



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC NO. E15 OF 2021**

LOYD MUGAMBI MAINA.....1<sup>ST</sup> APPELLANT  
MURIMI MBAE.....2<sup>ND</sup> APPELLANT  
GITONGA MURITHI.....3<sup>RD</sup> APPELLANT  
AGNES KANYUA MICHAEL.....4<sup>TH</sup> APPELLANT  
M'RITHAA M'RAJA.....5<sup>TH</sup> APPELLANT  
MWENDA GITONGA.....6<sup>TH</sup> APPELLANT  
MBABU WILSON.....7<sup>TH</sup> APPELLANT  
GITONGA MWIANDI.....8<sup>TH</sup> APPELLANT  
EUNICE KANINI MWIANDI.....9<sup>TH</sup> APPELLANT  
GERRALD MURIUKI.....10<sup>TH</sup> APPELLANT  
BENSON NJERU MWOGA.....11<sup>TH</sup> APPELLANT  
JULIE NJERU.....12<sup>TH</sup> APPELLANT  
RICHARD NDUBI KAJOGI.....13<sup>TH</sup> APPELLANT  
ANNJOY KANGAI M'RIRIA.....14<sup>TH</sup> APPELLANT  
MARTIN MBABU NJERU.....15<sup>TH</sup> APPELLANT  
FREDRICK KABURU MWOGA.....16<sup>TH</sup> APPELLANT  
ALEXENDER MURITHI NJERU.....17<sup>TH</sup> APPELLANT  
MAWIRA NDUBI.....18<sup>TH</sup> APPELLANT  
KARIUKI MURUNGI.....19<sup>TH</sup> APPELLANT  
DOREEN KINYA.....20<sup>TH</sup> APPELLANT

**VERSUS**

**KIRUMI KIAMUJARI WATER PROJECT (Sued through its**

**RULING**

1. This Ruling is in respect of a notice of motion dated 29.11.2021 in which the applicants have sought the following orders:

1) **THAT** this application be certified urgent.

2) **THAT** Pending interpartes hearing of this application an order of temporary injunction do issue restraining the Respondents whether by itself through the registered trustees or through its agents, contractors, assigns, servants, employees or anybody else acting at its behest from excavating, digging or burrowing trenches for purposes of laying a water pipeline or in any other manner whatsoever interfering with the Appellants' peaceful occupation of L.R.Nos.MWIMBI/MURUGI/6178, 94, 305, 4, 3906, 5710, 2483, 3908, 33, 35, 2482, 2484 and 6180.

3) **THAT** pending the hearing and determination of this application and the Appeal an order of temporary injunction do issue restraining the Respondent whether by itself through the registered trustees or through its agents, contractors, assigns, servants, employees or anybody else acting at its behest from excavating, digging or burrowing trenches for purposes of laying a water pipeline or in any other manner whatsoever interfering with the Appellants' peaceful occupation of L.R.Nos. MWIMBI/MURUGI/6178, 94, 305, 4, 3906, 5710, 2483, 3908, 33, 35, 2482, 2484 and 6180.

4) That costs of this application be provided for.

2. The application is brought pursuant to Order 42 Rule 6(6) of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act and is premised on the grounds set out thereunder and supported by the affidavit sworn **by LOYD MUGAMBI MAINA on 29<sup>th</sup> November, 2021** in which he states *inter alia*:

a) That the Appellants were the plaintiffs in CHUKA C.M. ELC CASE NO.52 of 2019 while the Respondent was the 1<sup>st</sup> defendant.

b) **THAT** vide a decision rendered on 11/11/2021, the plaintiffs' claim was dismissed with costs.

c) **THAT** being aggrieved by the said decision the Appellants have preferred this Appeal.

d) **THAT** the Appellants' claim before the Lower Court was prompted by an intention by the Respondent to lay a water pipeline across the Appellants' parcel of land without adhering to the legal requirement for the acquisition of a public right of way through private property.

e) **THAT** the Appellants are apprehensive that the Respondent will proceed with the project despite not having acquired the necessary way leaves from the Appellants or paid compensation.

f) **THAT** the installation of the project will affect significant portions of the appellants parcels of land which will in turn render the Appeal worthless.

g) **THAT** the Appellants Appeal has a very strong chance of success.

h) **THAT** the Appellants are in active occupation of the respective parcels of land and hence will suffer irreparable harm

i) That the balance of convenience tilts towards and/or in favour of the Appellants.

3. The respondent **HELDAD MURIUKI JUSTOR** via replying affidavit sworn on 10.12.2021 opposed the application.

4. It is the respondent's contention that the Application before court is incurably defective as it does not seek a stay of execution of the judgement and decree of the trial court but seeks orders of injunction as if this was a fresh suit.

5. He further deposes that this being an Application premised on Appeal of the decision of the trial court, then this court being an Appellate court cannot entertain an Application for orders of injunction as that was the province of the trial court.

6. The respondent contends that through a judgement delivered on the 11<sup>th</sup> November 2021 at Chuka Chief Magistrate court ELC no 52 of 2019, the lower court dismissed the Applicants case.

7. The respondent further contends that the memorandum of Appeal as filed by the Applicants does not raise any triable issues and the Appeal has no chances of success.

8. The respondent avers that the applicants allege at paragraph 5 of the supporting affidavit that they have filed an Appeal but they have not filed any appeal before the court and as such their Application stands on the wind and that the well- reasoned judgement by the trial court captured the pleadings, the material evidence presented and produced in court and the Applicable Law. That whereas the Applicants are 20, the parcels of land in dispute were 14 as captured at page 4 of the trial court judgement which shows clearly that there are parcels of land being claimed by many persons and the Applicants could not demonstrate who owns which parcel of land in the trial court.

9. The respondent contends that he is advised by his Advocates Messrs Muthomi Gitari & Co. Advocates that Section 26 of the Land Registration Act No.3 of 2012 provides for a certificate of title deed as prima facie evidence as to ownership of land and the applicants' failed to prove ownership of the parcels of land listed in the trial court and as such even the court cannot infer ownership to the Applicants since they failed to adduce any evidence to the same.

10. The respondent avers that laying of the water pipes would not render the appeal nugatory as any loss that may be suffered by the Applicants can be adequately compensated by way of damages.

11. The respondent further avers that as a successful litigant, the respondent should not be deprived of the fruits of the judgement in their favor without just cause and that the Applicants have not applied for a stay of execution of the decision of the trial court and as such the same is not available to the Applicants. That it is then only just and fair that this Application for injunction pending appeal is denied.

12. The parties consented to have the application dispensed with by way of written submissions. The Appellants filed their submissions dated 18<sup>th</sup> January, 2022 on 21<sup>st</sup> January, 2022 while the Respondent's submissions is dated 14<sup>th</sup> February, 2022 and filed on even date.

13. The applicants submitted that the court while exercising its appellate jurisdiction has the discretionary power to grant an order of temporary injunction pursuant to order 42 Rule 6 (6) of the Civil Procedure Rules, 2010. They also submitted that the court will ordinarily apply the same legal principles as if it were handling an application under order 40 Rule 1 of the Civil Procedure Rules.

14. The applicant cited the case of JASON KATHURIMA RUKARIA VS KENYA POWER & LIGHTNING CO.LTD (2008) eKLR in which the court while entertaining an application for temporary injunction pursuant to its appellate jurisdiction stated that the conditions upon which interlocutory injunction may be granted are articulated in **Giella v Cassman Brown & Co. Ltd [1973] EA 358.**

15. The applicant further cited the case of **STEPHEN MUTUGI MWENJE VS MUNICIPAL COUNCIL OF KERUGOYA & ANOTHER (2018) eKLR**

which buttressed the position postulated earlier as in considering an application such as this one, the court will be guided by the following:

**“1. An order of injunction pending Appeal is a discretionary one which will be exercised against an Applicant whose Appeal is frivolous.**

**2. Such discretion should be refused where it would inflict greater hardship than it would avoid**

**3. The Applicant must show that a refusal to grant the injunction would render the Appeal nugatory.**

**4. The court should also be guided by the principles set out in GIELLA VS CASSMAN BROWN & CO.LTD [1973] E.A.358.”**

16. The respondent submitted that he is opposed to the Application for an order of injunction pending appeal for reasons that the court has jurisdiction to issue an order of injunction pending appeal and that the trial court issued a negative order and as such an application for stay could not suffice for the reasons that a negative order cannot be stayed.

17. The respondent further submitted that the power to grant an injunction pending appeal is discretionary and such discretion must be exercised judiciously on the basis of law and evidence. The respondent submitted that the principles applicable in considering an application for an injunction pending appeal were pronounced by Visram J. (as he then was) in Patricia Njeri & 3 others v National Museum of Kenya (2004) eKLR as follows:

**“a) An order of injunction pending Appeal is a discretionary one which will be exercised against an Applicant whose Appeal is frivolous.**

**a) The discretion should be refused where it would inflict greater hardship than it would avoid**

**b) The Applicant must show that a refusal to grant the injunction would render the Appeal nugatory.**

**c) The court should also be guided by the principles set out in GIELLA VS CASSMAN BROWN & CO.LTD [1973] E.A.358.”**

18. The respondent has also cited the locus classicus case of **GIELLA VS CASSMAN BROWN & CO.LTD [1973] E.A.358**, where the court set out the conditions necessary for the grant of an interlocutory injunction as follows:

**“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.”**

19. The Respondent cited the case of **Mrao Limited –v- First American Bank of Kenya and 2 Others [2003] eKLR** where the Court of Appeal determined the question of what constitutes a prima facie case. It is the Respondent's submissions that none of the Appellants presented a copy of a title deed, a search certificate or swore an affidavit claiming ownership of any of the parcels of land listed in this suit and that none of the Appellants demonstrated ownership or proprietary interest of the said parcels of land. That the court cannot tell for the purposes of the injunction sought that the Appellants have established a prima facie case. The Respondent submitted that in the event that the injunction sought is granted, the net effect would be to inflict greater hardship on the members of the Respondent organization who do not have any drinking water in their homesteads.

20. The Respondent further submitted that the Appellants have not demonstrated what loss they would suffer if the Respondent proceeds with the process of laying water pipes as such action will not take anything away from the Appellants. That any loss that would be caused to the land by laying of the water pipes can be compensated by way of damages if the Appellants appeal succeed. The Respondent submitted that the Appellants will not suffer irreparable harm as they can be compensated by way of damages. The Respondent relied on the case of **Kenya Shell Limited vs Kibiru [1986] KLR 410** wherein Platt, AG. JA (as he then was) considered the principle of substantial loss.

### **Analysis & Determination**

21. I have considered the application herein, the respondent's replying affidavit and the parties' submissions. The central issue for consideration is whether **the** applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the hearing of the appeal.

22. The Applicants have moved this court principally under Order 42 Rule 6(6) which provides as follows:

***“Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power 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 the subordinate court or tribunal has been complied with.”***

23. It is therefore clear that the above sub-rule gives this court discretionary power to grant an injunction on terms that it thinks just so long as the procedure for filing an appeal from the subordinate court has been complied with. Appeals from subordinate courts have to be filed within 30 days from the date of the decision of the lower court and such appeal is filed when a Memorandum of Appeal has been filed. Section 79 G of the Civil Procedure Act provides:

***“79 G. Every appeal from subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”***

24. In this case, the decision of the lower court was made on **11<sup>th</sup> November, 2021** and a Memorandum of Appeal filed on **19<sup>th</sup> November, 2021**. That the Applicants have complied with the procedure for filing of an appeal before this court is not in doubt, and the court is therefore seized of the matter and has the requisite jurisdiction and power to determine whether or not to grant the injunction sought while exercising its appellate jurisdiction.

25. Whether or not to grant an injunction pending appeal involves exercise of discretion and that discretion has to be exercised judicially. Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the Applicants have made a case in terms of ***Giella –v- Cassman Brown Case (Supra)***. The Applicants must show that they have a prima facie case with a probability of success, that they will suffer, irreparable damage which cannot be compensated by an award of damages, and if in doubt, the court should decide the case on a balance of convenience.

26. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether the Applicants have a prima facie case, the ultimate objective of course being to safeguard rights of the Appellants in the appeal so that the appeal is not rendered nugatory.

27. The court has considered the principles as set out in the case of ***Patricia Njeri & 3 Others –vs- National Museum of Kenya (Supra)***. Further in considering whether or not to grant an injunction pending appeal, the court while trying to ascertain if the appeal is arguable, or put differently, whether the appeal raises serious questions for determination, the court does not have to go deeply into the appeal itself. It must bear in mind that the appeal is yet to be heard and avoid making comments that may prejudice the trial of the appeal itself. The court should only consider the grounds raised in the Memorandum of Appeal vis a vis the impugned decision and form its own opinion whether there is an arguable appeal to warrant the orders of injunction.

28. In the application before me, the Applicants have stated that their claim before the lower court was prompted by an intention by the Respondent to lay a water pipeline across the Applicants' parcels of land without adhering to the legal requirement for the acquisition of a public right of way through private property. The Applicants' claim was dismissed and the Applicants are apprehensive that the Respondent will proceed with the project despite not having acquired the necessary wayleaves from the Applicants and despite having not paid compensation.

29. In this case, the applicants' argument is that the Respondent intends on excavating the suit lands for purposes of installing a water pipeline. The Applicants argue that the damage to be occasioned when undertaking such an exercise is twofold; crops and trees on one hand and land on the other. The Applicants further contend that the Respondent had at the trial indicated its willingness to compensate for the loss occasioned to the crops and trees but the amount quoted was rejected by the Applicants for being inadequate. It is therefore the Applicants contention that it would be prudent and just to restrain the Respondent from laying of the water pipeline pending the determination of the appeal herein. It is clear to me that the Applicants are mainly after compensation before the project is undertaken.

30. In this case, I am not persuaded that the Applicants have demonstrated that the appeal is arguable. They have also failed to demonstrate that the appeal would be rendered nugatory if the injunction orders are denied. I say so because the subject of the suit is land which will still be there post the appeal and the water pipes even if laid, can still be removed. I am also not convinced that the appeal shall be rendered nugatory in the event the appeal is successful. Moreover, the Applicants are concerned about compensation for their land and therefore the Applicants can still be adequately compensated by an award of damages in the event their appeal succeeds.

31. By reason of the foregoing, it is my finding and I so hold that the Notice of Motion dated **29<sup>th</sup> November, 2021** lacks merit and the same is hereby dismissed with costs to the Respondent.

32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF MARCH, 2022 IN THE PRESENCE OF:**

C/A: Martha

Ms. Wahome h/b for Muriithi for Appellants

N/A for Muthomi for Respondent

**C. K. YANO,**

**JUDGE.**