



**Mbugua v Njuguna & 2 others (Environment and Land Appeal
E024 of 2021) [2022] KEELC 3974 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3974 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E024 OF 2021**

**YM ANGIMA, J
JULY 28, 2022**

BETWEEN

DOMINIC GITAU MBUGUA APPELLANT

AND

FREDRICK MWANGI NJUGUNA 1ST RESPONDENT

DISTRICT LAND REGISTRAR NYANDARUA COUNTY ... 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

RULING

1. By a notice of motion dated December 8, 2021 based upon Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21) and all other enabling provisions of the law, the Appellant sought orders to the effect that there be a stay of execution of the orders made by the trial court on November 4, 2021 in Nyahururu CM ELC No. E020 of 2021 and that the interim injunction initially granted on March 17, 2021 be reinstated pending the hearing and determination of the appeal.
2. The said application was based upon the grounds set out on the face of the motion and contents of the supporting affidavit sworn by the Appellant on December 8, 2021 and the exhibits thereto. The Appellant contended that the trial court erred in dismissing his application for interim orders dated March 16, 2021 and in allowing the 1st Respondent to collect the certificate of lease and develop the suit property during the pendency of the suit. The Appellant further contended that he had been in possession of the suit property since 1998 and that by making the orders of November 4, 2021 the trial court in effect determined the main claim in the suit at the interlocutory stage without the benefit of a full hearing. The Appellant further contended that unless the orders sought were granted then his appeal shall be rendered nugatory if successful.



3. The first Respondent filed a replying affidavit sworn on August 2, 2022 in opposition to the application. The 1st Respondent stated that he was the legitimate allottee of the suit property and that he had made all the requisite payments as per the conditions of allotment. He further stated that upon allocation he caused the suit property to be surveyed and the relevant survey plan was duly registered and the suit property assigned Nyahururu Municipality Block 2/673. It was his case that he had duly paid the applicable land rent in consequence whereof he was issued with a rent clearance certificate.
4. The 1st Respondent contended that the Appellant's application for an interim injunction was dismissed by the trial court because he had failed to satisfy the legal requirements for the grant of the order. It was also the 1st Respondent's contention that the Appellant had not satisfied the conditions for the grant of a stay pending appeal as there was no evidence of substantial loss or an offer of security for due performance of any order which might ultimately be binding upon him. It was further contended that the Appellant had failed to demonstrate that the trial court had wrongly exercised its discretion in dismissing his application for interim orders. The court was consequently urged to dismiss the application with costs.
5. There is no indication on record of the 2nd and 3rd Respondents having filed any response to the application. In fact, they do not appear to have participated in the application at all.
6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were granted 21 days to file and exchange their written submissions. However, none of the parties had filed submissions by the time of preparation of the ruling.
7. The court has considered the Appellant's application, the 1st Respondent's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main issues for determination herein are as follows:
 - (a) Whether the Appellant has made out a case for stay of execution pending appeal.
 - (b) Whether the Appellant has made out a case for the grant of an interim injunction.
8. The court has considered the material and submissions on the first issue. The court has noted that vide his application dated March 16, 2021 the Appellant had sought two interim injunctions against the 1st Respondent. The first was to restrain him from remaining upon, erecting structures or interfering with the suit property. The second was to restrain the 2nd and 3rd Respondents from processing or issuing a certificate of lease for the suit property to the 1st Respondent.
9. It is evident from the copy of the trial court's ruling annexed to the application that both orders were denied. It is evident that the Appellant's application was dismissed on the basis that the applicant had failed to demonstrate a prima facie case with a probability of success at the trial as required by law. Accordingly, the import of the ruling was that the 1st Respondent was at liberty to process and issue a certificate of lease to the 1st Respondent. It was not necessary for the trial court to make such an obvious declaration in its ruling. However, there is nothing wrong with making such a clarification since it does not change the fact that the Appellant's application for interim orders was dismissed.
10. The court is of the opinion that a dismissal order is not capable of being stayed under Order 42 rule 6 of the *Civil Procedure Rules*. It is a negative order which simply means that the parties were left in the same position they were in before the filing of the application. See *Western College of Arts and Applied Sciences –vs- Oranga & Others* [1976-80] KLR 78. The court is thus of the opinion that there is nothing to be stayed in the dismissal order made on November 4, 2021 hence the court is not inclined to grant any stay.



11. The court has also considered the material and submissions on record on the second issue. It is obvious that the Appellant is seeking a temporary injunction in the same terms as those of his application dated March 16, 2021 before the trial court. The Appellant has, however, worded the same in a curious manner by seeking an order for the ex parte interim injunction made on March 17, 2021 by the trial court to be 'reinstated'.
12. The court is not satisfied from the material on record that the ex parte interim injunction initially granted on March 17, 2021 should be reinstated. The material which was before the trial court on November 14, 2021 when those orders were vacated is the same material still on record before this court. An interim injunction can only be granted on the same principles set out in the case of *Giella -vs- Cassman Brown and Co. Ltd* [1973] EA 358. There is no evidence on record to demonstrate that the Appellant shall suffer irreparable damage in the absence of an injunction. In the premises, the court is not satisfied that the Appellant has made out a case for the granting of an interim injunction or the reinstatement of the ex parte interim injunction made on March 17, 2021.
13. The upshot of the foregoing is that the court is not satisfied that the Appellant's application has merit. Accordingly, the Appellant's notice of motion dated 08.12.2021 is hereby dismissed. Costs shall be costs in the appeal. For the avoidance of doubt, the interim orders in place are hereby vacated.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 28TH DAY OF JULY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

Ms. Wambui for the 1st Respondent

N/A for the 2nd 3rd Respondent

C/A - Carol

Y. M. ANGIMA

JUDGE

