



**Abongo v Abongo (Suing on Behalf of the Estate of Erasto Abongo Okode);  
Abongo & another (Interested Parties) (Environment and Land Appeal  
E083 of 2024) [2024] KEELC 13480 (KLR) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13480 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E083 OF 2024**

**E ASATI, J**

**DECEMBER 2, 2024**

**BETWEEN**

**GEORGE OCHIENG ABONGO ..... APPELLANT**

**AND**

**DR CAREN ATIENO ABONGO (SUING ON BEHALF OF THE ESTATE OF  
ERASTO ABONGO OKODE) ..... RESPONDENT**

**AND**

**MARY ATIENO ABONGO ..... INTERESTED PARTY**

**CHRISTINE MAINA ABUNDE ..... INTERESTED PARTY**

*(Being an appeal from the judgement of the Chief Magistrate's Court at Kisumu by Hon. Ezekiel Angaga Obina(SPM) delivered on 12<sup>th</sup> September 2024 in KISUMU MCEL/006 OF 2022)*

**RULING**

1. Vide the Notice of motion dated 21<sup>st</sup> November 2024, the applicant seeks for an order of temporary injunction restraining the appellant, his employees, servants, workers and/or agents from carrying out construction thereon or excavation therefrom carrying out any buildings fencing, farming activity, cutting down trees or any other adverse activity whatsoever on the suit parcels of land known as Kisumu/Kanyawegi/971 and Kisumu/Kanyawegi/970 until the hearing and determination of the appeal. The applicant also seeks for an order that costs of the application be borne by the appellant.
2. The application was based on the grounds that the applicant is the daughter-in-law to the late Mzee Erasto Abongo Okode deceased, having been married to his eldest son, the late Churchill Otieno Abongo. That the deceased had several assets both immovable (parcels of land) and movable (cattle) among them being Kisumu/Kanyawegi/971. That the applicant's late husband is a beneficial owner



- of Kisumu/Kanyawegi/970. That the applicant's mother-in-law and the applicant's late husband purchased a portion of the neighbouring portion of land number Kisumu/Kanyawegi/970 from one Onyuro Otenga which was annexed to the said ancestral parcel number Kisumu/Kanyawegi/971.
3. That by virtue of being the daughter-in-law of the deceased and legal representative of the estate of her late husband the late Churchill Otieno Abongo, the eldest son to the late Mzee Erasto Abongo, she is a beneficial proprietor of the suit land entitled to the possession and acquisition of the same.
  4. That the appellant had brought construction materials and started construction on the suit parcels. That the appellant is doing these in spite of the judgement being entered against him on the 12<sup>th</sup> September 2024 with regard to the suit properties. That instead of waiting for the outcome of the appeal, he has decided to construct on the suit parcels with impunity. That the appellant has unlawfully dispossessed the applicant of the suit lands and continues to deal with the suit lands in a manner prejudicial to the interests of the deceased Erasto Abongo Okode and Churchill Atieno Abongo. That the actions of the appellant are bound to affect and/or alter the character and texture of the suit lands in addition to intermeddling with the deceased's estate. That the applicant has a prima facie case against the appellant with overwhelming chances of success. That the applicant is bound to suffer loss that is not compensable by monetary award.
  5. The application was supported by the averments in the Supporting Affidavit of the applicant sworn on 21<sup>st</sup> November 2024.
  6. The application was opposed vide the grounds raised in the Replying Affidavit sworn by the appellant on 27<sup>th</sup> November 2024. The appellant's case is that the applicant is his sister-in-law by virtue of being wife to his late elder brother Churchill Otieno Abongo. That the applicant has her home which was built for her by her late husband on the deceased's (Erasto Abongo Okode's) land parcel NO. Kisumu/Kanyawegi/986 and Kisumu/Kanyawegi/919. That the said land parcel number Kisumu/Kanyawegi/971 measuring approximately 0.6 Ha is his ancestral land registered in the name of the deceased and was never bequeathed to the applicant's mother as alleged by the applicant. That he constructed his home on the suit lands in the year 2021 and that the suit lands had been earmarked for him by his late father with the blessings of his siblings and his mother. That construction begun in the year 2021 long before the lower court judgement.
  7. That by dint of the present application, the applicant is trying to set aside the consent order entered into on 23<sup>rd</sup> October 2024 allowing the application for stay of execution. That there is no evidence that the applicant's husband and mother in law bought parcel number Kisumu/Kanyawegi/970.
  8. That he stands to suffer more prejudice if the application is allowed because he will be rendered destitute and homeless since the suit property is where he has his matrimonial home.
  9. The application was argued orally on 28<sup>th</sup> November 2024. It was submitted on behalf of the applicant that the appellant is doing adverse activities on the suit land. That the applicant allowed the appellant to stay on the suit land until the appeal is heard. That there should be no adverse activity on the land. That the applicant's prayer is that the construction be stopped pending appeal.
  10. On behalf of the appellant it was submitted that it was the order of injunction granted in the judgement that prompted the appeal. That the suit land is the appellant's matrimonial home. That it is not right to set aside the consent order through the current application. Counsel urged the court to sustain the stay order pending appeal.
  11. I have considered the application, the Replying Affidavit and submissions made.



12. Order 42 Rule 6 (6) gives this court, in exercise of appellate jurisdiction, power to grant orders of temporary injunctions pending appeal on such terms as are just. It provides;
- “Notwithstanding anything contained in sub-rule (1) of this Rule the High Court shall have powers 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.”
13. The condition for the grant of temporary injunction pending appeal is that there has to be an appeal in place hence the court has to be satisfied that the procedure for instituting an appeal from a subordinate court has to be complied with. The procedure of instituting the appeal is by filing a Memorandum of Appeal. In the present case, that has been done. In the case of *Patricia Njeri & 3 Others vs National Museums of Kenya* [2014] eKLR the court gave the following guidance on grant of temporary injunctions pending appeal:
- An order of injunction pending appeal is a discretionary matter which will be exercised against an applicant whose appeal is frivolous. (Also see case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR),
  - The discretion should be refused where it would inflict great hardship than it would avoid,
  - The applicant must show that to refuse the injunction would render the appeal nugatory,
  - The court should also be guided by the principles in *Giella vs Cassman Brown & Co. Ltd*.
14. The principles for grant of temporary injunctions as set in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] EA 358 at page 360 are that an applicant must firstly show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly if the court is in doubt, it will decide an application on the balance of convenience.
15. The burden of proof lies with the applicant. In this case it is not in dispute that judgement was delivered against the appellant in the lower court to the effect inter alia that the applicant’s husband is a beneficial owner of the suit lands. The judgement further barred the appellant from dealing with the suit land in any way including entering there onto. Hence the appeal herein. It is also not in dispute that the appellant’s application for stay of execution of the judgement was on 23<sup>rd</sup> October 2024 allowed by consent. The does not deny the activities complained of by the applicant. His position is that by dint of the consent order, he can proceed to construct on the suit lands unhindered and that to grant an order of temporary injunction against him would be tantamount to setting aside of the consent order. I have perused the consent order entered on 23/10/2024 allowing the appellant’s application dated 11/10/2024 in terms of prayers 2 and 4 thereof. I find nothing in the said order allowing the appellant to commence or continue with construction on the suit lands. The construction will no doubt alter the character of the suit lands to the detriment of the applicant. The order of temporary injunction will not necessarily render the appellant destitute or homeless as he claims as the application does not seek to restrain him from entry onto the suit lands.
16. Knowing that the judgement in the trial court was against him, there is no justification for the appellant to commence or continue with the construction on the lands the subject matter of the suit and the appeal.



17. In the circumstances, I find that there is reason for the court to exercise its discretion in favour of the applicant. The applicant, as the holder of the judgement by the trial court has demonstrated a prima facie case with a probability of success. She has also demonstrated that if the construction is allowed to proceed she and the estate of the deceased persons will lose the land in its current state and thereby suffer irreparable loss. I find merit in the application and hereby allow it in the following terms:

- i. A temporary order of injunction is hereby granted restraining the appellant by himself, his employees, servants, workers and/or agents from carrying on construction, excavation, building, fencing, cutting down trees and or doing any adverse activity on the suit land parcel numbers Kisumu/Kanyawegi/970 and Kisumu/Kanyawegi/971 pending hearing and determination of the appeal herein.
- ii. Costs to the applicant.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 2ND DAY OF DECEMBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Alex- Court Assistant.

Ayieko for the Appellant.

Sala for the applicant.

