



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mtuwani & 3 others v Karina (Family Appeal E019 of 2023)  
[2023] KEHC 27265 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27265 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E019 OF 2023  
G MUTAI, J  
DECEMBER 20, 2023**

**BETWEEN**

**HEMED OMAR MTUWANI ..... 1<sup>ST</sup> APPELLANT  
SULEIMAN BAKARI KUROREA ..... 2<sup>ND</sup> APPELLANT  
IDDI AMIR MWAMIRI ..... 3<sup>RD</sup> APPELLANT  
SINANGOBA BAKARI KUROREA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ABDALLA JUMA KARINA ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application dated 21<sup>st</sup> September 2023 *vide* which the appellants/applicants seek the following orders: -
  - a. Spent;
  - b. That the firm of Omondi Waweru & Company Advocates be allowed to come on record on behalf of the appellants /applicants;
  - c. That pending the hearing and disposal of this application, the respondent by himself, his servants and or agents or otherwise howsoever be restrained by a temporary injunction from charging, leasing, selling, transferring or in any way whatsoever and howsoever dealing with the parcel of land known as Kwale/WAA/1155. For the avoidance of any doubt, no construction works should be undertaken;
  - d. That pending the hearing and disposal of this appeal, the respondent by himself, his servants and or agents or otherwise howsoever be restrained by a temporary injunction from charging, leasing, selling, transferring or in any other way or manner whatsoever and howsoever



interfering with the parcels of land known as Kwale/WAA/1155. For the avoidance of any doubt, no construction works should be undertaken; and

- e. That costs of this application be provided.
2. The application is premised on the grounds stated in the body of the said Notice of Motion and also on the supporting affidavit of Hemed Omar Mtuwani sworn on 21<sup>st</sup> September 2023. The 1<sup>st</sup> appellant/applicant deposed that he and his co-appellants/applicants, being dissatisfied with the ruling of the Kadhi's Court delivered 5<sup>th</sup> July 2023 by the Hon. Salim Mwaito, Principal Kadhi, Kwale, filed a Memorandum of Appeal dated 13<sup>th</sup> July 2023 and applied for typed proceedings. They also applied for a stay pending appeal before the said Kadhi. In his ruling of 17<sup>th</sup> August 2023, the said Kadhi held that the Kadhi's Court was not the proper forum and advised them to seek a stay in the High Court.
3. He further stated that the intended appeal raises serious arguable points of law. He averred that the respondent sold part of the property and the purchaser /developer had commenced works on the suit property. They alleged that the respondent is an impostor who took advantage of the situation as at the time as the appellants/applicants were reluctant to share the property as there was no fear of invasion from anyone. They are afraid that the respondent may succeed in transferring the suit property to the purchaser pursuant to the impugned transaction.
4. He stated that if conservatory orders are not granted, the intended appeal will be rendered nugatory.
5. In response the respondent filed a replying affidavit sworn 5<sup>th</sup> October 2023. He stated that the application is premised on the wrong sections of the law as it is brought under Order 40 of the *Civil Procedure Rules*, but drafted as an application for stay of execution of judgement pending appeal. The application is made on the basis of erroneous presumptions and belief that there is an ongoing suit and the suit property is in danger of being wasted. The appellants/applicants have introduced matters and evidence already dealt with at the Kadhi's Court, and they had an opportunity to present their case before the court but failed to do so. He urged the court to dismiss the application with costs.
6. This court directed that the application be canvassed by way of written submissions. Subsequently, the appellants, through their advocates Omondi Waweru & Company Advocates, filed written submissions dated 25<sup>th</sup> October 2023. Counsel submitted on three issues, namely, whether the orders sought by the applicant are tenable, whether the application, if allowed, will occasion prejudice to the respondent, and whether the respondent obtained a fake death certificate.
7. On the first issue, counsel submitted that this court has a duty to safeguard the property pending the appeal and that with a third party constructing a house on the suit property, the orders sought are tenable so as to preserve the same from further disposal, until the appeal is heard and determined.
8. On the second issue, counsel submitted that the respondent will suffer no prejudice if the stay is ordered.
9. On the third issue, counsel submitted that the respondent did not have a good title to transfer, having obtained the death certificate fraudulently and also transferred the suit property to himself using an illegally obtained document.
10. In conclusion counsel urged the court to allow the application.
11. On the other hand, the respondent, through his advocates Mgupu & Company Advocates, filed written submissions dated 9<sup>th</sup> November 2023. Counsel argued the application as one of stay of execution under Order 42 rule 6 and submitted that the appellants did not prove that they would suffer substantial loss if the orders sought were not granted, neither did they address the issue of security for



the due performance of the orders of the court. Counsel further submitted that security should be an amount equivalent to the value of the suit property or an amount issued by the court. In conclusion, counsel urged the court to dismiss the application.

12. I have considered the application, the response therein and the rival submissions, and it is now my duty to determine whether the orders sought should be issued.
13. The appellants/applicants' argument is that the respondent has sold part of the property, and the purchaser /developer has commenced works on the suit property. They submit that the respondent is an impostor who took advantage of the situation to defraud them. They are afraid that the respondent may succeed in transferring the suit property to the purchaser pursuant to what they say is an unlawful transaction. They urge that this court has a duty to safeguard the property pending the appeal. They submit that the respondent did not have a good title to transfer, having obtained the death certificate fraudulently, and also transferred the suit property to himself using an illegally obtained document.
14. The respondent, on the other hand, has argued that the application has been drafted as an application for a stay of execution and not one for an injunction.
15. The application herein has been brought under several provisions of the law, including Order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act. The appellants/applicants have sought orders of temporary injunction to preserve the suit property.
16. The law on temporary injunction is provided for under Section 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules 2010

Section 63 (c) and (e) provides:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed

—

- (c) grant a temporary injunction and, in case of disobedience, commit the person guilty thereof to prison and order that his property be attached and sold;
- (e) make such other interlocutory orders as may appear to the court to be just and convenient.”

Order 40 rule provides that:-

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



17. The Court of Appeal in the case of *Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others* [2016] eKLR stated:-

“Needless to emphasise, the remedy of a temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established so as to prevent the ends of justice from being defeated. Order 40 recognises that a temporary injunction will be sought where the property in dispute is in danger of being wasted, damaged, alienated, or wrongfully sold in the execution of a decree or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, nor can it be denied arbitrarily by the court.

Because of its importance and susceptibility to abuse, certain guidelines have been developed while considering an application for temporary injunction. The three well-known tests enunciated in *Giella v Cassman Brown* (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if an injunction is denied. In case of doubt, the issue in contention ought to be decided on the scale of a balance of convenience.”

18. Further, the court in the case of *JM v SMK & 4 others* [2022] eKLR stated:-

“Therefore, though at an interlocutory stage, the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances, whether the orders sought are likely to affect the interests of non-parties to the suit, the issue of whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said *Act* in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective, as interpreted by the Court of Appeal, is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.”

19. In discussing the three factors to be taken into consideration by the court when issuing temporary injunction and or injunction orders, the court, in the case of *JM v SMK & 4 others* (*supra*) stated:-

“What then constitutes a *prima facie* case? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show *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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless



discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “*prima facie*” case and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a *prima facie* case, the former being the lesser standard of the two...In civil cases a *prima facie* case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party 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.”

As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held In [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) [2014] eKLR expressed itself as hereunder: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

As regards the issue of balance of convenience, I associate myself with the decision in [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR where it was held as follows:

“The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience



which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

20. From the nature of the application before me, it is clear that the applicants are seeking an order of injunction pending appeal. Could this court issue such an order?

21. The answer to the foregoing question would appear to me to be in the affirmative. Courts have jurisdiction to issue injunctions pending appeal. Order 42 Rule 6(6) of the Civil Procedure Rules provides as follows:-

“Notwithstanding anything contained in Subrule (1) of this Rule, the High Court shall have power 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.”

22. Principles for grant of temporary injunction pending appeal are now well settled. In the case of Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR, 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 that 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.”

23. In my view, the appellants/applicants have demonstrated that the suit premises are in danger of being transferred. It does appear to me that the intended appeal is arguable. I am satisfied they may suffer irreparable damage that an award of damages may not compensate unless the orders sought herein are granted. In the circumstances, I find and hold that they are deserving of the orders sought.

24. The upshot of the foregoing is that the application is allowed.

25. This being a family matter, parties shall bear their own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20<sup>TH</sup> DAY OF DECEMBER 2023 VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

No appearance for the Appellants/Applicants;

No appearance for the Respondents; and

Arthur – Court Assistant

