



REPUBLIC OF KENYA



KENYA LAW
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**Sheikh v Mungai (Environment and Land Appeal 4 of 2022)
[2024] KEELC 4441 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 4 OF 2022**

FM NJOROGE, J

JUNE 3, 2024

BETWEEN

SAEED SIDOMAN SHEIKH APPELLANT

AND

PHYLLIS NYOKABI MUNGAI RESPONDENT

*(Being an Appeal arising from the Ruling and Order of Hon. J.M Kituku delivered
on 12th January 2022 in Kilifi SPMCC ELC MISC APP NO. 117 of 2021)*

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 20th June, 2022 filed by the Applicant and is expressed to be brought under Section 1A, 1B, 3A, 63(e), 79G of the [Civil Procedure Act](#), Order 42 Rule 6(1) and (2) and Order 51 Rule 1 of the [Civil Procedure Rules](#) and all enabling provision of the law which sought the following orders:
 1. That this application be certified as urgent and service be dispensed with the first instance.
 2. That this Honourable Court be pleased to grant stay of execution of the Ruling and order dated 12th January 2022 delivered by Hon. Kituku SPM, Kilifi in SRMCC ELC MISC APP ONO. 117 OF 2021 pending hearing and determination of this application.
 3. That this Honourable Court be pleased to grant stay of execution of the Ruling and order dated 12th January 2022 delivered by Hon. Kituku SPM, Kilifi in SRMCC ELC MIS APP 117 OF 2021 pending the hearing and determination of this Appeal.
 4. That costs be provided for.
2. The Application is premised on the following grounds:



1. That the Applicant is the Defendant in SRMCC 117 of 2021 and of which he is the actual and beneficial owner of all that parcel of land referred to as Plot 7963/III/MN which is amongst one of the properties he acquired from the mother title Plot 1898/12 Section III/MN.
 2. That the Respondent filed an application seeking for injunctive relief restraining the Applicant from the suit property as well as orders of mandatory injunction seeking to demolish the Applicant's perimeter wall around the suit property.
 3. That the Applicant herein is aggrieved that the Honourable Magistrate in his Ruling of 12th January 2022 granted mandatory injunctive orders at an interlocutory stage despite the Applicant challenging the legitimacy of the Respondent's title over the suit property.
 4. That the Respondent herein has filed an application dated 12th May 2022 seeking for reinforcement of the demolition of the perimeter wall which shall come up for inter partes hearing on 5th July 2022.
 5. That the applicant stands to suffer irreparable harm and loss if the stay orders are not granted and would serve only to render the Appeal nugatory.
 6. That this application has been brought at the earliest opportunity and without unreasonable delay.
 7. That the Applicant is ready and willing to furnish security as the Court orders to secure performance of such decree.
 8. That the Respondent shall not suffer any prejudice if the Application herein is allowed as prayed.
 9. That in the interest of justice, the Applicant prays the Application be allowed as prayed.
3. The application is further supported by the Supporting Affidavits sworn by Saeed Sidoman Sheikh which largely reiterates the above grounds. In the Supporting Affidavit the Deponent avers that he purchased a total of 14 Plots from three different persons for development purposes 11 of which have titles in his name.
 4. The genesis of the present application is that the Respondent sued the applicant before the lower court on seeking inter alia a mandatory injunctive relief seeking to demolish the perimeter wall around the suit property Plot No. 7963/III/MN. The wall had been approved by the County Government of Kilifi. The Court ordered its demolitions, and the Respondent has applied formally for enforcement of the demolition order, which motion was scheduled for hearing on 5/7/2022.
 5. The Respondent case in the lower court was that he owns Plot No. 7963/III/MN, which the appellant has in the process of fencing off Plot No. 1898/121 included. The Plot in this included the fenced land and only one gate to access the whole property has been provided. Further, it is guarded by security personnel who deny access to persons seeking to access the plots inside. In that case the appellant challenged the authenticity of the plaintiff's title for which he alleges to have paid Kshs 1.5 Million as consideration. In the ruling impugned by the appellant the lower court observed that: the Appellant does not reveal whom he purchased the plots from; that none of the Sale Agreements bear the number 7963/III/MN; that the Appellant has not denied erecting the fence complained of and denying the respondent entry, that the appellant has admitted some of the plots he has fenced off belong to different people, only to contradict himself and claim that he has purchased them.



6. The lower court considered the balance of convenience and found that if the injunction sought is denied then the acts complained of will continue and if the suit ultimately succeeds the harm done will be greater than if the injunction is granted and later the suit is dismissed. It was also observed that the appellant may be exposed to greater harm if the injunction is not granted and he proceeds to develop the property. The court considered the issue of a mandatory injunction, and the case of *Kenya Breweries Ltd v Washington O. Okeyo* [2002] eKLR and found that the case before it was one of the exemptions where such an order can issue, and so it granted the order of mandatory injunction ordering the defendant to demolish the perimeter wall touching on the Respondents Property Plot No. 7963/III/MN pending hearing and determination of suit. The fact that only the order of demolition was addressed and granted would imply that the respondent is still unable to access the disputed property despite the afore stated gaps and inconsistencies that have been exposed by the lower court decision in respect of the appellant's case.
7. I have examined the appeal and the application before me as well as the reply and the submissions of the parties. Much time has elapsed since they were filed on 30th June 2022. The appeal has not yet been admitted for hearing as the parties have been fighting this interlocutory battle over whether the court should issue a stay of execution against the lower court's order of demolition. What the foregoing implies is that the demolition has not taken place since this court granted interim orders.
8. The Record of Appeal has been filed but the lower court record has not been availed as required. What this implies is that save for the record of the lower court which has not been availed and which has barred the issuance of an order admitting or not admitting the appeal, the appeal is otherwise ripe for hearing inter partes.
9. Mandatory injunctions are highly discouraged at the interlocutory stage and are rarely issued save in exceptional circumstances as they evoke a tinge of finality in to the litigation or part of it before the hearing. In a way they summarily expose litigants to the possibility that if the affected litigant against whom they are issued is successful at the end of the proceedings they may not have a remedy for any injustice that may have occurred. It is thus the reason why mandatory injunctions can only be issued in the clearest of cases. Whether or not the circumstances in which the lower court allowed the mandatory injunction is warranted is not an issue for trial at this interlocutory stage also but for decision in the main appeal.
10. Considering the foregoing, I have found that the applicant has raised a triable issue for the court to consider in the appeal. Out of the foregoing it is also deducible that if the wall is demolished and later on the court finds for the applicant in the lower court case he may have suffered substantial harm.
11. Consequently, this court finds that the application dated 20th June, 2022 has merit and it is therefore granted in terms of prayer no 3 thereof. The costs of the application shall abide the outcome of the appeal.
12. Lastly, it is not fit that parties can spend two long years on an application for stay of execution pending appeal while the record of appeal has been lying in the file for all those two years. Having noted that and desirous of having the appeal disposed of in a more just, expeditious, proportionate, and affordable manner in accordance with the spirit and overriding objective of Sections 1A *CPA* and 1(B)(1)(d) CPA and the body of the *CPR*, this court has purposely brought forward the date of the ruling in this matter. Also, to further guard against further delay in the disposal of the substantive appeal the Deputy Registrar of this court shall ensure that the lower court record is brought up to this court strictly within 7 days of this order. This matter shall be mentioned on 18/6/2024 for issuance of directions on the hearing of the appeal after receipt of the lower court file record.



**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 3RD DAY OF JUNE 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI

