



**Simekha v Bwabi (Environment and Land Appeal E001 of 2023)
[2023] KEELC 21221 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

E ASATI, J

NOVEMBER 2, 2023

BETWEEN

PATRICK AMIANDU SIMEKHA APPELLANT

AND

JOSEPH ASIACHI BWABI RESPONDENT

*(Being an Appeal from the Judgement of Hon. R.M. Ndombi (SRM) in
VIHIGA PMC EL CASE NO.4 Of 2021 delivered on 19th June 2023)*

RULING

1. This ruling is in respect of the Notice of Motion Application dated 25th July, 2023 brought by the Appellant pursuant to the provisions of Order 42 Rule 6 Civil Procedure Rules and Sections 3A, 3B, 6 and 63(e) of the *Civil Procedure Act*. The application seeks for an order of stay of proceedings, judgement, order or decree in Vihiga SPM ELC Case No.4 of 2021 delivered on 19th June, 2023, pending hearing and determination of the appeal and an order of temporary injunction restraining the Respondent either by himself or his agent from entering, remaining, leasing, charging, pledging, disposing of in any way, transferring, constructing any structures, dealing with the Appellant's quite possession of property known as L.R. West Bunyore/Emusire/1200 pending hearing and determination of the appeal.
2. The grounds upon which the application was brought were that the Appellant bought the suit land in the year 2012 but the seller later died before transfer of the sold land. That the Appellant has been in quite possession of the suit land since he bought it and even during pendency of the lower court case. That the Appellant enjoyed temporary orders during pendency of the lower court case. That after judgement of the lower court, the Respondent has threatened to invade the suit property and destroy the Applicant's developments. That if the orders sought herein are not allowed, the appeal will be rendered nugatory. That the Appellant is willing to furnish security as the court may order and that the application has been brought without unreasonable delay.



3. The application was supported by the averments in the Supporting Affidavit sworn by the Applicant on 25th July, 2023 and the annexures thereto.
4. The application was opposed vide the grounds of opposition contained in the Replying Affidavit sworn by the Respondent on 4th October, 2023.
5. The application was argued orally on 9th October, 2023. Counsel for the Applicant submitted that the Applicant has developed the suit land. That there are 2 green cards attached to the Supporting Affidavit of which one is in respect of a separate land parcel known as West Bunyore/Emusire/1186 which belongs to the Respondent and where the Respondent resides. That the judgement was delivered on 19th June, 2023 and appeal filed by 11th July, 2023 hence there was no delay.
6. It was submitted on behalf of the Respondent that the application was an afterthought. That there was no evidence of occupation of the suit land by the Applicant. That the Respondent as a beneficiary to the estate of Martha Asiadi is entitled to the estate. That the Appellant has another property where he resides.
7. I have considered the application, contents of Supporting Affidavit and annexures, contents of Replying Affidavit and the oral submissions made by Counsel. The law on stay of execution pending appeal relevant to this case is found in Order 42 Rule (6) of the Civil Procedure Rules 2010.
8. It is not denied that the Appellant had temporary orders of injunction during the pendency of the suit before the subordinate court. It has been stated on oath that the Applicant has carried out developments on the suit land and that the Respondent resides elsewhere on a separate parcel of land for which a green card was exhibited.
9. I find that the prayers for stay or execution is justified. The applicant has undertaken to provide such security as the court may order.
10. The law regarding temporary injunctions pending appeal is found in order 42 Rule 6 (6) which 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”.
11. The grounds for grant of temporary injunction pending appeal are as set out in the case of *Giella v Cassman Brown Co. Ltd* [1973] 358 that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank Kenya Ltd & 2 Others* [2003] eKLR as follows:

“ a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case 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.”
12. In this case the applicant has already preferred the appeal, he has deposed that he is in occupation of the suit land and that during the pendency of the suit in the lower court he had been granted



orders of injunction. He has further deposed that now the Respondent threatens to interfere with the occupation. It is, in my view, in the interest of justice that the status quo as prevailed during the hearing of the lower court case be preserved pending the hearing and determination of the appeal.

13. I find that the application has merit and allow it and make the following orders:-

- a. An order of stay of execution of the judgement in Vihiga PMC EL Case No 4 OF 2021 is hereby granted pending hearing and determination of the appeal herein.
- b. A temporary order of injunction is issued restraining the Respondent either by himself or his agents from entering, remaining, leasing, charging, pledging, disposing of in any way, transferring, constructing any structures, dealing with the Appellant's quite possession of property known as L.R. West Bunyore/Emusire/1200 pending hearing and determination of the appeal.
- c. Costs to the Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 2ND DAY OF NOVEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

No appearance for the Appellant/Applicant.

No appearance for the Respondent.

