



REPUBLIC OF KENYA



KENYA LAW
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Family Welfare Organization & another v Karanja & 5 others (Environment and Land Appeal E17 of 2022) [2022] KEELC 15171 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E17 OF 2022
LA OMOLLO, J
DECEMBER 6, 2022**

BETWEEN

FAMILY WELFARE ORGANIZATION 1ST APPELLANT

DAVID KAMAU NDIRANGU 2ND APPELLANT

AND

JOHN NGUGI KARANJA 1ST RESPONDENT

STEPHEN KIARIE WANJIKU 2ND RESPONDENT

JOEL MWANGI WAINAINA 3RD RESPONDENT

NELSON MWANIKI MAINA 4TH RESPONDENT

MARGARET NJERI KIMANI 5TH RESPONDENT

MERCY WAMBUI NJIHIA 6TH RESPONDENT

(Being an appeal from the ruling of Hon. J. Karanja, Senior Principal Magistrate, Naivasha Law Courts delivered on 20th April 2022)

RULING

Introduction

1. This ruling is in respect of the Appellants/Applicants Notice of Motion application dated 11th May 2022. The said application is brought under Order 42 Rule 6 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#).
2. The application is brought under certificate of urgency and seeks the following prayers:
 - i. ...Spent



- ii. ...Spent
 - iii. That pending the hearing and determination of this suit in the lower court the orders of the court issued on 29/07/2020 be reinstated and in the alternative the interested party/6th respondent be ordered to deposit security for costs in the lower court case.
 - iv. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one David Kamau Ndirangu.

Factual Background.

4. This Appeal was lodged on 11th May 2022 and was filed together with the application that is under consideration.
5. The Appellant/Applicant set out the grounds of Appeal as follows:
 - a. That the honorable magistrate erred in law and fact by discharging existing interim orders of injunction issued on 29th of July, 2020 and allowed the 6th Respondent/Interested Party to proceed with construction on the suit premises Plot Site & Service Scheme Kabati/469 despite the fact that the said respondent had already been in open violation of the same orders of injunction by constructing more than two floors of the storied building in open defiance of the court's existing and valid order.
 - b. That the honorable magistrate court erred in law and fact by making a finding on balance of convenience tilting in favor of the 6th Respondent/Interested Party despite there being sufficient evidence that there existed two parallel documents of ownership on the same physical ground hence the need to freeze any activities that would adversely affect either party after the conclusion of the main case.
 - c. That the honorable magistrate erred in law and in fact in failing at the very least to order that the 6th respondent/interested party place a substantial security for possible heavy costs in a case of this nature.
 - d. That the honorable magistrate erred in law and in fact in making a finding that any possible damages that could be suffered by the appellants could be compensated by an award of damages if they were successful, without showing why this same argument could not be used on the 6th Respondent who was a late entrant in the case and actually an interested party in a suit that had initial substantive parties.
 - e. That the honorable magistrate's court erred in law and in fact in failing to appreciate that the matter before him being fairly old, the most reasonable solution would have been to give hearing dates on a priority basis but not allow one party to go on with construction.
 - f. That the honorable magistrate's court erred in law and in fact by not appreciating the new dilemma its ruling created whereby in the event the appellants won the case, they would be confronted with a possible scenario of a building much improved in value and with tenants as third parties in the equation, the possibility of demolishing the multi storied building in an urban setting or even the possibility of having to buy an expensive building they did not heed.



6. This application first came up for hearing on 11th May, 2022 when the court directed that the Memorandum of Appeal and the Application be served upon the Respondents. The application was slated for inter partes hearing on 23rd May, 2022.
7. On 23rd May, 2022 the respondents sought more time to file their responses which they finally did on 30th May, 2022. On the said date parties agreed to canvass the application by way of written submissions.
8. On 18th July, 2022 the application was reserved for ruling on 1st December, 2022.

The Appellants/applicants Contention.

9. The affidavit in support of the application is sworn by the 2nd Appellant/Applicant.
10. He contends that on 20th April, 2022, the lower court delivered a ruling which is the subject of this appeal.
11. The 2nd Appellant/Applicant further contends that the subject matter of the main suit is a parcel of land described as Plot No. 469 Site & Service Scheme Kabati or Site & Service Scheme Kabati 469 and UNS Residential/Plot No. 469/Naivasha Municipality.
12. The 2nd Appellant/Applicant also contends that the lower court sanctioned and ordered that both parties supply the Naivasha Sub-County land Surveyor with their title documents and with aid of this information he would trace and ascertain the location of the properties on the ground.
13. It was his contention that the surveyor after at least two visits one of which was a site visit/hearing by the court, filed his report.
14. The 2nd Appellant/Applicant contends that it was his understanding that thereafter only a final hearing would determine who was holding the bonafide plot documents.
15. The 2nd Appellant/Applicant further contended that in the meantime, the appellants held interim orders restraining the 1st to 5th Respondents from interfering with the suit premises adding that the 6th Respondent joined the proceedings much later vide an application that stalled the originally expected timelines for case completion.
16. The 2nd Appellant/Applicant also contends that the Interested Party/6th Respondent made an oral application to discharge the interim orders in place pending the hearing of the case, and the ruling rendered is the basis of the appeal.
17. It was his contention that the ruling effectively allows the Interested Party to continue with the construction on the basis that the balance of convenience tilts in her favor.
18. The 2nd Appellant/Applicant contends that they are aggrieved because the Interested Party had gone on with the construction in disregard of the orders issued by the court that were existing by the time she applied to be joined in the proceedings despite their complaints to the court.
19. The 2nd Appellant/Applicant also contends that the Interested Party took advantage of the Covid-19 pandemic court closures and general court interruptions to increase the progress of construction.
20. The 2nd Appellant/Applicant further contends that the net effect of the ruling is that a party who is in contempt of court orders is rewarded by getting an interpretation of balance of convenience in her favor.



21. The 2nd Appellant/Applicant contends that there was no order for depositing of any security of costs and the effect would be that if the appellants won the case, they will be looking at the prospect of either buying out a completed premise with tenants or the flip side, starting fresh litigation with third party tenants and the complexities of demolishing a huge building in an urban area.
22. It is his contention that the most realistic proposition would have been to give a hearing date on a priority basis or have the Interested Party place a substantial security for costs for instance a sum of Kshs. 10,000,000.00 such that both parties would share the risks as each of them holds documents a court appointed professional has identified.
23. The 2nd Appellant/Applicant contends that the application by the Interested Party was defective and the court in the ruling found as much.
24. The 2nd Appellant/Applicant further contends that the orders sought were for setting aside the ruling of 29th July 2020 and all consequential orders pending the hearing and determination of the application inter partes.
25. The 2nd Appellant/Applicant also contends that the court for strange reasons suo motu amended the application to read that the orders sought were pending the hearing and determination of the main suit without indicating the basis as it assisted a party to amend its pleadings and consequently pursuant to such substantive amendments gave orders in favor of the beneficiary of the amendment.
26. It is his contention that although the parties described the suit properties differently, the court in its ruling adopted the description of Plot No. 469 Site and Service Scheme Kabati and now it is not clear if this is now deemed to incorporate Plot UNS. Residential/ Plot No. 469/Naivasha Municipality.
27. The 2nd Appellant/Applicant also contends that the Interested Party/6th Respondent's application filed on 10th August 2020 annexed to her the supporting affidavit the Notice of Motion application dated 6th August 2020 which attached pictures that showed that the structure was at its formative stages and the Interested Party admits to have been served with an order of injunction at this stage.
28. It is his contention that the ruling issued by the court stated that three floors were already constructed with the construction headed to the fourth floor which was an illegality as the orders of injunction were in place when the construction was going on.
29. The 2nd Appellant/Applicant contends a party should not benefit from mischief they have deliberately engineered to circumvent the ends of justice.
30. He ends his deposition by stating that the application for reinstatement of orders be granted with cost.

6th Respondent's Response To The Application.

31. In response to the application, the 6th Respondent filed a Replying Affidavit sworn on 18th May 2022.
32. She deposes that she is advised by her advocates on record that the application is fatally flawed and brought in utmost bad faith as the orders sought may not issue.
33. She further deposes that the Appellant/Applicant herein filed the lower court suit in 2016 and listed the suit property among the properties that he was laying a claim over but failed to join her in the suit.
34. She also deposes that she had taken up possession of the suit property immediately after purchase, erected a fence and commenced construction.



35. She deposes that she only became aware of this suit when she was served with the court order while the construction was going on.
36. She further deposes that it is not accurate that the construction begun after issuance of the court order and upon service of the said order, she instructed her advocates to file an application for joinder as an interested party which application was allowed and an order of Status quo granted.
37. She also deposes that she was advised by her advocates on record that the process leading to the issuance of the ruling is one that afforded the court an opportunity to discern the issues bedeviling the parties.
38. She deposes that the site visit was important and that it was done in the presence of the County Surveyor and the parties involved which assisted the court in making its determination.
39. She further deposes that the site visit ascertained that she was on the suit property and had commenced construction that stalled at the 4th floor because of the orders of status quo.
40. She also deposes that it is not in contention that both parties lay claim over the same property but the Appellant/Applicant has concealed vital information.
41. She deposes that the Appellant/Applicant holds title documents reading T.O.L Kabati 469 and according to the surveyors report dated 30th June 2021 titled 'Addendum to the Surveyor's Report on Civil Case No. 339 of 2016', the surveyor asserted that the records relating to T.O.L Kabati 469 held at the county offices indicate the owner to be Julius Kungu Mungai.
42. She further deposes that the said Julius Kungu Mungai is not among the persons listed as Defendants in the suit before the subordinate court and therefore it is not correct that the construction embarked on at the subject property was the sole reason that persuaded the trial court in lifting the orders of Status quo.
43. She also deposes that she demonstrated that the title documents she holds relate to the suit land and she has a prima facie case over and above the fact that the balance of convenience tilts in her favour.
44. She ended her deposition by stating that in any event damages are available to the party that succeeds and at no point in time did the Appellants/Applicants move the court in an application requiring either party to deposit security in court.

Issues For Determination.

45. The Appellants/Applicants filed their submissions on 9th June 2022 while the 6th Respondent filed her submissions on 18th July 2022.
46. The Appellants/Applicants gave a background of the Appeal, a summary of the facts and relied on Order 40 Rule 1 of the *Civil Procedure Rules* and the cases of Nairobi Civil Appeal No. 44 of 2014 *Naftali Ruthi Kinyua vs Patrick Thuita & Another* and Nairobi Civil Application No. 32 of 2008 *Pankaj Vrajlala Somaia vs Bill Kipsand Rotich & 2 Others*.
47. The Appellants/Applicants submitted that the trial court in changing its mind in the middle of the case needed to demonstrate why it opened up the suit property for wastage instead of hearing the matter on a priority basis.
48. The 6th Respondent in her submissions reiterated the contents of her replying affidavit, relied on the case of *Nguruman Limited vs Jan Bonde Nielson & 2 Others* [2014] eKLR and submitted that the Appellants/Applicants have not demonstrated how the trial magistrate erred in arriving at the impugned decision.



49. The 6th Respondent further relied on the cases of *Mbogo v Shah* [1968] EA 93, *American Cyanamid Co. (No. 1) vs Ethicon Ltd* [1975] UKHL and concluded her submissions by seeking that the application be dismissed.

Analysis And Determination.

50. After considering the application, the affidavit in support, the response thereto and the rival submissions of the parties, it is my considered view that the following issues arise for determination:
- a. Whether the orders issued on 29/07/2020 should be reinstated pending the hearing and determination of the lower court case and/or whether the 6th Respondent should be ordered to deposit security in the lower court case.
 - b. Who shall bear the cost of this application?

A. Whether the orders issued on 29/07/2020 should be reinstated pending the hearing and determination of the lower court case and/or whether the 6th Respondent should be ordered to deposit security in the lower court case.

51. The application is expressed to be brought pursuant to the provisions of Section 3A of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#).
52. Section 3A speaks to the inherent powers of the court while Order 42 Rule 6 of the [Civil Procedure Rules](#) provides for stay pending appeal. This, however, is not an application seeking orders of stay pending appeal.
53. I shall proceed to determine this application, under the provisions of Article 159(2) (d) of the [Constitution](#) of Kenya, 2010 and Section 1A, 1B and 3A of the [Civil Procedure Act](#).
54. I also note that the orders issued on 29th July 2020 are not annexed to the application. The only order annexed is that of 20th April 2022.
55. The said orders of 20/4/22 are subject of this Appeal. My understanding is that they vacated the orders of temporary injunction issued on 29th July 2020 against the Defendants. The orders of temporary injunction prohibited the defendants from making unauthorized entry on land parcel No. Plot.UNS/ Residential/Plot No. 469 Site and Service Scheme Kabati.
56. My considered view is that if the prayer for reinstating the orders issued on 29th July were to be granted, there would be no appeal left to be heard. Essentially, this application goes into the merits of the appeal.
57. The Appellants/Applicants are also seeking that the court orders the 6th Respondent to deposit security for costs in the lower court case.
58. Order 26 Rule 1 of the [Civil Procedure Rules](#) provides as follows;

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”

59. The Court in the case of [Mutethya Ali v Gregory Mathew Kyalo](#) [2022] eKLR stated as follows:

The power to order security for costs is discretionary as can be seen from the use of the word “may” above. In the case of *Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru*, HCCC No 146 of 2004 the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be



able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed. It is not enough to allege that a Respondent will be unable to pay costs in the event that she is unsuccessful. The same must be proven. Further, in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court emphasized that:

“In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

60. In the present matter, the Appellants/Applicants have not laid a basis for the grant of orders for security of costs. In any event, this is a matter for the trial court to consider and make a determination.

B. who shall bear the costs of this application?

61. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

62. I find that the Notice of Motion application dated 11/5/22 lacks merit and the same is dismissed with costs to the 6th Respondent.
63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6th DAY OF DECEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of:-

Mr. Gitau for the Appellants/Applicants.

No appearance for the 6th Respondent.

Court Assistant; Ms. Monica Wanjohi.

