



**Kimani v Munuhe & 3 others (Environment and Land Appeal
E064 of 2022) [2023] KEELC 19165 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E064 OF 2022
OA ANGOTE, J
JULY 27, 2023**

BETWEEN

MIRIAM NYAWIRA KIMANI APPELLANT

AND

PATRICK MWANGI MUNUHE 1ST RESPONDENT

REGINA WANGUI KAMAU 2ND RESPONDENT

LOISE GATHONI NJOROGE 3RD RESPONDENT

TERESIA WANGUI NGATIA 4TH RESPONDENT

*(Being an Appeal from the order and ruling delivered by Honourable Edger Kagoni
(PM) on 29th July 2022 in Milimani Commercial Courts CMELC No. 493 of 2021)*

RULING

1. By the Notice of Motion application dated August 5, 2022, the Appellant/ Applicant has sought for the following orders:
 - a. That there be a stay of proceedings, ruling and order given by Hon Edgar Kagoni (PM) on July 29, 2022 in Milimani Chief Magistrate's Courts ELC No 493 of 2021 pending the hearing and determination of the lodged appeal.
 - b. That pending the hearing and determination of the Appeal herein, this Honourable Court do and hereby restrain the Respondents whether by themselves, their servants, agents, licensees or in any capacity whatsoever from trespassing or encroaching or dealing or demolishing or otherwise using or intermeddling in any way whatsoever with the Appellant/ Applicant's quiet



enjoyment of her parcel of land known as Plot No 139 as described in Share Certificate No 756 in Kasarani Re-Settlement Project and situated at Kasarani.

- c. That cost of this application be provided for.
2. This application is supported by the Affidavit of the Appellant who deposed that she is the beneficial owner of all that parcel of land known as Plot No 139 as described in Share Certificate No 756 in Kasarani Re-Settlement Project and situated at Kasarani, having purchased the same from one Hannah Wanjira Karanja.
3. It was deposed by the Appellant that she filed Milimani CMELC No493 of 2021 on December 17, 2021 and sought injunctive orders and that by the ruling dated July 29, 2022, the court dismissed her application.
4. The Appellant opines that the dismissal was wrongful as the court failed to consider the evidence presented in the application; that she is in actual possession of the suit property and that due to the trial court's ruling, the Respondents have threatened to trespass on the suit property with the intention of constructing thereon and if a stay of execution is not granted, the object of the application and appeal will be rendered nugatory.
5. The 3rd Respondent opposed the application. According to the 3rd Respondent, the impugned order is a negative order incapable of being stayed; that the ruling and order essentially dismissed the application dated December 17, 2021 with costs to the Respondents and that the refusal means that the applicant stays in the situation she was in before coming to court and the issues of substantial loss and/or the appeal being rendered nugatory does not arise.
6. The 3rd Respondent averred that while the application is pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides for stay of execution pending appeal, the Applicant's Order No 3 is sought under the provisions of Order 40 rule 1,2 & 3 of the Civil Procedure Rules.
7. It was deposed that the application is a clever attempt to have a second bite at the cherry after failing to meet the threshold for grant of injunction; that the Applicant is misrepresenting facts as she continues to be in possession of the suit property and is further wasting away the property by engaging in a construction exercise, thus exposing the Respondents herein to irreparable harm if a decision is rendered in her favour.
8. It was the 3rd Respondent's averment that the appellant has not met the threshold provided for under Order 42 Rule 6 as she has not proved the substantial loss she might suffer and has not expressed the willingness to furnish such security and that the Appellant has approached this court with unclean hands and is culpable of abuse of legal process and is forum shopping.
9. It was argued that the Applicant has failed to demonstrate and prove to this court that the Respondents have threatened to trespass onto the said parcel; that the Respondents have never threatened to trespass onto the suit land or pursue construction thereon and that the only person posing a risk to the suit property is the Applicant.
10. The 3rd Respondent deposed that the Appeal herein is *prima facie* frivolous; that the subordinate court considered the arguments together with the evidence before it and that there will be no prejudice suffered if the suit in the subordinate court is allowed to be heard expeditiously to resolve the ownership dispute.
11. The Appellant/Applicant, in a Further Affidavit, averred that the stay of proceedings in the trial court is necessary to avoid parallel decisions based on the same subject matter; that he is not engaged in the



construction of the suit property; that the purported photographic evidence by the 3rd Respondent is a fabrication of evidence which cannot be true and lastly, that she has an arguable Appeal as demonstrated by the Memorandum of Appeal filed herein.

Submissions

12. Counsel for the Appellant submitted that this court has the discretion to grant the orders for temporary injunction pending appeal under Order 42 Rule 6(6) of the [Civil Procedure Rules](#) and that the role of this court is not to consider what was decided by the lower court, but whether the Appellant has demonstrated having an arguable appeal.
13. Counsel submitted that the Applicant has demonstrated that she has a good and arguable appeal through her Memorandum of Appeal; that in her Further Affidavit, the Appellant has showed the evidence she relied on in the Lower Court and that the Applicant has shown that to refuse to grant the injunctive orders would render the appeal nugatory as the Respondent has threatened to go back to the suit property and continue the construction.
14. Counsel submitted that by producing the sale agreement and the share certificate, the Appellant had established that she bought the property for value and therefore has a legal or equitable right requiring protection by way of an injunction. On the other hand, it was submitted, the 3rd Respondent claims to have purchased Plot No 316, which is different from the Applicant's Plot No 139, and that in any case, the 3rd Respondent failed to exhibit a sale agreement.
15. Counsel for the 3rd Respondent submitted that the lower court's orders were in the nature of a negative order and as such, are incapable of being stayed; that the Applicant is not deserving of the orders of this court because while the application is brought pursuant to Order 42 Rule 6 of the [Civil Procedure Rules 2010](#), the Applicant's third prayer is an order of injunction to be sought under Order 40 Rule 1, 2 and 3 making the application fatally defective.
16. Counsel submitted that the Applicant is not in any danger of suffering any substantial loss; that the court has to consider the conflicting claims of both parties, with each case being considered on its merits and that the subordinate court applied the law to the facts as espoused in [Robert Mugo wa Karanja v Ecobank \(Kenya\) Limited & another](#) [2019] eKLR.

Analysis and Determination

17. Upon consideration of the application, the pleadings filed and the parties' submissions, the issues that arise for determination are:
 - a. Whether to issue temporary injunction orders against the Defendant.
 - b. Whether a stay should issue against the lower court proceedings and orders.
18. A brief background of this matter is that the Appellant/Applicant filed CMELC No 493 of 2021 on December 17, 2021 and simultaneously sought orders of injunction, which the court declined to grant in the impugned ruling of July 29, 2022.
19. The Appellant's claim before this court is that the magistrates' court erred in failing to find that she had satisfied all conditions for the grant of injunction; that the court failed to assess the possible loss to be suffered by her in failing to grant the orders and that the court failed to appreciate the grounds of the application and her arguments.



20. The jurisdiction of this court to grant a temporary injunction pending hearing and determination of an appeal is grounded under Order 42 Rule 6 (6) of the *Civil Procedure Rules*. This provision grants the court discretionary powers to grant orders on such terms as it deems fit so long as the procedure for filing an appeal from a subordinate court has been complied with. It provides as follows:

“Notwithstanding anything contained in sub rule (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 subordinate Court or tribunal has been complied with.”

21. Section 16A of the *Environment and Land Court Act* stipulates that appeals from the subordinate court should be filed within thirty days from the date of the order or decree appealed from.

22. In the instant appeal, the impugned ruling was delivered on July 29, 2022 whilst the Memorandum of Appeal was filed on August 5, 2022 which is within the requisite period. The Appellant has thereby complied with the procedure for instituting an appeal before this court.

23. The applicable principles in considering a prayer for injunction pending appeal were persuasively distilled by Visram J (as he then was), in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR. The learned Judge stated as follows:

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?

In the Venture Capital case (Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd Civil Application No Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* [1985] KLR 840 which cited *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* 1982 – 88) KLR 1088 (also cited in *Venture Capital*).
- b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* [1982] KLR 417 (cited also in *Venture Capital*).
- d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).” See also *Mukoma v Abuoga* [1988] KLR 645.”



24. In *Madbupaper International Limited v Kerr* [1985] KLR 840, the Court of Appeal stated that as follows:

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.”

25. The principles in *Giella v Cassman Brown* [1973] EA 358 that must be satisfied for a court to issue injunctive orders are whether an applicant has a *prima facie* case with a probability of success; whether the applicant might suffer irreparable injury, which would not adequately be compensated by an award of damages and whether the balance of convenience tilts in favour of the applicant.

26. In *Mrao Ltd vs First American Bank of Kenya and 2 Others*, [2003] KLR 125 which was cited with approval in *Moses C. Mubia Njoroge & 2 Others v Jane W Lesaloi and 5 Others*, [2014] eKLR, the Court of Appeal defined a *prima facie* case as follows:

“A *prima facie* case in a civil application includes but not confined to a genuine and 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.”

27. Further, the Court of Appeal in the case of *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR held that:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.”

28. In this case, the Appellant’s case is that the lower court’s dismissal of the application for injunction was wrongful as the court failed to consider the evidence presented in the application; that the Appellant is in actual possession of the suit property and due to the trial court’s ruling, the Respondents have threatened to trespass on the suit property with the intention of constructing on the suit thereon.

29. According to the Appellant, if a stay of execution is not granted, the object of the application and appeal will be rendered nugatory.

30. The object of the appeal is with respect to the refusal of the subordinate court to issue orders of injunction against the Respondents, pending determination of the application.

31. In support of the application, the Appellant has annexed the impugned Ruling, the Memorandum of Appeal, an ownership certificate over the suit property in the Appellant’s name, a sale agreement, the injunction application before the Magistrate’s court, copies of an OB No 28/20/11/2021 and photographs.

32. The Respondents have not denied that the Appellant is in possession of the suit property. In my view, the prevailing status quo by way of an injunction pending the hearing of the Appeal, or the suit in the lower court, whichever comes first should be issued. That way, the danger of the Appellant suffering irreparable injury in the event she is evicted at this stage will be curtailed.

33. The Appellant/Applicant has also sought that this court stays the orders of the subordinate court issued on July 29, 2022 as well as the proceedings in the lower court. This court has the discretionary



power to issue orders of stay of proceedings or a stay of execution upon filing of an application such as the one before this court.

34. In the impugned Ruling, the subordinate court considered the Appellant's prayers for temporary injunction orders. The court found that the Appellant had failed to persuade it that the suit property was in danger of being wasted. The court concluded that the prayer for injunction was unmerited and dismissed the Motion dated 17th December 2021 with costs to the Respondents.

35. In dismissing an application for stay of negative orders, the Court of Appeal in *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others* [2021] eKLR relied on the decision in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the learned Judges stated thus:

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

36. The Court similarly relied on the case of *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where Makhandia, J (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

37. A similar finding was made by the court in *Catherine Njeri Maranga v Serah Chege & Another* [2017] eKLR, where the court expressed itself as follows:

“...The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise.”

38. It is evident that the impugned Ruling of the court is a negative order as it did not order the parties to do anything or to refrain from doing anything. As such, the order is incapable of execution and cannot be stayed. Guided by these decisions, this court dismisses the prayer for stay of the impugned orders.

39. In respect to the prayer for stay of proceedings, the court in *Kenya Wildlife Service vs James Mutembei* [2019] eKLR quoting Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, held as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of



his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

40. Ringera J (as he then was) *In Re Global Tours & Travel Ltd* HCWC No43 of 2000 Ringera, J opined that in an application for stay of proceedings, the sole question is whether it is in the interests of justice to order a stay of proceedings and the terms upon which such stay should be granted.
41. This court has already made a finding that the prevailing status quo be maintained pending the hearing of the appeal or the suit in the lower court. The Appellant has neither argued nor shown that she stands to suffer substantial loss by the continued proceedings in the lower court. That being so, it is in the interest of justice that CMELC No 493 of 2021 be heard and determined swiftly on its merits.
42. Accordingly, the court partially allows the application dated August 5, 2022 as follows:
 - a. The prevailing status quo to be maintained pending the hearing and determination of the appeal, or the suit in the lower court, meaning that:
 - i. The Appellant will remain in possession of the suit property.
 - ii. There shall be no further constructions or development on the disputed parcel.
 - iii. There shall be no charging or transferring of the suit property.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Lithu for Respondents

Mr. Muinde for Appellants

**Court Assistant - Tracy

