Murumia (Sued as the legal representative of the Estate of Murumia Murathi - Deceased) v Manyara (Environment and Land Appeal E090 of 2024) [2025] KEELC 360 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 360 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E090 OF 2024

JO MBOYA, J

FEBRUARY 5, 2025

BETWEEN

JAMLICK MURUMIA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MURUMIA MURATHI - DECEASED) ..... APPELLANT

AND

WILSON MWIRIGI MANYARA ..... RESPONDENT

RULING

Introduction and Background

1. The Appellant/applicant [herein after referred to as the Applicant] has approached the Honourable Court vide Notice of Motion Application dated 18.12.2024 and wherein same [Applicant] has sought for the following reliefs:

    i. That this Application be certified as urgent and the same be heard Ex-parte in the first instance.

    ii. That the Honourable court be pleased to issue an order of stay of execution of Ex-parte Judgment, decree and all subsequent orders in Nkubu PM ELC Case No. E039 of 2019 pending hearing and determination of this application inter-partes.

    iii. That the Honourable court be pleased to issue an order of inhibition, inhibiting any dealings in relation to L.R No. Abogeta/U-Kithangari/2966 pending the hearing and determination of this application inter-partes.

    iv. That the Honourable court be pleased to issue an order of injunction barring the respondent either by himself, his agents, assigns, servants or successors in title from entering in any way dealing with L.R No. Abogeta/U-Kithangari/2966 pending hearing and determination of this application inter-partes.

v. That the Honourable court be pleased to issue any other or better relief as shall meet the end of justice.

vi. That the costs of this Application be borne by the Plaintiff/Respondent.

2. The instant application is premised and anchored on a plethora of grounds numbering 24 in total; and which grounds have been enumerated in the body of the application. Furthermore, the application beforehand is supported by the affidavit of Jamlick Murumia [Deponent] sworn on even date and to which the deponent has annexed a total of Thirteen [13] documents.

3. Upon being served with the subject application, the Respondent filed a Replying affidavit sworn on 20th January 2025 and to which the deponent has annexed a total of Eleven [11] documents. Moreover, the Respondent has contended that the Applicant herein has neither established nor demonstrated a basis for the grant of the orders of stay of execution pending the hearing and determination of the appeal or at all.

4. Additionally, the Respondent has averred that even though the Applicant is seeking for the issuance of an order of temporary injunction as well as an order of inhibition, respectively, the Applicant herein is neither the registered owner nor proprietor of the suit property. To this end, it has been averred that the application beforehand is not only premature and misconceived, but same constitute an abuse of the due process of the court.

5. The instant application came up for directions before the court on 15th January 2025; whereupon the advocate[s] for the respective parties covenanted to canvass and dispose of same vide written submissions. In this regard, the court proceeded to and prescribed [circumscribed] the timelines for the filing and exchange of the written submissions.

6. The Applicant filed written submissions dated 23rd January 2025; whereas the Respondent filed written submissions dated 28th January 2025. Both sets of written submissions form part of the record of the court.

Parties Submissions

a. Applicant's submissions

7. The Applicant filed written submissions dated 23rd January 2025 and where in the Applicant adopted the contents of the grounds highlighted at the foot of the applications. In addition, the Applicant also reiterated the averments contained in the body of the supporting affidavit. Besides the Applicant also highlighted the contents of various annextures attached to the supporting affidavit.

8. Furthermore, learned counsel for the Applicant ventured forward and highlighted three [3] salient issues for consideration and determination by the court. Firstly, learned counsel for the Applicant has submitted that the dispute before hand touches on and concerns L.R No. Abogeta/U-Kithangari/2966 [suit property]. Besides, it was submitted that the suit property herein is currently registered in the name of Winfred Kinoti Nkonge.

9. It was the further submission by learned counsel for the Applicant that even though the matter proceeded before the trial court; the Respondent herein did not serve Wilfred Kinoti Nkonge. In this regard, it has been posited that the said Wilfred Kinoti Nkonge, who is the registered proprietor of the suit property was neither informed nor notified of the proceedings before the subordinate court.

10. Secondly, learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated sufficient basis to warrant the grant of the orders sought. In this regard, learned

counsel for the Applicant has contended that same has met and satisfied the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010.

11. To buttress the submissions underpinned by the provisions of order 42 Rule 6 of the Civil Procedure Rules, Learned counsel for the Applicant has cited and referenced various decisions including Butt vs Rent Restriction Tribunal (1979) eKLR and RWW vs EKW (2019) eKLR, respectively.

12. Thirdly, learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated a basis for the grant of temporary injunction to restrain the Respondent from alienating, dealing with and or otherwise disposing off the suit property. For good measure learned counsel for the Applicant has submitted that there is a likelihood that the suit property may be alienated during the pendency of the appeal.

13. Premised on the foregoing, learned counsel for the Applicant has submitted that the Applicant has therefore demonstrated the existence of a prima-facie case and a likelihood of irreparable loss arising if the orders of temporary injunction are not granted.

14. Finally, learned counsel for the Applicant has submitted that the Applicant has proven a basis to warrant the grant of an order of inhibition. To this end, learned counsel for the Applicant has sighted and referenced the provisions of Section 68 of the *Land Registration Act* 2012.

15. In particular, learned counsel for the Applicant has posited that an order of inhibition ought and should issue provided that the claimant has laid a basis for the grant of same.

    To underscore the submissions touching on and concerning the necessity to grant an order of inhibition, learned counsel for the Applicant has cited and referenced the case of Dorcas Muthoni and 2 others vs Michael Ireri Ngari (2016) eKLR.

16. Arising from the foregoing submissions, learned counsel for the Applicant has impressed upon the court to find and hold that the application before hand is meritorious. In this regard, it has been contended that the court should proceed to and allow the application.

b. Respondents submissions

17. The Respondent filed written submissions dated 28th January 2025 and wherein same [Respondent] has adopted and reiterated the averments contained in the body of the Replying affidavit. In addition, the Respondent has canvassed and highlighted Three [3] pertinent issues for consideration and determination by the court.

18. First and foremost, learned counsel for the Respondent has submitted that the Applicant herein has not laid a basis to warrant the grant of an order for stay of execution pending the hearing and determination of the appeal. In any event, it has been contended that the subject application has no prayer seeking for an order of stay of Execution pending the hearing and determination of the appeal.'

19. On the contrary, it has been submitted that the only prayer which has been sought by the applicant relate[s] to and concerns the grant of an order of stay of execution pending the hearing and determination of the application [Inter-partes] and not otherwise.

20. To the extent that the Applicant has neither pleaded nor sought for an order of stay pending the hearing and determination of the appeal, it has been submitted that the court is therefore deprived and divested of the requisite jurisdiction to grant such an order. For coherence, it has been submitted that parties are bound by their pleadings and hence the Applicant herein must stand or fall, on the basis of what same [Applicant] has pleaded.

21. Furthermore, it has been posited that parties are not at liberty to depart from their pleadings and thereafter seek orders outside the four corners of their pleadings. In this regard, it has been submitted that the prayer for an order of stay pending appeal is legally untenable.

22. Secondly, learned counsel for the Respondent has submitted that the application beforehand has been made with unreasonable and inordinate delay, which has neither been accounted for nor explained. To this end, it has been submitted that whosoever seeks to procure and or partake of an order of stay of execution pending appeal is obligated to move the court without unreasonable delay.

23. On account of the delay and taking into account that the impugned judgment was rendered on 11th January 2024, learned counsel for the Respondent has submitted that the application beforehand is defeated by the doctrine of laches.

24. Thirdly, learned counsel for the Respondent has submitted that the prayer for temporary injunction and an order of inhibition, have been made in vacuum. In particular, it has been submitted that the Applicant herein is not the registered proprietor of the suit property and hence same [applicant] is not disposed to suffer any loss, harm, injury and or damage, whatsoever if the order sought are not granted.

25. Further and at any rate, learned counsel for the Respondent has submitted that the Applicant has neither established nor demonstrated the requisite ingredients espoused vide the decision in Giella vs Cassman Brown Ltd (1973) E.A 353. In this regard, it has been contended that the application for temporary injunction is therefore misconceived and does not lie.

26. In the circumstances, learned counsel for the Respondent has implored the court to find and hold that the application beforehand is devoid of merits and thus same [application] ought to be dismissed with costs.

Issues For Determination:

27. Having reviewed the application and the response thereto, and upon taking consideration of the written submissions filed by and on behalf of the respective parties, the following issues crystallize [emerge] and are thus worthy of determination.

    i. Whether the Applicant has established and demonstrated a basis to warrant the grant of an order of stay of execution pending the hearing and determination of [sic] the appeal.

    ii. Whether the Applicant has laid a basis to warrant the grant of an order of temporary injunction or otherwise.

Analysis And Determination

Issue No. 1 Whether the applicant has established and demonstrated a basis to warrant the grant of an order of stay of execution pending the hearing and determination of [sic] the appeal.

28. The application before the court seeks a plethora of reliefs, [whose details have been captured and highlighted on the face thereof]. Pertinently, one of the reliefs that has been sought by the Applicant herein touches on and concerns the grant of an order of stay of execution of the ex-parte judgment, decree and or subsequent orders in Nkubu PM ELC No. E039 of 2019.

29. However, even though the Applicant has sought for an order of stay [details highlighted in the preceding paragraphs], it is imperative to point out that the order of stay of Execution has been sought for pending the hearing and determination of this application inter-partes. To my mind, the relief

pertaining to the order of stay of Execution is only intended to last until the inter-partes hearing of the application and not otherwise.

30. Pertinently, the Applicant herein appears not to be interested in any order of stay of execution pending the hearing and determination of the appeal. For good measure, the Applicants interest and desire is limited to the inter-partes determination of the application.

31. The question that does arise, is what happens following the determination of the application inter-partes. Suffice to underscore that the kind of orders sought for by the applicant herein are incomprehensible and do not address the reality on the ground.

32. Be that as it may, it is not lost on this court that courts do not issue orders for the sake of it. Furthermore, there is no gainsaying that court orders are never issued in vain or futility. In this regard, it is evident and apparent that if the court were to issue the kind of order[s] that has been captured at the foot of prayer 2, then the court will be acting in vanity nay futility.

33. Other than the foregoing, it is also worthy to underscore that an order of stay of execution pending appeal [which is not the one sought] can only issue to avert substantial loss. Simply put, substantial loss is the cornerstone and or key pillar upon which an order of stay of execution pending appeal is founded/anchored.

34. In the premises, it then means that every claimant, the applicant not excepted, who is desirous to partake of and benefit from an order of stay of execution pending appeal must prove and or substantiate that same [claimant] is disposed to suffer substantial loss. Instructively, such an applicant must depose to substantial loss in the affidavit and thereafter substantiate same.

35. Furthermore, it is also imperative to highlight that substantial loss is not to be speculated upon; imagined; and or inferred. For coherence, same must be expressly alluded to and authenticated.

36. However, in respect of the instant matter, the Applicant has neither adverted to nor substantiated the likelihood of substantial loss arising. In any event, the Applicant has not even mentioned [just mention] substantial loss in the body of the application.

37. In the absence of proof of substantial loss, there is no gainsaying that an Applicant, the one beforehand not excepted, cannot procure and or benefit from an order of stay of execution.

38. Without belaboring the importance of substantial loss, it suffices to cite and reference the decision in where the court Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] eKLR, where the Court of Appeal [per Platt JA] stated thus;

> It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.

39. The primacy [centrality] of substantial loss was also highlighted by the court in the case of James Wangalwa v Agnes Naliaka Cheseto [2012]eKLR, where the court stated as hereunder;

> 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case

here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

> "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.

12. The Applicants in their Memorandum of Appeal have raised a question of res judicata. They alleged that the case being appealed against is res judicata since the same issues were determined in Sirisia Magistrate's Court Miscellaneous Application No. 4 of 2001. That is an arguable point of law except the proceedings with regard to Sirisia Magistrate Miscellaneous Application No. 4 of 2001 were not annexed.

40. Lastly, I beg to address the question of timeliness. Suffice it to posit that an Applicant desirous to partake of an order of stay of execution is obliged to file the application timeously and without unreasonable and inordinate delay.

41. On the other hand, where the application is made and or mounted with some degree of delay, [like in the instant one] then it behooves the applicant to account for and or give explanation for the delay. In any event, it is worthy to recall that it is the reasons, if any; that are granted that would enable the court to discern whether to exercise equitable discretion in favour of the applicant.

42. The importance of reasons, if any; for the delay to act with due promptitude has been highlighted in numerous decisions. In particular, the necessity to provide plausible, cogent and credible reasons for delay was elaborated in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), wherein the Court [per Mativo JA] stated thus:

> In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay.
>
> The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

> Equally important is that an application for condonation must be filed without delay and/ or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

43. Back to the instant matter. It is evident that the judgment and decree which underpin the current application was rendered on on 11th January 2024; yet the application was not filed until the 18th December 2024.

44. To my mind,[s] the timeline taken is not only unreasonable but inordinate. Moreover, it is not lost to the court that no reason/ explanation has been supplied for the delay.

Issue No. 2 Whether the applicant has laid a basis to warrant the grant of an order of temporary injunction or otherwise.

45. Other than the prayer for stay of execution, pending the hearing and determination of the application inter-partes, which has been addressed in the preceding paragraphs; the applicant herein has also sought for the orders of temporary injunction.

46. Instructively, the orders of temporary injunction which have been sought for in the body of application have been worded and crafted such that same are [sic] to subsist until the hearing and determination of the application inter-partes.

47. My understanding of the import and tenor of the prayer for temporary injunction is to the effect that same, [if granted], ought to last until the application is heard and determined. Quite interestingly, the question that remains lingering is what next after the application is heard and determined.

48. Surely, the Applicant had his learned counsel should revert to the drawing board and appreciate the dichotomy between an interim order whose purport is to last pending inter-partes hearing and the temporary order, whose purport is to subsist pending the hearing and determination of the appeal, if any or the intended appeal.

49. Be that as it may, Kenya subscribes to the adversarial legal system. In this regard, it suffices to posit that parties, the applicant not excepted, are bound by their pleadings. Furthermore, the courts are equally bound by the pleadings filed by the parties [see Order 2 Rules 6 of the Civil Procedure Rules 2010].

50. Notably, the legal import and tenor of the adversarial legal system has been highlighted and elaborated upon in a number of decisions. However, it suffices to cite and reference the decision in IEBC vs Stephen Mutinda Mule (2013) eKLR where the Court of Appeal stated thus;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.
>
> It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or Defence not made by the parties.

> To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

51. Suffice to state that on this account alone, I would have been constrained to proclaim that the order of injunction sought by the Applicant herein is misconceived and legally untenable.

52. However, there is yet another aspect that warrants consideration. The perspective herein relates to whether the Applicant has demonstrated the existence of a prima facie case with probability of success or otherwise.

53. To start with, the Applicant himself concedes that the suit property was transferred to and is currently registered in the name of Wilfred Kinoti Nkonge. [See paragraph 9 of ther grounds in support of the Application]. However, there is no gainsaying that the said Wilfred Kinoti Nkonge is not a party in respect of the instant matter.

54. In the absence of Wilfred Kinoti Nkonge, [who is the registered owner of the suit property] it is evident that any order that may issue in respect of the instant matter, would be contrary to and in contravention of the right to Fair hearing; due process of the law and the rules of natural justice. Moreover, such an order would also be in contravention of Article 50 of *the Constitution* 2010.

55. Notwithstanding the foregoing, the critical question relates to whether the Applicant herein has any rights over and in respect of the suit property. In my humble view, without having any rights over and in respect of the suit property, one wonders what prima facie case the applicant herein has as pertains to the suit property.

56. Sadly, I come to the conclusion that the Applicant herein has neither established nor demonstrated the existence of a prima facie case. In the absence of a prima facie case, this court is not enjoined to venture forward and address the question of irreparable loss.

57. Pertinently, the conditions to be established and demonstrated before one can partake of an order of temporary injunction are sequential in nature. It then means that if an applicant does not surmount the first hurdle [prima facie case]; then court ought not to waste precious Judicial time on interrogating irreparable loss.

58. Before departing from this issue, I beg to cite and reference the decision in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the Court of Appeal stated and held as hereunder:

> If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.

59. I am afraid that the totality of the evidence on record does not warrant the grant of the application beforehand. For coherence, the Applicant herein has failed to meet and or satisfy the conditions espoused vide Giella vs Cassman Brown Ltd (1973) E.A 358; Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR and Nguruman Ltd vs Jan Bonde Nielsen & others (2014) eKLR, respectively.

Final Disposition:

60. Flowing from the analysis [details highlighted in the body of the ruling] it must have become apparent that the application beforehand is not only premature and misconceived, but same constitute[s] an utter abuse of the due process of the court.

61. Consequently, and in the premises, the orders that commend themselves to the court are as hereunder;

    1. The Application dated December 18, 2024; be and is hereby dismissed.

    2. Costs of the Application are hereby awarded to the Defendant/Respondents

62. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 5TH DAY OF FEBRUARY 2025

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma – Court Assistant.

Miss Kerubo for the Appellant/Applicant

Miss Mugo for the Respondent