



**M’Mutunga v M’Nkanata & another (Environment and Land Appeal E081 of 2022) [2023] KEELC 16956 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16956 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E081 OF 2022**

**CK NZILI, J  
APRIL 19, 2023**

**BETWEEN**

**STEPHEN GIKUNDA M’MUTUNGA ..... APPLICANT**

**AND**

**BEATRICE KANYUA M’NKANATA ..... 1<sup>ST</sup> RESPONDENT**

**M’ARIMI M’MUNA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The court is asked to stay the execution of a decree by the lower court issued on 26.9.2022; grant a temporary injunction restraining the respondents from interfering with the applicant’s use, enjoyment, and occupation of LR No. Abothuguchi/Mariene/1278 and lastly, for the issuance of an inhibition order against the said property pending hearing and determination of the appeal.
2. The application is supported by grounds on its face and a supporting affidavit sworn by Stephen Gikunda M’mutunga on 21.12.2022. The applicant contends that he had bought the subject land from the 2<sup>nd</sup> respondent for value, the subdivision was done in 2001 and the land thereafter was transferred to him on 9.4.2001, whereafter he took vacant possession and caused various developments thereto. The applicant aver that upon learning that there was a pending suit over the land in Githongo Law Courts in July 2022, sought to be joined as a party but the trial court declined his request and proceeded to revoke his title deed without according him a fair hearing. The applicant further averred that his appeal has arguable grounds and should stay not be granted, the same shall be rendered nugatory. He attached a copy of the sale agreement, a copy of the records, and the ruling dated 8.12.2022, as annexures marked 5 GM “1-3” respectively.
3. The application is opposed through the replying affidavits of Beatrice Kanyua M’Nkanata and Japhet M’puthia M’Arima as legal representative for the 2<sup>nd</sup> respondent sworn on 2.2.2023 and 30.1.2023 respectively.



4. It is the respondent's contention that the suit property was awarded to the 1<sup>st</sup> respondent in 2002, though he has been unable to enjoy the fruits of the judgment which was now at the execution stage as per a decree issued in Meru CMCC No. LDT 49 of 2002 dated 25.11.2009, against the 2<sup>nd</sup> respondent to which the applicant was not a party. That the applicant objected to the decree in Githongo SRMC CC. No. 25 of 2018 which objection was dismissed vide a ruling dated 26.9.2022. Further, the respondent averred that in Meru H.C No. 71 of 2004, the applicant as an objector also lost the same vide a ruling delivered on 3.10.2007 where he was seeking to stay proceedings in Meru CMC LDT No. 49 of 2002.
5. The 1<sup>st</sup> respondent has attached copies of the ruling dated 26.9.2022, judgment in LDT No. 49 of 2002, copies of the order dated 24.1.2006 and ruling dated 3.10.2007 as annexures marked BKM 1, 2, 3 (a) & (b) respectively.
6. On his part, the 2<sup>nd</sup> respondent averred that he is the rightful owner of LR No. Abothuguchi/Mariene/1279, which was excised from LR No. Abothuguchi/Mariene/499 and that on 12.1.2001 it was sold to the applicant for Kshs.80,000/= and the same excised as per the sale agreement. He confirmed that the LDT judgment came after the land had been sold, transferred, and the title deed issued to the applicant. He attached a copy of the records, the sale agreement and the green card as annexures marked MM "1-3" respectively.
7. With leave of court, parties were directed to canvass the application through written submissions. It was only the appellant who filed written submissions dated 31.1.2023, taking the view that there was need to preserve the substratum of the appeal since if the stay was not granted, the land registrar will proceed to cancel the title deed, rectify the register and revert the land to the 1<sup>st</sup> respondent. Reliance was placed on *Amal Hauliers Ltd vs Abdulnasir Abukar Abukar Hassan* (2017) eKLR which cited with approval *Butt vs Rent Restrictions Tribunal* (1982) KLR 417.
8. As regards the prayer for restriction and or temporary injunction, the applicant relied on Section 68 of the [Land Registration Act](#) 2012 and Order 40 of the Civil Procedure Rules and urged the court to find that there was need to restrict any dealings on the land and to stop the respondents from breaching the contract or occasioning injury of any kind to him as held in *Giella vs Cassman Brown* (1973) E.A 169, since he was a bona fide purchaser for value which right is likely to be infringed as held in *Mrao Ltd vs First American Bank of Kenya Ltd and 2 others* (2003) eKLR and *Jacinta Wanjiku Njuki vs Jane Wambua Mugo & another* (2021) eKLR.
9. The issue for determination is whether the applicant has made out a case for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules and for an injunction pending appeal as per Order 42 Rule 6 (6) of the Civil Procedure Rules.
10. For a party to be entitled to a stay of execution, he has to demonstrate substantial loss, file the application expeditiously, offer security for costs and lastly, demonstrate that it is in the interest of justice to not only grant a stay but also issue a temporary injunction as well as inhibition orders.
11. While expounding on the above grounds, the court in *James Wangalwa vs Agnes Naliaka Cheseto* (2012) eKLR held that execution of a decree was a lawful process that cannot by itself be termed as amounting to substantial loss and that a party must show other circumstances which would prejudice or interfere with the substratum so as to go to the core of the appeal hence rendering it nugatory. In so doing, the court said that an order of stay would be aiming at preserving the substratum and balancing the rights of an appellant who has an undoubted right of appeal against those of the decree-holder who was entitled to the enjoyment of the fruits of his judgment. See also *RWW vs EKW* (2019) eKLR,



- KPLC vs Ester Wanjiru (2019) eKLR, Machira t/a Machira & Co Advocates vs East African Startard Ltd (2002) KLR 63.
12. Coming to an order of temporary injunction and inhibition pending appeal, the court in Munga vs Munge (Civil Appeal Applications) 36 of (2020) (2023) KECA (75) (KLR) 3<sup>rd</sup> February (2022) (Ruling), held that an applicant has to demonstrate that the appeal is arguable with a probability of success in overturning the impugned judgment and that unless the orders sought are granted the appeal if successful shall be rendered nugatory.
  13. In the case of Patricia Njeri & 3 others vs Kenya National Museum of Kenya (2004) eKLR, the court while expounding on the principles said that an order for an injunction pending appeal was discretionarily, exercisable against an applicant whose appeal was frivolous and should be refused where it would inflict more hardship than it would avoid, the applicant must show that to refuse the injunction would render the appeal nugatory and lastly, that the court should also find comfort in Giella vs Cassman Brown (Supra). The same principles were also expounded in Madhupaper International Ltd vs Kerr (1985) KLR 840 and in Bio Corn Products EPZ Ltd vs Diamond Trust Bank (K) Ltd (2020) eKLR.
  14. Regarding an inhibition, courts have held an inhibition is in the nature of a prohibitory injunction. In the case of Mwongera Mugambi Rinturi & another vs Florence Imathiu (2014) eKLR, the court declined to order for an inhibition since it was going to serve no purpose since the pending appeal had been heard by the time the orders were being sought. Further, in Alice Karuru Kithinji vs Gideon Kithinji Limberia (1997) eKLR, the court granted orders of restriction and inhibition pending appeal so as to give the wife who was the applicant a measure of protection for the court was of the view that the claim may well succeed.
  15. Applying the foregoing case law, the applicant's sole complaint as the registered owner of the suit land bought for value without notice is that he was condemned unheard by the trial court despite attempts to join the suit. Further, the applicant says that the effect of the decree is to revoke, invalidate and rectify the register so as to revert the land to the 1<sup>st</sup> respondent. Above this, the applicant says that he has been on the suit land since 2001 where he has extensively made various developments and that should the land revert to the 1<sup>st</sup> respondent, the substratum of the appeal will drastically change to his detriment and render the appeal nugatory.
  16. The right to be heard and not to be thrown out of the seat of justice is the cornerstone of the rule of law and the bedrock of *the Constitution* of Kenya 2010. Under Article 40 of *the Constitution* as read together with Sections 24, 26 and 28, 68 & 80 of the *Land Registration Act* 2012 and Order 40 of the Civil Procedure Rules, the right to land ownership is guaranteed except on sound grounds set hereunder.
  17. In this application, the applicant has said he has protectable rights under the law and which the court in Mrao Ltd supra as well as Nguruman Ltd vs Joel Nielsen Bonde (2014) eKLR held must be protected.
  18. To my mind, the grounds of appeal herein raise arguable points which are likely to succeed. If the suit property is not preserved, the appeal is likely to be rendered nugatory. The 2<sup>nd</sup> respondent has confirmed that the owner's rights of the applicant were acquired before the decree was issued. It is also notable that one of the issues, the appellate court is asked to determine in the appeal is whether the Land Dispute Tribunal had jurisdiction to determine a dispute on titled land.
  19. The 1<sup>st</sup> respondent has not demonstrated what prejudice he would incur or what damage was likely to be inflicted if the court were to issue a temporary injunction and an inhibition order to preserve the property pending appeal.



20. The upshot is I find the applicant entitled to a temporary injunction and inhibition orders pending the hearing and determination of the appeal. The applicant shall meantime deposit as security for costs Kshs.100,000/= as well as the original title deed with the Deputy Registrar within 14 days from the date hereof in default the stay order to lapse.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19<sup>TH</sup>  
DAY OF APRIL, 2023**

**In presence of:**

**C/A: John Paul**

**Wambau for 2<sup>nd</sup> respondent**

**Muthomi Njeru for applicant**

**Miss Gikunda for 1<sup>st</sup> respondent**

**HON. C.K. NZILI**

**ELC JUDGE**

