



REPUBLIC OF KENYA



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**Maleto v Thini (Environment and Land Appeal E008 of 2025)
[2025] KEELC 5065 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E008 OF 2025**

LN GACHERU, J

JULY 3, 2025

BETWEEN

STANLEY MALETO APPLICANT

AND

BERNARD MAINA THINI RESPONDENT

RULING

1. The matter for determination is the Notice of Motion Application dated 15th May 2025, brought by the Appellant/Applican therein which is premised under Order 40 Rule 1[a], Order 42 Rule 6[6] of the *Civil Procedure Rules* and Sections 1A, 3A and 3B of the *Civil Procedure Act*, wherein the Appellant/Applican has sought for these orders;
 - i. That pending the hearing and determination of the present appeal, the Respondent whether acting in person, through proxy, servants, agents, employees or any other person acting at his behest be restrained from selling, developing or in any other way dealing and or interfering with the appellan ownership and possession of the parcel of land known as plot No 304 block 4;
 - ii. That costs of this application abide the outcome of the Appeal.
2. The Application herein is premised on the following grounds;
 1. That the trial magistrate rendered a judgement in Narok CMCC 200 of 2013 which had been consolidated with Narok CMCC 57 of 2013. On its judgement and decree, the court found that plot number 304 block 4 never existed and that the appellan never proved ownership in any event.
 2. That the applicant has lodged an appeal against the judgement and the decree of the court
 3. That the orders issued by the trial magistrate require the appellan to inter alia refrain from trespassing on the parcel of land. That order, coupled with the declaration that the appellan's



parcel of land doesn't exist are not positive in nature and may not be subject to an application for stay of execution.

4. That this court, as the appellant court has the jurisdiction under order 42 rule 6[6] to issue order of injunction restraining the interference with the property which is the subject matter of an appeal pending the hearing and determination of an appeal.
 5. That the applicant has a prima facie case on appeal whose chance of success are impregnable. The damage that may be occasioned if the respondent proceeds to deal with the parcels of land herein cannot be compensated by way of damages.
 6. That it is only fair that this court exercises its discretion in favour of the applicant and issues the orders of injunction as prayed.
3. Further, the Application is supported by the Affidavit of Stanley Ole Maletto, who reiterated the contents of the grounds in support of the application and also averred that the Respondent herein as the Plaintiff sued him in Narok CMCELC *No. 200 of 2013*, claiming that he had trespassed on his parcel of land known as plot No. 305 block 4 within Narok town. However, the Appellant/Applicant filed his Defence, and pleaded that he owned land parcel No. 304 block 4, and the said suit was consolidated with Narok CMCELC *No 57 of 2013*.
 4. He also averred that the matter was heard and concluded, wherein the trial court entered judgement on 13th May 2025, in favour of the Respondent as the Plaintiff thereon, on the following terms; that land parcel No 304 block 4 does not exist; a restraining order be issued to prevent the applicant from interfering with the Respondent quiet possession and ownership of land parcel no 305 block 4.
 5. Further, the Applicant averred that he has been advised by his advocate that the trial court having found and held that he is not the owner of land parcel No 304 block 4, and the said land does not exist, then the Respondent was granted clear path to alienate the said land.
 6. The Applicant further averred that in execution of the said judgement, the Respondent has entered on the disputed parcel of land and commenced excavation in readiness to commence construction.
 7. He claimed that having filed this Appeal, it is in the interest of justice that the integrity of the appellate process that the subject matter of the said appeal be preserved pending the determination of that right. Further, that if the Respondent is allowed to deal with the suit land plot No 304 block 4, as he desires, then this appeal will be rendered an academic exercise.
 8. The Applicant further claimed that the Respondent will not suffer any prejudice if the application herein is allowed.
 9. The Application is vehemently opposed through the Replying Affidavit of Benard Maina Thini, the Respondent herein. He admitted that the trial court did enter judgement as averred by the Applicant and held that plot No 304 block 4 does not exist on the ground as the 1st Defendant [Appellant] did not produce sufficient documents to prove ownership and also issued restraining orders against the Applicant herein from interfering with the Respondent's parcel of land plot No. 305 block 4.
 10. The Respondent averred that the application herein is misconceived and incompetent since the said plot No 304 block 4, is non-existent on the ground. Further, he averred that his advocate has advised him the applicant herein must satisfy the court that he will suffer substantial loss if the orders sought are not granted.
 11. Further, the Respondent averred that though the Applicant has annexed a draft Memo of Appeal, the same does not have a Number, and therefore, it is not filed. Further, that his advocate has advised



him that the draft Appeal does not raise any arguable or trial issues with high chances of success. Therefore, the orders sought by the Appellant/Applicant herein cannot be issued in an Appeal that is incompetent.

12. The Respondent also argued that there is no evidence that the appeal herein will be rendered nugatory if the orders sought are not granted, since the suit property is non-existent. He also claimed that he had already developed the land in contention with permanent structures prior to filing of the suit before the trial court.
13. Further, the Respondent averred that the Application herein is frivolous, vexatious and an abuse of the process of court, and was filed with the intentions of denying the Respondent the fruits of his judgement, and that the grant of the orders sought will prejudice him. He also argued that if the Orders sought are granted, then the court should direct the applicant to provide sufficient security for due performance of the court decree.
14. Therefore, the Respondent urged the court to dismiss this Application with costs.
15. The Application was canvassed by way of written submissions. The Appellant/Applicant filed the written submissions through Githui & Co Advocates and submitted that for an Application for injunction pending appeal it is guided by these conditions; an order for injunction pending Appeal is discretionary; the court should also consider whether the appeal is frivolous; the court should consider which party would suffer great hardship should the discretion be declined; further, that if the application is disallowed, the appeal will be rendered nugatory; finally the court should be guided by the principles set out in the case of *Giela v Cassman Brown Ltd* 1973 EA 358.
16. The Applicant also relied on the case of *Bilha Mideva Buluku v Everlyne Kanyere* [2016] eKLR; *Julius Musili Kyungu v Kenya Commercial Bank Ltd* HCC No. 324 of 2008[Mombasa], and urged the court to allow the instant application.
17. The Respondent filed his submissions through Maina Ngaruiya & Co Advocates, and set out one issue for determination being whether the court should grant the post judgement restraining orders against the Respondent from interfering with plot No 304 block 4 in any way pending the hearing and determination of the instant appeal.
18. The Respondent submitted that for the court to grant the orders sought, the Applicant must satisfy to court that he will suffer substantial loss if the orders sought are not granted, and that the applicant has a prima facie case. He submitted that the Applicant has not met the above conditions.
19. He also relied on Order 42 rule 6 of the *Civil Procedure Rules*, which states: -

“[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 sub-rule [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.”

20. It was the Respondent’s further submissions that the Memo of Appeal does not raise any arguable appeal with high chances of success. Further, that there is no evidence that the Appeal will be rendered nugatory if the orders sought are not granted, and that the applicant will suffer substantial loss or prejudice if the orders sought are not granted.
21. The Respondent reiterated that if the orders sought are granted, the court should order the Appellant/Applicant to provide sufficient security for due performance of the court decree. It was his further submissions that the instant application is a desperate attempt by the Appellant/Applicant to defeat the ends of justice. The court was urged to exercise its discretion judiciously and dismiss the instant application entirely.
22. The above are the arguments for and against the instant application, which this court has carefully considered. The court too has considered the rival written submissions, the cited authorities and the relevant provisions of law, and the court finds the single issue for determination is whether the instant application is merited.
23. The Application herein is anchored under Order 40 Rule 6[6] of the *Civil Procedure Rules* which states:
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“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.”
24. Further, the Application is premised on sections 1A, 3A and 3B of the *Civil Procedure Act*. Though section 3B does not exist, the other sections of law deal with Overriding Objective of the *Act*, and the inherent power of the court to issue orders that are necessary for the end of justice to be met.
25. From the court record, it is clear that the trial court entered judgement for the Respondent herein, wherein the Appellant/Applicant herein and the Narok County Government were restrained from interfering with plot No 305 block 4 Stadium ward. Further, the trial court made a declaration that plot No. 304 block 4, does not exist.
26. It is the above judgement of the trial court that aggrieved the Appellant/Applicant therein, who filed this Appeal vide the Memo of Appeal dated 15th May 2025.
27. Simultaneously, the Appellant/Applicant filed the instant Application and sought for Injunctive Orders to restrain the Respondent from interfering with Plot No 304 block 4, which plot was declared non-existent by the trial court. This Application for injunction pending Appeal is vehemently opposed by the Respondent herein.
28. As stated earlier, the legal framework that allows court to grant or issue injunction pending appeal is Order 40 Rule 6[6] of the *Civil Procedure Rules*. Further, from the above provision of law, it is clear that injunction pending appeal is a discretionary court order that temporarily stays the execution of a



lower court's decision, preventing actions that could render an appeal moot or futile. Therefore, this is a mechanism to preserve the subject matter of an appeal and ensure that the appellate court's decision, if the Appeal is successful, would not be meaningless.

29. Therefore, it is not in doubt that courts do issue injunction pending appeal where the applicant has satisfied the laid down principles.
30. For the court to issue injunction pending Appeal, the following factors have to be considered; that whether to issue or not to issue such order is at the discretion of the court: thus, the court has the power to grant or deny an injunction pending appeal, and this power is exercised judiciously, and not arbitrarily.
31. Secondly the said order is issued for the purpose of preserving the Subject Matter in dispute; Therefore, the primary purpose of injunction pending appeal is to maintain the status quo until the appeal is determined, preventing actions that could alter the situation in a way that would render the appeal nugatory.
32. Thirdly, the court has to consider whether the Appeal is frivolous or not: Courts are unlikely to grant an injunction pending Appeal if the appeal is deemed to be frivolous or without merit.
33. Fourthly the court will consider the hardship to be encountered by the applicant if order is not granted: in this regard, the court will consider whether granting the injunction would cause greater hardship to the other party than refusing it would cause to the appellant.
34. Fifth the court will take into account the principles set out in *Giella v Cassman Brown* [supra] on the grant of injunctive reliefs: The court will also be guided by the principles established in the case of *Giella v Cassman Brown*, which outlines the conditions for granting a temporary injunction. These principles are; -

“first the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly, that if the Court is in doubt as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience.”

35. Courts have variously held that the essence of injunction pending appeal is to ensure fairness and prevent a successful Appeal from being undermined by actions taken while the Appeal is ongoing, and thus render the outcome of such appeal pointless. See the case of *Julius Musili Kyunga v Kenya Commercial Bank Limited & Another* [2012] eKLR, where the court held that:

“The object of the injunction pending appeal is to preserve the subject matter to ensure that the appeal, if successful, will not be rendered nugatory.”

36. In the case of *Patricia Njeri and 3 Others v National Museum of Kenya* [2004] eKLR, which cited with approval as the decision in the case of *Timothy Kisina Kithokoi v Elijah Kitele and Another* [2022] eKLR, the court set out the principles to be considered in an Application for injunction pending Appeal as follows;

- 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 greater hardship that 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 v Cassman Brown* [1973] EA 358.”
37. Further, In the case of *Madhupapper International Limited v Kerr* [1985] KLR 840, the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or whether the injunction would inflict greater injustice that it would avoid.
38. And in the case of *Kenya Commercial Bank Ltd v Nicholas Ombija*, the court held that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully in court.
39. Being guided as above, the court will proceed to determine whether the applicant has established the above principles, and whether he is deserving of the orders sought. It is clear that at this juncture, the court is dealing with an interlocutory application and not the main Appeal.
40. In its findings, the trial court issued injunctive orders against the Appellant/Applicant herein not to interfere with plot No 305 block 4. Further, the trial court held that plot No 304 block 4, which allegedly belong to the Appellant herein does not exist.
41. The Appellant/Applicant has urged the court to issue injunctive orders in respect of plot No 304 block 4, which was declared no existence by the trial court. If this court would proceed to issue such injunctive order, then in essence this court in its appellate jurisdiction and at the interlocutory stage, would have declared that the plot No 304 block 4 is existing, thus overturning the findings of the trial court at the interlocutory stage.
42. By doing so, this court would in essence have dealt with the merit of the Appeal, at the interlocutory stage, thus jeopardizing the outcome of the said appeal before the same is heard interparties. The discretion of the court to grant injunction pending appeal has to be exercised judiciously. See the case of *Samka Ltd and Another v Mercedes Schez Rau Tussel* Civil Application Nairobi No 21 of 1999 [Gicheru, Omollo and Owuor JJA on 19 July 1999], held as follows:
- “Discretion must be exercised on reason and not caprice and the exercise must not be arbitrary or oppressive even if unfettered.”
43. By asking the court to grant injunction pending appeal over a suit property which has been declared non-existent by the trial court, if this court was to grant such an order, it would not have exercised its discretion judiciously since the trial court’s findings have not been set aside, and or vacated and that holding is subject of this Appeal.
44. The primary purpose of injunction pending Appeal is to preserve the suit property. There is no danger of alienation of the suit property by the Respondent herein to warrant preservation of the said suit property. In fact, the Appellant had averred that he had intended to sell the suit property, which sell did not go through because of the dispute at hand. Therefore, this finds no danger posed by the Respondent over the suit property to warrant an order of preservation of the said suit property.
45. While considering the principles set out in the case of *Giella v Cassman Brown* [*supra*], this court has considered the Judgement of the trial court, which held that the Appellant failed to produce documents to confirm that he was allotted the suit land. Without watering down the merit or demerit of the instant Appeal, this court finds and holds that without such documents to prove that the



Appellant owns the said plot No304 block 4, this court cannot find and hold at this juncture, that the Appellant has a prima facie case with probability of success, at the trial.

46. In the case of in *Mrao Limited v First American Bank of Kenya* [2003] KLR 125 , the court held: -

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

47. Further, the burden of proving a “prima facie” case lies with the Appellant/Applicant herein. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen and 2 others* [2014] eKLR, held that: -

“...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.”

48. On whether the Appellant will suffer irreparable loss which cannot be compensated by an award of damages, this court finds and holds that irreparable loss refers to a type of damage or injury that cannot be adequately compensated for by monetary damages or remedied through financial compensation. Further, it signifies harm that is so severe or unique that no amount of money can restore the injured party to their previous state.

49. In the case of *JM v SMK & 4 others* [2022] eKLR, the court defined irreparable loss as follows:-

“The equitable remedy of temporary injunction is issued to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never adequately remedy”.

50. The suit property herein can be quantified and the Appellant/Applicant awarded damages in the event he become the successful party in this Appeal. Further, the court has power to issue any orders that are necessary for the end of justice to be met. Cancellation of any registration or dealing of the suit property would be an option in the event the Appeal is successful in favour of the Appellant herein.

51. The Court of Appeal in the case of *Charter House Investments Ltd v Simon K. Sang & 3 Others* [2010] eKLR, held as follows: -

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties.”

52. On the balance of convenience, this court finds that there is no evidence that the Appellant was ever in possession of the suit land. He had intention of selling the said parcel of land to a third party. There was evidence that the Respondent is the owner of plots no 305, 306 and 307 in block 4. The trial court



held that plot No 304 block 4 does not exist. The issue of whether the said plot exist or does not exist will be subject of this Appeal. Therefore, the court finds and holds that the balance of convenience tilts in favour of not issuing or granting injunction pending Appeal.

53. For the above reasons, this court finds and holds that the instant application dated 15th May 2025, is not merited, and the same is dismissed entirely with costs to the Respondent herein.

54. Let the instant appeal be prosecuted expeditiously so that the issues in dispute can be determined at once.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 3RD DAY OF JULY 2025.

L. GACHERU

JUDGE.

Delivered online in the presence of

Elijah Meyoki Court Assistant

Mr. Machoka holding brief for Mr. Githui for Appellant/Applicant

NA for Respondent.

L. GACHERU

JUDGE

