



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Dika & 2 others (Environment & Land Case 002 of 2022)
[2025] KEELC 5073 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5073 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 002 OF 2022**

**JO MBOYA, J
JUNE 26, 2025**

BETWEEN

FATUMA MOHAMMED ALI PLAINTIFF

AND

BODU DIKA 1ST DEFENDANT

HENRY KIMATHI 2ND DEFENDANT

**ADAM GITONGA NYAGA ([AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF FESTUS NYAGA KABERIA - DECEASED) 3RD DEFENDANT**

RULING

1. What is before me is the Notice of Motion Application dated 19th May 2025; brought pursuant to the provisions of Sections 1A, 1B, 3A & 63C of the *Civil Procedure Act* Cap 21 Laws of Kenya; Sections 13 (7) and 19 (2) of the *Environment and Land Court Act*, Section 3 (1) of the *judicature act*; and Order 42 Rule 6 of the Civil Procedure Rules 2010; and wherein the Plaintiff/ Applicant has sought the following reliefs:
 - i. That this Honorable court be pleased to certify this application as urgent and be heard Ex-parte in the first instance.
 - ii. That a temporary injunction be issued restraining the 1st & 3rd respondents, their agents and or servants or any person claiming under them from selling, transferring or in any other manner interfering with the suit property being plot J (1) L.R No. 7918/128 pending the hearing and determination of the instant application.
 - iii. That a temporary injunction be issued restraining the 1st & 3rd respondents their agents and or servants or any person claiming under them from selling, transferring or in any other manner



interfering with the suit property being plot J (1) L.R. No. 7918/128 pending the hearing and determination of the appeal in the Court of appeal.

- iv. That costs be in the cause.
2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of the applicant, namely, Fatuma Mohamed Ali sworn on even date and wherein the deponent has annexed various documents, including a copy of the Judgment rendered on the 2nd April 2025; and the Decree arising therefrom.
3. The 1st and 3rd respondents filed a replying affidavit and wherein same have opposed the application beforehand. Furthermore, the 1st and 3rd defendants/respondents have averred that the applicant herein has neither established nor proved the requisite ingredients underpinning the grant of the orders of temporary injunction. In this regard, the 1st & 3rd defendants/ respondents have implored the court to find and hold that the application beforehand is devoid of merits and thus same ought to be dismissed.
4. The 2nd Defendant/ Respondent did not file any document in opposition to the application under reference. On the contrary, learned counsel for the 2nd defendant/ Respondent intimated to the court that same shall not be opposing the application.
5. The Subject application came up for hearing on the 20th May 2025; where upon the advocates for the respective parties covenanted to canvass the application by way of written submissions. To this end, the Plaintiff /applicant and the 1st and 3rd defendants/respondents proceeded to and filed their written submissions. For good measure, the two [2] sets of written submissions are on record.
6. Having reviewed the application and the response thereto and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject application turns on two [2] key issues; namely; whether this court is seized of the requisite jurisdiction to grant the orders sought or otherwise; and whether the applicant has indeed established sufficient cause to warrant the grant of the orders sought or otherwise.
7. Regarding the first issue, it is important to recall and reiterate that jurisdiction is everything. Where a court is not expressly granted jurisdiction to undertake certain proceedings or to grant certain orders, then such a court cannot arrogate unto itself jurisdiction by innovation, strained reasoning or by craft.
8. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others (2012) eKLR, the Supreme Court of Kenya highlighted the position in the following terms:

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law. ”



9. Bearing in mind the principle[s] espoused in the decision [supra], there is no gainsaying that before a court of law, this court not excepted, engages with a particular matter, it behooves the court to discern and or ascertain whether same is bestowed with the requisite statutory jurisdiction or otherwise. In this case, what the applicant is seeking is the grant of an order of temporary injunction to restrain the 1st & 3rd defendants from interfering with, selling, transferring and or in any other manner dealing with the suit property pending the hearing and determination of the intended appeal to the Court of Appeal.
10. Essentially, the applicant is seeking an order of temporary injunction pending the hearing of the intended appeal to the Court of Appeal. I beg to state that there is a clear distinction between an order of stay of execution pending the hearing of an intended appeal to the Court of Appeal and an order of temporary injunction. Instructively, the former is well provided for by dint of Order 42 Rule 6 (1), (2) and (4) of the Civil Procedure Rules 2010. [See also the decision in the case of Kenya Shell Limited versus Benjamin Karuga Kibiru and another [1986] eklr].
11. On the other hand, the *civil procedure act* and the rules made thereunder do not make an express provision giving this court authority, mandate and or jurisdiction to grant an order of temporary injunction pending the hearing and determination of the intended appeal to the Court of Appeal. For good measure, the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules only confer jurisdiction to grant a temporary injunction where the process of appeal from the subordinate court to this court has been complied with.
12. For ease of appreciation, the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010; stipulate thus;
 - (6) 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 a subordinate court or tribunal has been complied with.
13. My reading of the said provisions drives me to the conclusion that this court can only engage with and or grant an order of temporary injunction where the appeal arises from the subordinate court to this court and not from this court to the Court of Appeal. Instructively, the said provisions cannot be invoked and or deployed for purposes of procuring a temporary injunction pending an appeal to the court of appeal.
14. I am aware of the decision in the case of PATRICIA NJERI & 3 OTHERS V NATIONAL MUSEUM OF KENYA [2004] KEHC 1614 (KLR) where Hon. Justice Visram J. [as he then was], addressed the jurisdiction of the High Court to grant an order of temporary injunction pending appeal. However, it is notable that the situation obtaining in that particular case related to an appeal from the subordinate court to the high court and not otherwise.
15. I beg to underscore that where the court is not vested with jurisdiction to grant a particular set of orders, then it does not lie within the mandate of the court to go beyond the statute. In any event, it is worth recalling that the applicant like the one beforehand, has an avenue, [if so advised], to procure the orders of temporary injunction [subject to proof] before the Court of Appeal in terms of Rule 5 (2) (b) of the said court.
16. I am afraid that the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010 which has been invoked and deployed by the applicant herein, does not avail. To this end, I come to the conclusion that this court is not vested with the requisite jurisdiction to grant the orders sought.



17. Turning to the second issue, namely; whether the applicant has established sufficient cause to warrant the grant of the orders sought, it is important to highlight that the applicant herein just like any other applicant seeking orders of temporary injunction is enjoined to satisfy the requisite conditions for granting such an order. [See *Giella vs Cassman brown* (1973) E.A 173; *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR; *Vivo Energy Ltd vs Maloba Petrol Station & others* (2015) eKLR and *Nguruman Ltd vs Jan Bonde Nielsen & another* (2014) eKLR, respectively.
18. Simply put, it was incumbent upon the applicant to demonstrate the existence of a prima facie case or better still a prima facie appeal. It is not lost on me that the applicant herein had laid a claim to ownership of plot No. 7918/128 J 1 [which is the suit plot]. However, in the course of the hearing, this court interrogated the totality of the evidence that was tendered, and it came to pass that the 2nd defendant who allegedly sold the land to the applicant did not have title to it.
19. On the contrary, the court found and held that the land in question was sold to and transferred in favour of the 1st defendant. As things stand, the 1st defendant has a valid Judgment and decree declaring same as the owner of the suit property.
20. I am alive to the fact that the Judgment is the subject of the appeal. However, it was incumbent upon the applicant herein to demonstrate to the court that the same has some prima facie appeal which espouses a sufficient cause to warrant the grant of the orders of temporary injunction. Sadly, the applicant herein has not endeavored to demonstrate the existence of a prima facie appeal. Moreover, there is not even a single paragraph that speaks to this critical aspect in the supporting affidavit.
21. Furthermore, it is worth to recall that even if the applicant had highlighted the aspect of a prima facie appeal in the body of the supporting affidavit [which is not the case], the applicant would still be obligated to demonstrate the likelihood of irreparable loss arising if the orders of temporary injunction are not granted. Suffice it to underscore that irreparable loss is what has to be averted vide an order of temporary injunction. [See *Kenya Commercial Finance Company Ltd –versus- Afraha Education Society Civil Appeal No. 142 of 1999 (Nakuru)* reported in [2001] 1 E.A. 86].
22. Additionally, it is not lost on me that irreparable loss must not only be alleged. For good measure, the applicant is called upon to implead irreparable loss and thereafter place before the court credible evidence to substantiate the nature of the loss adverted to. Instructively, irreparable loss must neither be speculative nor remote. [see *Vivo Energy Ltd vs Maloba Petrol Station and others* (2015) eKLR].
23. Has the applicant established and proven irreparable loss? The only allegation that has been propagated by the applicant is to the effect that the 1st & 3rd defendants/respondents are likely to sell and or dispose of the suit property. However, despite making the said fanciful allegation no evidence has been tendered and or placed before the court.
24. On the other hand, it is also worth recalling that the suit property which is the subject in dispute, is capable of valuation and ascertainment of its monetary value. In this regard, assuming for the sake of argument[s] only that the applicant was to succeed, same can be very well indemnified in monetary terms.
25. I am afraid that the applicant herein neither met nor satisfied the requisite conditions underpinning the grant of an order of temporary injunction, even in the ordinary circumstances regulated by Order 40 of the Civil Procedure Rules.
26. To this end, I am unable to discern sufficient cause, which is a key ingredient in the exercise of this courts discretion in granting orders of stay of execution pending appeal or, better still temporary injunction,



albeit in appropriate cases. [See the provisions of Order 42 Rule 6[1] of the Civil Procedure Rules, 2010]

Final Disposition:

27. Flowing from the discussion obtaining elsewhere in the body of the ruling, it must have become apparent that the application beforehand is not only misconceived and premature, but same is also legally untenable.
28. Consequently, and in the premises, the final orders of the court are as hereunder;
 - i. The Application be and is hereby Dismissed.
 - ii. Costs of the Application be and are hereby awarded to the 1st & 3rd Defendants/Respondents only.
 - iii. The Costs in terms of (ii) shall be agreed upon and in default be taxed by the Deputy Registrar of the court in the usual manner.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 26TH DAY OF JUNE 2025

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma – Court Assistant

Mr. Ndung'u holding brief for Mr. Kabiru for the Plaintiff/Applicant

Miss Kerubo holding brief for Mr. Kiautha Arithi for the 1st & 3rd Defendants/Respondents

Mr. Mwenda Tyson for the 2nd Defendant/Respondent

