



**Tulet v Kukutia (Environment and Land Appeal E004 of 2021)
[2022] KEELC 3306 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E004 OF 2021**

EM WASHE, J

JUNE 7, 2022

BETWEEN

LEKILASU SHANKUR OROL TULET APPLICANT

AND

OLES KANKEY KUKUTIA RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion Application dated 28th October 2021 (hereinafter referred to as “the present application”) seeking for the following Orders;-
 - “1. That this Application be certified as urgent and be heard Ex-parte in the first instance for reasons of the urgency set out in the Certificate of urgency and the same be heard inter-parte on such date as this Honourable Court may direct. (Spent).
 2. That there be a stay of execution of the ruling and Order issued on the 11th October 2021 in Kilgoris Principal Magistrate’s Environment & Land Court Case No.4 of 2021 pending the hearing of this Application inter-partes.
 3. That there be a stay of execution of the ruling and Order issued on the 11th of October 2021 in Kilgoris Principal Magistrate’s Environment & Land Court Case No. 4 of 2021 pending the hearing and determination of this Appeal.
 4. That there be an Order reviewing, varying and/or setting-aside the Order of the Trial Court dismissing the Appellant’s application for injunction relating to Land Reference Transmara/olomismis/1300 or at all.
 5. That costs of the application be provided for.
- “2. The present Application is based on four grounds which are pleaded on the face of it as follows;-



- a. That the Appellant/Applicant being dissatisfied and aggrieved by the Ruling of the Principal Magistrate (R.M. Oanda) particularly refusing to Order an injunction pending the hearing and determination of Kilgoris Principal Magistrate Environment & Land Case No. 4 of 2021, the Land Reference Transmara/olomismis/1300 will be interfered with.
 - b. That the Applicant has an arguable Appeal with a very high probability of success and he would be prejudiced if he is evicted from the land he has occupied since 2006 while the suit and this Appeal is pending.
 - c. That if the Order declining grant of injunction is not reviewed, varied or set-aside as sought, the Appellant/Applicant's Appeal will be rendered nugatory.
 - d. That this Application has been made without delay.
3. 3. The present Application is supported with the Affidavit of the Applicant sworn on the 8th of November 2021.
 4. The legal provisions that the present application invokes are Order 42 (6) and 22(2) of the Civil Procedure Rules as well as Article 159 (2) of the Constitution of Kenya, 2010.
 5. The origin of the present Application is a Memorandum of Appeal emanating from a Ruling and Order delivered on the 12th October 2021 regarding an injunctive application dated 2nd February 2021 by the Trial Court.
 6. The finding of the Trial Court delivered on the 12th October 2021 was a dismissal of the injunctive application dated 2nd February 2021.
 7. The present application now seeks to the Stay the dismissal of the Application dated 2nd February 2021 in the Trial Court pending the hearing and determination of the Appeal.
 8. In addition to the Order of Stay, the Applicant in this Application seeks this Court to review, vary or set-aside the dismissal Order issued on the 12th October 2021.
 9. The Court having perused the present Application in details, the Statement of Grounds of Opposition filed on the 8th December 2021, the submissions of the Applicant dated 22nd February 2022 and the submissions of the Respondent dated 15th March 2022, the Court notes that the issues for consideration are only two.

A. Whether of not to Grant Stay of Execution.

10. The first issue appertains the granting of Stay orders against the Ruling and Order of 12th October 2021 regarding the injunctive application dated 2nd February 2021.
11. The Applicable principles settled in our jurisdiction in the determination of Application of stay Orders pending Appeal are two fold;-
 - i) Firstly, that the Appeal or intended Appeal is arguable and not frivolous.
 - ii) If the Stay Orders are not issued, then the intended Appeal or Appeal will be rendered nugatory.
12. On the first principle of application, the holding of the Trial Court in regards to the injunctive application dated 2nd February 2021 was a denial of the protective Orders applied by Applicant couched in the form of an injunction.



13. In other words, the Respondent was not granted any active Orders that could be executed and/or enforced against the Applicant pursuant to the Application dated 2nd February 2021.
14. The Orders made by the Trial Court as regards the injunctive Application dated 2nd February 2021 are negative in nature.
15. In the Respondent's cited *Authority George Ole Sangui-versus- Kedong Ranch Limited*, Civil Application No.55 Of 2015, the Court made the following pronouncement;

“The dismissal Order cannot be enforced and is not capable of execution. It is not a positive Order requiring any party to do or to refrain from doing anything. It does not confer any relief.

It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the Respondent.

It is not capable of execution or enforcement. The act of dismissal of a suit could not be stayed.”
16. Looking at the above disposition of the law, the Court is not convinced that the Appellant/Applicant has an arguable Appeal to warrant the issuance of a Stay Order as anticipated in the first principle.
17. On the second principle whether the appeal would be rendered nugatory, the Applicant has not made any attempts to address this issue in either the Supporting Affidavit sworn by the Appellant/Applicant dated 8th November 2021 or the Submissions dated 22nd February 2022.
18. The subject matter of the intended Appeal or Appeal in this matter are the findings of the Trial Court pronounced on the 12th October 2021.
19. This Court is at pains to clearly understand how the negative Orders issued on the 12th October 2021 would be rendered nugatory if a Stay Order is not granted in this present Application.
20. Consequently therefore, the Appellant/Applicant has again failed to discharge this burden of proof to the satisfaction of the Court.

B. Whether or not to Vary, Set-aside and/or Review the Orders Issued on the 12th October 2021.

21. The present Application seeks to review, vary and/or set-aside the Order of the Trial Court dismissing the Applicant's application for injunction relating to the Land Reference Transmara/olomismis/1300.
22. The Applicant's prayer No.4 in the present Application is rather vague on the date of the application it seeks to address or the day the Order to be reviewed was pronounced.
23. The Application disclosed by the Applicant as determined by the Trial Court is the one dated 2nd February 2021 and finalised on the 12th October 2021.
24. The proceedings at the Trial Court which are still ongoing appertain to the property known as Transmara/olomismis/1300.
25. The Applicant's Application which was heard and dismissed on the 12th October 2021 by the Trial Court is dated 2nd February 2021.
26. This dismissal is the subject of the Memorandum of Appeal filed in court on the 27th October 2021.



27. The Applicant's prayer in the Memorandum of Appeal filed on the 27th October 2021 is to set-aside, varied or annul the Ruling delivered on the 12th October 2021 by the Trial Court.
28. In essence therefore, any attempt to evaluate and/or discuss the merits or demerits of prayer No. 4 in this present application would be to evaluate the merits and demerits of the Memorandum of Appeal at an interlocutory stage.
29. The dismissal Order dismissing the Appellant's/Applicants Application for injunction at the trial court can only be set-aside, varied, reviewed and/or annulled upon the hearing and determination of the Memorandum of Appeal filed on the 27th of October 2021.
30. In conclusion therefore, the Court makes the following findings and/or Orders as regards the Applicant's application filed on the 18th November 2021;-
 - A. The Application dated 28th October 2021 be and is hereby dismissed.
 - B. The Appellant/Applicant shall bear the costs of this Application.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 7TH OF JUNE 2022.

EMMANUEL. M. WASHE

JUDGE

IN THE PRESENCE OF:

ADVOCATE FOR THE APPLICANT: MR. MUKOYA

ADVOCATE FOR THE RESPONDENT:

