



Waithaka & 3 others v Kenya Urban Roads Authority & another (Environment and Land Appeal E019 of 2023) [2023] KEELC 22107 (KLR) (5 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E019 OF 2023
LN GACHERU, J
DECEMBER 5, 2023**

BETWEEN

**FRANCIS MURIUKI WAITHAKA 1ST APPELLANT
JACKSON MUIRURI WATHIGO 2ND APPELLANT
JULIUS MACHARIA MWANGI 3RD APPELLANT
DEDAN KIMATHI MUCHOKI 4TH APPELLANT**

AND

**KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT
NOTCHMARK SUPPLIES LTD 2ND RESPONDENT**

RULING

1. *Vide* a Notice of Motion Application dated 18th October 2023, the Appellants/Applicants have sought on the following Orders: -
 1. That the Court be pleased to grant an Order of injunction against the Respondents by themselves, their servants and/or agents, from entering into the properties known as Murang'a Municipality/Block 1/4, 1/371, 1/2 and 1/7, remaining therein, carrying out any demolition, excavation, carting away materials or in whatsoever manner interference with the said properties pending the hearing and determination of the Appellant's Muranga Environment Land Court Appeal No.E019 of 2023.
 2. That the costs be provided for.
Which Application is anchored on the following grounds:
 1. That on 20th September 2023, the lower Court delivered its judgment in which it dismissed the Appellants' case In Muranga CMELC No.E016 of 2021.



2. That the Appellants were enjoying an Order of interim injunction pending the hearing and determination of the suit and therefore the Orders stood vacated pursuant to the dismissal of the suit.
 3. That after the dismissal of the case, the Respondents are now at liberty to take the 6 metres into the Appellants' land to build the Mukuyu-Kambwe Sewerage Road an activity that will involve demolition of walls and buildings and generally laying the Appellants land to waste while building a tarmac road on it which will cause irreparable damage.
 4. That the appeal will be rendered nugatory unless the orders sought herein are granted to preserve the status quo on the current occupation and use of the said land as at the time of the delivery of the judgment in the lower Court.
 5. That the Applicants are ready to abide by such terms as to security as the Court may order such as not dealing with the said properties by way of transfer or otherwise until the determination of the appeal.
2. It is also supported by the Sworn Affidavit of Francis Muriuki Waithaka, the 1st Appellant/Applicant herein, who averred that he was one of the Plaintiffs in Muranga CMELC No. E016 of 2021, wherein judgment was delivered on 20th September 2023, and the Court dismissed their claim. That during the pendency of the suit, they enjoyed injunctive Orders, which Orders lapsed automatically upon dismissal of the suit. That since they were not satisfied with the said Judgment, they filed an appeal which has an overwhelming chance of success.
 3. It was his contention that upon the delivery of the said Judgment, the 1st Respondent which is a road and maintenance entity, may at any time enter into the said land parcels being Muranga Municipality Block 1/4, Block 1/371, Block 1 /2 and Block 1/17, and excise an area extending 6 metres into the properties and building the road Makuyu-Kambwe Sewerage Road on the said 6 metres which will cause irreparable harm upon the Appellants/Applicants, since the said properties constitutes their homes, which if destroyed will leave them destitutes. He also contended that since they have filed an appeal, it is only fair that their properties should be protected and preserved by way of injunction. Further, that the Respondents will not suffer any prejudice as they will be in a position to take over the properties in the event that appeal fails. That it is in the interest of justice to let the Appellants/Applicants to exhaust the process of Appeal by issuing the injunction as prayed.
 4. The 1st Respondent filed grounds of opposition in resisting this application and averred that:
 1. That the Notice of Motion Application is defective in that it is brought under wrong provisions of the law, given that Order 42 Rule 6 of the *Civil Procedure Rules* deals with stay of execution, which is not one of the prayers in the application.
 2. That the Notice of Motion is incompetent and ill-conceived in that the substratum of an appeal cannot be preserved by issuing an injunction against a successful, party but rather by staying the execution of the impugned judgment.
 3. That the application is bad in law, defective and incompetent and an abuse of Court process, in that the orders sought are incapable of being granted as they will amount to allowing the appeal prematurely.
 4. That the Honourable Court has no jurisdiction to grant injunction pending appeal under Order 42 rule 6 of the *Civil Procedure Rules*.



5. That the application does not meet the required principles for the grant of an injunction as set out In *Giella vs Cassman Brown & Co Ltd* (1973) E.A. 360 in that the Applicant have failed to demonstrate a *prima facie* case with a probability of success and have also failed to demonstrate that they will suffer irreparable injury that cannot be compensated by an award of damages.
 6. That the Application is misconceived and an abuse of the Court process.
5. The 1st Respondent urged the Court to dismiss the instant application with costs.
 6. The Court had on 23rd November 2023, directed the parties to file their written submissions by close of business on 30th November 2023. The parties did comply as directed. The Applicants filed their submissions on 27th November 2023, and the 1st Respondent on 30th November 2023 which this Court has carefully read, considered and finds as follows: -

This application is expressed to be brought under Order 42 Rule 6(6) of the Civil Procedure Rules and all other enabling provisions of the law. The 1st Respondent has alleged that the instant Application is defective as it is brought under the wrong provisions of law as Order 42 Rule 6 of the Civil Procedure Rules deals with stay of execution and not injunction.
 7. However, the Court has considered the provisions of Order 42 (Rule 6(6) of the [Civil Procedure Rules](#) and it reads as follows:

“Notwithstanding anything contained in Sub rule (1) of this rule, the High Court shall have power in exercise of its Appellate jurisdiction to grant temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal for a subordinate Court or tribunal has been complied with”
 8. Therefore, from the above provisions of law, the Appellates/ Applicants are within the law to bring this application for injunction pending appeal. The only condition is that the procedure for instituting an appeal from the subordinate Court has to be complied with.
 9. Order 42 Rule 1 of the [Civil Procedure Rules](#) set the procedure for filing an appeal from the Subordinate Court to the Superior Court and it states:
 - (1) Every appeal to the High Court shall be in the form of a Memorandum of Appeal served in the same manner as the pleadings”
 10. The Appellants/Applicants have filed a Memorandum of Appeal dated 17th October 2023, and thus the procedure for filing an appeal from the Subordinate Court to the Superior Court such as this Court has been complied with.
 11. Having found that the procedure for filing appeal has been complied with, the Court finds the issue for determination is whether the Appellants/Applicants are deserving of an Order of injunction pending appeal.
 12. It is trite that an Order of injunction pending appeal is a discretionary one, which will be exercised against an Applicant whose Appeal is not frivolous. However, the discretion should be refused where it would inflict greater hardship than it would avoid.
 13. As provided by Order 42 Rule 6(6) of the [Civil Procedure Rules](#) above, the Court has discretion to grant the Orders of injunction pending appeal. The principles for grant of temporary injunction pending appeal are well settled by various Courts decisions. In the case of [Patricia Njeri & 3 others vs National Museum of Kenya](#) (2001) eKLR the Court held:



- a. “An Order of injunction pending appeal is discretionary one which will be exercised against the Applicant whose appeal is not frivolous.
 - b. The discretion should be refused where Court would inflict hardship than it would avoid.
 - c. The Applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The Court should also be guided by the principles of *Giella vs Cassman Brown* (1973) EA 356.
14. Further, in the case *Madbupaper International Ltd vs Kerr* (1985) eKLR, the Court held that it would be wrong to grant a temporary injunction pending appeal, where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.
 15. In the instant case, the Appellants/Applicants’ have alleged that their case at the trial Court where they had enjoyed injunctive orders was dismissed and that if no injunction is granted, the Respondents will proceed with demolition of their houses and also evict them from the disputed 6 metres of their respective parcels of land.
 16. It is indeed clear that with the dismissal of the Appellants/Applicants’ suit by the trial Court, the Respondents are at liberty to enter into the 6 metres land that is at the centre of the dispute herein. If they do so, the Appellants/Applicants properties or buildings will have to be demolished, and that is before the appeal is heard and determined. The said demolition and eviction of the Applicants will cause irreparable harm on the part of the Applicants herein. There was an injunction Order that was in place while the matter was proceeding at the lower Court. Therefore, the Respondents will not be prejudiced at all by the Order of injunction, but the Applicants/Appellants would stand to suffer loss that might not be compensated by an award of damages if appeal is successful and demolition and eviction will have taken place.
 17. The Appellants/Applicants have filed an appeal and have faulted the trial Court for arriving at a wrong determination because she never considered the weight of the evidence presented before her. The Court has indeed seen and considered the filed Memorandum of Appeal.
 18. Indeed, the Court finds that the Memorandum of Appeal presents an arguable appeal which is not frivolous. An arguable Appeal is not one which must necessarily succeed, but it is one that ought to be argued fully before the Court. See the case of *Kenya Commercial Bank vs Nicholas Ombija* (2000) eKLR.
 19. At this stage, the Court is only supposed to determine on whether the intended appeal is frivolous or not, and not on the merit of the said appeal as that determination will be made after hearing of the appeal. See the case of *Kamau Mucuba vs The Ripples Ltd* Civil Application No.186 of 1992 (1990-1994) EA 388, where the Court held:

“In an Application for injunction pending appeal, it may well be that the intended appeal is not frivolous, but the Court does not have to decide whether the Judge was right or wrong since the determination will be made at the hearing of the appeal itself”
 20. This Court having taken into account the fact that there was a pending injunction before the impugned Judgment and also taking into account that the intended appeal is not frivolous and that the injunction sought is for preservation of the suit properties pending appeal, the Court finds the said application is merited and it is thus allowed in terms of prayers No.3 of the said Notice of Motion Application dated 17th October, 2023, with costs to the Appellants/Applicants.
 21. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of:

Mr. Ndonga holding brief for Mr. Mbuthia for Appellants/Applicants

Mr. Mwambonu for 1st Respondent

Joel Njonjo – Court Assistant.

L. GACHERU

JUDGE

5/12/2023

