



Owour & 3 others (2nd and 3rd Appellants Suing as the Administrators of the Estate of Dr. John Moroiyiani Ole Tameno alias John Tameno - Deceased) v Senior Chief, Kibiko Location & 2 others (Environment and Land Appeal E039 of 2024) [2025] KEELC 3704 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E039 OF 2024
LC KOMINGOI, J
MAY 5, 2025**

BETWEEN

**GEORGE STEPHEN OWOUR 1ST APPELLANT
FRANCIS SANKALE OLE TAMENO 2ND APPELLANT
ALEXANDER PARMERES TAMENOH 3RD APPELLANT
MARY NAISIAE TAMENO 4TH APPELLANT
2ND AND 3RD APPELLANTS SUING AS THE ADMINISTRATORS OF THE
ESTATE OF DR. JOHN MOROIYIANI OLE TAMENO ALIAS JOHN TAMENO -
DECEASED**

AND

**SENIOR CHIEF, KIBIKO LOCATION 1ST RESPONDENT
KENYA RURAL ROADS AUTHORITY 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. This is the Ruling in respect of the Notice of Motion dated 20th of August 2024 brought under (Order 51 rule 1, Order 42 rule 6 of the Civil Procedure Rules (2010), Section 26 (1) of the [Land Registration Act](#), Cap 300 of the laws of Kenya and Article 159(2) (d) of the 2010 Constitution).
2. It seeks orders that:
 - i. Spent
 - ii. Spent



- iii. That the Honourable Court be pleased to grant an Order of stay of the execution of the Judgement and consequential decree made on the 22nd day of August 2024 by Hon. P. Achieng (CM) vide Ngong E.L.C. Case No. 41 of 2018 pending the hearing and determination of the instant appeal.
 - iv. That the Honourable Court be pleased to grant temporal injunction on any dealings in the Applicants' parcel numbers KJD/Ngong/Ngong/11423, Ngong/Ngong/2890, Ngong/Ngong/2895, Ngong/Ngong/2896 and Ngong/Ngong/2897 pending the hearing and determination of the appeal herein.
 - v. That the costs of this application to the Applicant.
3. The grounds are on the face of the Application and are set out in paragraphs 1 to 13. The application is supported by the Affidavit of George Stephen Owuor, the 1st Appellant/Applicant sworn on the 20th of September 2024 and that of Alexander Parmeres Tameno, the 3rd Appellant/Applicant sworn on the same date.
 4. The Application is opposed. There is a Replying Affidavit sworn on behalf of the 2nd Respondent on the 23rd of October 2024.
 5. On the 4th of December 2024, the Court directed that the Notice of Motion be canvassed by way of written submissions.

The Appellants'/Applicants' submissions

6. They are dated 27th December 2024. They raise two issues for determination:
 - i. Whether the orders sought should be granted.
 - ii. Costs of the suit
7. Counsel submitted that the Appellants acquired their respective titles legally without any fraud or illegal dealings. He has put forward the case of Vijay Morjaria VS Nansingh Madhusingh Darbar & Another [2000] eKLR.
8. It is also submitted that the Appeal has high chances of success hence the orders sought ought to be granted. Reliance is placed on Order 42 rule 6 (1) (2) and rule 4 of the Civil Procedure Rules and the case of Butt VS Rent Restriction Tribunal [1982] KLR 417; Consolidated Marine VS Nampijja & Another, Civil App. No.93 of 1989 (Nairobi); J.K. Industries VS Kenya Commercial Bank Ltd & Another [1987] KLR 506; Peter Munya VS Dickson Mwenda Kithinji & 2 others [2014] eKLR.
9. Counsel also submitted that there is an imminent action by the Respondents to construct a road reserve on the suit parcels hence the subject matter ought to be preserved pending appeal.
10. It is also submitted that the Application has been brought without undue delay. He has put forward the case of Utalii Transport Company Ltd & 3 others VS NIC Bank Ltd & another [2014] eKLR. He contented that the judgement was delivered on 22nd of August 2024 and this Application was filed on 20th September 2024.
11. It is further submitted that the Appellants stand to suffer to the effect that if the erection of the road proceeds, they will not be able to develop their properties as anticipated having acquired them legally. He has cited the case of Kenya Shell Ltd VS Benjamin Karuga Kibiru & Another [1986] eKLR.



12. Counsel also submitted that if the construction of the road proceeds, it will be difficult for the Appellants to regain their properties as the road is designed to be a public road. He has put forward the cases of James Wangalwa & Another VS Agnes Naliaka Cheseto [2012] eKLR; Shah Munge & Partners Ltd VS NSSF Board of Trustees & 3 others [2018] eKLR.
13. It is also submitted that the Appellants are willing to abide by the conditions as to security as shall be set by court. He has cited the case of Mohammed Salim t/a Choice Butchery VS Nasserpuria Memon Jamat [2013] eKLR.
14. It is finally submitted that costs follow the event hence the application ought to be allowed with costs to the Appellant. He has put forward the case of Party of Independent Candidate of Kenya & Another VS Mutula Kilonzo & Others HC PET. No. 6 of 2013. He prays that the application be allowed.

The 2nd Respondent's submissions

15. They are dated 13th January 2025. They raise four issues for determination:
 - i. Whether the Applicants have met the requirements for a grant of an order of stay of execution.
 - ii. Whether an order of stay of execution can be granted on a negative order.
 - iii. Whether the Applicants have met the requirements for the grant of a temporary injunction pending appeal.
 - iv. Costs of the suit.
16. Counsel relied on Order 42 rule 6 (2) of the Civil Procedure Rule and the case of Kamau VS Ruraya & 4 others [2022] KEELC 13323 KLR to submit that the Appellants have failed to demonstrate the requirements for the grant of stay of execution as there were irregularities in the manner in which the suit properties came into existence. Further that the Appellants have never been in possession hence have not demonstrated substantial loss.
17. Counsel also submitted that the judgement did not order parties to do anything or to refrain from doing anything. The orders granted are incapable of being stayed. He has put forward the case of Kaushik Panchamatia & 3 others VS Prime Bank Ltd & Another [2020] eKLR which cited with approval the case of Western College of Arts and Applied Sciences VS Oranga & others [1976] KLR 63.
18. It is also submitted that the Appellants are not entitled to orders of temporary injunction pending Appeal. He has cited the case of Raphael Mulinge Muthusi & 2 others VS Mary Ndila Nyolo which quoted with approval the case of Patricia Njeri & 3 others VS National Museum of Kenya [2004] eKLR.
19. It is also submitted that the Appeal herein is frivolous as the suit properties which are the subject of this case were found to have been irregularly acquired. The trial Court relied on the Ngong District Surveyor's report dated 2nd November 2021 which stated that there were irregularities in the manner in which the suit properties came into existence.
20. It is also submitted that the grant of temporary injunction would inflict hardship to the 2nd Respondent and the general public as it would cause an unreasonable delay in the demarcation of the road reserve which is the 2nd Respondent's statutory mandate as enshrined in Section 7 of the [Kenya Roads Act](#) and is for the benefit of the public. Further that the Court should be guided by the principles in Giella VS Cassman Brown [1973] EA 358.



21. It is also submitted that costs follow the event. The application ought to be dismissed with costs to the 2nd Respondent.

Analysis and Determination

22. I have considered the Notice of Motion, the Affidavit in support, the response thereto, the rival submissions and the authorities cited. The issues for determination are:

- i. Whether the Appellants' application meets the requirements set out in Order 42 rule 6 of the Civil Procedure Rules.
- ii. Whether the Appellants are entitled to a grant of temporary injunction pending appeal.
- iii. Who should bear costs of this application

23. Order 42 rule 6 of the Civil Procedure Rules provides that:

- “ 1) 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 from 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 to make such order 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 order set aside.
- 2) No order for stay of execution shall be made under subrule (1) unless –
 - a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b) 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.
- 3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- 4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- 5)
- 6)”

24. It is the Appellants' case that they will suffer substantial loss if these orders are not granted. They claim they will lose their suit properties if the 2nd Respondent proceeds to construct a road. In the case of



Feissal Amin Jan Mohammed t/a Dunvia Forwarders VS Shami Trading Company Ltd [2014] eKLR, Kasango J. stated as follows;

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security.”

25. Similarly, in the case of Antoine Ndiaye VS African Virtual University [2015] eKLR, Gikonyo J. cited the holding in Andrew Kuria Njuguna VS Rose Kuria Nairobi Civil Case of 224 of 2001. I have gone through the Affidavits in support and I am not convinced that the Appellants will suffer substantial loss. The report by the surveyor dated 2nd November 2021 concluded that there were irregularities in the manner in which the suit properties came into existence.
26. I find that the Appellants’ application does not meet the conditions set out under Order 42 rule 6 (2) of the Civil Procedure Rules.
27. The Appellants also seek orders of temporary injunction pending the hearing and determination of the appeal. In the case of Patricia Njeri & 3 others VS 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 one 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 of Giella Vs Cassman Brown [1973] EA 358.”
28. I have considered the Appellants’ application and I am not convinced that the appeal will be rendered nugatory if the orders of injunction are not granted.
29. In conclusion, I find no merit in this application and the same is dismissed with costs to the 2nd Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 5TH DAY OF MAY 2025.

L.KOMINGOI

JUDGE

In the Presence of:

For the Appellants/Applicants

For the 1st Respondent

For the 2nd Respondent

For the 3rd Respondent

Court Assistant: Mutisya

