



**Charo v Gathuku (Environment and Land Appeal E001 of 2023)
[2023] KEELC 19951 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E001 OF 2023
EK MAKORI, J
SEPTEMBER 22, 2023**

BETWEEN

JAPHET NOTI CHARO PLAINTIFF

AND

DAMARIS NJOKI GATHUKU DEFENDANT

*(Appeal against the ruling of Hon D. Wasike the Senior Resident Magistrate
at Malindi (CMC. ELC No E54 of 20122 delivered on 14th December 2022)*

RULING

1. On 14th December 2022. Hon D. Wasike (SRM) delivered a ruling in Malindi CMC. ELC No E54 of 2022 as follows:

“It is imperative that the issue of whether LR No Portion 12181 and LR Portion No 14034 sit on the same portion of land or are different be dealt with as the suit property is preserved therefore application dated 31st May 2022 is allowed in the following terms:

- a. That a temporary injunction does issue restraining the defendant, his agents, servants, employees, assigns, or anyone whomsoever acting under him from encroaching into, entering, constructing, or in any way interfering with the plaintiff’s quiet use, possession, and development of all that land parcel known as portion No 12181 measuring approximately 0.0548 Ha. In addition, delineated in Land Survey Map No. 2881177 pending the hearing and determination of the main suit.
- b. The Government Surveyor- Malindi Sub-County through the County Surveyor does survey LR Portion No 12181 Malindi measuring approximately 0.0548 Ha. Delineated on Land Survey Map No 281177 under Grant No CR



46609 and LR Portion No 14034 Malindi measuring approximately 2.432 Ha. or thereabouts as delineated on Land Survey Plan No. 401352 under Grant No CR 52004 to establish the boundaries and or whether the two portions sit on the same land and to prepare and file a Report in court within 90 days from the date of the of this ruling. The costs of the survey are to be borne by the plaintiff.

- c. That the costs of the application be in the cause.
 - d. That the injunctive orders remain in force for a period of 12 Months from the date of the ruling.
2. It is that ruling that provoked an appeal and the current application dated 9th January 2023 seeking among other reliefs temporary stay of execution of those orders and a stay of all the proceedings in the lower court pending the outcome of the appeal.
 3. The application was canvassed by way of written submissions.
 4. The applicant contended that the applicant is the holder of land title parcel No LR 14034 and the respondent is the owner of land title parcel LR No 12181. The applicant commenced the development of his portion and has tenants who have long occupied commercial shops erected on the said parcel. The applicant has not encroached at all onto the respondent's portion to warrant being injuncted. The applicant had filed a detailed report showing the extent of the two plots and the court had no business soliciting another report suo moto- as that would amount to seeking evidence for the respondents. The applicant and the tenants who had long taken possession will suffer loss if the orders confirming the injunction are left standing, as the survey report stands unchallenged.
 5. The respondent averred that the court issued orders to stop further construction until a survey report was approved by the court. Instead, the applicant approached this court and got a temporary stay of the lower court's injunctive orders, and immediately the applicant embarked on a spree of building and completion of structures on the contested parcel of land. The plot in dispute had not been built at the time the lower court issued injunctive orders. The same was accelerated when this matter was actively pending and at one point, the police were called to stop the further development of that plot. An agreement was arrived at that, no further developments were to be done until the matter in court was determined.
 6. The respondent contended that the final orders issued by the lower court were a product of a merit hearing of all sides, and the same should not be disturbed. The applicant wrongfully misinterpreted the stay orders issued by this court and clothed himself with ownership which issue is yet to be determined on merit by the lower court hence the current application is misplaced.
 7. The single issue to be determined in this matter is whether stay orders can be issued by this court pending the hearing of the filed appeal based on the material placed before me.
 8. An appellate court will usually interfere with the findings of a lower court under the following principles as enunciated in the case of *RWW v EKW* [2019] eKLR:

“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.



9. Indeed to grant or refuse an application for a stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

9. What is appealed against in this matter are interlocutory orders of an injunction and further orders of the survey to determine a boundary dispute concerning the two parcels of land issued by the trial court.
10. The issuance of those orders as I can gather from the record was to fully and finally decide on the issue in controversy since there seems no dispute as to ownership but the extent of LR Portion No 12181 Malindi measuring approximately 0.0548 Ha. Delineated on Land Survey Map No 281177 under Grant No CR 46609 and LR Portion No 14034 Malindi measuring approximately 2.432 Ha. or thereabouts as delineated on Land Survey Plan No. 401352 under Grant No CR 52004 to establish the boundaries and or whether the two portions sit on the same land. The Survey Report was to have been filed in court within 90 days from the date of the trial court’s ruling.
11. The applicant in this matter seeks to erode the gains made by the lower court’s ruling. The current appeal seeks to determine the ownership of the two parcels summarily without a hearing. I think that would be the wrong route - to turn this court into a trial court, when the trial court had taken a tangent meant to determine the issues before it, by referring the matter to the experts – the surveyors to fix the boundary.
12. I can gather that the applicant has already misused the stay orders issued by this court by accelerating the building and letting out the completed structures on the disputed parcels oblivious of the doctrine of lis pendens.
13. I see no merit in the current application for a stay dated 9th January 2023 which is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 22ND DAY OF SEPTEMBER, 2023

E.K. MAKORI

JUDGE

In the presence of:

M/s Marubu for Respondent

Court Clerk: Happy

In the absence of:

Mr. Otara for the Appellant

