



**Kibundu v M'mukira (Environment and Land Appeal E087 of 2022)  
[2023] KEELC 17078 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E087 OF 2022**

**CK NZILI, J**

**APRIL 26, 2023**

**BETWEEN**

**SAMSON KIRIMI KIBUNDU ..... APPELLANT**

**AND**

**ELIAS MUTURA M'MUKIRA ..... RESPONDENT**

**RULING**

1. Before the court is an application dated December 20, 2022 seeking to stay the execution of a decree issued by the trial court on September 8, 2022; reinstate the appellant to the suit land and lastly; issue a temporary injunction against the respondents, their agents, servants or employees restraining them from trespassing, encroaching, utilizing, selling, charging, invading or in any way whatsoever interfering and or dealing with LR No Ithima/Antuambui/8351 pending the hearing and determination of this appeal. Further, the court is asked to set aside the ruling delivered on December 15, 2022 dismissing an application dated January 1, 2022.
2. The application is premised on the grounds on its face and in a supporting affidavit sworn by Samson Kirimi Kibundu on December 20, 2022. The grounds are that on September 8, 2022, a judgment was delivered by the trial court out of a formal proof and upon request the court declined to set aside the exparte judgment on the ground of non-service of summons to enter appearance; that the court had directed the ruling would be on notice but none was sent for December 15, 2022 when the ruling was delivered, declining to set aside the exparte judgment.
3. Further, the applicant stated that he is willing to provide security, he has been in occupation of the suit land for 8 years after purchasing from the respondent, though there was no written sale agreement. That the land was at imminent risk of disposal to third parties considering that it was fraudulently transferred to the respondent's children as per the attached CID report. That the respondent took possession, demolished the buildings and harvested miraa and other perennial plants occasioning him damage and financial loss, yet the land was his only source of income.



4. The application was opposed through a replying affidavit by Elias Mutura M'Mukira sworn on February 1, 2023 on the basis that execution of the decree was affected and vacant possession taken up, hence the application is overtaken by events, following aborted attempts to stay execution at the lower court. The respondent urged the court to find no merits in the instant appeal.
5. Order 42 Rule 6 of the [Civil Procedure Rules](#) provides that a party seeking a stay of execution must file the application without inordinate delay, demonstrate substantial loss, offer security for the due satisfaction of the decree should the appeal not succeed and lastly, establish that it is in the interest of justice to grant the orders sought. Additionally, Order 42 Rule 6 (6) [Civil Procedure Rules](#) provides that the court appealed to, has powers to grant a temporary injunction pending appeal on such terms as it thinks just and fit.
6. While considering the above provisions of law, in the case of [Patricia Njeri and 3 others v National Museum of Kenya \[2004\] eKLR](#), the court held that an order of injunction pending appeal was a discretionary order which would be exercised against an applicant whose appeal was frivolous; the discretion should be refused where it would inflict greater hardship than it would avoid, the appellant must show that to refuse the injunction would render the appeal nugatory and that the court should also be guided by the principles in *Giella v Cassman Brown [1973] E.A 358*.
7. Further in [Madhupaper International v Kerr \[1985\]](#), the court held that an arguable appeal was not one that must succeed, but one which ought to be argued fully before the court. As regard stay of execution, in [Tende Drive Villas Ltd v David Kamau & 4 others \[2005\] eKLR](#), the superior court had refused to grant restraining orders since the applicant had not disclosed a prima facie case with a probability of success and secondly, that the anticipated loss could adequately be compensated in damages. The Court of Appeal was being asked to stay and issue an injunction pending appeal. The superior court had also made a further finding that the applicant did not deserve an equitable relief of injunction since he had failed to disclose material facts.
8. The Court of Appeal held that the intended appeal was not arguable, the reasons given for refusing the interim orders compellable and said it was not persuaded otherwise by the applicants. It declined the stay or injunctive orders as sought by the applicant.
9. In [Selestica Ltd v Gold Rock Development Ltd \[2015\] eKLR](#), the court held that to grant or refuse an application for a stay of execution involves balancing of the interest of the two parties. The court cited with approval [James Wangalwa & another v Agnes Naliaka Cheseto \[2012\] eKLR](#), where it was held that the putting into the motion of the process of execution did not amount to substantial loss but a party must establish other vitiating factors which show that the execution would create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal and that substantial loss was what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
10. Regarding the delay, in [Jaber Mohsen Ali & another v Priscillah Boit & another \(2014\) eKLR](#), the court held that what was unreasonable delay was dependent on the surrounding circumstances of each case since even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.
11. As to the restoration of an evicted party to the suit property, the court in [Momanyi v Osano](#) (Civil Application No E033 of 2022 [2022] KECA 698 (KLR) July 8, 2022 (Ruling), the court took the view that for a party to succeed, he had to show that he possessed an arguable appeal and that if the orders sought were not granted, be they stay or an injunction, the said appeal would be rendered useless, illusory, an academic exercise or be of no effect. As to what an arguable appeal means, the court said it



- must not be one to necessarily succeed, but must be one which was not trifling as long as it was raising at least one bonafide point calling for a response from the respondent and be worthy of a decision by the court hearing the appeal as held in *Stanley Kangethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR and *Kieni Plaintiffs Co. Ltd v Ecobank* [2018] eKLR.
12. The court made a finding that the eviction had been done lawfully so as to enforce a valid court order after the stay orders had lapsed. The court saw no need to grant a restorative injunction. Further, the court agreed with the respondent that for a party to be entitled to a restorative order, he must show and satisfy the court that he owned up property and establish the connection to the property which aspect would render the appeal useless if the orders of restoration were not granted.
  13. Further, in the case of *New Ocean Transport Ltd and another (2014) v Anwar Mohamed Bayusuf Ltd (2014) eKLR*, the court was being called upon to issue a restorative injunction where eviction had occurred. The court held that an injunction is granted in cases in which monetary compensation affords an inadequate remedy to an injured party and that a positive injunction would direct a party to do something whereas a negative one would restrain a party from doing something. The court said that a restorative injunction requires a person against whom it is directed to undo a wrongful act to restore the status quo so that the damage does not continue whereas a mandatory injunction per se compels a party to carry out some positive act to remedy a wrongful omission. Further, the court said that under the overriding objective principles it would grant any interlocutory order that may be necessary for the ends of justice including a restorative injunction in a suitable case. The court however declined to issue a restorative injunction since the eviction was lawful.
  14. Applying the foregoing case law to the instant application, the applicant's main complaint is that the impugned judgment was *ex parte*, his application to set aside was dismissed and that therefore he was condemned unheard to the extent of losing his right to land as a registered title holder of the land lawfully purchased from the respondent. In the judgment delivered on September 8, 2022 the trial court not only declared the registration of the applicant as the owner of the suit land but also as illegal or fraudulent, directed for the deregistration of the title to the applicant. The court also went ahead to order for the forthwith eviction of the applicant from the suit land.
  15. The law and the procedure relating to eviction from either private, community or public land is governed by Sections 152A, 152B, 152E and 152F of the *Land Act* 2012.
  16. Any order of eviction has far reaching implications as it entails the forceful removal of a party who has been in occupation for some time from the subject land. An eviction notice must be issued and be served upon the adverse party in line with Section 153 E of the Act and in a prescribed form as per Rule 65 – 70 of the Land Regulation 2017.
  17. There is no evidence if the lower court established the service upon the affected party, the applicant and or took into consideration the provisions of Section 152F of the *Land Act* and Regulations 66 thereof. In the case of *Morris Kiruja Mpungu & another v Margaret Ngiri Muchiri & another* [2021] eKLR, the court held that the process and procedure of eviction had not been followed. The court cited with approval *Margaret Karwirwa Mwonera v Francis Kofi* [2019] eKLR, where the court said other than the person on the land the Deputy County Commissioner in charge of the area where the land is situated and the OCPD had to be properly served with the notice under Section 152 E of the *Land Act*.
  18. Looking at the circumstances of this matter, I find the applicant has an arguable appeal with a probability of success due to the following. There is no dispute that the applicant became a registered owner of the suit land on September 2, 2014. He averred that the transfer to him was lawfully done.



19. He argued that he was not properly served with summons to enter an appearance but attempts to set aside were declined hence the reason he has proffered an appeal.
20. To my mind the applicant has established other factors, which unless the orders sought are issued his appeal would be rendered nugatory and the substratum of the appeal may change its status.
21. The eviction herein cannot be termed as lawful for non-compliance with the law. Therefore, the loss and damage incurred by the applicant cannot be compensated by way of damages. In *Belle Mansion Ltd v Yaya Towers Ltd (1992) eKLR*, the court held it offended public policy to flagrantly disobey the law. In *Coach Safaris Ltd v Sharrif Hussein* NRB HCC No 370 of 1995, the court held that a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu nor must a wrongdoer be permitted to benefit, however remotely from his wrong doing especially when the act was contrary to law.
22. In *Ramzan Ebrahim & another v Reverend Margaret Wanjiru* NRB Milimani Commercial HCC No 462 of 2000, the court said that an order of stay that would lead to the applicant reaping the benefit of what was wrong.
23. In this application even if the respondent acquired an eviction order from court, that did not absolve him from following the legal requirements under the *Land Act*. He seems to have taken the law into his own hands and should therefore not be allowed to reap benefits out of illegality since our laws must be respected and people must follow the law when seeking legal rights.
24. In the case of Bell Mansion (supra), it was observed that the status to be restored was the one before the illegal act or the wrongful act complained about so as to protect the right of the applicant. The court said it had no discretion when the defendant had acted contrary to law and could not shut its eyes to the act and sanction an illegality. Similarly, in *Ripples Ltd v Mucuba [1992] eKLR*, the court held that a mandatory injunction sought to compel the respondent to reinstate the applicant was necessary. In *Uhuru Highway Development v CBK & others* C.A 140 of 2005, the court held that it was a universal rule of natural justice that orders ought to be made only after hearing or giving all the parties an opportunity to be heard and for a party to benefit from the exception, there must be good and compelling reasons for it.
25. In the case of *Adrina Properties James Radcliff v Kena Properties Ltd & 4 others, Prime Bank Ltd & another (IP) (2022) eKLR*, the court held that under Article 165 (6) of the *Constitution*, it had the mandate under the exercise of its supervisory jurisdiction to correct glaring dereliction of duty and a flagrant abuse of the fundamental principles of law or justice by subordinate courts but within the bounds of their authority.
26. The court cited with approval *Okonjo Jin NSSF v Soko Maina Ltd & another [2021] eKLR*, that in exercising that power it has to ensure that it was not micromanaging the trial court's independence in the conduct and management of its proceedings or to use it as a short cut for an appeal, but should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice.
27. Further, the court going by the maxim that where there was a wrong there was a remedy, under Sections 13 (7) of the Environment and *Land Act*, it could order restitution among other remedies.
28. Since this court has found that the lower court order of eviction was illegal, a nullity and void, it goes without saying that the suit land should revert to the applicant pending the hearing and determination of the appeal. Given that his homestead was demolished during the eviction, the applicant is at liberty to decide how he shall operate on the suit land until the appeal is heard and determined.



The OCS shall provide security during the exercise. An order of injunction is also issued restraining the respondents, his agents, servants or employees from trespassing, encroaching, utilizing, selling, charging, transferring or in any way whatsoever dealing with or interfering with the applicant's quiet enjoyment and occupation of the suit premises pending hearing and determination of this appeal.

29. Costs to the applicant

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 26<sup>TH</sup> DAY OF APRIL, 2023**

**In presence of:**

**C/A: John Paul**

Kiyuki holding brief for Miss Mutinda for appellant

Ariaga holding brief for Mutembei for respondent

**HON C K NZILI**

**ELC JUDGE**

