



**Gikiri v Jama (Environment and Land Appeal E075 of 2024)
[2024] KEELC 6937 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E075 OF 2024
MD MWANGI, J
SEPTEMBER 17, 2024**

BETWEEN

ESTHER GIKIRI APPELLANT

AND

FATUMA AHMED JAMA RESPONDENT

(In respect of the Notice of Motion Application dated 4th June, 2024 seeking an order of interlocutory injunction pending the hearing and determination of an appeal.)

RULING

Background

1. Before this court is the Appellant’s application dated the June 4, 2024 filed under the provisions of Section 1A, 1B, 3A and 63 of the *Civil Procedure Act* and Order 40 and Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law. Substantively, the Appellant seeks for orders that;
 - a. A temporary injunction do issue restraining the Respondent by herself and or by his undisclosed principals, agents, employees, servants and any other persons acting under her authority from trespassing remaining in occupation, entering, occupying, dealing with that parcel of land known as LR No. 15400/533 situate at Nairobi County, Sosian Estate pending the hearing and determination of the main suit and that OCS Soweto Police Station and OCPD Kayole be hereby ordered to ensure full and due compliance with the Orders.
 - b. The costs of the application herein be paid for by the Defendant/Respondent.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Esther Gikiri deposed on the 4th June, 2024. The deponent avers that she is the legitimate and registered owner of the suit property having acquired it from Amboseli Court Limited. A transfer thereof was



duly registered in her favour. Amboseli Court Limited was the original allottee of the larger parcel comprising the entire Sosian Estate. She asserts that she has not sold the suit property to anyone.

3. The Appellant avers that the Trial court dismissed her case on the basis that she did not produce any witnesses to show the root of her title. She contends that she holds the only title to the suit property and which has not been revoked. On the other hand, the Respondent is a Trespasser who holds no documents of ownership at all.
4. She deposes that the judgement of the Lower Court has emboldened the Respondent who is now proceeding with the construction on the suit property despite the fact that she has no ownership documents. The Appellant is apprehensive of the act of trespass being perpetuated by the Respondent on the suit property. It is therefore in the interest of justice that the orders sought be granted.

Respondent's Replying Affidavit

5. The Respondent opposed the Appellant's application vide the Replying Affidavit deposed on 20th June, 2024 by Shafe Omar Ahmed. The deponent is the Respondent's appointed Donee pursuant to a Power of Attorney Number 28 Registered with Land Registrar Garissa. The deponent avers that having a title document is not sufficient proof of ownership of a property hence the Appellant ought to have explained the origin of her title. Further, that where there are competing titles, then the first one in time prevails.
6. She avers that the Respondent's ownership is pegged on Kiambu Dandora Farmers Company Limited's title which was issued in 1970 as opposed to the Appellant's title which was issued on 31st December, 2013. She deposes that the Respondent proved the root of her title by calling a representative of Dandora Farmers Company Limited who testified in support of her case. Therefore, there is no way a sub-division could have been done without the consent of the original owner.
7. The deponent contends that the Respondent is not a trespasser as alleged having established her ownership of the suit property. She states that the Appellant failed to prove how the suit property was hived off from the original land which evidence was critical in proving her title.
8. Regarding the alleged on-going construction, the deponent denies undertaking any recent construction. She states that the buildings erected thereon were constructed way before she was joined in the proceedings before the Lower Court as the Appellant had initially sued a wrong person. Consequently, the application is not merited and ought to be dismissed with costs.

Court's Directions

9. The court directed that the application herein be disposed of by way of written submissions. However, neither of the parties complied with the court's directions within the time given. The Court therefore proceeds to make this ruling without the benefit of submissions by the parties.

Issues for Determination

10. In the court's opinion, the issues for determination in this matter are:
 - a. Whether an order of interim injunction may be granted pending appeal.
 - b. Whether the Applicant has satisfied the test for the grant of an order of interim injunction pending appeal.
 - c. What orders should the court issue in respect to the costs of the application?



Analysis and Determination

A. Whether an order of interim injunction may be granted pending appeal

11. Order 42 Rule 6 of the Civil Procedure Rules gives the court the power to grant an order of temporary injunction pending appeal. It states as follows:

“(6) Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in 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 a tribunal has been complied with.”

12. This Court, in the case of Umar Auto Garage New & another v Githere Investments Limited [2022] eKLR stated that;

“Rule 6 is clear and needs no expounding. Where the procedure for instituting an appeal has been complied with the court may exercise its discretion to grant a temporary injunction.....Under the provisions of order 42 rule (1), appeals to the High Court (and courts of equal status off course), are in the form of a memorandum of appeal signed in the same manner as a pleading.”

13. The Appellant having filed a memorandum of appeal in accordance with the provisions of Order 42 is deemed to have complied with the procedure for instituting an appeal (from a subordinate court or a tribunal to this court). Therefore, an order of interim injunction may be granted if the court is satisfied that the Applicant has made a case for its granting.

B. Whether the Applicant has satisfied the test for the grant of an order of interim injunction pending appeal.

14. The principles for grant of temporary injunction pending appeal are settled. In the case of Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR, the court restated the following principles as governing the grant of an order of temporary injunction pending appeal;

- a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is not frivolous.
- b. The discretion should be refused where it would inflict greater hardship than 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 in Giella vs. Cassman Brown [1973] EA 358.”

15. In the case of Giella vs. Cassman Brown [1973] EA 358, the court stated 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.”

16. A prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 Others* [2003] e KLR 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.”

17. The Applicant avers that she is the legitimate and registered owner of the suit property having acquired it from Amboseli Court Limited who according to her was the original allottee of the larger parcel comprising the entire Sosian Estate. She denies selling the suit property to anyone. She is therefore, on the face of it entitled to protection of her proprietary rights.

18. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to her if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, provides an explanation for what is meant by irreparable injury. The court stated that;

“ Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

19. It is evident from the Respondent’s replying affidavit that the Applicant has never been in possession and/or occupation of the suit property unlike the Respondent. The Respondent has been in possession and/or occupation of the suit property. The Respondent denies undertaking any recent construction thereon as alleged by the Appellant. She avers that the buildings erected thereon were constructed way before she was joined in the proceedings as the Appellant had initially sued a wrong person. Evidently, issuing the injunctive orders as sought will amount to evicting the Respondent from the suit property.

20. Looking at the overall circumstances of this matter, it is my finding that the Appellant’s application as framed is not merited.

21. However, this Court has authority to issue orders for the preservation, in the interim, of a subject matter of an appeal as held by the Supreme Court of Kenya in the case of *Board of Governors Moi High School, Kabarak and Another v Malcolm Bell* [2013] eKLR.

22. In *Musa Angira Angira v ICDC* [2015] eKLR, J M Mutungi J, expressed the view that since the issues were highly contested, the order that was merited therein was one conserving and or preserving the suit property until the suit is heard and determined on merit rather than an injunction in the terms sought by the plaintiff. Accordingly, he granted a status quo order in respect of the suit property. I am persuaded by the reasoning of the Judge. I am of the considered view that though the court finds the Appellant undeserving of an order of temporary injunction pending the hearing and determination of the appeal, it is appropriate that the subject property be preserved awaiting the outcome of the appeal.

23. Section 13(7) (a) of the *Environment and Land Court Act*, provides for this court’s mandate to grant interim preservation orders.



24. Practice Direction Number 32 of the Environment and Land Court Practice Directions, 2014 too provides that;

“During inter partes hearing of any interlocutory application, where appropriate, parties are encouraged to maintain status quo----- after considering the nature of the case or hearing both sides the judge shall exercise discretion to order for status quo pending the hearing and determination of the suit keeping in mind the overriding interests of justice.” (Emphasis laid).

25. The term “status quo” has been defined by the Black’s Law Dictionary 10th Edition to mean: -

“The situation that currently exists.”

26. In the obtaining scenario, it is the finding of this court that a status quo order will suffice in preserving the suit property pending the hearing and determination of the appeal. Considering that the issue of ownership of the suit property is highly contested.

27. In conclusion, I make the following orders;

- a. The Parties herein shall maintain the prevailing status quo in respect of the suit property at the time of this ruling. In particular, the Respondent is directed not to undertake any further constructions on the suit property pending the hearing and determination of the appeal.
- b. Costs of the application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Njuguna h/b for Mr. Obuya for the Appellant/Applicant

N/A for the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

