



REPUBLIC OF KENYA



**Chelimo & 2 others v Mwangi (Environment and Land Appeal  
055 of 2021) [2023] KEELC 16112 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16112 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL 055 OF 2021**

**JM ONYANGO, J**

**MARCH 14, 2023**

**BETWEEN**

**DANIEL KIPROP CHELIMO ..... 1<sup>ST</sup> APPLICANT**

**GLADYS RONO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ACCESS BANK ..... APPELLANT**

**AND**

**JOSEPH JOHN KARIUKI MWANGI ..... RESPONDENT**

**RULING**

1. The appellant filed an appeal against the ruling of Hon B. Kiptoo delivered on November 5, 2021 in which he granted an application for injunction in favour of the respondent restraining the appellant from dealing with land parcel number Uasin Gishu Kimumu/2270 pending the hearing and determination of the main suit. He subsequently filed a notice of motion dated December 8, 2021 seeking the following orders:
  - a. Spent.
  - b. That pending the hearing and determination of this application inter partes this honourable court be pleased to stay the implementation of the orders issued on December 5, 2021 and all execution proceedings herein pending the hearing and determination of the intended appeal on the ruling dated December 5, 2021.
  - c. That the honourable court be pleased to set aside and vary the order made with respect to the ruling of the court delivered on December 5, 2021 pending the hearing and determination of the appeal.



- d. Costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the notice of motion and the 1<sup>st</sup> appellant's supporting affidavit sworn on the December 8, 2021. In the said affidavit the 1<sup>st</sup> appellant depones that the effect of the order of injunction is to evict the 1<sup>st</sup> and 2<sup>nd</sup> appellants from land parcel number Uasin Gishu Kimumu/2270 (hereby referred to as the suit property) at an interlocutory stage yet the appellants acquired the suit property using finances obtained by charging the suit property to the 3<sup>rd</sup> appellant. He further depones that they have tenants in the houses on the suit property and they are using the rent to service the loan with the 3<sup>rd</sup> appellant. He therefore fears that if they are denied access to the suit property, they will be unable to service the loan and they will suffer irreparable loss. He adds that the said orders were made without giving him an opportunity to be heard.
  3. In response to the application, the respondent filed a replying affidavit sworn on January 18, 2022 in which he states that the ruling was arrived at on merits after considering all the facts affidavits and submissions by the parties. He depones that orders made on December 5, 2021 were to restrain the appellants, from trespassing upon the suit property pending the determination of the main suit.
  4. He further deponed that the respondent's suit was premised on the fact that the 1<sup>st</sup> and 2<sup>nd</sup> appellants had constructed illegal structures on the respondent's property which fact had not been denied by the appellants. He further averred that the trial court had made an order for the county surveyor to visit the suit property and make a report on the developments thereon.
  5. The respondent denied that the 1<sup>st</sup> appellant is the owner of the suit property or that he has been in occupation thereof since 2005. He also deponed that the 3<sup>rd</sup> appellant had denied having charged the suit property and had not authorized the 1<sup>st</sup> appellant to file an appeal on her behalf.
  6. It is the respondent's contention that the appellants have not demonstrated that their appeal has any chances of success. He therefore urged the court to dismiss the application as it lacks merit.
  7. The application was canvassed by way of written submissions and both parties filed their submissions.

### **Appellants Submissions**

8. Learned counsel for the appellant submitted that the appellants had met the requirements for stay pending appeal under the provisions of order 42 rule 6 of the *Civil Procedure Rules*. He relied on the case of *Winfred Nyawira Maina v Peterson Onyiego Gichana* (2015) eKLR where the court set out the conditions for stay pending appeal and emphasized the need for the applicant to demonstrate that if the stay was not granted, he would suffer substantial loss.
9. With regard to setting aside or varying the orders issued on December 5, 2021, counsel submitted that section 3A of the *Civil Procedure Act* gives the court inherent powers to make such orders as may be necessary to meet the ends of justice. He relied on the case of *Wachira Karani v Bildad Wachira* (2016) eKLR.
10. On his part, learned counsel for the respondent submitted that the appellants had not demonstrated that they had an arguable appeal. It was his contention that by appealing against the order of injunction, the appellants were asking the court to allow them to trespass upon the respondent's land without demonstrating that they are the registered owners thereof.
11. He submitted that the application was an abuse of the court process as the appellants had failed to disclose material facts. He further submitted that the application was merely intended to delay the



proceedings in the lower court and unjustly enrich the appellants by allowing them to trespass on the respondent's property and collect rent from illegally constructed dwellings.

### **Issues For Determination**

12. Having considered the application, rival affidavits and submissions filed by both parties, the issues for determination are twofold:
  - i. Whether the court should issue a stay of execution pending appeal
  - ii. Whether the court should set aside or vary the orders made on December 5, 2021

### **Analysis and Determination**

13. The provisions for stay pending appeal are found in order 42 rule 6 of the [\*Civil Procedure Rules\*](#) which provides as follows:

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub-rule (1) unless—
  - (a) the court is satisfied that substantial loss may result to the applicant 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 applicant.
- (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.



14. In order to determine whether the court should grant a stay of execution pending appeal it is necessary to consider whether the appellants have met the conditions in order 42 rule 6. The first condition the appellants need to satisfy is that that they will suffer substantial if the order of stay is not granted.
15. In his affidavit, the 1<sup>st</sup> appellant has stated that the effect of the order of injunction is to deny them access to the suit property which is charged to the 3<sup>rd</sup> appellant. As I understand it, they have constructed rental houses on the suit property whose rent they are using to service the loan. It is therefore their contention that if they are stopped from accessing the said houses and collecting rent therefrom, they will be unable to service the loan owed to the 3<sup>rd</sup> appellant.
16. Having perused the ruling of the lower court, it is clear that the appellants and respondent own neighbouring parcels of land being Uasin Gishu/kimumu Scheme/2270 and 2269 and whereas the appellants allege to have constructed rental houses on their plot which is plot number 2269, the respondent argues that the houses were illegally constructed on his plot which is plot number 2270. The property that is charged to Access Bank is parcel number Uasin Gishu/kimumu Scheme/2269 which belongs to the 1<sup>st</sup> and 2<sup>nd</sup> appellants.
17. The trial magistrate admitted that he did not know where the developed units were situated. that is why in his ruling, he directed the Land Registrar, Uasin Gishu to file a report concerning parcels number Uasin Gishu/kimumu Scheme/2270 and 2269 with emphasis on where the developments contained in the charge registered on September 25, 2015 in respect of Uasin Gishu/kimumu Scheme/2269 by the 3<sup>rd</sup> appellant are. He nevertheless restrained the appellants from dealing with land parcel number 2270. In my view the report of the Land Registrar and County Surveyor would be useful in clarifying whether or not the developed units are on the respondents' land and whether the appellants have trespassed on the respondent's land. At this juncture it is difficult to determine whether or not the appellants will suffer substantial loss if a stay of execution is not granted.
18. The second condition the appellants were required to meet is to file the application for stay without unreasonable delay. The ruling was delivered on November 5, 2021 and the application was filed on December 8, 2021. The period of slightly over one month is not unreasonable.
19. The third and last condition that the appellants were required to meet is to furnish security for costs. The applicants have made no mention of their intention to furnish security for costs.
20. Based on the material before the court, I am not persuaded that the applicants have met the conditions for stay pending appeal.
21. I will now proceed to determine whether the orders of November 5, 2021 ought to be set aside or varied pending the hearing and determination of the intended appeal.
22. The remedy of injunction is an equitable remedy which is granted at the discretion of the court based on settled principles. In asking this court to set aside the order of injunction, the applicant is asking the court to interfere with the exercise of discretion by the trial court. In *Mbogo & another v Shah* [1968] EA 93, the Court of Appeal stated that it would only interfere with the exercise of discretion by a lower court where it is satisfied that the decision of the lower court is clearly wrong

“... because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



23. Having perused the ruling of the trial court, I find no reason to set aside the injunction as the same is in respect of land parcel number Uasin Gishu/kimumu Scheme/2270 which does not belong to the applicant.

24. The upshot is that the application lacks merit and it is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 14<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of;**

1) Miss Kimeli for Mr. tororei for the Appellants/Applicants

2) No appearance for the Respondents

Court Assistant: Mr. Oniala

