



**Musembi v Machakos County Land Registrar & another (Environment and Land Appeal E013 of 2023) [2023] KEELC 22052 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22052 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E013 OF 2023  
CA OCHIENG, J  
DECEMBER 5, 2023**

**BETWEEN**

**DANIEL NZEI MUSEMBI ..... APPELLANT**

**AND**

**THE MACHAKOS COUNTY LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SURVEYOR, MACHAKOS COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Appellant's Notice of Motion application dated the 4<sup>th</sup> September, 2023 where he seeks the following Orders:
  - 1) Spent
  - 2) That this Honourable Court be pleased to issue an order restraining the respondents herein, their employees, agents, servants, assigns or any other person/entity whomsoever acting on the behalf and/or authority of the respondents herein from conducting any alleged ascertainment and opening of a road traversing through Land Parcel No. Machakos Town Block [particulars withheld] which exercise is slated to occur on 7th September 2023 or on any other date pending interpartes hearing of this application.
  - 3) That this Honourable Court be pleased to issue an order restraining the respondents herein, their employees, agents, servants, assigns or any other person/entity whomsoever acting on the behalf and/or authority of the respondents herein from conducting any alleged ascertainment and opening of a road traversing through Land Parcel No. Machakos Town Block [particulars withheld] which exercise is slated to occur on 7th September 2023 or on any other date pending hearing and determination of this application.



- 4) That this Honourable Court be pleased to issue an order restraining the respondents herein, their employees, agents, servants, assigns or any other person/entity whomsoever acting on the behalf and/or authority of the respondents herein from conducting any alleged ascertainment and opening of a road traversing through Land Parcel No. Machakos Town Block [particulars withheld] which exercise is slated to occur on 7th September 2023 or on any other date pending hearing of this appeal.
  - 5) That pending inter partes this Honourable Court be pleased to issue an order of stay of execution of the Ruling Dated 22nd March 2023 more particularly the findings and/or orders and or directives issued by the trial court inter alia;
 

“I shall direct that should the plaintiff (the appellant herein) choose to prosecute the suit there be a current survey by the Machakos County Surveyor and report be filed in court”
  - 6) That pending hearing and determination of this application this Honourable Court be pleased to issue an order of stay of execution of the Ruling Dated 22nd March 2023 more particularly the findings and/or orders and/or directives issued by the trial court inter alia;
 

“I shall direct that should the plaintiff (the appellant herein) choose to prosecute the suit there be a current survey by the Machakos County Surveyor and report be filed in court”
  - 7) That pending hearing and determination of this appeal, this Honourable Court be pleased to issue an order of stay of execution of the Ruling Dated 22nd March 2023 more particularly the findings and/or orders and or directives issued by the trial court inter alia;
 

“I shall direct that should the plaintiff (the appellant herein) choose to prosecute the suit there be a current survey by the Machakos County Surveyor and report be filed in court”
  - 8) That this Honourable Court be pleased to grant such other and/or further orders deemed fit and just in the circumstances.
  - 9) That costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Daniel Nzei Musembi where he confirms being the registered proprietor of land parcel number Machakos Town Block [particulars withheld] hereinafter referred to as the 'suit land'. He contends that the suit land was surveyed in 1997 and beacons affixed thereto. Further, that he has extensively developed the said land, fenced it and erected thereon as he has been in occupation for a period in excess of 20 years. He explains that on two of its side, the suit land is serviced by two wide public roads on which both human and motor traffic constantly pass on a daily basis which roads have never been blocked or interfered with. He contends that vide a letter dated the 21<sup>st</sup> October, 2022, the 1<sup>st</sup> Respondent wrote to him including two other persons notifying them of a visit allegedly to conduct proceedings in relation to boundaries which were slated for 10<sup>th</sup> November, 2022. Further, before the findings and/or proceedings were conducted, the 1<sup>st</sup> Respondent wrote to him and seven others, a letter dated the 12<sup>th</sup> January, 2023, indicating it intended to ascertain and open a public access road which would pass through the suit land, and this exercise was slated for 9<sup>th</sup> February, 2023. He avers that on the 10<sup>th</sup> November, 2022 the Defendants including their agents visited the suit land and indicated that they intended to hive off a portion of



it whether he consented or not. Further, this culminated in his filing Machakos Chief Magistrate's Court ELC Case No. E005 of 2023 challenging the legality of the said actions. He states that the trial Magistrate delivered a Ruling dated the 22<sup>nd</sup> March, 2023 where the court declined jurisdiction on the issue but proceeded to grant orders on the same which primarily instigated the institution of this Appeal. He reiterates that despite the lower court matter not having been heard on merit the 1<sup>st</sup> Respondent wrote to him a letter dated the 17<sup>th</sup> August, 2023 seeking to ascertain and open a public access road traversing the suit land. He argues that the parcels indicated in the letter dated the 17<sup>th</sup> August, 2023, do not flow in any identifiable sequence regarding their physical/geographical placement which makes the 1<sup>st</sup> Respondent's purported intentions questionable. Further, that there exist two conflicting maps on the area. He reiterates that the basis and legality of the aforementioned exercise are the subject matter of the lower court suit as well as the present Appeal. Further, if the exercise is to proceed, it will invariably negate the substratum of the instant appeal.

3. The Respondents in response to the instant application filed Grounds of Opposition dated the 4<sup>th</sup> October, 2023 where they stated that the said application is bad in law, incompetent and incurably defective. They argued that the application is brought in bad faith and a waste of court's judicious time. Further, that the Applicant does not disclose substantial loss he is likely to suffer if the application is not allowed. They contend that the Applicant has failed to explain the unreasonable delay in filing the application for stay of execution of the Ruling delivered on 22<sup>nd</sup> March, 2023 and the instant application is an afterthought hence should not be entertained. They claim the instant application and appeal offend the provisions of section 18(2) of the Land Registration Act and should be dismissed. Further, that it does not meet the threshold for granting an injunction.
4. The Appellant filed a supplementary affidavit reiterating his averments and annexing the two maps on the area where the suit land is situated. He explains that the Respondents have declined to provide the identity of the complainant nor respond to the letter from the Ombudsman's office dated the 6<sup>th</sup> September, 2023. He reaffirms that he filed the instant application promptly after he received the letter dated the 17<sup>th</sup> August, 2023.
5. The application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Motion application, respective affidavits, Grounds of Opposition and rivalling submissions, the following are the issues for determination: Whether there should be a stay of execution of the trial Magistrate's Ruling delivered on 22<sup>nd</sup> March, 2023 pending determination of the Appeal. Whether the Appellant has met the threshold of injunction pending Appeal.
7. The Appellant in his submissions contend that he has met the threshold set for grant of the injunctive orders sought as he is the registered proprietor of the suit land which the Respondents seek to interfere with by using maps that have glaring inconsistencies. He argues that there should be stay of execution of the trial court's Ruling delivered on 22<sup>nd</sup> March, 2023. He avers that proceedings for rectification of boundary if any should be governed by the tenets of the Rule of Law and Rules of Natural Justice. Further, that he has raised the issue of which of the conflicting maps of the area will form the basis of the Registrar's proceedings but the Respondents have failed to provide information on the same. To buttress his averments, he relied on the following decisions: *Giella v Cassman Brown & Co. Ltd.* [1973] E.A. 358; *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR; *Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125; *Patrick Simiyu Wamoto & another v County Surveyor, Trans Nzoia Andrew Kitum & 24 others* [2021] eKLR; *Owners of the Motor Vessel "Lillian*



*S v Caltex Oil (Kenya) Ltd.* (1989); *Terry C Maina v District Land Registrar, Kajiado* (2015) eKLR and *Hudson Kulundu & 2 Others v Martha Chibetti & Another* (2020) eKLR.

8. The Respondents in their submissions provided a background of the dispute herein and insisted that the instant application is not justified as the Appellant has not granted them an opportunity to ascertain and identify the position of the public road on the ground as required by section 18 and 19 of the *Land Registration Act*. They argue that this Court does not have jurisdiction to hear and determine the instant application as it is only the Land Registrar and Surveyor that is equipped to perform the technical exercise envisaged under Sections 18 and 19 of the *Land Registration Act*. They reiterate that the Appellant has not met the threshold for granting injunction pending appeal. Further, that the Appeal does not raise arguable grounds with probability of success as the Appellant has not demonstrated any irreparable loss and damage he may suffer. They argue that the Appellant has not met the threshold for granting stay of execution of the Ruling pending Appeal. To support their arguments, they relied on the following decisions: *George Kamau Macharia v Dexka Limited* (2019) eKLR; *Willis Ocholla v Mary Ndege* (2016) eKLR; *Patricia Njeri & 3 others v National Museum of Kenya* (2004) eKLR and *Giella v Cassman Brown & Co. Ltd.* [1973] E.A. 358.
9. As to whether the Court should grant a stay of execution pending the hearing and determination of the Appeal. The Appellant sought for stay of execution of the Ruling delivered on 22<sup>nd</sup> March, 2023 pending Appeal insisting that he is the proprietor of the suit land which he had fenced. He contended that the land had been surveyed and beacons fixed in 1997 but the Respondents have sought to ascertain and demarcate a road that traverses through it. He explained that there were two conflicting maps for the area and the Respondents had not indicated which map they intend to use. The Respondents opposed the application for stay of execution insisting that it was filed after an inordinate delay. Further, that the Appellant had not demonstrated what irreparable harm he stood to suffer. I note the Respondents have not denied that there are two conflicting maps on the area where the suit land is situated. Further, they have not indicated which of the two maps they intend to use. The legal provisions governing stay of execution pending Appeal are stipulated in order 42 rule 6(2) of the *Civil Procedure Rules* which stipulates thus:
  - “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.”
10. On stay of execution pending Appeal, the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 stated thus:
  - “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal."
11. In the current scenario the Appellant seeks a stay of execution of the lower court's Ruling delivered on 22<sup>nd</sup> March, 2023. I note in the impugned Ruling, the trial court had down its tools claiming it did not have jurisdiction to deal with the matter therein as it was a boundary dispute which was the mandate of the Land Registrar by dint of section 18 of the *Land Registration Act*. I further note that despite downing her tools, the trial Magistrate proceeded to make further orders as follows:
- "I shall direct that should the plaintiff choose to prosecute the suit there be a current survey by the Machakos County Surveyor and report be filed in court"
12. On jurisdiction, in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989): the Court pronounced itself as follows:
- "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."
13. In associating myself with the decisions I have cited above and applying them to the circumstances at hand, I opine that once the trial Magistrate had downed her tools citing lack of jurisdiction, she should have restrained herself from making any further orders thereafter. The Respondents insist the Appeal is frivolous and has no chances of success. On perusal of the proceedings in the lower court as well as the Memorandum of Appeal without delving into the merits or demerits of the Appeal, noting that the Appellant is the registered proprietor of the suit land and the Respondents have declined to offer information on the relevant map they intend to use to ascertain and demarcate the road traversing through the said land, I opine that the Appeal indeed raises triable issues. However, Order 42 Rule 6 of the *Civil Procedure Rules* is clear that filing an Appeal alone does not operate as a stay of execution. Further, after the impugned Ruling, the Respondents' have not denied that they proceeded to issue another letter dated the 17<sup>th</sup> August, 2023 seeking to ascertain the boundary and demarcate a road traversing the suit land. It is my considered view that since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair hearing can only be guaranteed if stay pending appeal is granted to the intended Appellant. Further, since the Appellant is the registered proprietor of the suit land and the Respondents have not indicated who the complainant is and no party has challenged his title, he is indeed the disadvantaged party herein. In the foregoing, I find that since the Respondents' intend to deal with the substratum of the suit during the pendency of the Appeal, it will render the Appeal nugatory and it is pertinent that a stay of execution pending appeal should indeed be granted.
14. As to whether the Court should grant an injunction pending hearing and determination of the Appeal, I note the Appellant filed a Memorandum of Appeal on 4<sup>th</sup> April, 2023 against the Ruling delivered on



22<sup>nd</sup> March, 2023 by Hon. Mary Otindo Principal Magistrate, Machakos Law Courts. The principles for granting an injunction are well established in the case of *Giella v Cassman Brown* (1973) EA 358. The trial Magistrate despite noting the anomaly in respect to the maps presented in court, declined to grant any orders restraining the Respondents from dealing with the suit land until that issue was determined. Further, as a result of the impugned Ruling, the Respondents have issued fresh notices to demarcate a road traversing the suit land.

15. In the case of *Bilha Mideva Bukulu vs Everlyine Kanyere* (2012) eKLR, it was held that an order of injunction pending Appeal is discretionary and the Court should be guided by the principles set down in *Giella vs Cassman Brown* (1973) EA 358.
16. From perusal of the proceedings in the lower court, the averments in the affidavits, Grounds of Opposition as well as the Memorandum of Appeal, I find that the Appellant has indeed established a prima facie case to warrant the granting of an order of injunction pending Appeal. I find that since he is the registered proprietor of the suit land and based on the standards set in the case of *Nguruman Ltd. Vs. Jan Bonde Nielsen* CA No. 77 of 2012, his injuries are not speculative and he stands to suffer irreparable harm if the orders sought are not granted.
17. It is against the foregoing that I find the Appellant's Notice of Motion application dated the 4<sup>th</sup> September, 2023 merited and will allow it. I will proceed to make the following final Orders:
  - i. That an order of interlocutory injunction be and is hereby issued restraining the Respondents herein, their employees, agents, servants, assigns or any other person/entity whomsoever acting on their behalf and/or authority from conducting any alleged ascertainment and opening of a road traversing through Land Parcel No. Machakos Town Block [particulars withheld] pending the hearing and determination of the Appeal.
  - ii. That a stay of execution of the Ruling and Order in Chief Magistrates' Court at Machakos (the Hon. Mary Otindo PM) dated and delivered on 22<sup>nd</sup> March, 2023 in Civil Suit CM ELC No. E 005 of 2023, be and is hereby granted pending the hearing and determination of the appeal.
  - iii. That the costs will be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF DECEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

