



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abdalla v Kadenge & 3 others (Environment & Land Case
203 of 2014) [2022] KEELC 2421 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 203 OF 2014**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

SAADE AHMED ABDALLA PLAINTIFF

AND

SAFARI KADENGE 1ST DEFENDANT

MNYAZI JEFWA 2ND DEFENDANT

KADZO KARISA LESO 3RD DEFENDANT

MIRIAM KITSAO 4TH DEFENDANT

RULING

- 1 This ruling is in respect of a Notice of Motion dated August 18, 2021 by the plaintiff/applicant seeking the following orders:
 - a. Spent
 - b. That this honourable court may be pleased to issue an injunction restraining the defendants/ Respondents jointly and severally by themselves, their agents, servants, employees, third parties and/or any other party from subdividing, alienating, transferring, selling or dealing, interfering in any way with the plaintiffs Plot No.S.R.2195 Takaungu pending hearing and determination of the instant application and the OCS Kilifi Police Station or the nearest Police station do ensure compliance.
 - c. That this Honourable Court may be pleased to issue an injunction restraining the defendants/ Respondents jointly and severally by themselves, their agents, servants, employees, third parties and/or any other party from subdividing, alienating, transferring, selling or dealing, interfering in any way with the plaintiffs Plot No.S.R.2195 Takaungu pending hearing and determination of the intended appeal.



d. Costs of the application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff/Applicant's Case

2 The applicant relied on the grounds on the face of the application together with his supporting affidavit sworn on August 18, 2021 where she deponed that upon the delivery of the judgment in favour of the Defendant, she lodged an appeal in the Court of Appeal. It was her averment that the respondents are in the process of executing the decree which in effect shall deprive her of 6 acres of her suit land.

3 The applicant stated that she was not able to file the present application when judgment was delivered as she was involved in the Covid-19 response but the application was filed within reasonable time and without undue delay.

4 It was the applicant's case that if the respondents obtain titles they will be at liberty to dispose off the property thereby rendering the Appeal nugatory and should there be an injunction pending appeal they will not suffer any prejudice as they will not be evicted.

Defendant/Respondents' case

5 The defendants opposed the application through the replying affidavit sworn on September 7, 2021 by Miriam Kitsao who stated that the survey and subdivision being done on the suit property was only on the 8 acres found to be the defendant's portion hence the present application is overtaken by events since the survey process was completed.

The respondent urged the court to dismiss the application with costs.

Plaintiff's Submissions

6 Counsel reiterated the applicant's case and submitted that the applicant will suffer irreparable loss if the injunction is not issued as once the respondents obtain title they are at liberty to dispose off the same which will render the appeal nugatory.

7 Counsel relied on the case of *Reliance Bank Limited v Norlake Investments Ltd* (2002) 1 EA 227 where the court held that factors which render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so the court is bound to consider the conflicting claims of both sides.

8 Counsel submitted that the respondents will still be in occupation of the suit property as the appeal is heard hence will not suffer any prejudice and urged the court to grant the orders as prayed to preserve both parties interest. Further that the balance of convenience is in favour of the applicant who holds the Title to the suit property and has preferred an appeal against the decree in favour of the Respondents herein.

Defendants' Submissions

9 Counsel submitted that Order 40 which the application is premised on does not apply to this case since there was no pending suit in this court. Further that Order 42 rule 6 (6) does not apply to this case since this court is not sitting as an appellate court hence the court lacks jurisdiction to hear and determine the application.

10 Mr Shujaa submitted that the application is incompetent as the jurisdiction of this court to grant a temporary injunction pending appeal is limited to a situation where the court is exercising its appellate



jurisdiction. That the operative phrase in the rule is in exercise of its appellate jurisdiction..’ Counsel relied on the case of *Bartholomew Mwanyungu & 3 others v Florence Dean Karimi* [2019] eKLR.

- 11 It was counsel’s further submission that the Plaintiff has nether established that the appeal is arguable with chances of success nor shown that she will suffer any loss if the injunction is not granted and relied the cases of *Venture Capital & Credit Limited v Consolidated Bank of Kenya Limited*, Civil Application No 349 of 2003 cited in the case *Joshua Walter Anyango Ogutu T/A Anyango Ogutu & Co Advocates v Barclays Pension Services Limited & another* [2019] eKLR Counsel also submitted that there was hence the application should be dismissed with costs to the defendants.

Analysis and Determination

- 12 This is an application for injunction pending appeal brought under Order 42 Rule 6 (6) of the *Civil Procedure Rules* which provides 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 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.”

- 13 The stipulated provision is clear that the court shall have power in exercise of appellate jurisdiction to grant temporary injunction in such terms as it deems just provided that the procedure for instituting an appeal from the subordinate court or tribunal has been complied with.
- 14 This matter was heard and determined in this court and therefore it is not an appeal from the subordinate court. The catch phrase in the provision is “*exercise of its appellate jurisdiction*” and “*an appeal from a subordinate court*” This therefore locks out the applicant as the court cannot grant the orders of injunction sought for. The applicant should have moved to the next appellate court to seek for redress.
- 15 In the case of *Bartholomew Mwanyungu & 3 others v Florence Dean Karimi* [2019] eKLR the court held that:

It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this court given on April 18, 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This court is no longer exercising its appellate jurisdiction. The applicant has already filed a Notice of Appeal in the Court of Appeal. Under 5(2)(b) of the *Court of Appeal Rules*, the Court of Appeal may grant an injunction in civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 75.”

- 16 I have considered the application together with the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the defendants

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE



NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

