



**Mariga v Ketere & another (Environment and Land Appeal  
E017 of 2024) [2025] KEELC 3022 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3022 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E017 OF 2024**

**MN MWANYALE, J**

**APRIL 2, 2025**

**BETWEEN**

**IBRAHIM TOMAS MARIGA ..... APPELLANT**

**AND**

**WILLIAM SANKONA KETERE ..... 1<sup>ST</sup> RESPONDENT**

**KISEKU ENOLE PESI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling relates to the application dated 08.11.2024 which seeks injunctive prayers against the Respondent pending hearing and determination of an Appeal.
2. Before determining this Application, the Applicant filed 2 other applications in which he sought the same injunctive prayers pending delivery of this Ruling, prompting the court to inquire from Mr. Ochwangi Counsel for the Respondent whether there was any construction on the suit property to which Mr. Ochwangi replied that there was none. And the court issued a temporary injunctive order pending delivery of the ruling initially scheduled for 10.03.2025 but which was rescheduled in view of a second application again filed by the Applicant seeking similar orders as the ones that had been granted on 27.02.2025, and the orders issued on 27.02.2025 were extended till delivery of the Ruling on 31.03.2025.
3. Now this Ruling, the grounds in support of the application dated 08.11.2024 are mainly that an appeal which probability of success is pending determination before this court; and if construction proceeds as is desired by the Respondent it would be difficult for the Applicant to re-occupy the leased premises; and the orders sought are meant to preserve the subject matter.
4. The Respondents counsel did indicate on 20.09.2024 that the had filed grounds of opposition to the application by the court did not se the said grounds of opposition in the court file.



5. Parties were directed to file written submissions on the application.
6. In his submissions the Appellant/Applicant placed reliance on Order 42 Rule 6 (6) that empowers courts to grant a temporary injunction. He placed reliance on the case of Giella Vs. Cassman Brown on the principles of the grant of a temporary injunction.
7. On prima facie case, the Applicant submits that the lower court overlooked material facts in reaching its decision.
8. On irreparable loss, the Applicant submits that if construction proceeds the suit property will change in shape, making him not able to utilize the same in the event his appeal succeeds.
9. The Applicant submits that there is no timeframe within which to lodge an application for injunction pending appeal and that the application having been filed 3 months after judgment there was no inordinate delay.
10. He urged the court to allow the application.
11. In opposition to the application the 1<sup>st</sup> Respondent submits that they can be no order of stay of execution in negative orders, such as a dismissal and has placed reliance on the decisions in the case of Lucas Nganga Ndungu Vs. Emmanuel Kiluu Mutua Civil Appeal No. E047/2023 as well as Machakos Civil Appeal No. 3 of 2020, St. Mary Academy Ltd Vs. Grace Njeri Mukora to buttress the said position.
12. That because the judgment was in the negative from then no stay of execution can be issued; thus submits the 1<sup>st</sup> Respondent that no reasonable cause of action has been shown to warrant the grant of the orders sought.
13. Before framing the issues for determination, the court notes the following
  - i. That the record of Appeal in respect of this matter was filed on 13th November 2024 and is pending issuance of directions in the Appeal.
  - ii. That the court issued interim orders upon confirmation that there was no construction that was ongoing
14. Having analysed the application, the rival affidavits and submissions and considered the law the court frames the following as issues for determination?
  - i. What is the nature of the application before court?
  - ii. What are the principles governing the application?
  - iii. Whether or not the application is merited?
  - iv. What orders ought to issue?
  - v. Who bears the costs of the application?

### **Analysis and Determination**

15. In his submissions before court the 1<sup>st</sup> Respondent submitted that no stay of execution orders can issue in respect of negative orders and indeed that is the legal position, as affirmed by the Court of Appeal decision in the case Githundu Vs. Waithaka (Civil Application) E024 of 2021 (2022) eKLR.



16. But is the application before court a stay of execution application under 42 Rule 6 of the Civil procedure Rules? On the face of the application the same is said to have been brought under Order 42 Rule 6 (1) (2) and (6) as the substantive order. While stay of execution pending appeal is governed by Order 42 Rule 6 (1) to (5) of the Civil Procedure Rules.
17. An injunction pending appeal is provided for under Order 42 Rule 6 (6) which provides as follows: -

“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the 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.”
18. From the nature of the substantive orders sought in the application before court is an application for a temporary injunction pending appeal and not an application for stay of execution, and thus in answer to issue 1 the court finds that the application before it is an application for an injunction pending appeal.
19. Having found that the application before court is an application for injunction pending appeal, the court shall now examine whether the Applicant has the principles for grant of a temporary injunction pending appeal.
20. The said principles were stated in the case of Patricia Njeri and 3 Others Vs. National Museum of Kenya (2004) eLKR as is quoted in the decision in the case of Timothy Kisina Kithokoi vs. Elijah Kitele and Another (2022) eLKR.
21. The principles were stated to be
  - a. “an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
  - b. The discretion should be refused where it would inflict greater hardship that 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 358.”
22. In Madhupapper International Limited Vs. Kerr it was held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or whether the injunction would inflict greater injustice that it would avoid.
23. And in the case of Kenya Commercial Bank Ltd Vs. Nicholas Ombija, the court held that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully in court.
24. Applying the said principles to this matter to determine whether the application is merited, the court notes that the Record of Appeal has been filed and without going to the merits of the appeal, the appeal must be fully heard in court and the Applicant has thus demonstrated the existence of an arguable appeal.
25. The learned counsel for the Respondent had confirmed that there was no construction going on, and if construction is to commence before the appeal is heard then the appeal will be rendered nugatory and the discretion ought to be applied to avoid greater hardship and since no construction is ongoing, if the injunction is refused then the greater hardship would be occasioned to the Applicant whose appeal will be rendered nugatory and would not be able to utilize the suit property as he had desired.



26. In the end the court finds that the application is merited and allows the same by confirmation of the Interim orders pending hearing and determination of the appeal.
27. In order to expedite the Appeal directions on hearing of the Appeal shall be issued after delivery of this Ruling.
28. Costs of the application in the cause.

**DATED AT KILGORIS THIS 2<sup>ND</sup> DAY OF APRIL, 2025.**

**HON. M.N MWANYALE**

**JUDGE**

In the presence of

CA – Emmanuel

Ms. Aminga h/b for Mr. Ochwangi for Respondent

Mr. Matoke h/b for Mr. Nyagaka for Applicant

