



**M'ikiamba & 4 others v Ekabu & 2 others (Environment and Land
Appeal E008 of 2020) [2022] KEELC 3377 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E008 OF 2020**

**CK NZILI, J
JULY 27, 2022**

BETWEEN

**STEPHEN M'IKIAMBA 1ST APPELLANT
TABITHA N. LAARIA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF SOLOMON RARIA M'ETHANGATHA) 2ND APPELLANT
CHARITY GAKII ITABARI (SUING AS LEGAL REPRESENTATIVE OF ESTATE
OF JOHN MUTABARI THIMANGU) 3RD APPELLANT
JAMES K. AKWALU 4TH APPELLANT
JULIUS RUKIOYA 5TH APPELLANT**

AND

**JOHN KIRAMANA EKABU 1ST RESPONDENT
LAND ADJUDICATION OFFICER 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. The applicant by an application dated March 9, 2022, prays for temporary orders of injunction restraining the respondents from entering or trespassing into, taking possession or disposing of or in any way interfering with his possession of parcels Nos 1155, 1157, 413, 103 and 412 Uringu II Adjudication Section situated in Tigania west pending the hearing and determination of the intended appeal at the Court of Appeal.
2. The application is supported by the affidavit of Julius Rukioya authorized by the co-applicants sworn on March 7, 2022. The grounds relied upon are that the dismissal of the appeal on December 15, 2021 means the decision by District Land Adjudication and Settlement Officer stood upheld with the



resultant effect of dispossessing them from their land and homestead hence occasion them substantial loss. That unless the orders sought are granted the appeal shall be rendered nugatory since the 1st respondent is likely to carry out an eviction.

3. The application is opposed by the 1st respondent through a replying affidavit sworn on March 21, 2022 by John Kiramana Ekabu. The grounds are that an injunction cannot issue against the 2nd & 3rd respondents by dint of section 16 (2) of the [Government Proceedings Act](#) and order 29 rule 2(2) of the [Civil Procedure Rules](#).
4. Secondly it is stated that a similar application was struck out with costs on February 3, 2022 hence this application is an abuse of the court process and the court is functus officio.
5. Thirdly, reason given is the applicant has not satisfied the conditions for the issuance of injunction given under section 24 & 25 of the [Land Registration Act](#) they are not the registered owners of the subject parcels of land.
6. Fourthly it is averred the intended appeal lacks merits since the applicants did not challenge the A/R objection.
7. Fifthly, are the applicants lack any legal or equitable rights since they have never occupied the suit land and the photos attached must have been taken elsewhere.
8. Sixthly, are the applicants have not exhibited any document of ownership.
9. Seventhly, are the allegations of flawed process of hearing disputes in the adjudication process raised in this application ought to have been raised in the said A/R objection proceedings or via an appeal to the minister or through judicial review.
10. Lastly it is averred there will be no prejudice in the unlikely event the appeal succeeds for the land will go nowhere for they do not intend to dispose it otherwise they will suffer grave and irredeemable prejudice and injustice through further expenses, time, anxiety and attendant litigation considering the age of the suit.
11. With leave of court parties filed written submissions dated May 9, 2022 respectively. The applicants rely on [Patricia Njeri & 3 others v National Museum of Kenya](#) [2004] eKLR on the principles to apply in granting an injunction pending appeal as discretionary power exercised where the appeal is not frivolous; it will be refused if it will inflict greater hardship than it would avoid; the applicant must show that to refuse the injunction would render the appeal nugatory and that the court should also be guided by the [Giella v Cassman Brown](#) (1973) EA 358 principles.
12. The court was also urged to consider the decision of [KCB Ltd v Nicholas Ombija](#) [2009] eKLR on the proposition that an arguable appeal is not one that must necessarily succeed but one which ought to be argued fully before the court. The applicants also relied on [Mua park Investments Ltd v Kenya National Assurance Co Ltd, Dubai Bank \(K\) Ltd v ICEA Ltd](#) [2007] eKLR.
13. The applicants herein were initially represented by the law firm of Maitai Rimita & Co Advocates. On February 3, 2022, the court struck out an application dated January 14, 2022 seeking to have the firm of Ngala J & Co Advocates to come on record for the applicants herein in place of Maitai Rimita & Co advocates.
14. After the said application was struck out the firm of Owang & Associates Advocates filed a notice of change of advocates on March 10, 2022 and proceeded to file the application dated March 9, 2022. There is no indication if the new law firm sought for and obtained leave from the court in line with



- order 9 rule 6 & 9 [Civil Procedure Rules](#) before filing the notice of change of advocates and subsequently formally coming on record for the applicant's post-judgment.
15. Further, even if there was a consent to come on record, the same was not formally filed and leave sought from the court for its endorsement as an order of the court. The issue was raised in the replying affidavit by the 1st respondent. Even after it was raised that a similar application was struck out, the applicants did not take any remedial action to redress the failure and or comply with rule 9 of order 9 Civil Procedure Rules. See *John Langat v Kipkemoi Tere & 2 others* [2013] eKLR. The application on that score is therefore filed by a law firm improperly before court.
 16. The respondents have nevertheless proceeded notwithstanding the defect to address the application before the court substantially and raised another objection that the application offends order 29 of [Civil Procedure Rules](#) and section 16 (2) of the [Government Proceedings Act](#). The response by the applicants is that the fact that an injunction is sought against the 2nd and 3rd respondents does not render this application incompetent and or make it fatally defective.
 17. Section 16 (2) of the [Government Proceedings Act](#) cap 40 provides that the court shall not proceed in any proceedings to grant an injunction or make any order against an officer of government if the effect of granting the injunction or making the order would be to give relief against the government which could not have been obtained in proceedings against the government. Order 29 rule 2 (2) & (3) [Civil Procedure Rules](#) provides that no order of injunction shall be made against the government.
 18. The applicants herein seeks an order of temporary injunction pending appeal against the respondents. The 2nd respondent is an officer of the government while the 3rd respondent is the chief legal adviser to the government.
 19. In *Royal Media v Telkom Kenya* (2001) EA the court held that where there is a cause of action directly against the government there can be no injunction and the appropriate remedy would be a declaratory relief. The court held this concept is founded on the principles that the king cannot do wrong and that the king cannot be sued in his court.
 20. Guided by the above reasoning and the clear legal provisions my finding is that the application offends the law section 16A of the [Government Proceedings Act](#) and order 29 [Civil Procedure Rules](#).
 21. For the applicants to be entitled to an injunction pending appeal they must demonstrate an arguable appeal which is likely to be rendered nugatory unless the orders sought are granted and this must be on top of meeting the *Giella v Cassman Brown* (*supra*) principles.
 22. In *Mrao Ltd v First American Bank & 2 others* [2003] eKLR court defined a prima facie case on the material before the tribunal, a right has been established which is infringed by the other party to call for its rebuttal.
 23. In *Siskena* [1977] ALLER 824 Lord Diplock held a right to obtain an injunction is not a cause of action but is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him or a legal or equitable right.
 24. In *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court in considering whether a prima facie case had been established the court is to see that on the face of it the person applying has a right which has been threatened with violation and all what an applicant has to establish is if he has a fair and bonafide question to raise as to the existence of the right which he alleges.
 25. Secondly, the court held a party must show he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in absence of an injunction.



26. In this matter, the applicants have not demonstrated they have letters of administration or any proof that they were ever recorded as having interests in the subject suit parcels of land. The applicants have not attached any searches on whether the suit parcels have now been registered and title deeds issued in favour of the 1st respondent even though in their written submissions at page 10 they suggest registration occurred in 2016 after the death of registered owner in 2010.
27. The applicants have expressed an apprehension that they are likely to be evicted unless an injunction issues. It is trite law that submissions however forceful cannot replace pleadings or evidence. See *Daniel Toroitich Arap Moi v Murithi Stephen Mwangi* [2014] eKLR. A lot of what the applicants have submitted has not be substantiated by way of annexures in the supporting affidavit. There is no official search if the title deeds have come out and under whose names.
28. Other than the photographs which are not authenticated, there is no report on whether or not the applicants are in occupation and in which parcels of land for this court to appreciate the nature and extend of the injury likely to occur. The applicants have the burden to demonstrate where each of them is occupying and is likely to be evicted if the orders sought are not granted.
29. An equitable remedy of injunction is issued solely to prevent grave and irreparable injury which is actual, substantial, demonstrable and which cannot adequately be compensated by an award of damages. See *Nguruman Limited v Jan Bonde Nielsen & 2 others supra*.
30. In *Patrick James Mbogo & another v Bank of Africa Ltd* [2020] eKLR the Court of Appeal held a party has to establish any loss likely to be incurred cannot be adequately be remedied by way of damages. It is not enough to say there will be irreparable loss and damages without the demonstration of the nature of the loss and damage. The applicants have submitted title deeds are out in the name of the 1st respondent yet at paragraph 17 of the supporting affidavit they allege the 1st respondent has no recognizable registrable interest in the suit premises. Once a title deed is issued the only way it can be impeached is under the provision of sections 24, 25 & 26 of the *Land Registration Act*.
31. Given the clear admissions that the status of the suit parcels of land is now governed by the *Land Registration Act*, I find the court would be acting in vain if it were to grant any temporary orders of injunction at this stage against the 1st respondent who is holding a bonafide title deed which has not been challenged under the *Land Registration Act* and the Land Registrar enjoined as a party to the intended appeal.
32. There is also nothing by way of an extracted decree from both this court and the lower court that the applicants are under the alleged threat of eviction.
33. In the premises I find the application incompetent, bad in law and lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Owang for applicant

Kieti for 1st respondent

CP Mbaabu for 2nd respondent

HON CK NZILI



ELC JUDGE

