. In the premises, the court finds no fault in the temporary injunction granted by the trial court on September 1, 2022. There is no evidence on record to demonstrate that the appellant shall suffer substantial loss in the absence of a stay order. There is also no evidence to demonstrate that whatever loss the appellant may suffer by being kept out of the suit property shall constitute irreparable loss which cannot be adequately compensated by damages should the appellant ultimately succeed. Consequently, the court is not inclined to grant a stay of the temporary injunction granted by the trial court granted on September 1, 2022.



(b) – Whether the suit or proceedings before the trial court should be stayed

16. The court has perused the submissions on record and it is apparent that none of the parties submitted on the issue of stay of proceedings. The court shall, nevertheless, consider and determine the same. It has been held that it is in the discretion of the court to grant or decline a stay of proceedings depending on the nature and circumstances of each particular case.

17. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR Gikonyo J considered the applicable principles for stay of proceedings by quoting the following passages from *Halsburys Laws of England*, 4th Edition Vol 37 pages 330 and 332:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

18. Similarly, in the case of *Global Tours and Travels Limited* Nairobi HC winding – up cause No 43 of 2000 Ringera J (as he then was) stated that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

19. The court is not satisfied on the basis of the material on record that there is a legitimate reason or justification to stay the hearing of the suit before the trial court on merit. There is no good reason why the respondent should be prevented from prosecuting the main suit since a decision on the merits of the suit shall have no bearing on the pending interlocutory appeal against the interim injunction granted on September 1, 2022. The appellant has no right to stall the hearing of the suit simply because she lost an interlocutory application. The court is thus of the opinion that the appellant has not made out a case for the grant of the stay of proceedings sought.



(c) – Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). Although the appellant prayed that costs of the application do abide the outcome of the appeal, the court is of the opinion that there is no good reason why the successful litigant should be deprived of costs of the application. Accordingly, costs of the application shall be awarded to the respondent.

G. Conclusion and Disposal

21. The upshot of the foregoing is that the court finds no merit in the appellant’s application for interim orders. Accordingly, the appellant’s notice of motion dated September 27, 2022 is hereby dismissed with costs to the respondent. For the avoidance of doubt, any interim orders in place are hereby vacated.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF MARCH, 2023.

In the presence of:

N/A for the Appellant

Ms. Wanjiru Muriithi for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

