



**Dikir v Maasai Mara Wilderness Lodge Limited (Environment and Land Appeal E005 of 2022) [2022] KEELC 14914 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14914 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E005 OF 2022  
EM WASHE, J  
NOVEMBER 21, 2022**

**BETWEEN**

**KORINKO OLE PIRIAS DIKIR ..... APPELLANT**

**AND**

**MAASAI MARA WILDERNESS LODGE LIMITED ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant herein filed a Notice of Motion Application dated 15<sup>th</sup> February 2022 (hereinafter referred to as “the present Application”) seeking for the following ORDERS; -
  1. THAT the instant Application be certified urgent and same be heard ex-parte in the first instance. (SPENT)
  2. THAT pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an interim order of stay of execution of the Orders issued on the 21<sup>st</sup> day of January 2022 together with all consequential orders arising therefrom and/or attendant thereto. (SPENT)
  3. THAT the Honourable Court be pleased to grant an order of stay of execution and/or enforcement of the ruling and orders issued on the 21<sup>st</sup> day of January 2022 together with consequential orders arising therefrom and/or attendant to pending the hearing and determination of the Appeal.
  4. THAT the costs of this Application do abide the Appeal.
2. The grounds in support are provided on the body of the present application and further collaborated in the supporting Affidavit sworn by the Appellant/Applicant on the 15<sup>th</sup> February 2022.



3. The Supporting Affidavit has annexed a number of documents which include (i) Title Deed of the suit property (ii) A Memorandum of Appeal dated 15<sup>th</sup> February 2022 (iii) The Ruling dated 21<sup>st</sup> January 2022 (iv) The Order issued on the 25<sup>th</sup> January 2022(v) a bundle of Six (6) photographs.
4. The Respondent has opposed the present Application by filing Grounds of Opposition dated 8<sup>th</sup> March 2021 and a Replying Affidavit sworn by JOHN SMITH on the 24<sup>th</sup> of March 2022.
5. The Replying Affidavit has also annexed a number of documents which included (i) Lease Agreement between WILDERNESS LODGE LIMITED and JOHNSON LEKAKENY TUNAI dated 24<sup>th</sup> August 2006 (ii) Lease Agreement between Korinko Ole Piriya Dikir & Maasai Mara Wilderness Lodge Ltd dated 8<sup>th</sup> April 2011 (iii) The Counterpart and Addendum to the Lease Agreement dated 24<sup>th</sup> August 2006 between WILDERNESS LODGE LIMITED and KORINKO OLE PIRIYA DIKIR dated 24<sup>th</sup> August 2006 (iii) a bundle of Three (3) photographs.
6. The present Application was canvassed by way of written submissions with the Appellant/Applicant filing their submissions on the 15<sup>th</sup> of September 2022 and the Respondent filing theirs on 27<sup>th</sup> October 2022.

### **ANALYSIS & DETERMINATION**

7. Looking at the present Application, the Ground of Opposition filed herein, the Replying Affidavit and the submissions, the Court identified the following issues for evaluation and determination; -  
  
ISSUE NO.1- WHETHER OR NOT THIS COURT HAS JURISDICTION TO HEAR & DETERMINE THE PRESENT APPLICATION.  
  
ISSUE NO.2- WHETHER OR NOT THE APPELLANT/APPLICANT HAS SATISFIED THE PRINCIPLES ON THE GRANTING OF A STAY OF EXECUTION PENDING APPEAL.

### **ISSUE.NO.3- COSTS OF THIS APPLICATION.**

8. The Court having identified the above-mentioned issues for determination, the same are discussed hereinbelow.

### **ISSUE NO.1- WHETHER OR NOT THIS COURT HAS JURISDICTION TO HEAR & DETERMINE THE PRESENT APPLICATION.**

9. The Respondents herein have raised an objection to the Court's jurisdiction to hear and determine the present Application.
10. The Respondent's objection on jurisdiction is premised on two aspects as described hereinbelow; -
  - a. The present application is premature as the wording of Prayer No. 2 emanated from an error parent on the face of the record.
  - b. The Appellant/Applicant herein has not complied with the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules.
11. On the first aspect of this issue, the Appellant/Applicant states that the granting of a Permanent injunction at an interlocutory stage amounts to a final determination of issues to be canvassed at the Trial Court.
12. Consequently therefore, the Orders issued on issued on the 21<sup>st</sup> of January 2022 can only be granted upon a full hearing of the pending suit at the Trial Court not any time before.



13. On the other hand, the Respondent state that the use of the word “PERMANENT” in Order No. 2 pronounced on the 21<sup>st</sup> of January 2022 was an apparent error on the face of the record as the prayer sought in the application dated 10<sup>th</sup> September 2020 was a temporary injunction pending the hearing and determination of the main suit.
14. The Respondent therefore submits that the Appellant/Applicant ought to have filed an application for review under Order 45 Rule 1 of the Civil Procedure Rules to have the said Order No. 2 pronounced on the 21<sup>st</sup> of January 2022 corrected and not filed this pending Appeal.
15. In an effort to understand the background of this issue, it is imperative that the Court refers to the prayers sought by the Respondent in the Application dated 10<sup>th</sup> September 2020.
16. According to the prayers contained in the Application dated 10<sup>th</sup> September 2020, the Respondents stated as follows; -
  1. THAT this Application be certified urgent and be heard ex-parte in the first instance during the Court vacation.
  2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction to restrain the Respondents by themselves, their family, relatives, agents, servants, members of the local community , any one authorised by them or claiming under them from in any manner or otherwise howsoever from entering or trespassing into the land parcels TRANSMARA/KERINKANI/67, 68 & 69 in any manner whatsoever for whatever purposes.
  3. THAT the OCS Kilgoris and Angata Police Station be directed to ensure enforcement of the Orders by this Court.
  5. THAT pending the hearing of this suit, this Honourable Court be pleased to issue a permanent injunction restraining the Respondents by themselves restrain the Respondents by themselves, their family, relatives, agents, servants, members of the local community , any one authorised by them or claiming under them from in any manner or otherwise howsoever from entering or trespassing into the land parcels TRANSMARA/KERINKANI/67, 68 & 69 from in any way interfering with the Applicant’s right to quiet and peaceful enjoyment of the properties.
17. Looking at the Orders sought in the Application dated 10<sup>th</sup> September 2020, the Trial Magistrate allowed Prayer No. 3 and 4 as prayed.
18. The Order extracted on the same day 21<sup>st</sup> January 2022 provided Prayer No. 2 as follows; -

“Pending the hearing of the suit, a permanent injunction is hereby issued restraining the Respondents by restrain the Respondents by themselves, their family, relatives, agents, servants, members of the local community, any one authorised by them or claiming under them from in any manner or otherwise howsoever from entering or trespassing into the land parcels TRANSMARA/KERINKANI/67, 68 & 69 or from in any way interfering with the Applicant’s right to quiet and peaceful enjoyment of the properties.”
19. Referring to Prayer No. 4 on the Application dated 10<sup>th</sup> September 2020, the Court finds that it is the same prayer which was granted as Prayer No. 2 in the Order issued on 21<sup>st</sup> January 2022.
20. Consequently therefore, the Court holds that there was no error on the face of Order No. 2 issued on the 21<sup>st</sup> of January 2022.



21. The Appellant's/Applicant's decision to appeal against the Orders issued on the 21<sup>st</sup> of January 2022 is therefore lawful and the Court has jurisdiction under Section 65 of the *Civil Procedure Act*, Cap 21 to hear and determine both the present application as well as the substantive Appeal.
22. The second aspect of this issue was the allegation that the Appellant/Applicant did not comply with the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules.
23. The Respondent's submission is that the Appellant/Applicant is required to first make the Application for Stay of Execution in the Court which issued the said Orders being appealed against and not file the Stay of Execution Application to the Appellant Court in the first instance as happened in the present Application.
24. The provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules provides as follows; -

“No appeal or second Appeal shall operate as a stay of execution or proceedings under a Decree or Order appealed from except in so far as the Court appealed may Order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty , on application being made, to consider such application and make such orders thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such orders set-aside.”
25. The Respondent relied on three authorities namely NICHOLAS KIPTOO ARAP KORIR-VERSUS- IEBC & 6 OTHERS 2013 eKLR, SPEAKER OF NATIONAL ASSEMBLY-VERSUS-NJENGA KARUME (2008) KLR 425 and KALAVA KULAMBA & ANOTHER-VERSUS-PHILIP KAMOSU & RODA NDANU PHILIP (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JACKLINE NDINDA PHILIP (DECEASED) 2016 eKLR.
26. The Appellant/Applicant in response to the above submissions by the Respondent stated that the Order No.2 pronounced on the 21<sup>st</sup> of January 2022 was one couched in the nature of a final Order.
27. The finality of Order No. 2 in effect compromised the issues to be canvassed at the hearing of the main suit which is yet to be heard and determined.
28. Consequently therefore, the Appellant/Applicant believes the Trial Court did not have any further powers to hear and/or deal with any other interlocutory application relating to the issue of possession and/or occupation of the suit properties therein.
29. In addition to the above, the Appellant/Applicant further submitted that Order 42 Rule 6(1) did not expressly prohibit a party from making an Application for stay of the Order and/or Decree to the Appellant Court without first making one before the Court in whose Order and/or Decree is being appealed against.
30. This Court has again looked at the provisions of Order 42 Rule 6(1) and in particular the following words; -

“ , the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such orders thereon as may to it seem just,”
31. The Court's interpretation of this part of Order 42 Rule 6 (1) is that any party who intends and/or has Appealed against an Order and/or Decree of a Sub-ordinate Court is at liberty to file an Application



for Stay of Execution in the Appellant Court without necessarily having filed one in the Sub-ordinate Court from where the Order and/or Decree being Appealed against was issued.

32. The use of the word “AT LIBERTY” connotes the freedom to make an election of various methodologies when approaching the Court with an application for Stay of Execution under Order 42 Rule 6 (1).
33. A litigant seeking a Stay of Execution pending Appeal against an Order and/or Decree issued by a Sub-ordinate Court can either elect to first file such an Application to the Court issuing such an Order and/or Decree or file the Application directly to the Appellant Court.
34. In essence therefore, it is not a mandatory requirement that an Applicant under Order 42 Rule (6) 1 must file such an Application to the Trial Court which issued the Order and/or Decree before making such an Application in the Appellant Court.
35. In conclusion therefore, the present Application is properly before the Court and the Court has the statutory jurisdiction to hear and determine the same.

**ISSUE NO.2- WHETHER OR NOT THE APPELLANT/APPLICANT HAS SATISFIED THE PRINCIPLES ON THE GRANTING OF A STAY OF EXECUTION PENDING APPEAL.**

36. The issue on the principles to be applied in the consideration of Stay of execution Applications under Order 42 Rule 6 (1) have been discussed numerous times by various Courts in our jurisdiction.
37. In the case Socfinac Company Limited V Nelphat Kimotho Muturi [2013] eKLR, H.C at Nairobi (Milimani), 542 of 2012, the Court observed as follows;

“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.



It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality”.

38. In another Case of Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006 the Court also added its voice in the following manner; -

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

39. Guided by the above principles mentioned hereinabove, the Court shall first evaluate whether or not the present application has been brought without delay.

40. Looking at the annexures contained in the supporting Affidavit to the present application, the Court confirms that the Order which the Applicant would like to be stayed pending Appeal was issued on the 21<sup>st</sup> of January 2022.

41. The Ruling of 21<sup>st</sup> of January 2022 granted the Applicant leave of Thirty (30) days to file any Appeal if so desired.

42. The Memorandum of Appeal against the Ruling delivered on the 21<sup>st</sup> of January 2022 was filed on the 16<sup>th</sup> February 2022 way before the lapse of the Thirty (30) days granted by the Court and the present Application filed on the 23<sup>rd</sup> of February 2022.

43. Consequently, the Court is of the considered view that the present Application has been promptly filed by the Applicant.

44. The second principle is regards whether or not the Applicant shall suffer a substantive loss if the Stay Orders sought in the present application are not granted.

45. The Applicant submits that Order No. 2 issued on the 21<sup>st</sup> January 2022 amount to an eviction from the portion which he resides.

46. The Applicant states that he resides on a portion of the property known as TRANSMARA/KERINKANI/67 and the permanent injunctive Orders issued on the 21<sup>st</sup> of January 2022 completely denies his access and/or occupation of his home.



47. Secondly, the Applicant further states that the issuance of a permanent injunction at an interlocutory stage fully determines some of the issues before the suit Trial Court before he is accorded an opportunity to ventilate his side of the story.
48. The net-effect of the permanent injunction at the interlocutory stage is to deny him the right to a fair trial which is a right provided in the Constitution under Article 50.
49. The Respondent on the other side states that the Applicant willingly executed a Lease Agreement over the suit property.
50. The said Lease Agreement has not lapsed and/or terminated and therefore the Respondent has a right to quiet possession and/or occupation over the said suit property.
51. Secondly, the Respondent submits that the Applicant does not occupy and/or stay on the suit property and therefore there will be no inconvenience and/or hardship caused by the Orders issued on 21<sup>st</sup> January 2022.
52. The Court in this present application cannot consider the merits and/or demerits of the substantive Appeal.
53. What the Court should satisfy itself is whether there will be any substantive loss and/or inconvenience caused to the Applicant emanating from the Orders being Appealed upon pending the hearing and determination of the Appeal.
54. Referring to the issue of the Applicant being unable to access his residence which is located on the property TRANSMARA/KERINKANI/67, the Court has referred back to the Lease Agreement dated 8<sup>th</sup> April 2011.
55. In the description part of the Lease, the suit property was indicated to measure approximately 37.65 Ha which translates to about 90 Acres.
56. The Lease Agreement indicates that the Respondent leased approximately 60.1 Acres leaving a balance of 30 Acres still in the occupation and/or possession of the Applicant.
57. The Lease Agreement further as contained in the part SCHEDULE AND SPECIAL CONDITIONS identified the portion of the suit property which had remained with the Applicant and outlines the rights of use therein.
58. The Court has not come across any other legal document which granted the entire suit property to the Respondents to the exclusion of the Applicant.
59. Consequently therefore, the blanket manner in which the Order issued on 21<sup>st</sup> January 2022 deals with the entire suit property without keeping in mind the portion retained by the Applicant will definitely cause untold hardship and loss to the Applicant.
60. The Court is therefore pursued that the Orders issued on 21<sup>st</sup> January 2022 will cause substantive losses to the Applicant during the pendency of the Appeal filed in this Court.
61. The second aspect in this principle is the issue of the right to a fair hearing.
62. Referring to the Further Amended Plaint dated 4<sup>th</sup> December 2020, the first prayer sought is as follows;  
-

“A permanent injunctive Order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests



from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all the parcels of land known as TRANSMARA/KERINKANI/67, TRANSMARA/KERINKANI/68 and TRANSMARA/KERINKANI/69.”

63. Referring further to Prayer No. 2 contained in the Order issued on 21<sup>st</sup> January 2022, the same reads as follows; -

“Pending hearing of this suit, a permanent injunction is hereby issued restraining the Respondents by themselves, their family, relatives, agents, servants, members of the local community, or otherwise howsoever, from entering or trespassing into the land parcels number TRANSMARA/KERINKANI/67, TRANSMARA/KERINKANI/68 and TRANSMARA/69.”

64. Prayer No. 2 contained in the Order issued on 21<sup>st</sup> January 2022 emanated from an interlocutory application filed on the 10<sup>th</sup> September 2020.

65. Various Courts have evaluated the impact of permanent injunctions issued upon determination of an interlocutory application.

66. In the case cited by the Applicant in their submissions dated 12<sup>th</sup> September 2022 to wit KENYA POWER & LIGHTING CO. LIMITED-VERSUS- SHERIFF MOLANA HABIB (2008) eKLR, the Court held as follows; -

“ a permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and it thus a decree of the Court. The injunction is granted upon merits of the case after evidence in support of and against the claim has been tendered.”

67. The Second Case provided by the Applicants known as NAIROBI CIVIL APPEAL NO. 77 OF 2012 BETWEEN NGURUMAN LIMITED & ANOTHER -VERSUS- HERMAN PHILIP STEIN, the Court further stated as follows; -

“once more, we remind ourselves that in considering this Appeal, it would be both premature and prejudicial to the rights of the parties to make any conclusive pronouncements on matters either of fact or law, while the suit where such merits will be decided is still pending.”

68. The two cited cases herein discuss the impact of permanent injunctions and when the same should be issued by a Court of law.

69. Keeping in mind that Prayer No. 1 of the Further Amended Plaint dated 4<sup>th</sup> December 2020 is still pending before the Trial Court, the Orders issued on 21<sup>st</sup> January 2022 seem to determine the dispute between the parties with finality thereby denying the Applicant an opportunity to present its facts contrary to the principle of fair trial provided under Article 50 of the Kenyan Constitution.

70. The denial of an opportunity for a party to ventilate its case before a final determination is pronounced in the Court's considered view amounts to a substantive loss if not an irreparable one.

71. Consequently therefore, the Applicant has again demonstrated a substantive loss that emanates from the Orders issued on the 21<sup>st</sup> January 2022.

72. The last principle for consideration in the present application is the issue of costs.



73. Order 42 Rule 6(2)(b) provides that no Order of Stay pending Appeal shall be made without provision of security for the due performance of such a Decree or Order as may ultimately be binding on him has been given by the Applicant.
74. In the present Application, the Order being sought to be stayed is an injunction against the Applicant.
75. The due performance of the Order issued on the 21<sup>st</sup> January 2022 do not in any way involve any monetary performance save for the costs awarded therein.
76. Consequently therefore, the Court is of the opinion that the Applicant be directed to deposit a sum of Kenya Shillings One Hundred Thousand (KShs 100,000/-) in Court within Fourteen (14) days from the date of this Ruling as security.

## **CONCLUSION**

77. In conclusion therefore, the Court hereby makes the following Orders appertaining the Application dated 15<sup>th</sup> February 2022; -
  - A. The Orders issued on the 21<sup>st</sup> January 2022 in KILGORIS SENIOR PRINCIPAL MAGISTRATE'S COURT ENVIRONMENT & LAND COURT CASE NO.27 OF 2020 be and is hereby STAYED pending the hearing and determination of the present Appeal.
  - B. The Applicant herein is directed to deposit a sum of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) into the Court within Fourteen (14) Days from the date of this Ruling as Security.
  - C. The Costs of the present Application abide the outcome of the Appeal herein.
  - D. The Appellant is further directed to prepare, file and serve the Record of Appeal within the next Thirty (30) Days.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21<sup>ST</sup> NOVEMBER,2022.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: Ngeno

ADVOCATE FOR THE PETITIONER/APPLICANT: Moranga holding brief Ochwangi

ADVOCATE FOR THE RESPONDENT: Wasuna

