



Ndubai v M'Ikunyua & 4 others (Environment and Land Appeal E 019 of 2022) [2022] KEELC 13300 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E 019 OF 2022
CK YANO, J
OCTOBER 5, 2022**

BETWEEN

LEON NDUBAI APPELLANT

AND

CHARLES NTIRITU M'IKUNYUA 1ST RESPONDENT

MOSES MURIUKI M'IKUNYUA 2ND RESPONDENT

STEPHEN MUTHEE M'IKUNYUA 3RD RESPONDENT

HARRIET GACHIENJA M'IKUNYUA 4TH RESPONDENT

LUKE MURIUNGI MAKATHIMO 5TH RESPONDENT

RULING

1. This ruling is in respect to the notice of motion dated June 21, 2022 brought under order 45 of the [Civil Procedure Rules](#) and sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) and all other enabling provisions of law seeking inter alia, an order that pending the hearing and determination of the appeal, the court be pleased to issue an order of temporary injunction restraining the respondent/petitioner acting either by herself or otherwise from selling, transferring, leasing LR No Kiirua/Naari/1178 (hereinafter called "the suit property) or in any other way interfering with the applicant's peaceful possession and occupation of the suit property.
2. The application is premised on the grounds on the face of the motion and is supported by the affidavit of Leon Ndubai, the applicant, sworn on June 21, 2022 and further affidavit sworn on July 27, 2022. The applicant avers that on April 5, 2022 Hon D.W Nyambu chief magistrate delivered a judgment in Meru CMC ELC No 061 of 2021 Leon Ndubi v Charles Ntiritu M'Ikunyua and 4 others. That in the said judgment, the learned magistrate found *inter alia* that the applicant had failed to prove that



he had paid the entire purchase price for the suit land and therefore was not entitled to an order of specific performance as pleaded.

3. That being dissatisfied with the said decision the applicant preferred an appeal to this court on April 28, 2022. It is the applicant's contention that the intended appeal is highly meritorious with high probability of success. The applicant states that the memorandum of appeal was duly served upon the respondents.
4. The applicant avers that he is in current possession of the suit property and believes that the same is in imminent and immediate danger of being alienated and or disposed of by the 5th respondent. The applicant avers further that unless the court grants the orders sought, the appeal will be rendered nugatory and futile. The applicant asserts that the respondents will suffer no prejudice if this application is allowed as prayed. That it is in the interest of justice and fairness that this application be allowed as prayed. The applicant has annexed a copy of the said memorandum of appeal. It is also the applicant's contention that an appeal is a different suit independent from the suit in the lower court, hence no need to file a notice of change.
5. In opposing the application, the respondents filed a replying affidavit sworn by Luke Muriungi Makathimo, the 5th respondent on July 5, 2022. He has deponed inter alia, that he is the registered owner of the suit land and that he is currently in exclusive possession. He has annexed some photographs showing crops allegedly planted thereon.
6. Relying on advice, the 5th respondent states that the appeal has low chances of success, adding that the applicant has failed to annex a copy of the impugned judgment for the court's consideration. The 5th respondent avers that when he purchased the suit land from the 1st to 4th respondents who had been awarded the same by the High court in ELC No 26 of 2011 (OS) where the court held that the 1st to 4th respondents were in occupation of the said land. A copy of the judgment in Meru ELC No 26 of 2011 (OS) has been annexed.
7. It is contended that the court in dismissing the applicant's case held that he did not have legal capacity to institute the suit in his own capacity. That the applicant is lying by stating that he is in occupation of the suit land. It is the respondents contention that the issue of occupation has been determined by the court in ELC No 26 of 2011 (OS) adding that no plausible reason has been advanced by the applicant to warrant the grant of the orders sought herein.
8. Further and relying on advice, the respondents aver that the application is incompetent, the same having been filed by the firm of Donex Juma who have not file notice of change of advocates (with leave of court) to replace the firm of M.D Maranya & Co Advocate and therefore have blatantly breached the clear provisions of order 9 rule 9 of the Civil Procedure Rules. It is further stated that the respondents have been in occupation, possession and use of the suit land for over thirty (30) years and that the application is not merited and is an abuse of the court process. The respondents urged the court to dismiss the application with costs.
9. The application was canvassed by way of written submissions. The applicant filed his submissions on July 28, 2022 through the firm of Donex Juma Advocates and relied on the case of Agnetta Akalo Simoli v Dorothy Avieta Amayamu civil appeal No E040 of 2021 (Kisumu). The applicant submitted that he is apprehensive that the respondents are in the course of disposing off the suit property which is the substratum of the matter before court and consequently there is reasonable apprehension that the appeal herein will be rendered nugatory. It is submitted that the respondents have not controverted the averment that they are in the course of disposing off the suit property, and that article 22 of the Constitution grants the applicant the right to move this court where his rights are denied, violated



or infringed or is threatened. That a reasonable and founded fear of sale of the land and subsequent eviction is therefore proper.

10. The respondents filed their submissions on July 28, 2022 through the firm of Mutegi Mugambi & Co Advocates. It is submitted that the applicant is not in possession and occupation of the suit land, the issue having been determined in Meru ELC No 26 of 2011 (OS) and confirmed by a scene visit by the trial court. It is further submitted that the application fails to meet the threshold for grant of the orders sought. Counsels for the respondents relied on the case of *Gideon Muchui Aritibi v Wilson Mutua* [2021] eKLR and submitted that the applicant has not demonstrated that he shall suffer substantial harm, has not tendered any security and that the application is made after inordinate delay and does not raise a *prima facie* case. It is further submitted that the applicant's advocate did not seek leave to come on record for the applicant after judgment had been passed as provided under order 9 rule 9 of the *Civil Procedure Rules*.
11. I have considered the application, the affidavits in support, the response thereto as well as the rival submissions. In my considered view, the issues for determination are whether the applicant's advocate is properly on record, and whether the applicant has met the threshold necessary to be granted an injunction pending appeal.
12. The respondents argued that the firm of M D Maranya & Co Advocates were on record for the applicant and that there is no notice of change of advocate that was filed with the leave of court allowing the firm of Donex Juma advocates to come on record for the applicant after the entry of judgment as provided for under order 9 rule 9 of the *Civil Procedure Rules*.
13. It was the applicant's contention that an appeal is a totally different suit independent from the suit that was before the lower court and thus counsel need not have filed a notice of change of advocate to commence the appeal.
14. This court takes cognisance of order 9 rule 5 of the *Civil Procedure Rules* which provides that-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such case or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter including any review or appeal “ (emphasis added)
15. In addition, order 9 rule 7 of the *Civil Procedure Rules* provides that-

“where a party, after having sued or defended in person appoints an advocate to act in the cause or mater on his behalf, he shall give notice of the appointment and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications”
16. It is therefore clear that a notice of change of advocates has to be filed in court and served in accordance with the provisions of order 9 rule 6.
17. Further, order 9 rule 9 of the *Civil Procedure Rules* states as follows-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-:



- a. Upon an application with notice to all the parties, or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”
18. It is therefore evident that before notice of change of advocate can be filed after judgment has been passed, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and the proposed incoming advocate or party intending to act in person as the case may be. Order 9 rule 5 is clear that representation extends till appeal stage unless there is a change while rule 9 provides for change after judgment has been passed.
19. From the foregoing, it is clear that the argument by the applicant that an appeal is a different suit from the suit that led to the impugned judgment cannot hold water. For these reasons it is the finding of this court that the firm of Donex Juma advocates is not properly on record for the appellant/applicant. On that ground alone, the application must fail.
20. The second issue is whether the applicant has met the threshold for grant of temporary injunction pending hearing and determination of the appeal herein. Order 42 rule 6(6) of the [Civil Procedure Rules](#) provides as follows-;

“Notwithstanding anything contained in sub rule (1) of this rule the High court shall have power in 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”
21. It is therefore clear that this court in the exercise of its appellate jurisdiction has power to grant a temporary injunction pending appeal, where the ends of justice demand so. The power of the court to grant an injunction pending appeal is discretionary and the said discretion should be exercised judicially and not in whimsical or arbitrary fashion by following laid down certain principles, namely, i) the discretion will be exercised against an applicant whose appeal is frivolous, ii) the discretion should be refused where it would inflict greater hardships against the respondent than it would avoid, iii) the applicant must show that to refuse the injunction would render the appeal nugatory and, iv) the court should be guided by the principles in *Giella v Cassman Brown & company* (1973) EA 358.
22. The above principles for grant of temporary injunction pending appeal were reiterated in many cases such as [Patricia Njeri & 3 others v National Museum of Kenya](#) [2004] eKLR, [Madbu Paper International Limited v Kerr](#) [1985] eKLR, [Venture Capital & Credit Limited v Consolidated Bank of Kenya](#) (2004) 1EA 357, and [Equip Agencies Limited v I & M Bank limited](#) [2017] eKLR.
23. In the *Giella case* (supra) the court stated the conditions for grant of temporary injunction as follows-;

“First an applicant must 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”



24. In the case of *Mrao Ltd v First American Bank of Kenya & 2 others* [2003] eKLR a *prima facie* case was defined as follows-;

“A *prima facie* case in a civil case include but is not confined to a “genuine or arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

25. In the instant case, the appellant has stated that he is apprehensive that the respondents may alienate the suit property, thus rendering the appeal nugatory. The applicant stated that the respondents are in the course of disposing off the suit property. The respondents have on their part, argued inter alia, that the dispute over the suit property was determined in finality in ELC No 26 of 2011 (OS) and that there is no appeal against that decision. They further argue that it is the 5th respondent, who will stand to suffer irreparable harm if the orders sought are granted since he is the one in possession and occupation.
26. On the question of *prima facie* case, the court has noted that the suit property is registered in the name of the 5th respondent. In addition there is judgment in favour of the respondents from ELC 26 of 2011 (OS) and which judgment has not been set aside or reviewed in any appeal. The instant appeal is against the decision in Meru CMC ELC No E016 of 2021 and not Meru ELC No 26 of 2011 (OS). Further the applicant has not tendered any evidence to show that the respondents are in the process of alienating the suit property as alleged.
27. Further, this court takes cognisance of the fact that a stay of execution helps to preserve the subject matter of the appeal so that it is not rendered nugatory if it succeeds. In this case, I am not convinced that the intended appeal will be rendered nugatory if the stay is not granted. This is so because the subject matter of this suit which is the suit land will still be present post the appeal.
28. On the question of the balance of convenience, the court has already noted that there is a judgment in ELC No 26 of 2011 (OS) in favour of the respondents. The balance of convenience therefore tilts in favour of the respondents as opposed to the applicant.
29. In the result, this court finds no merit in the notice of motion dated June 21, 2022. The same has failed to meet the threshold laid down in order 42 rule 6 of the *Civil Procedure Rules* and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF OCTOBER, 2022.

In the presence of

C/A Mwenda

Manyonge holding brief for Juma for applicant

Mrs. Mutegi for respondents

C.K YANO

ELC JUDGE

