



**Bazo v Ali (Environment and Land Appeal E003 of 2023)
[2023] KEELC 22174 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

AE DENA, J

DECEMBER 7, 2023

BETWEEN

MGAYI BAZO APPELLANT

AND

HEMEDI ALI RESPONDENT

RULING

Application

1. The firm of Bunde Mangaro & Co Advocates filed the application subject of this ruling under certificate of urgency on 1/3/2023. The nature of the urgency was that the respondent is in the process of executing the ruling and orders issued by the trial court in Msambweni on 17/1/2023. That as a result of the same the applicant's property was at a risk of being disposed and the applicant displaced hence the instant appeal over the said ruling.
2. The Notice of Motion sought for the following prayers;
 1. Spent
 2. That this honourable court be pleased to issue temporary preservative orders restraining the respondent whether by himself, his agents, servants, employees or any one acting under his instruction, authority or instance from constructing, trespassing, entering, excavating or otherwise dealing with the suit property situated at Mwena Village, Mwena Sub Location, Mwereni Location, Lunga Lunga within Kwale County being part of title no Mwereni/Group Ranch/14 and the proceedings in Msambweni ELC No E001.Mgayi Bazo v Hemedi Ali be stayed pending the hearing and determination of this application.
 3. That this honourable court be pleased to issue temporary preservative orders restraining the respondent whether by himself, his agents, servants, employees or any one acting under



his instruction, authority or instance from constructing, trespassing, entering, excavating or otherwise dealing with the suit property situated at Mwena Village, Mwena Sub Location, Mwereni Location, Lunga Lunga within Kwale County being part of title no Mwereni/Group Ranch/14 and the proceedings in Msambweni ELC No E001.Mgayi Bazo v Hemedi Ali be stayed pending the hearing and determination of this appeal

4. That costs of this application be in the cause.
3. The application is based on grounds that the respondent has trespassed on the Applicant's piece of land and is developing structures thereon. That the applicant had filed suit at the Msambweni court but the ruling favored the respondent hence the application herein and appeal. That it is in the interest of justice that the application is allowed as it has been made without delay and the appeal has high chances of success.

Supporting Affidavit

4. The application is supported by an affidavit sworn by Mgai Bazo the Applicant herein. It is averred that the trial magistrate issued a ruling that contravened mandatory provisions of the law and allowed respondent to unfairly invade the Appellant/Applicants property. At paragraph 4, the applicant outlines his reasons for terming the ruling biased and based on lack of evidence from the respondent. He avers at paragraph 11 that his house and entire homestead are in the danger of being demolished and hence loose everything they have worked for. The applicant seeks that the suit property is preserved.

Replying Affidavit

5. In response to the application the Respondent filed a replying affidavit sworn by the Respondent Hemed Ali Mwanguvu. It is averred that the application is not merited and the same is a waste of judicial resources. The application is further termed as an abuse of the court process and that the matter is *res judicata* as it contravenes the provisions of Section 7 of the *Civil Procedure Act*. The Respondent alleges that the issues raised in the application were determined by the court in Msambweni SRM vide a ruling delivered on 17/2/2023 and therefore *res judicata*.
6. It is stated that the orders sought are prejudicial to the respondent as he derives his income from the farm. At paragraph 7 of the replying affidavit, the respondent states that the Applicant in belittling the court raised issues of bribery without proof. That the application is intended to delay the determination of the suit and the same should be dismissed with costs.

Supplementary Affidavit

7. The applicant filed a supplementary affidavit on 29/5/2023. He avers that he is a member of Mwereni Group Ranch and a holder of the share certificate as appended on the affidavit. That as members each and every community and family own land within the said ranch. The Mwereni Group Ranch are the custodians of the title Kwale/Mwereni/14. He states that sometime in the year 2000 disputes arose over ownership of his family land and were resolved by a panel of elders with the local administration. The dispute was designated as Land Dispute No 4 of 2000 and the Applicant was awarded the land.
8. According to the Applicant, the respondent is not from the ranch but hails from Lunga Lunga Group Ranch. The Applicant states that the trial court issued directions for amendment of the plaint and service of the same was effected upon the Respondent. In response the respondent filed a preliminary objection which was contested. The Applicant states that the trial court appears to be taking sides as it did not determine the preliminary objection well. That the same led to the invasion of the suit property by the Respondent and which necessitates the instant application.



Submissions

9. On 2/3/2023 when the application was first placed before me *ex parte*, I certified the same urgent and ordered that it be served upon the respondent. Status quo orders were further issued in order to preserve the suit property pending hearing of the application *inter partes*. On 18/4/2023 upon the application coming up for hearing it was ordered that the same be dispensed off by written submissions.
10. The Appellant's submissions are filed before court on 29/5/2023 while the Respondents submissions are filed on 14/7/2023. The contents thereof have been noted by the court and have been considered in arriving at this determination.

Determination

11. The main issue for determination is whether the Applicants should be granted an order of injunction pending appeal and if the lower court proceedings should be stayed. I have reviewed the application and it seeks injunction orders to preserve the suit property pending appeal and stay of proceedings. The application is brought under the provisions of orders 22 rule 22, 40, 42 rule 6, 50 rule 1 of the *Civil Procedure Rules* and Article 50 and 159 of the *Constitution*.
12. The court has had the chance to read through the ruling by Hon Sandra Ogot dated 17/2/2023. It is subject of the appeal before this court. It is further the basis upon which the instant application is termed as being *res judicata*. The Applicant therein and who is the Applicant in this application and Appellant for that matter sought for an injunction against the Defendant. The application was disallowed by the court and has attracted the appeal before me.
13. Let me first pronounce myself on the plea of *res judicata* raised by the respondent. While I have noted there has been a ruling on the application for injunction, the applicant is aggrieved by the same and has moved this court on appeal. Coupled with this it is stated that the result of the said ruling has exacerbated encroachment into his land for which they now seek the court intervention to preserve the property. What is before me therefore is an injunction pending appeal and which has been clearly stated in the respondent's submissions herein. It cannot be termed *res judicata* in my view.
14. The grant of injunction pending appeal is regulated by the provisions of Order 42 Rule 6 which 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.”
15. The above provisions grant the court powers to issue an injunction pending appeal with the rider that an applicant satisfies the procedure for instituting an appeal from the subordinate court. The said procedure is provided under Section 79G as follows; -

“Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.



16. I note that the ruling the subject of the appeal was delivered on 17/02/2023. A memorandum of Appeal is filed on 1/03/2023 together with the present application. The court is satisfied that the procedure has been complied with.
17. The power donated by the rules is discretionary but the court is aware that discretion must be exercised judiciously. In the case of *Mrao v First American Bank of Kenya Limited & 2 others*, 2003 KLR 125 Bosire JA stated as follows on the jurisdiction to grant an interim injunction: -
- “The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.”
18. In exercising discretion I will be guided by the cases of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR, *Giella v Cassman Brown* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where in summary the following thresholds must be met to warrant the grant of an injunction pending appeal; -
1. An order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is frivolous;
 2. The discretion should be refused where it would inflict greater hardship than it would avoid;
 3. The applicant must show that to refuse the injunction would render the appeal nugatory;
 4. The applicant must present a *prima facie* case with probability of success;
 5. The applicant must demonstrate that she will suffer irreparable injury if a temporary injunction is not granted; and
 6. The applicant must show that the balance of convenience tilts in her favour.
19. The applicant seeks for temporary preservative orders against the Respondent over the suit property Kwale/Mwereni/14. It is alleged that the Respondent has trespassed upon the same to the detriment of the applicant. However, upon perusing the application and affidavits thereto, it has not been demonstrated how the alleged trespass has occurred. The alleged sales are not proved by any sale agreement. Enough evidence has not been rendered to establish a *prima facie* case and the threshold set in the case of “*Giella v Cassman Brown*”. The Applicant in my view has centred the instant application in discrediting the findings of the trial court, which in my opinion is jumping the gun. That, should be shelved for the appeal.
20. But having made the above finding it is important to consider where the balance of convenience lies. I have noted the arguments raised by the respondent that grant of preservative orders will cause him great prejudice because that is where he earns his living. In my view the respondent cannot benefit from this argument when he states that he is a mere supervisor and not the owner of the suit. The essence of an injunction pending appeal is to preserve the *status quo* to avoid a situation where the if the applicant succeeds the proceedings would be rendered a futile exercise.
21. Orders of *status quo* need not necessarily be prayed by the parties but can be given by the court based on the circumstances of a suit and under its general jurisdiction. This was outlined in the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR.
- “Firstly, an order of *status quo* will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular



state or set of facts... the second or alternative order for *status quo* is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

22. The gist of the trial court suit is ownership of a portion of the suit property Kwale/Mwereni/14 which as per the averments raised by the Applicant has been subdivided to parcels currently occupied by several families under the auspices of the Mwereni Group Ranch. From the ruling and also as per the documentation annexed as evidence in support of the instant application, the Applicant's alleged ownership of the suit property has been alleged not to be backed up by enough evidence. This notwithstanding a decision on who between the applicant and the defendant is the lawful proprietor of the land has not been made. In my opinion that is the main reason why the parties are before court. The trial court has in fact simply made an interlocutory finding on grant of injunctive orders pending the main hearing and determination of the suit.
23. In exercise of its general jurisdiction, this court opines that the appropriate orders to grant at this time will be those of maintenance of the current *status quo*. The same will not only preserve the substratum of the dispute and which is the suit parcel but will also prevent further prejudice between the parties pending hearing and determination of the appeal.
24. But there is a hurdle that must be surmounted. The respondent has deponed in response to the pleadings that he has been wrongly sued since he is a mere supervisor has urged that the orders of injunction cannot be issued in vain. The respondent is a disclosed agent and has even provided the particulars of his principals and he is responsible for the time being to communicate the orders of the court.
25. The court has also been moved to stay the proceedings in the lower court. The court in the case of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR discussed the law and principles to be applied in the grant of stay of proceedings as hereunder; -
 11. Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
 12. Order 42 Rule 6(1) of the *Civil Procedure Rules* states that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



13. No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
14. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. ‘
26. The stay has been opposed on the basis that it will delay justice. The main considerations for grant of a stay of proceedings are, the applicant must demonstrate they have an arguable appeal which will be rendered nugatory. I’m aware that stay of proceedings is a very grave matter and must be given sparingly. In the present case the application for leave to amend the pleadings to join the parties disclosed as the principals was dismissed by the learned Magistrate. As it is there is an emerging issue that there is a defendant who has allegedly been wrongly sued. The Appellant is still desirous of joining these parties as defendants to the suit. In the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR, the Court of Appeal citing *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd & another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. It is my opinion that in the interest of justice the proceedings should be stayed given the circumstances.
27. I have also considered the grounds of appeal and to me some are arguable. It is now established that an arguable appeal should only raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed. See *Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
28. It is my finding that it is proper to further issue stay of proceedings in the lower court pending the hearing and determination of the appeal as well as preserve the *status quo*.
29. In conclusion the following orders hereby issue;
 1. The *status quo* on the suit property be preserved pending the hearing and determination of the appeal. For the avoidance of doubt there shall be no demolishing of the applicant’s house and his entire homestead, selling and or disposition of the suit premises.
 2. The proceedings in Msambweni ELC No E001 of 2022 Mgayi Bazo v Hemedi Ali are hereby stayed pending the hearing and determination of the appeal.
 3. The Appellant shall file and serve his Record of Appeal within forty-five (45) days from the date of this Ruling.
 4. The costs of the application shall abide the Appeal.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 7TH DAY OF DECEMBER 2023

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A. E. DENA



JUDGE

SIGNED

Ruling delivered virtually through Microsoft teams Video Conferencing Platform

In the presence of:

Mr. Mumin holding brief for Mangaro for Appellant/Applicant

No appearance for Respondent

Mr. Daniel Disii – Court Assistant.

