



**Mbiti v Mbiti & another (Environment and Land Appeal  
E023 of 2022) [2024] KEELC 5119 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5119 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E023 OF 2022**

**EC CHERONO, J**

**JULY 4, 2024**

**BETWEEN**

**FREDINAND MUGESA MBITI ..... APPELLANT**

**AND**

**SIMON OLINDO MBITI ..... 1<sup>ST</sup> RESPONDENT**

**AGNES VOSOLO NYALANGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion application dated 24<sup>th</sup> January, 2024 brought under Section 1A,1B,3 & 3A of the [Civil Procedure Act](#) and Order 22 Rule 22, Order 42 Rule 6 of the [Civil Procedure Rules](#), the applicant prays for the following orders;
  - a. Spent.
  - b. Spent.
  - c. That pending hearing and determination of this appeal this Honourable Court be pleased to issue an order restraining the appellant from destroying, demolishing and interfering with the parties parents homestead and houses as well as trees and crops on land parcel No Bungoma/ Kiminini/2449.
  - d. Spent.
  - e. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of the application supported by the affidavit of Simon Olindo Mbiti-the Applicant herein sworn on 24<sup>th</sup> January,2024.
3. It is the applicant's case that there is a pending appeal and cross-appeal preferred by the parties herein against the judgment and decree of the trail court in PMELCC No 40 of 2019 delivered on 29<sup>th</sup>



August, 2022 and that he is apprehensive that the substratum of the said appeal will be lost and the appeal rendered nugatory in the event the orders sought herein are not allowed. The Applicant further states that the Appellant/Respondent has been destroying the houses on land parcel No Bungoma/Kiminini/2449 (hereinafter the 'suit land') and attacking other family members who try to access the same. It is the Applicants prayer that the Appellant/Respondent be restrained from harassing him and the other siblings and from further destroying and damaging the remaining structures which actions will render the appeal nugatory.

4. The Appellant/Respondent filed his replying affidavit in opposition to the application sworn on 24<sup>th</sup> April, 2024 in which he stated that this application is based on falsehood since he has not engaged in any destruction as alleged by the Applicant. He argued that he merely put up a fence around the suit land to prevent theft and vandalism. He argued that none of his siblings live on the suit land since their homes are elsewhere and that he is the only one who resides therein. It was his position that the Applicant herein is not the registered owner of the suit land and that his interest in the suit land has not crystalized and as such, he has no direct claim and locus standi. Lastly, he argued that the Applicant has not met the threshold for the grant of injunctive orders as sought in the application.
5. The 2<sup>nd</sup> Respondent on her part argued that she is the eldest child of Esau Mbiti and Joyce Muhonja Mbiti and that the other parties herein are her siblings. She stated that the suit land is a family land registered jointly in her name and the Appellant/1<sup>st</sup> Respondents in trust for the family. She deposed that the Appellant/1<sup>st</sup> Respondent herein has been hostile to the other family members by chasing them away from the suit land and destroying their parents homestead by pulling down buildings and their graveyard. It is her argument that the trial Court's judgment ordering the division of the suit land into two has not been set aside and therefore the same still stands. It was her argument that as the eldest child, she helped her parents construct the buildings in the suit land as the other siblings were still in school and that the allegation by the Appellant/1<sup>st</sup> Respondent that he built the said structures is false. She argued that the Appellant/1<sup>st</sup> Respondents registration as a joint owner of the suit land was for the purpose of holding in trust for himself and on behalf of the other family members/siblings. She urges the Court to safeguard and preserve the suit land pending the determination of the appeal.
6. The applicant herein filed a supplementary affidavit sworn on 22<sup>nd</sup> May, 2024 in further support of the application. He also filed written submission dated 27<sup>th</sup> May, 2024 where he submitted that if the prayers sought are not allowed, then the substratum of the appeal will be lost since the Appellant/1<sup>st</sup> Respondent is hellbent in wasting the suit land as opposed to preserving it. He argues that none of the parties will be prejudiced if the orders sought are granted. He relied on the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* (2022) eKLR.
7. At the time of preparing this ruling, the Respondents had not filed their submissions.

### **Legal Analysis and Decision**

8. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions. In my considered view, the sole issue that arise for determination is whether the applicant has met the threshold for the grant of a temporary injunction order pending hearing and determination of the appeal herein. In the exercise of its appellate jurisdiction, this Court has power to grant a temporary injunction pending appeal, where the ends of justice demand so, and where the procedure for instituting an appeal has been complied with. This is provided for under Order 42 Rule 6(6) *CPR* which states as follows;

“Notwithstanding anything contained in subrule (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.”

9. The principles for the grant of temporary injunction pending appeal are now settled. In the case of *Giella v Cassman Brown* [1973] EA 358, the court set out the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a *prima facie* case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

10. A *prima facie* case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 others* [2003] eKLR as follows;

“A *prima facie* case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

11. It has been argued by the Applicant and the 2<sup>nd</sup> Respondent that despite preferring this appeal, the Appellant/1<sup>st</sup> Respondent has been demolishing and destroying the substratum of the appeal which is a family home. The Applicant informed the court that he has also filed a cross-appeal against the judgment of the trial court and that it is in the interest of justice that this application be allowed. It has been said that if the orders sought are not granted, the substance of the appeal will be rendered non-existent and the appeal will be rendered nugatory. The Appellant/1<sup>st</sup> Respondent on the other hand argues that the allegations against him are false. The 2<sup>nd</sup> Respondent in her replying affidavit in support of the application attached photographs showing happy moments of the family which she argues have come to an end since the Appellant/1<sup>st</sup> Respondent has been demolishing and destroying the family home which sits on the suit land and restricting the larger family from accessing the family house.
12. On the issue as to whether the Applicant shall suffer irreparable injury should the temporary injunction not be granted, the applicant has argued that the Appellant/1<sup>st</sup> Respondent is demolishing and destroying the family home as well as fencing it off and that the same will change the subject matter before the appeal is heard and determined. The Appellant/1<sup>st</sup> Respondent has on his part argued that as the applicants are not in occupation of the suit property and that all he is doing is protecting the suit land from invaders and that the injury, if any, likely to be suffered by Respondents cannot be termed as irreparable or incapable of being compensated in damages.
13. Having considered the facts and the submissions by the parties, I am persuaded by the Applicants argument that any demolition and destruction of of the suit property which is a family house will alter the subject matter of the suit which will render the appeal nugatory.
14. On whether the balance of convenience tilts in favour of the Applicant, I wish to rely in the case of *Paul Gitonga Wanjau v Gatbuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, where the court dealing with the issue of balance of convenience expressed itself as follows :-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should



be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

15. Again in *Amir Sulaiman v Amboseli Resort Limited* [2004] eKLR, the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.

16. Bearing this in mind, I am persuaded beyond peradventure that there is a lower risk in granting the orders sought than not granting them, as I wait to hear the appeal on its merits

17. In upshot of my finding is that the Appellants/Applicants Notice of Motion Application dated 24<sup>th</sup> January, 2024 is merited and the same be and is hereby allowed as follows;

- a. That pending hearing and determination of this appeal, the appellant by himself, servants and/or agents be and are hereby restrained from destroying, demolishing and interfering with the parties parents homestead and houses as well as trees and crops on land parcel No Bungoma/Kiminini/2449.
- b. That costs of this application shall abide the appeal.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 04<sup>TH</sup> DAY OF JULY, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of; -

1. Mr. Teti for the Respondent.
2. Mr Bwonchiri H/B for Wanyonyi for the Applicant.
3. Bett C/A.

