



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Progressive Credit Limited & 2 others (Environment & Land  
Case 326 of 2017) [2023] KEELC 17677 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 326 OF 2017**

**JG KEMEI, J  
MAY 31, 2023**

**BETWEEN**

**ZIPPORAH WANJIKU KARIUKI ..... PLAINTIFF**

**AND**

**PROGRESSIVE CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CARNELIAN ENTERPRISE AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE NJUGUNA NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Vide the Application dated the November 15, 2022, the Applicant has moved the Court under Art 159 (2) (d) of the Constitution of Kenya, Sections 1A, 1B, 3A, & 63 (c) of the Civil Procedure Act, Order 42 Rule 6, Order 42 rule 22, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. In the main she seeks the following orders;
  - a. Spent.
  - b. Pending the hearing and determination of the appeal intended herein this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents by themselves their representatives their agents and or any other person acting under their authority/ instruction from erecting any structures, alienating, dealing subdividing transferring and or in any other way possible transacting with all the parcels of land known as LR No Muguga/ Gitaru/3112.
  - c. The costs of this Application shall abide the outcome of the appeal.
2. The Application is based on the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on the November 15, 2022.



3. The grounds in the Motion are to wit; an Auctioneer in execution of their statutory power of sale attached the Judgment Debtor's goods; She has appealed against the decree and filed a Notice of Appeal in that regard through her former advocates which appeal has high chances of success and unless the orders sought are granted she stands to suffer prejudice; She has an arguable appeal hence the need for orders of interim injunction or status quo to preserve the substratum of the suit so that the appeal may not be rendered an academic exercise; That it is meted that interim orders be granted in the interest of justice; Inter alia that the 3<sup>rd</sup> Respondent was charged in Kikuyu Law Courts Criminal Case No 857 of 2022; The Respondents will not suffer any prejudice, she pleaded.
4. In her Supporting Affidavit she reiterated the grounds above and added that the Respondents maliciously intended to evict her following the dismissal of her case and she stands to lose the suit land, her only source of income and home since 2000. That the delay in filing the appeal was occasioned by several things among them the misunderstanding with her previous lawyer, inadvertent mistake/error on the part of her advocate which should not be visited on her, delay in obtaining typed proceedings which are yet to be given. She added that the delay however is not inordinate and the appeal has a high chance of success.
5. Relying on Article 159(2) a - d of the Constitution of Kenya as read with Section 1A, 1B of the Civil Procedure Act the Applicant urged the Court to render justice in all cases in a just expeditious proportionate and affordable cost to the parties. That this is a fundamental procedural value that the Court must adhere to in determining an Application for stay of execution pending the hearing and determination of her appeal.
6. That the appeal process has commenced and if not stopped her appeal shall be rendered nugatory. In support of this limb she annexed a copy of a notice from Carnellian Enterprises Auctioneers of the intent to auction the suit land on the March 17, 2022. That she is under imminent threat of eviction by the Respondents. That as a woman of humble background she relies on the suit land for livelihood and the imminent eviction is likely to cause injustice and erode her dignity and respect in society.
7. That she has filed the Application in utmost good faith and is ready to abide by the conditions set by the Court.
8. Inter alia, she pleaded that she has been in possession of the land uninterrupted and exclusive of the rights of others, if any. There are no suits or proceedings pending with respect to the suit land; no financing arrangements have been filed against the suit land except the claim to sell the same by public auction.
9. In the end she sought an injunction stopping any dealings in whichever way with the suit land pending the hearing and determination of the appeal. That the execution by way of auction will irreparably affect or negate her appeal.
10. The Application is opposed by the 1<sup>st</sup> Respondent through the Replying Affidavit sworn on the November 9, 2022 by Collins Mbatia, the Legal Officer of the 1<sup>st</sup> Respondent who deponed on behalf of the Respondents. He stated that; the Application is frivolous and an abuse of the Court process; there are no positive orders/decrees issued by the Court directing any other thing to be done other than the dismissal of the suit; negative orders are incapable of being stayed.
11. In addition, he urged the Court to dismiss the Application for being incompetent incurably defective and ought to be struck out on grounds that it offends the provisions of Order 9 rule 9 of the Civil Procedure Rules. The Applicant was represented previously by the firm of Macharia Gakaria & Associates and ought to have sought leave to act in person. Inter alia that the Application is an abuse



of the process of the Court as the Court determined a similar Application for injunction disguised as an Application for review and dismissed it on the October 2, 2022 (sic). This Application he avers is to frustrate the 1<sup>st</sup> Respondent from exercising its statutory power of sale over the property.

12. That the Applicant has not demonstrated any arguable appeal or grounds thereof. Interalia, the Application does not meet the threshold for the grant of stay pending appeal for the reason that; no demonstrable substantial loss that she stands to suffer noting that execution is a lawful process; the Application suffers from inordinate delay the Judgement having been delivered on the September 24, 2021 and this Application was filed on the November 15, 2022 a period of over one year two months and finally no security of costs has been provided. He urged the Court to deny the orders in the interest of justice equity and fairness.
13. In a rejoinder, the Applicant filed a Further Affidavit sworn on the February 24, 2023 in answer to the Replying Affidavit sworn by Collins Mbatia on the November 9, 2022 and avowed that the advocate who allegedly transferred the suit land has written to the Directorate of Criminal Investigations denying the said transaction. She enclosed an inelible letter from the law firm of Kamangu & Co Advocates. That since appeals take time it is mete that the orders be granted to preserve the suit land from execution by way of auction. In response to the provisions of Order 9 rule 9 of the Civil Procedure Rules (CPR) she argued that her advocate abandoned the suit midway, a fact that the Respondents are fully aware of. She pleaded with the Court to stop the execution so that her grievance may be heard and determined.
14. In her undated written submissions filed on the March 15, 2023, the Applicant argued for stay of execution pending appeal. That following the delivery of Judgment dismissing the Applicant's case the Respondents have embarked on auctioning the suit land. That her Application for review of Judgment faced the same fate of dismissal like the suit. That she was not aware of the appeal and was done at the very last stage of the review Application by the 2<sup>nd</sup> Respondent. That there is a clear case of mistake of counsel that should not be visited on her.
15. On whether substantial loss may result to the Applicant unless the order is made she submitted that the suit land is her matrimonial property having purchased it in 2015. She did not transfer the suit land to any of the Respondents and should the suit be dismissed she stands to suffer irreparable loss and damage if the property is auctioned by the 2<sup>nd</sup> Respondent to recover monies owed by the 3<sup>rd</sup> Respondent. She relied on the case of *James Wangalwa & Anor v Agness Naliaka Cheseto [2012] eKLR* where the Court stated as follows;

' No doubt, in law, the fact that the process of execution has been put in Motion, or is likely to be put in Motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:



'the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

16. That her suit land was transferred through fraud and illegality. That the appeal has raised triable issues with high chance of success and failure to grant the orders will render it nugatory.
17. Further she argued that the Application has been made without any delay. Reliance was placed on the decision in the case of [RWW v EKW \[2019\] eKLR](#) where it was held that;

' The purpose of an Application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.'

18. On the principles of grant of injunction pending appeal she relied on the decision of the Court in [Patricia Njeri & 3 Others v National Museum of Kenya \[2004\]eKLR](#) where the Court stated as follows;
  - a. An order of injunction pending appeal is a discretionary which will be exercised against an Applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict greater hardship than it would avoid.
  - c. The Applicant must show that to refuse the injunction would render the appeal nugatory.
19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submission on the March 22, 2023 alongside the list of authorities dated the March 21, 2023 through the firm of Mukiri Global Advocates LLP.
20. On whether there is any order capable of being stayed by the Court, the Respondents answered in the negative. That in the Judgement the Court dismissed the Applicants suit and hence no positive orders were made capable of being stayed. See the cases of [Kimani Kabogo v William Kabogo Gitau \[2021\] eKLR](#); [Bernard Njoroge Kibaki T/A Njowa Njemu Enterprises v Equity Bank Limited & Anor \[2020\] George Ole Sangui & 12 Others v Kedong Valley Ranch Limited \[2015\]](#).
21. Whether the present Application is competent? The Respondents submitted in the negative on the grounds that it offends order 9 rule 9 of the CPR. In buttressing the point of incompetency of the Application the Respondents relied on the decision of the Court in the case of [Saleh Muhsin Shogog v Augus M Dishu & Others \[2019\] eKLR](#) where the Court stated as follows;

' Order 9 Rule 9 is clear that no new advocate and no person acting in person can take over the conduct of a suit which has finally been determined while any proceedings or related proceedings are continuing before the same court in continuation of the determined matter through notice of change of advocate or notice of intention to act in person without the leave of the court through a formal application or by consent of the outgoing advocate, or person acting in person. In the present case, the 1<sup>st</sup> Defendant filed the application dated July 10, 2019 without leave of the court. No doubt the application is in continuation of the determined matter. Order 9 Rule 10 provides that an application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first. In the application dated July 10, 2019, there is no



such prayer sought. The provisions of Order 9 Rule 9 are couched in mandatory terms and cannot be termed as mere technicalities.'

22. That the Applicant was previously represented by counsel and ought to have sought leave of the Court before representing herself.
23. Whether the Application for stay pending appeal is merited? Relying on the provisions of Order 24 Rule 6(2) of the Civil Procedure Rules, the Respondents submitted that the right of execution cannot be stayed unless it is for a just cause. The Applicants have not demonstrated any substantial loss she stands to suffer. No proof has been placed before the Court to show that the suit land is her matrimonial property nor that she will be rendered homeless as alleged. The mere fact that the process of execution has been put in place does not amount to substantial loss since execution is a lawful process. See the case of *James Wangalwa 7 Anor v Agnes N Cheseto* [2012] eKLR cited in the case of *Nicholas Stephen Okaka & Anor v Alfred Waga Wesonga* [2012] eKLR.
24. That it is not enough for the Applicant to say that she lives or resides on the suit land and that she will suffer substantial loss. She must go further and show substantial loss that she may stand to suffer if the Respondent executes the decree against her.
25. The Respondents argued that the Applicant suffers from inordinate delay as she has filed the Application 14 months after the delivery of Judgment. That no justifiable reason has been given for the delay to warrant exercise of discretion in favour of the Applicant and her attempt to blame her previous counsel is but just an excuse since she has been representing herself since March 16, 2022 when she filed an Application for review.
26. On whether there is an arguable appeal the Respondents have submitted that the Applicant has neither filed a Memorandum of Appeal within the statutory timelines and no grounds of appeal are present to determine whether or not the appeal is arguable and or will be rendered nugatory if stay is not granted.
27. On security the Respondents have beseeched the Court to order that the Applicant deposits in Court the sum of Kshs 1.5 Million as security for costs should the Court be minded to grant the orders and in default the orders should lapse automatically.

### **Analysis and determination.**

28. Having read and considered the Application, the rival grounds and the written submissions the issue before this Court is whether the Application has merit.
29. First it is important to give the background leading to this Motion. As already alluded to in the previous paras, this Court delivered its Judgment on the September 24, 2021 dismissing the Applicants suit. *Interalia*, the Court determined that the Applicant gave the 3<sup>rd</sup> Respondent the authority to transfer the suit land to himself and in furtherance of that authority gave the documents of completion to the 3<sup>rd</sup> Respondent and the Court found no misrepresentation and or fraud on the part of the 3<sup>rd</sup> Respondent in the transfer of the suit land. The Court found the transfer of the suit land was not only legitimate but lawful.
30. Aggrieved by the said Judgment the Applicant filed the Notice of Motion dated the March 16, 2022 seeking *interalia* orders of review and setting aside of the Judgment dated the September 21, 2021 and its consequential orders, temporary injunction be issued barring the Respondents from selling the suit land mandatory injunction *interalia* advertising the suit land for auction or such other means of disposal, orders compelling the 1<sup>st</sup> Respondent to issue the Applicant with the accurate loan statement



of accounts to ascertain the amount due. The Court in its Ruling delivered on the November 3, 2022 upon hearing the Application dismissed the same for want of merit.

31. Undeterred in her determination to seek reliefs, the Applicant filed this Application dated the November 15, 2022 seeking two prayers which are orders for temporary injunction against the Respondents barring them from interfering with the suit land either through erecting structures alienating dealing subdividing transferring and or any other way disposing the suit land pending the hearing and determination of the intended appeal and an order for costs of the Application.
32. The Application dated the November 15, 2022 seems to have been abandoned. I say this because despite the same pending the Applicant filed an Application dated the January 13, 2023 seeking inter alia the following orders;
  - a. Spent.
  - b. That pending hearing and determination of this Application herein, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent by themselves, their representatives, their agents and/or any other person acting under their authority/ instruction from erecting any structures, alienating, dealing, subdividing, transferring and/or in any other way possible transacting with all the parcels of land known as LR MUGUGA/ GITARU/3112.
  - c. That the notification of sale of property dated November 2, 2022 be set aside.
  - d. That the costs of and incidental to this Application do abide the result of the said appeal.
33. It must be noted that the orders being sought in the above Application are similar in all respects with the current Application the subject of this Ruling.
34. The Application dated the January 13, 2023 was dismissed on the February 13, 2023 for want of prosecution and/or nonattendance.
35. Following the dismissal of the Application, the Applicant dusted her earlier Application of the November 15, 2022 which is now being prosecuted before me. The question is whether this Application in the face of a dismissal orders of February 13, 2023 is resjudicata. The dismissal orders aforesaid have not been set aside, vacated and or appealed.
36. Before I delve into the merits of the Motion, I must point out that the orders sought by the Applicant in her Application are that of a temporary injunction pending the hearing and determination of an intended appeal. However in the written submissions she has by and large submitted on an Application for stay of execution. As the old adage states a party is bound by his /her pleadings. In this case the Court will determine the Application as pleaded.
37. The power to grant an injunction is discretionary and such discretion must be exercised judiciously on the basis of law and evidence. (See *Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR*).
38. The principles applicable in considering an Application for an injunction pending appeal were pronounced by Visram J (as he then was) in *Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR* as follows:
  - a. An order of injunction pending appeal is a discretionary which will be exercised against an Applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict greater 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 [1973] EA 358*.
39. In the case of *Giella v Cassman Brown [supra]*, the conditions necessary for the grant of interlocutory injunctions as follows:
- ' The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- Thirdly, if the Court is in doubt it will decide an Application on the balance of convenience.'
40. The question of what constitutes a prima facie case was determined by the Court of Appeal in the case of *Mrao Limited v First American Bank of Kenya and 2 Others [supra]* as follows;
- ' A prima facie case in a Civil Case include but is not confined to a 'genuine or arguable' case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'
41. Equally in the case of [\*Nguruman Limited v Jan Bonde Nielsen & 2 Others \[2014\] eKLR\*](#) the case summed it thus:
- ' The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed.'
42. In this case save for the Notice of Appeal dated the October 7, 2021 the Applicant has not annexed the grounds of appeal to show firstly that an appeal has been filed and secondly the grounds of appeal. In the absence of the said grounds therefore the Court is unable to assess whether or not there is an arguable or a triable issue.
43. The orders are being sought pending the hearing and determination of an intended appeal. Nothing has been demonstrated to the Court that there is indeed an appeal filed within the timelines provided in law. It must be noted that the auction sought to be enjoined, according to the record, was scheduled for the March 17, 2022 which has long been overtaken by events. The Court cannot grant orders in a vacuum.
44. The Court finds that the Applicant has not demonstrated a prima facie case before the Court.
45. On the second limb, that is that an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by



an award of damages, it is to be noted that the suit land is capable of being valued and compensated by way of an award of damages.

46. Lastly, the balance of convenience tilts in declining the Application for the reasons stated above.
47. In the end the Application is not merited. It is dismissed with costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF MAY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of**

**Plaintiff – Absent but served**

**Ms. Kamau HB Mukiri for 1<sup>st</sup> and 2<sup>nd</sup> Defendant**

**3<sup>rd</sup> Defendant – Absent**

**Court Assistants – Kevin & Lilian**

