



**Daktari v Hussein (Environment and Land Appeal
013 of 2023) [2024] KEELC 4983 (KLR) (1 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 4983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 013 OF 2023**

PM NJOROGE, J

JULY 1, 2024

BETWEEN

HABIBA HALKANO DAKTARI APPELLANT

AND

HAWO HUSSEIN RESPONDENT

RULING

1. This application is dated 13th December, 2023 and seeks orders;
 1. That this application be certified as very urgent and the same be heard as matter of priority.
 2. That there be a stay of execution of Isiolo Chief Magistrates Court ELC no. 33 of 2019 pending hearing and determination of this application.
 3. That there be a stay of execution of Isiolo Chief Magistrates Court ELC no. 33 of 2019 pending the hearing and determination of this appeal.
 4. That this Honourable Court does issue an order of injunction against the Respondent in the respect to Plot No. ISL/117/98/2017 Kambi Garba pending hearing and determination of this application.
 5. That this Honourable Court do issue an order of inhibition against the Respondent in respect of Plot No. ISL/117/98/2017 Kambi Garba pending the hearing and determination of this appeal.
 6. That costs for and incidental to the application be borne by the Respondent.
2. The application is supported by the affidavit of Habiba Halkano Daktari sworn on 13th December, 2023 and has the following grounds; -



- a. That judgment was issued by Hon. E Tsimonjero on 14th December, 2023 in which he indicated that the Applicant had no cause of action against the Respondent in the plot no. ISL/117/98/2017 Kambi Garba.
 - b. That this was despite the applicant herein giving overwhelming evidence in respect to its claim.
 - c. That the Respondent herein acquired a judgment where the Respondent was declared the Bonafide legal owner of Plot No. ISL/117/98/2017 Kambi Garba in ELC No. 33 of 2019 despite the evidence the Appellant adduced in court.
 - d. That the Appellant is the legal owner of land parcel Plot No. ISL/117/98/2017 Kambi Garba.
 - e. That the appellant has extensively developed the same by erecting a fence and constructing a homestead where she has resided for over thirty years.
 - f. That the Respondent with the help of police intends to proceed to invade the Appellant's property, destroying it and start construction on the said property.
 - g. That it is the interest of justice that the orders sought herein are awarded as the same is meant to safe guard the property in issue.
 - h. That if the orders sought herein are not awarded the same will render the appellants appeal nugatory.
 - i. That if the orders sought herein is not awarded, the appellant herein will suffer irreparable damages.
 - j. That both the applicant's application and appeal have overwhelming chances of success.
 - k. That the application has been brought without undue delay.
3. The application was canvassed by way of written submissions.
 4. In the submissions filed by the Appellant's Advocate, it is said that her evidence was ignored by the court and for that reason it is argued that the intended appeal has an overwhelming chance of success. The Appellants Advocate also argues that Order 9 Rule 9 of the *Civil Procedure Rules* [2010] does not apply to this case as, according to him, he had received fresh instructions to specifically represent the appellant in the appeal and had filed his Notice of Appointment. He urges the court to allow the application.
 5. The Respondents Advocate has opposed the application on the grounds that;
 - a. The Appellants has not satisfied the threshold for grant of an order of Injunction as enunciated in the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 39 and *Mrao Ltd v First American Bank Of Kenya Limited & 2 Others* [2003] KLR 123.
 - b. That the Appellant is improperly on record as he has sought to represent the appellant against the express and Mandatory requirement of Order 9 Rule 9 of the *Civil Procedure Rules*. For this assertion, the Respondent's Advocate has proffered the case of *S.K Tarwadi v Veronicah Muchlemann*, Malindi High Court Misc. Appl. No. 6 of 2018 [2019] eKLR.
 6. In arguing that the Appellant's Advocate has fallen foul of the requirements of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010, the respondent's advocate has constructively raised the issue of jurisdiction. The issue of jurisdiction requires this court to resolve it at the earliest possible time.



7. Order 9 Rule 9 of the *Civil Procedure Rules* reads as follows:

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been pressed, such change or intention to act Shall Not be effected without an order of the court; -

- a. Upon an application with notice to all the parties, or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

8. I find that Order 9 Rule 9 of the *Civil Procedure Rules* (2010) is coached in mandatory terms as it employs the word “SHALL”. I opine that a court of law has no business to amend the express and mandatory intention of the Legislature. I, therefore, find that the appellants advocate is improperly on record. I do not agree with him that he has fresh instructions to represent the appellant in this appeal. This argument seeks to reinvent the wheel and must be dismissed. Also, having considered the arguments proffered by the parties, I find that the appellant has not met the conditions prescribed by law for issue of orders of stay of execution, temporary injunction and inhibition.

9. In the circumstances, the following orders are hereby issued;

- a. This application is dismissed.
- b. Costs shall follow the event and are awarded to the Respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 1ST DAY OF JULY, 2024 IN THE PRESENCE OF:

Court assistant: Rahma

Ondari present for the Appellant.

Mwirigi Mbaya holding brief for Mbaabu Inoti for the Respondent.

HON. JUSTICE P.M NJOROGE

JUDGE

