



**Mkala v Kinago & 2 others (Environment and Land Appeal  
E012 of 2024) [2025] KEELC 5855 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 5855 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**LL NAIKUNI, J**

**MAY 28, 2025**

**BETWEEN**

**MWAREMA KAINGU MKALA ..... APPELLANT**

**AND**

**KAEMA JAWA KINAGO ..... 1<sup>ST</sup> RESPONDENT**

**MWAVUMBO GROUP RANCH ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. The ruling of this Honourable Court regards a Notice of Motion application dated 29<sup>th</sup> August, 2024. It was brought by the Appellant/Applicant – Mwarema Kaingu Mkala against the Respondent herein pursuant to the provision of Sections 1A and 3B of the *Civil procedure Act*, Cap. 21; Order 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules, 2010.
2. As a background, the Notice of appeal herein is informed by the ruling of 31<sup>st</sup> July 2024 by Hon C K Auka [SRM] in Kwale MCELC No E059 of 2023. The Appellant dissatisfied with the dismissal of his application for temporary injunctive orders has now approached this court with an appeal. Further to the appeal the Appellant filed the instant application for injunction pending appeal and which is subject of this ruling.
3. Upon effecting service, the application was opposed by a 1<sup>st</sup> Respondent through filing of Replying Affidavit dated 6<sup>th</sup> November, 2024 and whose contents are outlined in this ruling.

**II. The Appellant/Applicant's Case**

4. The Appellant's sought for the following orders:-



- a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of this application inter - partes this Honourable Court be pleased to grant conservatory orders by way of injunction barring the release of any compensatory monies by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in respect of the suit property measuring 8.0674 hectares and numbered Mwavumbo 409 and Mwavumbo 804 by the 3<sup>rd</sup> Respondent for purposes of compensation for Muache Multi Purpose Dam Project
  - d. That pending the hearing and determination of this application this honourable court be pleased to grant conservatory orders by way of injunction barring the release of any compensatory monies by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in respect of the suit property measuring 8.0674 hectares and numbered Mwavumbo 409 and Mwavumbo 804 by the 3<sup>rd</sup> Respondent for purposes of compensation for Muache Multi Purpose Dam Project
  - e. That pending the hearing and determination of this appeal herein this honourable court be pleased to grant conservatory orders by way of injunction barring the release of any compensatory monies by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in respect of the suit property measuring 8.0674 hectares and numbered Mwavumbo 409 and Mwavumbo 804 by the 3<sup>rd</sup> Respondent for purposes of compensation for Muache Multi Purpose Dam Project
  - f. That the costs of this application be provided for.
5. The application was based on the grounds, testimonial facts and the averments of the 9 Paragraphed supporting affidavit of Mwarema Kaingu Mkala. He averred as follows that:-
- a. He was the Appellant/Applicant herein and hence competent to swear this affidavit.
  - b. On 31<sup>st</sup> July, 2024, the Lower Court in Kwale – MCELC/059 of 2023 – Mwarenga Kaingu Mkala – Versus – Kaema Jawa Kinango & 2 Others” delivered a Ruling dismissing his application for injunctive orders against the release of compensation monies by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in respect of the suit property measuring 8.0674 hectares and numbered Mwavumbo/409 and Mwavumbo/804 by the 3<sup>rd</sup> Respondent for purposes of compensation of the Mwache Multi purpose dam Project.
  - c. He was dissatisfied with the ruling of the lower court and had lodged an appeal against it.
  - d. Currently compensation monies was being released by the 3<sup>rd</sup> respondent to various beneficiaries and the Appellant stood to suffer irreparable harm if the compensation monies for the suit property were to be released to the 1<sup>st</sup> Respondent.
  - e. Further, the 3<sup>rd</sup> Respondent never opposed the application before the lower court and as such it was fair that the applicant be granted a fair hearing.
  - f. The Applicant was apprehensive that in the event the monies were to be released to the 1<sup>st</sup> Respondent, the appeal would be rendered nugatory and that would be highly prejudicial to his case.
  - g. The dispute over the suit property had been raging for years and it would be proper for the issues to be settled before compensation.
  - h. The court was urged to allow the application as prayed.



### III. The responses by the Respondents

6. In opposing the application, the 1<sup>st</sup> Respondent, Kaema Jawa swore and filed an 11 Paragraphed Replying Affidavit dated 6<sup>th</sup> November 2024 and an annexure marked as “KK – 1” annexed thereto. He stated as hereinbelow that:-
  - a. He was the 1<sup>st</sup> Respondent herein well conversant with the facts of this case and competent to swear the affidavit.
  - b. The current application and the appeal emanated from an order by Hon C. K Auka [SRM] dated 31<sup>st</sup> July 2024 dismissing the Appellant’s application which had no basis and was not merited.
  - c. From the supporting affidavit the had not attached any Memorandum of Appeal to convince the court that he had an arguable appeal with high chances of success.
  - d. Just like in the sub – ordinate court’s application where the Applicant failed to prove his case, the current application did not provide and evidence upon which the Honourable Court could refer to and consider and thus the sub – ordinate court had no option but to dismiss it.
  - e. The 1<sup>st</sup> Respondent was the gazetted owner of all that parcel referred to Mwavumbo/409 and Mwavumbo/804 annexed as KK – 1” annex.
  - f. The Appellant had not exhausted the avenues available for resolution of disputes concerning land under the group ranch level.
  - g. The provisions of Section 116 of the Land Act, No. 6 of 2012 allowed the 3<sup>rd</sup> Respondent to go after any person wrongly compensated for refund of the monies received.
  - h. The Appellant/Applicant was aware that if any compensation had to be paid out by the 3<sup>rd</sup> Respondent, then it was purely on the basis of the Gazette Notice.
  - i. The Appellant/Applicant had his own land in different places and had been gazetted for compensated.
  - j. The appeal had no chances of success.
  - k. The court was urged to dismiss the application for lack of basis.

### IV. Submissions

7. Upon this matter coming before court on 17<sup>th</sup> February 2025, in the presence of the Learned Counsels for the Applicant and the 1<sup>st</sup> Respondent, it was ordered that the same be dispensed off with by way of written submissions. Both parties have complied and the court. Pursuant to this the Honourable Court reserved the 28<sup>th</sup> May, 2025 for delivery of Rulings herein.

### V. The Written Submissions by the Appellant/Applicant

8. The Law firm of Messrs. Mburu Kariuki & Co Advocates filed the Appellant/Applicant’s written submissions dated 16<sup>th</sup> January, 2025 on his behalf. M/s. Nduku Advocate commenced the submission by providing a detailed background of matter. She submitted by that the Appellant/Applicant had established a prima facie case by virtue of having been in occupation of the suit property for a long time. The said occupation had been confirmed by the 1<sup>st</sup> Respondent in his Replying Affidavit. The



court was asked to consider the dictum in the case of:- “Mrao - Versus - First American Bank Kenya Limited & 2 Others [2003] eKLR” on what a prima facie case entailed.

9. On irreparable harm it was submitted that the Appellant was at risk of having the whole appeal nugatory should the compensation funds be released to the 1<sup>st</sup> Respondent. That the issue of ownership of the suit properties had not yet been determined and such releasing the funds would be an injustice. That the 1<sup>st</sup> Respondent had not indicated in what way he was likely to be prejudiced in the event that the orders sought herein are issued in the interim. The Applicant submitted that the balance of convenience leaned towards granting the conservatory orders sought pending the hearing and determination of the appeal.
10. In conclusion the Appellant submitted that the application was merited, and it would be in the interest of justice that the same be allowed.

## **VI. The Written Submission by the 1<sup>st</sup> Respondent.**

11. The Law firm of Messrs. Odour Siminyu & Co Advocates submitted on behalf of the 1<sup>st</sup> Respondent. Mr. Siminyu Advocate provided a brief history of the matter was outlined. The Learned Counsel further submitted that for injunctive orders to be granted, the threshold set in the case of “Giella Versus Cassman Brown” had to be met. The same were summarised as establishment of a prima facie case, proof of irreparable harm and lastly if in doubt the court can make a decision based on a balance of convenience.
12. On a prima facie case, it was submitted that in the event of an appeal, the court ought to grant orders ensuring that the appeal would not be rendered nugatory. Reliance was placed on the case of:- “Butt Versus the Rent Restriction Tribunal CA No 6 of 1979. Further, the court was urged to consider the holding in the case:- “Patricia Njeri & 3 Others – Versus - National Museums of Kenya [2004] eKLR” on grant of injunction pending appeal.  
  
That from the application before court, a prima facie case had not yet been established. The application lacked any evidence for the court to consider.
13. On irreparable injury or harm. It was submitted that the suit properties belong to the 1<sup>st</sup> Respondent as evidenced by the gazette notice. That the Applicant had not shown court how he would suffer irreparable injury if the injunction was not granted. It was stated that the property was held by the 1<sup>st</sup> Respondent who was the lawful owner and hence no injury was to be suffered by the applicant. Further that in the event the compensation was made to a wrong party. The provision of Section 116 of the Land Act, No. 6 of 2012 provided for refund of the same.
14. On the last aspect of balance of convenience, it was submitted that having failed to meet the threshold in the first two conditions, the balance of convenience automatically tilted towards the 1<sup>st</sup> Respondent. That the conditions were to be met all at once and could not be separated. The 1<sup>st</sup> Respondent summarised his submissions by stating that the application lacked merit and was to be dismissed.

## **VII. Analysis & Determination**

15. I have keenly considered the application, the replies and the written submissions by both parties herein, the informative authorities and provisions of statute and the constitution relied upon.
16. In order to reach a just and informed decision, the following three (3) issues for determination arises:-
  - a. Whether the Notice of Motion application dated 29<sup>th</sup> August, 2024 by the Appellant/Applicant herein has any merit whatsoever.



- b. Whether the parties herein are entitled to the reliefs sought.
- c. Who will bear the costs of the application

**ISSUE No. a). Whether the Notice of Motion application dated 29<sup>th</sup> August, 2024 by the Appellant/ Applicant herein has any merit whatsoever.**

17. Under this Sub heading, the Honourable Court will be examining the substratum on granting stay of execution pending appeal. This court has discretion to grant injunction orders pending appeal under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010. The relevant part of Order Rule 6 of the Civil Procedure Rules, 2010 provides that:-

“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. The principles for grant of temporary injunction pending appeal are settled. In the case of “Patricia Njeri & 3 Others – Versus - National Museum of Kenya [2004] eKLR”, the court gave the following principles as governing grant of temporary injunction pending appeal:-

- 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 great hardship than 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 in Giella vs. Cassman Brown [1973] EA 358.”

19. The first point of departure for the court will be to establish whether the instant appeal can be termed as frivolous. The court in the case of: “Trust Bank Limited – Versus - Amin Company Limited & Another (2000) KLR 164” rendered itself on the same as follows:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?”

20. This court will not delve much into the merits of the appeal, however but from the pleadings it is noted that the application for injunctive orders before the lower court was dismissed. The Applicant/ Appellant is apprehensive of one fact, that in the event the payments are made to the 1<sup>st</sup> Respondent, the same will not only render the appeal herein nugatory but will further deny him the chance to be compensated for the land which according to him is legally and rightfully his.

21. The Appellant refers the court to the findings of the lower court on ownership of the suit property and states that the court was clear; ownership could only be determined after hearing both parties. I do not seem to find anything frivolous with the appeal as I believe the issues raised are substantial



in determining who the owner of the suit property is and hence who the rightful beneficiary for compensation should be.

22. In determining whether or not to grant the injunctive orders sought, the court has been asked to consider the conditions for injunctions that were settled in the celebrated case of “Giella – Versus - Cassman Brown & Company Limited (1973) E A 358” where the Court expressed itself in the following terms:

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

23. Has a prima facie case been established? In the case of:- “Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal on the definition of a prima facie case stated:-

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

**ISSUE No. b). Whether the parties are entitled to the reliefs sought.**

24. Under this sub title, the Honourable Court will consider whether the parties are entitled to the reliefs sought. However, as I do that let the court to digress abit. The process of compulsory land acquisition is provided for under the provision of Section 107 of the *Land Act*. The process commences with submission of a request from the National or county governments to the Commission for acquisition of land on its behalf. Under subsection 4 if the Commission is satisfied that the request meets the requirements of Section 107 (2) and Article 40 (3) of *the Constitution* the Commission shall;

- a) cause the affected land to be mapped out and valued by the Commission using the valuation criteria set out under this Act; and
- b) establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land, confirming for each such occupation how much time they have been in uninterrupted occupation or ownership of interest in the land prior to the date of the request for acquisition of the land, and the improvements thereon.



Subsection 5 provides that;

“Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land”

25. The 1<sup>st</sup> Respondent has provided this court with a gazette notice indicating him as the lawful owner of the property having been gazetted for compensation. The ownership is disputed by the Appellant/Applicant who states that he has been in occupation of the suit property together with his family, a fact that was not disputed by the 1<sup>st</sup> Respondent. That with that in mind the court should first seek to establish ownership of the suit property before the 3<sup>rd</sup> Respondent effects compensation to a wrong party. Based on this this court finds that a prima facie case has been established.

26. The next issue to be determined is whether the Applicant has demonstrated substantial loss in the event that the application is not allowed. Having established that there is a contest as to who the rightful owner of the suit properties is, the Applicant has in my opinion given a basis for being apprehensive of compensation being paid to a wrong party. For that reason, the issue of substantial loss is proved. the Court of Appeal in case:- “Madhupaper International Limited – Versus - Kerr [1985] KLR 840” to aptly apply to the facts of this case:-

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.”

27. The balance of convenience automatically tilts towards the Appellant.

28. Is the appeal by any chance an arguable one? An arguable Appeal is not one which must necessarily succeed, but it is one that ought to be argued fully before the Court. See the case of “Kenya Commercial Bank - Versus - Nicholas Ombija (2000) eKLR”. Also the Court of Appeal dictum in the case:- “Stanley Kang’ethe Kinyanjui – Versus - Tony Keter & 5 Others [2013] eKLR”

“The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.

29. See also the case of:- “Denis Mogambi Mong’are – Versus - Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same Court stated that:-

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

30. The above definition spells out an arguable appeal. Will the refusal of the appeal inflict greater hardship and render the appeal nugatory? I doubt so. I have noted from the proceedings in the lower court that the court established neither of the parties have the land registered in their names. The Appellant has in seeking the injunctive orders not proved his stake on the land in terms of what the alleged use by the Respondents is causing him.



31. I will again restrict myself into diving so much into this issue so as not to pre-empt findings that will have to be made at the end of the appeal. For now, with regards to grant of the temporary injunction to prevent payment of compensation to the 1<sup>st</sup> Respondent, I strongly find that indeed the issue of hardship has been demonstrated on the part of the Appellant.
32. The appeal will be rendered nugatory if the orders sought are not granted for the reason that the gist of the appeal is the impending compensation, the issue of ownership of the suit property comes in second. For these reasons, I discern that the Appellant/Applicant is entitled to the reliefs sought.

**ISSUE No. c). Who will bear the costs of the application**

33. It is trite that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action of proceeding in any litigation. The Provision of 27 (1) of the Civil Procedure Act, Cap. 21 provides that costs follow the event, By the event it means the outcome or results of the legal action.
34. In the instant case, the Appellant/Applicant has successfully prosecuted his application and is hence entitled to costs.

**VIII. Conclusion and disposition**

35. Consequently, upon causing indepth analysis to the framed issues, the Honourable Court arrives at the following conclusion and proceeds to award the orders:-
  - a. That the Notice of Motion application dated 29<sup>th</sup> August 2024 be and is hereby merited and thus allowed.
  - b. That pending the hearing and determination of this appeal herein this Honourable Court be pleased to grant conservatory orders by way of injunction barring the release of any compensatory monies by the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> Respondent in respect of the suit property measuring 8.0674 hectares and numbered Mwavumbo 409 and Mwavumbo 804 by the 3<sup>rd</sup> Respondent for purposes of compensation for Mwache Multi Purpose Dam Project.
  - c. That an order made for the Appellant/Applicant to compile and serve the Record of Appeal within the next 21 days and the matter be mentioned on 15<sup>th</sup> July, 2025 for the admission of the appeal and taking direction under the provision of Section 79B of Civil Procedure Act, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010. on a priority basis.
  - d. That costs be and is hereby awarded to the Appellant/Applicant.

It Is Ordered Accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS**

**VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS**

.....28<sup>TH</sup> ..... DAY OF ..... MAY .....2025

.....

**HON. MR. JUSTICE L.L NAIKUNI,**

Environment & Land Court

At

Kwale.



Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Nduku Advocate for the Appellant/Applicant.
- c. Mr. Siminyu Advocate for the Respondent.

