



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 23 OF 2001**

**UMESH MUNENE.....APPELLANT/APPLICANT**

**VERSUS**

**ROSE EVELYNE KONJE.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**MUNICIPAL COUNCIL OF MERU.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant herein filed an application dated **8<sup>th</sup> December 2020** seeking the following orders:

*(i) That this application be certified urgent and be heard ex-parte in the first instance on account of urgency.*

*(ii) That this honourable court be pleased to grant an order of temporary injunction restraining the respondent by herself agents, her employees, servants, assigns and/or any person acting on her behest or behalf from wasting, damaging, alienation, sale, removal and/or demolishing or in any other way developing Plot T. 202/non christened plot no. 3 block 11/343 Meru municipality pending the hearing interpartes of this application or pending further orders of this court.*

*(iii) That this honourable court be pleased to grant an order of temporary injunction restraining the 1<sup>st</sup> respondent by herself, her agents, employees servants, assigns and/or any other person acting on her behest or behalf from wasting, damaging, alienation, sale, removal and/or demolishing or in any other way developing plot T. 202/non christened plot no. 3 block II/343 Meru municipality pending the hearing and determination of Nyeri Civil Appeal no. 23 of 2017 in the court of appeal.*

*(iv) That this court be pleased to grant any further or better relief in the interests of justice.*

*(v) That costs of this application be borne by the 1<sup>st</sup> respondent.*

2. The grounds in support of the application are that

*(a) The applicant is aggrieved by the judgment of this court delivered on 27<sup>th</sup> June 2017 and has filed an appeal thereto in the Court of Appeal being Nyeri Court of Appeal civil appeal no. 23 of 2017*

*(b) That the respondent has while the appeal is pending for hearing and determination began to alter the developments on the suit land. She has driven a bulldozer on the site and in the verge of demolishing the applicant's residential house, the trees thereon have been cut in preparation to destroy the applicant's house.*

*(c) That this application is preferred in the interests of justice and to prevent the applicant from suffering substantial loss.*

*(d) That the 1<sup>st</sup> respondent unless estopped by an order of this court shall occasion irreparable loss to the applicant.*

*(e) That it is fair, just and equitable that this applicant is granted.*

3. In support of the application is the affidavit by Umesh Munene sworn on 8<sup>th</sup> December 2020. The application is opposed by the 1<sup>st</sup> respondent in two ways; first by a replying affidavit sworn on 31<sup>st</sup> February 2021 and secondly through a preliminary objection dated 25<sup>th</sup> July 2021.

4. Directions were given and by consent parties opted to disperse both the application and the preliminary objection simultaneously through written submissions.

5. The gist of the preliminary objection is that this court lacks jurisdiction to entertain the application and grant the orders sought for reason that the court is no longer exercising its appellate jurisdiction.

6. In support of the preliminary objection the 1<sup>st</sup> respondent maintains the court is functus officio and lacks jurisdiction to revisit this matter. The 1<sup>st</sup> respondent buttresses its arguments based on the holding in *Batholomew Mwanganga and 3 others vs Florence Dean Karimi 2019 eKLR* where in similar circumstances, the court dismissed a motion on a preliminary objection.

7. On the other hand the applicant submits this court has powers and urges the court to be guided by the reasoning in *Kiplagat Kotut vs Rose Jebor Kipngok 2015 eKLR*.

8. Having looked at the rival submissions I believe the crux of the objection is whether or not this court after delivery of its judgment and the applicant having moved to the Court of Appeal in 2017, he can still come back and seek to revisit the matter by way of temporary injunction.

9. **Order 42** of the Civil Procedure Rules refers to both stay of execution as well as temporary injunction. My understanding of the Section is that whereas the 1<sup>st</sup> part of the section clothes this court with powers to grant stay pending appeal to a higher court, the 2<sup>nd</sup> limb looks downwards, an appeal arising out of a lower court to the high court. So the court can grant temporary orders of injunction when it is sitting as an appellate court and exercising appellate jurisdiction over matters it is by law allowed to admit for appeal. It cannot therefore usurp powers which it does not have especially when it has finally determined a matter and become functus officio.

10. In *Clesoi Holdings Ltd vs Prime Bank Ltd 2021 eKLR* held thus;

*“It is trite that an injunction is granted for purposes of protecting a subject matter awaiting the determination of the main suit. Once the final judgment in the suit is pronounced against a party in whose favour the injunctive orders were issued, the injunction ceases to operate. Thus the same court that issued the injunction whilst the suit was pending cannot undo its judgment by issuing a second injunction after the judgment. To that end, not even this court’s inherent jurisdiction under section 1A 1B and 3A of the Civil Procedure Act can salvage the application presented by the plaintiff. The injunctive orders plaintiff sought can only be granted by the Court of Appeal in which the plaintiff has already lodged the notice of appeal”.*

11. The application before the court seeks only injunctive orders pending the hearing and determination of the appeal. It has no prayers for stay of execution pending appeal. Had it sought such prayers perhaps this court would have had some jurisdiction to consider the application.

12. In the case of *Kiplagat Kotut vs Rose Jebor Kipngok (2015)eKLR* relied upon by the applicant herein, the application was made under **Order 46 Rule 6, Order 51 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act** seeking for stay of execution at the delivery of judgment had been granted and lapsed. The principles for stay of execution and those of temporary injunction are totally different.

13. The application herein quotes **Order 42 rule 6** and goes specifically to seek for temporary injunction under **Order 42 rule 6 (5)**. If the applicant intended this court to consider prayers for stay of execution under **Orders 42 rule 6 (1), (2) (3) (4) and (5)** he would have specifically framed other prayers as such and clarified that position. It cannot be left for this court to guess the intention of the applicant. In any event the memoranda/record of appeal was filed on 25<sup>th</sup> August 2017 yet the application was only made on 6<sup>th</sup> December 2020 after a delay of close to 3 years.

14. In the case of *Board of Governors Moi High School Kabarak and another vs Malcom Bell Supreme Court Petition No. 6 and 7 of 2013* it was held that court’s jurisdiction flows from either the Constitution or legislation or both. As such a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. It must operate within the Constitutional limits.

15. In *Chembe Katana Changi vs Ministry for Land and Settlement and 4 others (2014) eKLR* the court while faced with similar application held thus;

*“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 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....”*

16. The application herein has invoked all other enabling provisions of the law. The injunctive orders sought can only be granted by the Court of Appeal under **Rule 5 (2) (b)** of the Court of Appeal in which the applicant has already filed both the record of appeal. It has been confirmed the appeal has already been admitted and now awaits allocation of a hearing date.

17. This court lacks jurisdiction to entertain the application dated 6<sup>th</sup> December 2020. It's hereby struck out with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2021 IN PRESENCE OF:**

M/s Muia for the applicant

Nelima for respondent

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**