



**Karanja v Ouko & 3 others (Being administrators of the Estate of the  
Late Jason Atinda Ouko) (Environment & Land Case 321 of 2011)  
[2022] KEELC 15666 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15666 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 321 OF 2011  
OA ANGOTE, J  
NOVEMBER 3, 2022**

**BETWEEN**

**MICHAEL MUTURI KARANJA ..... PLAINTIFF**

**AND**

**ROSELYN DOLA OUKO & 3 OTHERS ..... RESPONDENT  
BEING ADMINISTRATORS OF THE ESTATE OF THE LATE JASON ATINDA  
OUKO**

**RULING**

**Background**

1. Before this court for determination is the plaintiff's/applicant's Notice of Motion application dated October 28, 2021, seeking the following orders:
  - a. That pending the hearing and determination of the Intended Appeal, this Honourable Court restrain by way of an injunction, the Respondents, their agents, servants and/or employees from entering upon, occupying, distributing, alienating or dealing adversely with Plot No 3589/6/T now known as 3589/36) measuring two and a half acres to the prejudice of the Applicant.
  - b. That the costs of this application be on the Appeal.
2. The application is premised on the grounds on the face of the Motion and supported by the affidavit of Michael Muturi Karanja of an even date. It is his deposition that that he is dissatisfied with whole judgment of this court and that he has lodged a Notice of Appeal to challenge the said decision in the Court of Appeal.



3. According to the plaintiff, him, together with his wife, purchased the suit property known as LR 3589/36 measuring 2.5 acres from the late Joseph Bernard Ndung'u vide an Agreement dated December 6, 1998 with the consideration having been fully paid vide a bankers cheque in 1998 and that he has been in quiet uninterrupted possession of the suit property from 1999 up until 2011 when the respondents attempted to evict him.
4. It was his deposition that in 2011, he moved the court seeking it to declare him as the rightful owner of the suit property, which claim was dismissed; that as a result of the dismissal, he is in danger of losing his home and property for which he has been duly paying the requisite rates and that he will further lose all his investments on the property that he has been in possession of for over 20 years.
5. According to the plaintiff, if the suit property is re-possessed and the developments thereon demolished, the appeal will be rendered nugatory and he will suffer irreparable losses and that the interests of justice dictate that the orders sought are granted.
6. In response to the application, Aaron Tafari Ouko, one of the co-administrators of the Estate of the late Jason Atinda Ouko on his own behalf and on behalf of his Co-Administrators deponed that the application is a sham and that his late father is the registered proprietor of L.R No 3589/6/T (now known as 3589/36).
7. It was deponed by the defendant that the applicant's claim for both adverse possession and specific performance under the Sale Agreement of 6<sup>th</sup> December, 1988 were dismissed by the Court vide its Judgment of October 14, 2021 and that although the applicant was allowed to take possession of the property pending payment of the purchase price, he has to date never cleared, 23 years after entering into the Agreement.
8. It was deponed that the present application seeks to further frustrate the Estate's attempt to recover its property from the applicant who continues to possess it without having paid the purchase price; that the applicant has not demonstrated what prejudice he stands to suffer; that order 42 rule 6 deals with stay of execution and not grant of injunctions and that this court has no jurisdiction to grant an injunction in the manner sought.
9. It was deponed by the defendant that that the applicant seeks to invoke the principles that guide the Court of Appeal in the grant of injunctions pending Appeal as conferred by order 5 rule 2(b) of the [Court of Appeal Rules](#); that the court has held that even when execution has been levied, completed and the attached properties sold, the same does not in itself amount to substantial loss and that the applicant has not offered any security for the due performance of the orders sought. Both parties filed submissions which I have considered.

### **Analysis & Determination**

10. Having canvassed the application, affidavits in support and against thereto and the submissions, the issues that arises for determination are;
  - i. Whether the court has jurisdiction to entertain the application and if so?
  - ii. Whether the applicant is entitled to the orders sought?
11. The defendant contends that this court does not have the requisite jurisdiction to issue the orders of injunction pending Appeal sought by the applicant. The plaintiff did not respond to this assertion.
12. It is common ground that vide its Judgment of October 14, 2021, the Court dismissed the plaintiff's suit. The plaintiff states that he is dissatisfied with the entirety of the judgment and intends to file an



appeal against the same. He has towards this end lodged a Notice of Appeal dated October 15, 2021 and seeks in the interim injunctive orders restraining the defendant from dealing with the suit property pending hearing and determination of the Appeal.

13. The court has considered the application. It is expressed to be brought pursuant to the provisions of order 42 rule 6(1) and (2) & 4 & 6 of the *Civil Procedure Rules*, 2010.

14. Order 42 rule 6(1) and (2) states 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, 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.”

15. The above provision captures the pre-requisites for the grant of orders of stay of execution pending Appeal. Having regard to the nature of the application as well as the submissions, it does not appear that the Applicant is seeking for orders of stay of execution pending appeal. Citing of order 42 rule 6 of the *Civil Procedure Rules* seems to have been purely cosmetic.

16. On whether this court can grant an order of injunction after dismissing the suit, it is the view of this court that under order 42 rule 6 (6) of the *Civil Procedure Rules*, this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this court.

17. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application to grant the order of injunction sought by the applicant. This court, sitting in Malindi, dealt with a similar question in *Chembe Katana Changi vs Ministry of Lands & Settlement & 4 others* [2014] eKLR wherein it expounded the reasons as to why a party against whom judgment has been entered is estopped from seeking an injunction pending appeal in the same court. This court held as follows:

“There is no provision in the *Civil Procedure Rules* allowing a party against whom Judgment has been entered to file an application for injunction pending appeal.

The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial court to grant to a party an injunction after delivery of Judgment considering that one of the principles that must be established by an Applicant in such an application is to show that he has a prima facie case with chances of success.



Once a Judgment has been delivered, there will be no pending suit. It therefore follows that a party challenging a Judgment cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal.”

18. The court need not say more. The applicant has invoked this courts inherent jurisdiction under sections 1A, 1B & 3A of the Civil Procedure Rules. The court opines that this cannot salvage the application. The injunctive orders sought can only be granted by the Court of Appeal pursuant to rule 5 (2) (b) of the Court of Appeal Rules which empowers the Court of Appeal to grant an injunction pending appeal in civil proceedings.
19. Having found that this court does not have the requisite jurisdiction to grant the orders sought, the court will not engage in an academic discussion on the same. Therefore, it is the finding of this court that the application dated October 28, 2021 is unmerited. The same is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Maruti for Matasi for Plaintiff

Ms. Ndeti for Lukoye for Respondent

Court Assistant - June

