



**Wambugu & another v Wambugu & another (Environment and Land Appeal 30 of 2022) [2023] KEELC 20860 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20860 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 30 OF 2022  
JO OLOLA, J  
OCTOBER 19, 2023**

**BETWEEN**

**SHELMITH GATHONI WAMBUGU ..... 1<sup>ST</sup> APPELLANT**

**RICHARD MUTURI WAMBUGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACOB KIOI WAMBUGU ..... 1<sup>ST</sup> RESPONDENT**

**HUMPHREY MBATIA NJENGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated and filed herein on 18<sup>th</sup> January 2023, the two Appellants pray for an order of temporary injunction restraining the 2<sup>nd</sup> Respondent, his agents and/or servants from interfering with the ownership of the suit property by selling, charging or disposing of the same pending the hearing and determination of the Appeal.
2. The application which is supported by an Affidavit sworn by the 1<sup>st</sup> Appellant – Shelmith Gathoni Wambugu is anchored on the grounds:
  - (a) That the orders of the trial Court issued on 18<sup>th</sup> October, 2022 have been executed and the 2<sup>nd</sup> Respondent has been registered as the proprietor of the suit property;
  - (b) That the Appellants are apprehensive that the 2<sup>nd</sup> Respondent having acquired ownership may misappropriate and/or dispose off the suit property;
  - (c) That the Appellants have lodged an Appeal before this Honourable Court and which Appeal may be rendered nugatory if successful unless the orders sought are granted;
  - (d) That the Appellants have raised good and arguable grounds of Appeal with a high probability of success; and



- (e) That in light of the foregoing, it is only just and fair that the application be allowed.
3. The 2<sup>nd</sup> Respondent – Humphrey Mbatia Njenga is opposed to the application. In his Replying Affidavit sworn on 27<sup>th</sup> January 2023, the 2<sup>nd</sup> Respondent avers the deponent in the Supporting Affidavit to the application has no claim in the suit land and that the Appellants are misguided to the extent that they are seeking injunctive orders against him yet his registration as proprietor flows from a Court order.
  4. The 2<sup>nd</sup> Respondent further avers that the Appellants are seeking a stay of execution of the decree which they have disguised as an injunction application. The 2<sup>nd</sup> Respondent further asserts that the Appellants are guilty of laches and that they ought to have sought a stay of execution before the decree was effected as is the case now.
  5. The 2<sup>nd</sup> Respondent further avers that he has been unable to utilize the suit property since 4<sup>th</sup> April, 2019 when the Appellants registered an inhibition against it and the Appellants should not be heard asking that it be restored against the title after the Court ordered its removal.
  6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties.
  7. By their application before the Court, the Appellants pray for an order of temporary injunction restraining the Respondents from interfering with the ownership of the suit property by selling, charging or disposing of the suit property pending the hearing and determination of their Appeal.
  8. In regard to this Court’s power to grant a temporary order of injunction pending an Appeal, [Order 42 Rule 6\(6\)](#) 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.”
  9. As was stated by Visram J. (as he then was) in [Patricia Njeri & 3 Others -vs- National Museum of Kenya](#) (2004) eKLR:
    - “(a) An order of injunction pending Appeal is a discretionary one which will be exercised against an Applicant whose Appeal is frivolous;
    - (b) The discretion should be refused where it would inflict greater hardship than it would avoid;
    - (c) The Applicant must show that a refusal to grant the injunction would render the Appeal nugatory; and
    - (d) The Court should also be guided by the principles set out in *Giella -vs- Cassman Brown & Company Limited* (1973) EA 358.”
  10. Arising from the foregoing, it is pertinent that in considering whether or not to grant an injunction pending an Appeal, the Court should ascertain if the Appeal is arguable, or put differently, whether the Appeal raises serious issues for determination. In so doing, the Court must however bear in mind the fact that the Appeal is yet to be canvassed. Accordingly, the Court should only consider the grounds



raised in the Memorandum of Appeal vis-à-vis the impugned decision and then form its own opinion whether there is an arguable Appeal to warrant the grant of the orders of injunction.

11. In the matter before me, the Appellants who are a mother and her son had in the Trial Court sought an order of specific performance against the 1<sup>st</sup> Respondent herein seeking to compel him to have the suit property registered in the name of the 2<sup>nd</sup> Appellant. In addition, the Appellants sought orders of a permanent injunction to restrain the 1<sup>st</sup> Respondent from interfering with the Appellant's quiet use and possession of the suit property.
12. From the material placed before the Court, it was not disputed that as at the time the suit was instituted the suit property was registered in the name of the 1<sup>st</sup> Respondent who is the husband to the 1<sup>st</sup> Appellant and the father to the 2<sup>nd</sup> Appellant.
13. The Appellants' beef with the 1<sup>st</sup> Respondent was the fact that he had entered into a Sale Agreement to dispose the suit property to the 2<sup>nd</sup> Respondent in the Appeal. According to the Appellants, the 1<sup>st</sup> Respondent had agreed to gift the suit property to his son – the 2<sup>nd</sup> Appellant before he changed his mind and sought to sell the same to the 2<sup>nd</sup> Respondent.
14. Having considered the dispute, the Learned Trial Magistrate concluded that the Appellants had not established any proprietary interest on the suit land as the same had not been transferred to the 2<sup>nd</sup> Appellant.
15. By their Memorandum of Appeal filed herein, the Appellants fault the Learned Magistrate for finding that the 1<sup>st</sup> Respondent was at liberty to appropriate the subject land even after gifting the same to the 2<sup>nd</sup> Appellant. It is their case that by doing so, the 1<sup>st</sup> Respondent had effectively dispossessed the 2<sup>nd</sup> Appellant of the suit property and violated his rights to a legitimate expectation to own land.
16. By their application before the Court, the Appellants assert that they have raised good and arguable grounds of Appeal with a high probability of success and that it is only fair that their application for injunction pending Appeal be allowed. As was stated in the celebrated case of *Giella -vs- Cassman Brown and Company Limited* (1973) EA 358 in regard to an application for injunction:

“First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”
17. From the material placed before me, it was clear that the Appellant's case was that the 2<sup>nd</sup> Appellant had wrongly been denied a gift by the father. There was no dispute that the suit property had remained in the name of the father who as the proprietor had entered into a Sale Agreement with the 2<sup>nd</sup> Respondent.
18. It was also apparent that following the impugned Judgment, the suit property had been successfully transferred to the 2<sup>nd</sup> Respondent who is now the registered proprietor having duly purchased the same from the former proprietor thereof through a valid Sale Agreement.
19. In the circumstances herein, I was not persuaded that the Appellants had established a prima facie case with a probability of success. The Appellants have not demonstrated at this stage that the 2<sup>nd</sup> Appellant had a vested right to inherit the property and/or that the 1<sup>st</sup> Respondent as his father was under any obligation to gift unto the 2<sup>nd</sup> Appellant that particular parcel of land.



20. It follows that I did not find any merit in the Motion dated 18<sup>th</sup> January, 2023. The same is misconceived and without any basis. It is hereby dismissed.
21. Given the relationships between the Parties herein, I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

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**J. O. OLOLA**  
**JUDGE**

