



Mosinko & another v Nkuraiya (Environment and Land Appeal E001 of 2023) [2023] KEELC 18067 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**CG MBOGO, J
JUNE 13, 2023**

BETWEEN

STEPHEN LENKITIYA OLE MOSINKO 1ST APPELLANT

LANDER TANYASIS 2ND APPELLANT

AND

PETER OLOISHURUA OLE NKURAIYA RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's court at Narok (Hon. S.M. Mungai) in Narok CMCC ELC No. 71 of 2021 delivered on 24th January, 2023)

RULING

1. Before this court is the notice of motion application dated February 9, 2023 filed by the appellants and which is expressed to be brought under order 42 rules 1-6, order 40 rule 10 and order 51 rules 1-3 of the Civil Procedure Rules and Sections 1A,1B and 3A of the Civil Procedure Act seeking the following orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the respondent be restrained either by himself, his servants or agent, from interfering with the 1st appellant's possession and enjoyment of plot No 406 in the Ildamat Adjudication Section pending the hearing and determination of this appeal.
 5. That the costs be provided for.



2. The application is premised on the grounds inter alia that the appellants are the genuine and beneficial owners of the suit property known as plotNo 406 in the Ildamat Adjudication Section and that the respondent was granted orders on January 24, 2023 barring the appellants from interfering with the respondent's enjoyment of the suit land pending hearing and determination of Narok CMCC ELC No 71 of 2021.
3. The application is supported by the affidavit of the 1st appellant sworn on even date. The 1st appellant deposed that together with the 2nd appellant, they are the true, genuine and lawful owners of the suit land and the respondent is aware of the same. Further, that the 2nd appellant is the beneficial owner of a portion of land from the 56,000 acres parcel of land owned by Ntulele Group Ranch.
4. The 1st appellant further deposed that they are aggrieved by the ruling that was delivered on January 24, 2023 barring them from interfering with the respondent's enjoyment of the suit land and have filed a memorandum of appeal which shows that the lower court delved into matters that it ought not to have delved in. Further, that they are apprehensive that the respondent may enforce the said orders to his detriment which they have been in possession for a period of 8 years since the year 2016 and that unless the injunction sought is granted, there is high possibility that he will be forcefully removed from the suit land and his crops destroyed by the respondent.
5. The 1st appellant further deposed that this court is empowered under Order 40 Rules 1-2, 10 of the [Civil Procedure Rules](#) to preserve the subject matter of the suit and he relied on the cases of [Giella v Cassman Brown and Co. Limited](#) [1973] EA 358 and [Assanand v Petit](#) [1989] KLR 241.
6. The application was opposed by the replying affidavit of the respondent sworn on April 12, 2023. The respondent deposed that the appellants have not come to court with clean hands as the application only challenges the part of the ruling that does not favour them but do not mention the part of the ruling that allowed their application dated September 20, 2021 in which the intended 2nd defendant was enjoined in the suit.
7. The respondent further deposed that the appellants have not attached proof of ownership to the suit property but only a plain claim without any documentation but also claim forceful and illegal occupation as a justification and which the law does not recognize acts of encroachment, forceful and illegal occupation of someone's property. Further, that the orders being sought as stay of execution is a way to legally extend their illegal acts of encroachment and forceful occupation of his property.
8. The respondent deposed that it is trite law that a party to a suit should respect the orders of the court however ugly and in this case, the appellants should first relinquish the property to the respondent and proceed to have the case proceed to full trial.
9. The application was canvassed by way of written submissions. The appellants filed their written submissions dated April 13, 2023. The appellants while relying on the cases of [Punch Nigeria Limited v Attorney General](#) 1996 Commonwealth Human Rights Law Digest 46 and [Kariuki Gathitu v Attorney General](#) [2013] eKLR submitted that the respondent has not filed any response to their application before this court and that the respondent cannot be heard to question the facts contained in the said affidavit.
10. The appellants further submitted that this court has jurisdiction to preserve the subject matter of an intended appeal pursuant to Order 40 Rule 10 of the [Civil Procedure Rules](#). Reliance was placed in the case of [Madhupapaer International Limited versus Kerr](#) [1985] KLR 840. Further, that following the ruling delivered by the lower court, there is nothing the respondent cannot do to defeat the objects of this appeal by either evicting the 1st appellant from the suit property which he has been in possession



- of since the year 2016 or destroying his crops on the suit land. The appellants relied on the cases of *Assanand v Pettit* [1989] KLR 242, *African Safari Club v Safer Rentals Limited*, Court of Appeal at Nairobi Civil Application No Nai 53 of 2010.
11. The appellants further submitted that if the orders of the lower court are enforced by the respondent, the appellants' right to access this court for redress under Article 48 of the *Constitution* will be rendered nugatory. Also, that they are apprehensive that the respondent may enforce the said orders to the 1st appellant's detriment.
 12. In conclusion, the appellants submitted that they are entitled to the orders sought including costs.
 13. The respondent filed written submissions dated April 20, 2023. The respondent raised one issue for determination which is whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* for the grant of stay of execution pending appeal.
 14. On this issue, the respondent submitted that the appellants are just a party keen to deprive the respondent the fruits of his ruling and seek to extend their illegal possession of the respondent parcel of land. Also, that the appellants' have not gone further to show the substantial loss they shall suffer and that the only conditions that the appellants have satisfied is making the application without unreasonable delay. The respondent relied on the cases of *RWW v EKW* [2019] eKLR, *Elizabeth Nduki Richard versus Arison Kyuma Mbali & Another* [2022] eKLR, *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* [2014] eKLR and *Trust Bank Kenya Limited v Ajay Shah & 3 others* [2012] eKLR.
 15. In conclusion, the respondent submitted that the instant application is devoid of merit and should be dismissed with costs for the reason that it fails to meet the threshold being demonstrating the substantial loss they shall suffer and failed to provide the security for the due performance of the decree or order.
 16. I have considered the application, replying affidavit and the written submissions and authorities cited by both parties and the issue for determination is whether this court ought to grant orders of injunction pending hearing and determination of the appeal.
 17. 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.”
 18. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the court gave the following principles as governing grant of temporary injunction pending appeal;
 - 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 great 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.”

19. In the case of *Giella v Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of 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.”

20. A *prima facie* case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 others* [2003] e KLR 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 later.”

21. In this case, it was the 1st appellant’s case that together with the 2nd appellant, they are the lawful and genuine owners of plotNo 406 in the Ildamat Adjudication Section and that the respondent knows it and which they have been in possession since the year 2016. The 1st appellant has not annexed any evidence to show proof of ownership. However, a cursory look at the replying affidavit sworn by the 2nd appellant on September 18, 2021 indicated that he is in occupation having constructed a site house and is cultivating crops on the same.

22. The respondent on the other hand, produced a document dated 6th March, 2021 which appears to have emanated from the Sub County Land Adjudication and Settlement Officer indicating that he is the owner of the suit land. My analysis of the above is that both parties seem to lay claim of ownership of the suit land.

23. On a balance of convenience and in a bid to ensure that the appeal is not rendered nugatory, I am of the view that the orders suitable at this stage would be to ensure that *status quo* prevails pending hearing and determination of the appeal.

24. Arising from the above, this court hereby orders that *status quo* be maintained pending hearing and determination of the appeal. Costs to abide the outcome of the appeal. Mention on June 20, 2023 for further directions.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 13TH DAY OF JUNE, 2023.

HON. MBOGO C.G.

JUDGE

13/ 6/ 2023.

In the presence of:

CA:T.Chuma

