Mwangi & another (Suing as personal representatives of the Late Ibrahim Mwangi Kamau) v Mwangi (Civil Appeal E026 of 2024) [2024] KEELC 7373 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7373 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL APPEAL E026 OF 2024

JM ONYANGO, J

NOVEMBER 6, 2024

BETWEEN

JAMES GICHURU MWANGI ..... 1ST APPELLANT

HENRY MBOGO MWANGI ..... 2ND APPELLANT

SUING AS PERSONAL REPRESENTATIVES OF THE LATE IBRAHIM MWANGI KAMAU

AND

PETER GICHURU MWANGI ..... RESPONDENT

RULING

1. What is before me for determination is the Appellant's Notice of Motion dated 5th July 2024 which seeks the following Orders:

    1. Spent...

    2. That there be an order of inhibition in respect of Land Parcel Known as Eldoret Municipality Block 9/17 (Border Farm)/49.

    3. That there be a temporary injunction issued against the respondents whether by themselves their servants or agents from any dealings appertaining to the aforementioned suit of land (sic) until the hearing and determination of this application.

    4. That an injunction order be issued against the respondents whether by themselves, their servants or agents from any dealings appertaining to the aforementioned suit of land (sic) until the suit is heard and determined.

    5. That pending the hearing and determination of the instant appeal before this honourable court there be a stay of execution of the judgment.

6. That the costs of this application be in the cause.

2. The application was based on the grounds on the face of it and supported by the affidavit of James Gichuru Mwangi sworn on even date.

3. The application was opposed by the Replying Affidavit of Peter Gichuru Mwangi which was sworn on 23rd July 2024. The Respondent essentially argued that the application dated 5th July 2024 was premature, misconceived and an abuse of the court process and urged the court that the application be dismissed.

4. The genesis of this application is rooted in Eldoret ELC Case No. 13 of 2018 which was instituted by the Applicants against the Respondent herein and one Ngugi Gitonga.

5. The matter was subsequently transferred to the Magistrates Court as MCELC Case No. 119 of 2019 where the Honourable Magistrate rendered his judgment by ultimately dismissing the suit.

6. In accordance with the court's directions, both parties have duly filed their respective written submissions on this application.

Issues for Determination

7. Upon a thorough review of the application, the response thereto, the affidavit evidence adduced in support of the application and the Replying Affidavit, together with the parties' submissions, the following issues emerge for determination:

   i. Whether the Applicants are entitled to an Order of Inhibition in respect of land parcel known as Eldoret Municipality Block 9/17 (Border Farm)/49.

   ii. Whether the Applicants' have met the threshold required for a grant of a temporary injunction.

   iii. Whether an order for stay of execution should be granted.

Analysis and Determination

i. Whether the Applicants are entitled to an Order of inhibition in respect of the land parcel known as Eldoret Municipality Block 9/17 (Border Farm)/49

8. An Order of inhibition is provided for in Section 68 of the *Land Registration Act* as follows:

   (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

   (2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

   (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.

9. In essence, where sufficient cause exists to justify the temporary preservation or suspension of dealings concerning a specified parcel of land, the court may, at its discretion, issue an inhibition order. This order restricts the registration of any transactions affecting the land, lease, or charge until a further directive is issued, or until the conditions outlined in the order are met.

10. Counsel for the Applicant urged the court to be guided by the decision in *Dorcas Muthoni & 2 Others vs Michael Ireri Ngari* [2016] eKLR where the court, in granting an order of inhibition opined as follows:

> In my view, no prejudice will be caused to the defendant/respondent if an order of inhibition is granted as prayed. Guided by the principle that the Court should always take the course that carries the lower risk of injustice – *Films Rover International & Others Vs Cannon Films Sales Ltd* 1986 3 All E.R 772 - it is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted.

11. It is the Applicants' argument that granting an Order of inhibition carries a lower risk of injustice in this case.

12. Learned counsel for the Respondent argued that the Applicant had failed to establish the conditions for the grant of an order of inhibition and urged the Court to be guided by the decision in *M'murithi & another v Kigia* (Environment & Land Case E014 of 2022) [2023] KEELC 17760 (KLR) (7 June 2023) where the court addressed inhibition in the following terms:

> In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions; that the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued, that the refusal to grant orders of inhibition would render the applicant's suit nugatory, and that the applicant has an arguable case.

13. I concur with the requirements outlined hereinabove, recognizing that an inhibition is in the nature of a prohibitory injunction, the applicant must establish each condition to merit an inhibition order. Without such proof, the application would stand on tenuous ground and risk dismissal.

14. I have scrutinized the application, the supporting affidavit and the annexures therein. The Applicants have failed or neglected to present sufficient proof that the suit property is at the risk of being disposed of or alienated, to the detriment of the applicants.

15. Furthermore, the Applicants have failed to demonstrate that they face any imminent risk of irreparable harm that could not be sufficiently remedied by an award of damages. Their concerns, absent substantive evidence, amount to speculative apprehensions rather than the concrete, pressing threat of injury necessary to justify equitable intervention.

16. In essence, without a clear demonstration of harm beyond the remedy of damages, the application lacks the weight to tilt the proverbial scales in favor of an inhibition order. Consequently, and for avoidance of doubt, the application does not meet the threshold for an order of inhibition and the same is denied.

ii. Whether the Applicants' have met the threshold required for the grant of a temporary injunction

17. Turning to the second issue, I am tasked with determining whether the Applicants have satisfied the stringent threshold required for granting a temporary injunction. This threshold serves as a gatekeeper, admitting only claims that present the requisite legal merit with the clarity and strength expected in matters deserving of such relief.

18. The principles for granting an injunction are well settled in law and the threshold was well encapsulated in *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358.

19. First, the Applicant must establish a prima facie case with a reasonable likelihood of success. Second, an interlocutory injunction will generally not be granted unless the applicant demonstrates that they would suffer irreparable harm, which cannot be adequately remedied by an award of damages. Third, if the court is uncertain, it will resolve the application based on the balance of convenience.

20. Learned counsel for the Applicants relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR which defined a prima facie case as follows:

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

21. Turning to the instant application, the Applicants argue that the suit land belonged to the parties' father, one Ibrahim Mwangi Kamau (deceased) and further that the Respondent herein obtained the suit land through fraud.

22. It is noteworthy that in dismissing the Applicants' suit MCELC Case No. 119 of 2019, the Honourable Magistrate found that the Appellants/Applicants herein failed to prove fraud to the required standard.

23. By reiterating assertions that have already been determined and dismissed to establish a prima facie case the Applicants are for all intents and purposes taking a second bite at the cherry. An injunction is not a right but rather an equitable remedy granted at the discretion of the court.

24. In the circumstances, the Applicants have failed to establish a prima facie case and consequently not met the first condition to warrant an injunction order. As a result, the court need not address the other conditions as the Applicants' have fallen short of the prerequisite threshold.

25. The upshot is that the application does not merit the grant of an injunction.

iii. Whether an Order for Stay of Execution should be granted

26. The applicants' sought a Stay of Execution pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*, which provides that:

> " (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants".

27. It is crucial to underscore that satisfying these conditions is not merely a procedural formality but is essential for balancing the interests of both parties. The court must thoroughly examine the evidence of substantial loss and the timeliness of the application, as well as the provision of security, to ensure that any stay is granted not arbitrarily but rather based on a solid foundation of demonstrated necessity and equitable assurance.

28. In addressing the condition of substantial loss, learned counsel for the Applicants urged the court to be guided by definition espoused in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court opined thus:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR...
>
> ... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal."

29. Thus, it is incumbent upon the Applicants to present compelling evidence demonstrating that the execution of the judgment will lead to an irreparable harm that fundamentally undermines their position as the prevailing party in the appeal, beyond the mere act of execution itself.

30. Learned counsel for the Respondent argued that the Honourable Magistrate in MCELC Case No. 119 of 2019 did not give any positive order capable of being stayed. He urged the court to be guided by the decision of the Court of Appeal in *Jeremiah M' Njogu v District Land Registrar, Meru Central & 3 others; H. Young & Co. (E.A) Ltd & 2 others (Interested Parties)* [2021] eKLR which outlined the principles for the grant of stay of execution as follows:

> We have considered the application in its entirety, the affidavit in support and the submissions by both parties. The Ruling giving rise to this application dismissed the applicant's application. The orders given in that Ruling were negative orders. This Court has time and again stated that the Court cannot stay negative orders. In *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR this Court (Kantai J.A.) held as follows:-
>
> > "An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co.*

Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

> '..... an order for stay of execution must be intended to serve a purpose ...'" (emphasis supplied).

31. I concur with this reasoning as it effectively clarifies the distinction between positive and negative orders. The essence of a stay lies in its function to temporarily suspend the enforcement of obligations arising from a decree, which is inherently contingent upon the existence of a positive order that can be stayed. Negative orders, which do not impose any affirmative obligations on the parties inherently lack the capacity to be stayed.

32. On the issue of delay, I must point out that the application was filed without undue delay.

33. Therefore, in light of established jurisprudence, it is clear that the court cannot grant a stay where no positive order exists to suspend, thereby reinforcing the notion that any request for such relief must be grounded in a scenario where compliance is feasible and meaningful.

34. In the instant case, the Honourable Magistrate in MCELC Case No. 119 of 2019 made a negative order by dismissing the Applicants' case.

35. Thus, the request for a stay in this case is not only inappropriate but fundamentally misaligned with the established tenets of our jurisprudence. I therefore find that the relief cannot be granted in the circumstances.

36. In view of the foregoing, the application dated 5th July 2024 is dismissed in its entirety. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED, AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

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J. M. ONYANGO

JUDGE

In the presence of;

1. Mr. Ngigi Mbugua for the Appellant/Applicants

2. Mr. Kariuki for the Respondents

Court Assistant: Donna