



Maalim v Musa (Sued as the Legal Representative in the Estate of Fatuma Ahmed) & 2 others (Environment and Land Case 001 of 2022) [2025] KEELC 6137 (KLR) (22 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 001 OF 2022
CA OCHIENG, J
SEPTEMBER 22, 2025**

BETWEEN

MOHAMMED DAHIR MAALIM PLAINTIFF

AND

FATUMA AHMED AMINA MUSA (SUED AS THE LEGAL REPRESENTATIVE IN THE ESTATE OF FATUMA AHMED) 1ST DEFENDANT

COLONEL FARAH 2ND DEFENDANT

GULED ALIAS PS ALI DAUD MOHAMED 3RD DEFENDANT

RULING

1. What is before the Court for determination is the Plaintiff's Notice of Motion application dated 9th October 2024 where he seeks the following Orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the Respondents whether by themselves or by their agents or servants or any of them or otherwise howsoever dealing with the property known as Land Reference Number 36/1/50 be restrained from selling, disposing of, charging or any other encumbrance on the subject property pending the hearing and determination of the appeal.
 - e. Spent.
 - f. Spent.



8. The instant application was canvassed by way of written submissions which was only filed by the 1st and 3rd Defendants.

Submissions

9. The 1st and 3rd Defendants submit that Order 43 Rule 1 (1)(u) of the Civil Procedure Rules grants the Plaintiff an automatic right of Appeal. Further, that the instant application concerns issuance of injunctive orders which this Court already made a determination on, hence the same is res judicata and this Court has become functus officio on the said issue of injunctions.
10. They submit that if this Court is inclined to consider the prayer for injunction, it should find that the Plaintiff has not met the threshold for grant of injunctions as enumerated in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 at pg 36. They point out that the Plaintiff has not established a prima facie case as he has not illustrated any breach of his rights since he is not the proprietor of the suit land while in contrast, they annexed a duly registered indenture and Search outlining their proprietorship of the said suit land.
11. They contend that the Plaintiff did not demonstrate that he will suffer any harm while on their part, they have demonstrated that they will suffer irreparable harm to a tune of Ksh. 400 million, thus the balance of convenience tilts in their favour. They further submit that the Plaintiff also failed to satisfy the threshold for grant of stay orders set out under Order 42 Rule 6 of the Civil Procedure Rules.
12. To buttress their averments, the 1st and 3rd Defendants relied on the following decisions: *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] KECA 472 (KLR) and *Gianfranco Manenthi & Anor. Vs Africa Merchant Assurance Co. Ltd.* 2019 KEHC 7586 (KLR).

Analysis and Determination

13. Upon consideration of the instant Notice of Motion application including the respective affidavits as well as submissions, the following are the issues for determination: Whether the Plaintiff is entitled to leave to file an Appeal. Whether this Court should grant an order of injunction pending appeal.

I will deal with the issues jointly.
14. The Plaintiff seeks for an order of injunction pending Appeal. He seeks to restrain the Defendants from Land Reference Number 36/1/50. The Plaintiff claims to be the registered proprietor of the said land, which is also claimed jointly by the 1st and 3rd Defendants. It is not disputed that vide his earlier application dated 1st February 2024, the Plaintiff sought injunctive orders restraining the Defendants from interfering with the suit land pending determination of the instant suit. Further, vide its Ruling dated the 3rd October 2024, this Court dismissed the said application. Dissatisfied with the said decision, the Plaintiff has filed a Notice of Appeal and intends to Appeal the said decision.
15. Order 43 Rule 1 (1) (u) of the Civil Procedure Rules provides an automatic right of Appeal from Rulings of the nature of temporary injunctions and provides as follows:

“Order 43 Rule 1 Appeals from Orders.

1. An appeal shall lie as of right from the following Orders and rules under the
(1) provisions of section 75 (1) (h) of the Act

.....



(u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);”

16. While Section 75 of the *Civil Procedure Act* provides that:

“75. Orders from which appeal lies

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

.....

h) Any order made under rules from which an appeal is expressly allowed by rules.”

17. In relying on the legal provisions, I have cited, I find that the Plaintiff does not require leave to Appeal against the orders issued on 3rd October, 2024 as it relates to Order 40, rules 1, 2, 3, 7 and 11 on temporary injunctions.

18. On whether the Plaintiff is entitled to an injunction pending Appeal, I will make reference to the case of Charterhouse Bank Limited v Central Bank of Kenya & 2 Others [2007] KECA 395 (KLR), where the Court of Appeal stated that:

“The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.”

19. The Court of Appeal further stated as follows in David Thiong’o T/A Welcome General Stores v Market Fancy Emporium [2007] KECA 5 (KLR):

“The two ingredients that the Applicant should satisfy for grant of the injunction order are whether the intended appeal is arguable and whether it shall be rendered nugatory should the intended appeal be successful. This was also reiterated by this Court in Nelson Andai Havi v Law Society of Kenya & 3 Others [2018] eKLR, as follows:

“It is trite that at this stage our remit does not extend to determining the merits or otherwise of the Applicant’s intended appeal it is restricted to determining on the basis of the material on record, first, whether his intended appeal is arguable, and second, whether, absent an order of injunction, that appeal will be rendered nugatory if it succeeds.....”

20. On the arguability of an appeal, the Court of Appeal stated as follows in Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 Others [2021] KECA 844 (KLR);

“This Court can only grant an order of injunction pending appeal where it is demonstrated that an applicant has an arguable appeal or intended appeal, and that unless the injunction is granted the appeal, if successful, would be rendered nugatory. An arguable appeal is not one that must succeed, it is one that is not frivolous and merits a full consideration by this Court. The applicant need not establish a multiplicity of arguable grounds, even a single one is sufficient.”



21. In this instance, I note the Plaintiff filed the instant application which included a prayer for injunction pending Appeal. I note Justice Mbugua, vide her decision dated the 3rd October, 2024 had actually determined the Plaintiff's application for injunction where he sought to restrain the Defendants or their agents from the suit land, claiming he owned it. In my view, I find that the instant prayer for injunction pending appeal is res judicata as Judge Mbugua already dealt with the application for injunction dated the 1st February, 2024 through her Ruling of 3rd October, 2024. (see the case of John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
22. I opine that this Court cannot sit on Appeal over Judge Mbugua's decision and I hence find that the effect of the instant prayer for injunction pending appeal would be to grant an order of injunction, which the Hon. Judge Mbugua failed to grant vide her Ruling of 3rd October 2024.
23. In the foregoing, I find the instant Notice of Motion application unmerited and will proceed to dismiss it with costs to the 1st and 3rd Defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Hasea for Defendant/Respondent

Court Assistant: Joan

