



**Verisone Limited v Kanoga (Environment and Land Appeal
21 of 2022) [2022] KEELC 15397 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 21 OF 2022
EK MAKORI, J
DECEMBER 20, 2022**

BETWEEN

VERISONE LIMITED APPELLANT

AND

SIMON KANOGA RESPONDENT

RULING

1. The appellant filed civil case number 347 of 2018 Varizone Ltd –vs- Simon Kanoga vide a plaint dated September 26, 2018 against the respondent herein. Subsequently, through a judgment dated May 31, 2022 the suit was dismissed with cost to the respondent herein at the magistrates court Kilifi.
2. The appellant filed this appeal ELCA appeal No 21 of 2021 Varizone Ltd –vs- Simon Kanoga vide a memorandum of appeal dated June 27, 2022 before this court. The appellant in the said appeal filed an application dated June 27, 2022 where it seeks injunctive reliefs against the respondent over the subject of the said appeal which is title number group V/508/3. The respondent in opposition to the said appeal filed a notice of preliminary objection dated July 6, 2022.
3. Parties were directed to file their respective submissions on the PO and the application. As directed, the parties fully complied.
4. This matter arises from a sale of a land transaction whereby the appellant sold the respondent parcel of land known as title number group V/508/3. It will seem that the respondent was late in payment of the consideration, but concluded in repayment and was never granted possession. The judgment in the lower court ordered vacant possession since the purchase price had been fully paid provoking the current appeal.
5. The pending application seeks that the respondent be restrained from entering the land to preserve the suit property pending appeal. It is opposed on grounds that such an application for injunction was



- disallowed in the lower court and was never appealed against. Besides, the appellant cannot have the land and the purchase monies at the same time it will be quite unfair to the respondent.
6. The preliminary objection largely deals with the injunction having been dismissed and no appeal preferred the same runs contrary to section 68 of the *Civil Procedure Act*. Besides, there is a pending suit over the same subject matter - Malindi ELC No 190 of 2018.
 7. The issues that fall for determination are whether the preliminary objection should be upheld and whether this court should issue injunctive orders to preserve the suit property.
 8. On the preliminary objection the appellant submits that the same is misconceived since the issue of injunction was canvassed in the lower court and in civil case, number 347 of 2018 Varizone Ltd –vs- Simon Kanoga according to the said ruling the entire suit was heard to its logical conclusion and a judgment delivered on May 31, 2022. As such, the appellant has a right of appeal before this court. Aggrieved by the said judgment, the appellant has therefore preferred this appeal before this court. The court is seized with the jurisdiction to hear and determine this appeal. As such, the appellant has a right of appeal before this court. Further, the respondent has once again without any colour of right, encroached into the suit property by sending his agents to clear the bushes ready to erect structures thereon.
 9. The respondent’s allegation that the appellant cannot claim a prima facie case before this court after failing to establish any such case in 2020 on a similar application is neither here nor there as this court being the 1st appellate court, has to reconsider and re-evaluate the whole of the evidence afresh and come to its independent conclusion.
 10. Further the said suit that is pending before this honourable court (Malindi ELC Case No 190 of 2018 Simon Warui Kanoga vs Varizone Limited and Dennis Abraham Kinaro has been filed by the respondent herein whereby he seeks among other orders, that the said suit be transferred before the senior principal magistrate’s court at Kilifi. The respondent’s application is frivolous and an abuse of the court process as it seeks to have two courts hear and determine a matter between similar parties and the same subject matter, which will result in the two courts arriving at two different outcomes.
 11. The respondent has submitted and invited the court to find the decision appealed against was dismissed vide the ruling by honourable JM Kituku, senior principal magistrate delivered on June 10, 2020 dismissing the appellant’s application for an injunction after finding that the appellant was unable to surmount the first hurdle in *Giella vs Cassman Brown [1973] EA 358*. That is to say, the appellant had not established a prima facie case. From June 10, 2020, the appellant has had no orders of injunction in its favour after its application was dismissed. The appellant accepted that decision from 2020 and participated in the trial of the main suit which concluded with the judgment delivered on May 31, 2022 dismissing the suit.
 12. On grounds (g) and (i) of the appellant’s motion dated June 27, 2022 and in paragraphs 16 and 17 of the affidavit sworn by its director, Mr Christopher Denis Wilson in support of that motion, the appellant admits that it had filed a similar application for an injunction in the court below and that the application was dismissed after the appellant failed to establish a prima facie case. The appellant, therefore, admits that he sought but was denied similar orders in 2020 by the court below according to the finding that it had no merits.



13. Under section 68 of the [Civil Procedure Act](#): -

' Where any party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree'.

The ruling delivered in the court below on June 10, 2020 is a preliminary decree. The present application is filed in an appeal preferred from the final decree passed on May 31, 2022. The appellant did not appeal against the ruling and order dismissing his application for an injunction and it is now caught up by section 68 of the [Civil Procedure Act](#). The appellant cannot at this late stage and in this appeal dispute the correctness of the ruling that denied him the injunction more than 2 years ago.

14. The court below found that delivery of vacant possession is a mere formality after the respondent had paid the full purchase price because under the terms of the agreement of sale vacant possession was automatic after full payment. It would be most unjust and inequitable for the appellant to obtain orders of injunction enabling him to retain the property many years after it was paid the full purchase price. The position from 2018 is that the appellant has both the property and the full purchase price.

15. There is a suit pending in this court (Malindi ELC Case No 190 of 2018 - Simon Warui Kanoga vs Varizone Limited and Dennis Abraham Kinaro) between the same parties over the same property, which this court stayed pending the hearing and determination of the suit in the senior principal magistrate's court at Kilifi. In that suit, the respondent has his application for orders of injunction to restrain the appellant from interfering with its possession of the suit premises and evicting him from the suit premises and to transfer the suit to the SPM's court at Kilifi for hearing and final disposal. Regrettably, the respondent was evicted from the suit premises without any orders on June 10, 2022.

16. The preliminary objection as I understand it is that the lower court had initially dismissed an application for an injunction, and no appeal was preferred, then the applicant under section 68 of the [Civil Procedure Act](#) is estopped from seeking similar orders before this court. Further that the respondent having re-entered the land and jettisoned ought once again, filed another suit in this court that is Malindi ELC Case No 190 of 2018 - Simon Warui Kanoga vs Varizone Limited and Dennis Abraham Kinaro), that suit has an application for an injunction and seeks to have the second eviction declared null and void and that it ought to be heard first.

17. I have considered the two warring submissions on the issue as to whether the dismissal of the application for an injunction by the lower court and failure by the applicant to appeal resulted in a preliminary decree and by dint of section 68 [Civil Procedure Act](#); it is estopped from appealing on the same issue to this court.

18. In [HNN v JNK \[2021\] eKLR](#) the court held as follows in distinguishing final and preliminary decree as follows: -

' Decree is defined under section 2 of the [Civil Procedure Act](#) as follows:-

'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91.



A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.' (underlining mine)

10. The court of appeal discussed the meaning of preliminary decree, although in the context of an appeal, in the case *Muthike vs Kenya Film Corporation Ltd (1989) eKLR* stated thus:-

'The foundation is section 68 of the *Civil Procedure Act*, but the decision of this court's predecessor in *Baker v Rush*, which analyses the meaning of a preliminary decree, is of importance, as having declared the law which has been followed for a long time. The argument is very well set out on pp 604 and 605 where the distinction was drawn between preliminary decrees and interlocutory orders. The former conclusively determines the rights of the parties on some issue or issues though further proceedings must be taken before the suit can be completely disposed of. That follows the definition of 'decree' in the *Civil Procedure Act*. As against that there are ordinary interlocutory orders on such matters as misjoinder, jurisdiction, limitation, and so forth. The latter are seen as having the effect of merely regulating procedure and do not decide the rights of the parties.' (underlining mine)

19. The honourable magistrate in the lower court dismissed an application for an injunction at the interlocutory stage. No appeal was preferred. A formal hearing on the matter was done and the entire suit was dismissed. Part of the prayers in the lower court was for a permanent injunction. It was also declined after a hearing on merit. There is now an appeal on the entire proceedings. I do not think from what we have, the applicant can be estopped from seeking the orders sought herein because the application for injunction was dealt with at an interlocutory and final stage of the matter, and was dismissed at both levels. The applicant has a right to query the findings of the magistrate at both levels. That is what forms part of the appeal. The findings at the interlocutory and final stages cannot be separated. The respondent's plea fails on that limb.
20. On the issue of the pending matter where an injunction has been sought by the respondent, in a filed new matter by the parties on the same subject matter as this one, it is my view that it cannot be a bar to curtail the applicant approaching this court on appeal on a matter which has already been adjudicated and determined on merit. The only observation I can make is that parties are now multiplying suits out of a simple sale transaction, which may lead to incongruent decisions from both the superior and lower courts. It is a recipe for chaos and convolution of issues.
21. The preliminary objection to me was unnecessary and is hereby dismissed. The parties should have aimed at finalizing the pending appeal on merit it will tend to settle the matter fully and finally.
22. It brings me then to the issue of whether the court should issue injunctive orders to preserve the subject matter. The applicant submits that it is necessary. The respondent has started clearing bushes for re-entry into the suit property, which ought to be stopped. On the contrary, the respondent thinks it is an abuse of the court process. The respondent paid the purchase money and the lower court ordered vacant possession in his favor, he gained entry but was jettisoned out once more. The applicant has the money and the land. To me, it leads to an unconscionable state of affairs that equity cannot allow. The applicant is approaching this court with unclean hands.
23. In the case of *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others (Civil Application E055 of 2021) [2022] KECA 402 (KLR)* the court of appeal in



granting temporary orders of stay of execution to preserve the substratum of a suit property stated as follows: -

' We have considered the arguments and submissions canvassed by the applicants and 1st respondent. Mr Gikandi has raised the preliminary issue of this court's jurisdiction to grant the orders sought. It is notable in this regard that the court's powers and discretion under rule 5(2)(b) is wide and this court can order a stay of execution, injunction, or stay of further proceedings on such terms as the court deems just. Status quo orders preserve the subject matter of litigation pending the hearing of a suit or appeal, and are therefore a species of stay orders and fall within the ambit of rule 5(2)(b). The power of this court to grant status quo orders has been recognised in various decisions, including in the cases of *Kolongei Farmers Co-operative Society Ltd vs Tom Kevolwe Anzingale & 6 others [2005] eKLR* and *Rhoda Mukuma vs John Abuoga [1988] eKLR*. The powers of this court in this respect include specifying the terms and extent of the status quo orders.

13. In this regard, the principles applicable in the exercise of the court's unfettered discretion under rule 5(2) (b) to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR*.

14. The applicants herein have referred the court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The applicants have in their grounds faulted the ELC on the application of the doctrine of res judicata, which we find arguable and ought to be canvassed fully. The applicants' appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this court in *Reliance Bank Limited vs Norlake Investments Ltd [2002] 1 EA 227*, that 'the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.' See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [supra]* wherein it was held, inter alia, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.

15. It is notable that the 1st respondent does not dispute that the applicants are in occupation of the property which was the subject of the ruling in Malindi ELC Case No E063 of 2020**, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status of the title to the suit property is disturbed before the determination of the applicants' appeal.'

24. The scenario we have in this matter is that the applicant is the one in possession of the suit property well after evicting the respondent and failing to adhere to the lower courts findings that the respondent had paid the full decretal sum and needed to have vacant possession of the suit property. It is the subject of this appeal. Meanwhile, there is a suit in the lower court challenging the eviction. Which is yet to be concluded.



25. The substratum of the suit does not entirely rest on the suit property, there is the element of an agreement for sale whether it was breached or not or whether it was fully discharged by the parties. We have a scenario where the applicant has the money and the land to the detriment of the respondent. The respondent thinks that the pending lower court matter brought up a new cause of action. There is a pending application for injunction and challenge on the eviction, which ought to be heard. As I observed above, there is now a proliferation of suits over the same subject matter.
26. My view will be that there is no status quo or preservation of the suit property to order the parties to maintain the same having already been changed when the respondent was evicted from the suit property. The applicant cannot use the court to the disadvantage of the respondent who has orders of vacant possession. I have not been asked to give conditions as a precursor for stay pending appeal. I will disallow the application for injunction or order for status quo, pending appeal having observed that the status quo and the substratum of the suit keep mutating. At best, the parties need to set the appeal down for hearing on merit. It will be for their mutual benefit.
27. Therefore, I will order as follows: -
- i. The PO is hereby dismissed
 - ii. The notice of motion dated June 27, 2022 is hereby dismissed
 - iii. The appellant is to serve the respondent the appeal record within 21 days hereof.
 - iv. The respondent is to reply within 14 days after the service.
 - v. Costs of the PO and the application to abide by the outcome of the intended appeal.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2022.

EK MAKORI

JUDGE

