



**Owiti v Aridi & another (Environment and Land Appeal
E48 of 2022) [2023] KEELC 19084 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E48 OF 2022
SO OKONG'O, J
JULY 27, 2023**

BETWEEN

BENARD MUGA OWITI APPELLANT

AND

FREDRICK ARIDI 1ST RESPONDENT

JACKLINE ARIDI 2ND RESPONDENT

RULING

1. The appellant is the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 14/262(hereinafter referred to only as “Plot No 262”) while the respondents are the registered proprietors of all that parcel of land known as Kisumu Municipality/Block 14/263(hereinafter referred to only as “Plot No 263”). Plot No 262 and Plot No 263 are adjacent to each other. Plot No 262 is developed with a two-storey building while Plot No. 263 is being developed with a block of residential apartments. Sometime in September 2022 or thereabouts, a dispute arose between the appellant and the respondents over the boundaries of their respective parcels of land. The appellant claimed that the respondents’ building under construction on Plot No 263 had encroached on his land parcel, Plot No 262 a claim that was denied by the respondents.
2. The appellant filed a suit at the Chief Magistrate’s Court at Kisumu namely, Kisumu CMC ELC No E097 OF 2022 (the lower court) on or about September 15, 2022 seeking among others a permanent injunction restraining the respondents from carrying out any construction work or development that encroaches on Plot No 262. Together with the plaint, the appellant filed an application for a temporary injunction restraining the respondents from carrying out any construction work or development that encroaches on Plot No 262. In response to the said application, the respondents filed a Notice of Preliminary Objection in which they challenged the jurisdiction of the court. In a ruling delivered on November 16, 2022 on the respondent’s preliminary objection, the lower court held that it had no jurisdiction to determine the appellant’s suit as it was a boundary dispute that should have been



heard and determined in the first instance by the Land Registrar under sections 18 and 19 of the [Land Registration Act](#), 2012. The appellant was aggrieved by the said decision and filed this appeal on December 7, 2022.

3. Together with the memorandum of appeal, the appellant filed an application by way of Notice of Motion dated March 13, 2023 seeking a temporary injunction restraining the respondents from going on with construction work on Plot No 263 which encroaches on Plot No 262 pending the hearing and determination of the appeal. This is the application that is the subject of this ruling. The appellant contended that the respondents were carrying out construction work that had encroached on Plot No 262. The appellant averred that Plot No 262 and Plot No 263 had fixed boundaries with coordinates and beacons. The appellant averred that he would suffer irreparable loss and damages if the orders sought were not granted. The appellant averred that he engaged a surveyor who went to the ground and carried out a survey that established that the respondents had encroached on Plot No 262 by 1.6 meters at the southern end and 0.5 meters in the middle. The appellant annexed the survey report to his affidavit in support of the application as an exhibit. The appellant averred that the construction work being undertaken by the respondents on Plot No 263 had gone beyond the fixed boundaries and beacons of Plot No 263. The appellant averred that the lower court was wrong in its finding that it had no jurisdiction to entertain the appellant's suit since the Land Registrar is mandated by law to determine general boundaries and not fixed boundaries like the ones existing on Plot No 262 and Plot No 263.
4. The respondents opposed the application by way of a replying affidavit sworn by the 1st respondent on March 13, 2023. The respondents denied that their construction work on Plot No 263 encroached on Plot No 262 owned by the appellant. The respondents claimed that it was the appellants who had encroached on their parcel of land, Plot No 263 by 1.2 meters which was equivalent to 12.02 square meters. The respondents annexed to their replying affidavit a copy of a survey report in support of that allegation. The respondents averred that they obtained all the necessary approvals before commencing the development of Plot No 263 and that the appellant did not do so. The respondents averred that the appellant's building on Plot No 262 was put up without an approved building plan and that the appellant had been served with a notice to stop any further development on Plot No 262. The appellant filed a further affidavit sworn on March 31, 2023 in which he denied the respondent's claim that it was he who had encroached on Plot No 263 owned by the respondents. The appellant averred that the ground survey report relied on by the respondents was prepared by an unqualified surveyor.
5. The application was heard by way of written submissions. The appellant filed submissions and supplementary submissions on April 17, 2023 and May 15, 2023 respectively. The respondents filed their submissions on May 10, 2023. I have considered the appellant's application together with the supporting affidavits. I have also considered the respondents' affidavit filed in response to the application. Finally, I have considered the submissions by the parties' advocates.
6. The appellant's application was brought principally under Order 42 Rule 6(6) of the [Civil Procedure Rules](#) which 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.”
7. The principles that this court apply in applications for an injunction pending appeal are not different from those applied by the Court of Appeal in applications for an injunction pending appeal to that court under Rule 5(2)(b) of the former [Court of Appeal Rules](#) and Rule 43 of the [Court of Appeal](#)



Rules 2022. The jurisdiction to grant an injunction pending appeal is discretionary and is guided by the interests of justice. In the exercise of that discretion, the court must be satisfied that the appeal before it is arguable and that if the order sought is not granted and the appeal succeeds, the appeal will be rendered nugatory.

8. In an application made under Rule 5(2)(b) of the Court of Appeal Rules, the Court of Appeal stated as follows in *Trust Bank Limited and Another v. Investec Bank Limited and 3 Others* [2000] eKLR :

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put it in another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

9. In *Stanley Kang’ethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR the same court stated as follows:

vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.

vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.”

10. I have not had sight of the ruling of the lower court. In the circumstances, I have found it difficult to determine whether the appellant has an arguable appeal. However, from the averments made by the appellant as to the nature of the objection that was raised by the respondents in the lower court which was upheld by the court and the grounds of appeal put forward by the appellant, I am persuaded that the appellant’s appeal is arguable. It is arguable whether the Land Registrar has jurisdiction to determine a dispute over the boundary of parcels of land whose boundaries are fixed.

11. On whether the appellant’s appeal to this court would be rendered nugatory unless the injunction sought is granted, I am not satisfied that that would be the case. The appellant’s complaint in the lower court is that the respondents have encroached on his parcel of land and are carrying out construction thereon. The respondents have denied this allegation and have claimed that it is the appellant who has encroached on their land. Both parties have filed survey reports in support of their positions. I am not convinced that the appellant’s appeal herein would be rendered nugatory if the injunction sought is not granted and the appellant succeeds in his appeal. If the appellant is successful in the appeal, the parties would go back to the lower court to prosecute the pending suit. I have noted that among the reliefs that the appellant has sought in his plaint in the lower court is an order for the demolition of part of the respondents’ building that has encroached on the appellant’s land. The appellant has also sought damages against the respondents for trespass. I am of the view that even if the order of injunction sought herein is not granted and the appellant succeeds in his appeal and goes back to the lower court, he is likely to be restored to the same position in which he was prior to the construction complained of should he succeed also in the lower court suit. I am therefore not persuaded that the appellant’s appeal herein would be rendered nugatory or that the appellant would suffer irreparable harm unless the injunction sought is granted.



12. I wish to add that on the facts before the court, it is difficult to gauge the prospects of success of each party's case in the lower court. In such cases, it is good practice to maintain the prevailing status quo until the suit is heard and determined. In *Ougo and Another v Otieno* [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

Conclusion

13. In conclusion, it is my finding that the appellant's Notice of Motion application dated March 13, 2023 has no merit. The application is dismissed with costs to the respondents.

DELIVERED AND DATED AT KISUMU THIS 27TH DAY OF JULY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. P.D. Onyango for the Appellant

Mr. Mwesigwa for the Respondents

Ms. J. Omondi-Court Assistant

