



REPUBLIC OF KENYA



**Ngao v Mbarak (Environment and Land Appeal 19 of 2023)
[2023] KEELC 21110 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 19 OF 2023
EK MAKORI, J
OCTOBER 25, 2023**

BETWEEN

NGAO CHARO NGAO APPELLANT

AND

HAMID ABDALLA MBARAK RESPONDENT

(An appeal arising from the Ruling of the Senior Principal Magistrates Court at Kilifi delivered on in SPMCC ELC No.E145 of 2021 on 3rd of May 2023 by Hon. Kituku SPM)

RULING

1. The applicant in this matter seeks a stay of execution pending appeal. This arises from the orders of the Trial court at Kilifi (Kituku SPM) dated May 3, 2023.
2. The respondent had commenced an action against the applicant in the lower court pitting him with the applicant over possession of land parcel No. CR 2778; CR. 5054/1227 double registered as Kilifi/Block 3/925.
3. The proceedings show that there was a dual allocation of the suit property with the respondent being the first in time to have been registered hence the suit before the magistrates court to determine the real owner given the said allocation and registration.
4. Simultaneous with the plaint in the lower court, the respondent applied for injunctive orders. The court heard the motion on merit and made a ruling on June 12, 2022 allowing the application for an injunction and determining the status quo at that time but declining to issue a mandatory injunction at that stage on grounds that given the two titles, the issue had to await a full trial to determine who between the parties held a genuine title over the land.
5. An application for review was made to the court vide application dated September 12, 2022 seeking the review of the orders issued on June 12, 2022 declining the issuance of mandatory injunction.



6. After hearing the parties, the trial court concluded that there was enough evidence to support a review of the earlier orders made and that it was appropriate to issue a mandatory injunction at that stage on the reasons as stated by the trial court:

“In this case, the court gave restraining orders against the respondent. The respondent now claims he is still in occupation of the suit property contrary to the said orders. By granting the orders, it meant the applicant was the one who was in actual possession of the suit property (see paragraph 14 of the replying affidavit).

To give effect to the ruling of the court issued earlier, mandatory injunction will then issue.

Though that is not apparent error on the face of the record, it qualifies for any “other sufficient reason”.

In *Stephen Gathia Kimenyi v Nancy Wannjira Wawinyi T/A Providence Auctioneers* [2016] eKLR the Court held:

“a review cannot be claimed or asked for merely fresh hearing or argument or correction of an erroneous view taken earlier ... it may be pointed out that the expression “any other sufficient reason” used in Order 45 Rule 1 means a reason sufficiently analogous to those specified in the Rule”

On discovery of new and important matter, all issues were raised before the Court and no new material has been presented.

Consequently, I allow the application on the ground of “any other sufficient reason”

The net effect is that mandatory injunction is hereby issued directing the 1st defendant/respondent to demolish and remove the illegal structures on the suit premises Title Number CR. 2778 LR 5054/1227 situate at Kilifi township within 30 days of this order. In default, the applicant is at liberty to execute in strict accordance with the law.”

7. It is this trajectory taken by the Trial Court that precipitated the current application and the intended appeal. The only issue for determination then is whether to allow stay under the circumstances awaiting the outcome of the intended appeal.
8. The applicant submitted that the purpose of an appeal is to preserve the substratum of the suit. If a stay is not granted, the applicant will suffer irreparable damages, as an eviction would have been effected before the appeal is heard and determined.
9. The applicant avers that in any event, the value of the suit property ranges from 19,000,000/- to 26,000,000/-, and if successful, the applicant may not get such kind of a plot and therefore will suffer irreparable loss.
10. The applicant has cited the following cases enunciating the principles to follow for stay orders to be granted - *RWW v EKW* [2019] eKLR, *Vishram Ravji Halai v Thornton & Turpin* [1990] eKLR and who should bear costs the applicants cite the cases of *Ena Investment Limited v Bernard Onchau Mose & 2 others* [2022] eKLR and *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR – that costs follow the event.
11. The respondent is of the view that the stay orders are not merited since the mandatory injunction was issued based on the grounds that the Court earlier had injected all the parties from dealing with the suit property. That the applicant comes to this Court with unclean hands, as at the time the initial injunction was issued he was not on the suit property.



12. The applicant will not suffer any loss, as the structures targeted are illegal. The suit property remains until the suit is heard and determined. The investigation reports from the Kilifi Chief Land Registrar's Office and Ministry of Land was found to be wanting.
13. The respondent submits that no security for costs was provided in this matter. It should be dismissed.
14. Stay pending appeal is granted under the conditions as enumerated in the case of [Daniel Mburunga Kiriamburi v Murungi M'ananga](#) [2022] eKLR:

“Expounding on the above principles the court in *RWW v EKW* [2019] eKLR held the purpose of stay 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. Further, the court held in doing so, it has to weigh this right against the rights of a successful litigant who should not be deprived of the fruits of his judgment.

3. In other words, the court is called upon to ensure no party suffers prejudice that cannot be compensated by an award of costs.
4. As regards substantial loss the court in *Jeny Luesby v Standard Group Ltd* [2014] eKLR held the commencement of an execution was a lawful process and could not be equated to substantial loss. Further in *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court held power to grant a stay of execution was discretionary while in *National Industrial Credit Bank Ltd v Aquinas, Francis Wasike & another* [2006] eKLR the court held the legal duty was on the applicant to prove the allegations that an appeal would be rendered nugatory if the application was not allowed.”

15. The trial court handled an application for an injunction and ruled on July 12, 2022 that there was a need to preserve the status quo obtaining on the disputed parcel and that the issue of double allocation was to be addressed during the trial itself. He declined to issue mandatory orders of injunction. In its ruling, the court opined that the earlier orders of injunction were sufficient because the court was clear that the applicant did not have the suit property but tried to feign one. The structures, which the Court directed to be demolished were illegally erected, and they are demolished pending the hearing and determination of the main suit because it is those structures the applicant was holding on to claim possession when he was not. This the trial court did after reviewing the materials placed before him and that he was satisfied that the structures were erected in contravention of the orders in place.
16. A Mandatory injunction can be issued at the interlocutory stage under the following circumstances as stated in the case of *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR the court stated that:

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

17. In [Shariff Abdi Hassan v Nadbif Jama Adan](#) [2006] eKLR the Court of Appeal stated:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated



above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

18. The trial court exercised its discretion in the issuance of the mandatory injunctive orders as it did based on the material placed before it. The structures placed by the applicant on the disputed suit property were well after the court had issued injunctive orders to preserve the suit property pending the determination as to who between the parties in the suit held a good title.
19. I do not think I will overturn the decision of the Magistrate. The applicant is not being targeted for eviction but rather for placing illegal structures on the suit property well after being restrained. The suit property remains intact for the trial, which is pending. I do not think that the applicant will suffer irreparable loss if the current application is declined.
20. The application dated May 8, 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25TH DAY OF OCTOBER 2023

E.K. MAKORI

JUDGE

In the presence of:

Mr. Kinaro for the Respondent

Mr. Angima for the Applicant

Clerk: Happy

