



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC APPEAL NO. 42 OF 2019**

**CATHERINE NASIMIYU KHISA AND GLADYS NAKHUMICHA KHISA**

**(Suing as the Administrators and Legal Representatives of the Estate of the**

**Late SHADRACK KHISANALIAKHO – DECEASED.....APPELLANT**

**VERSUS**

**JACOB WANGILA WANYAMA .....1<sup>ST</sup> RESPONDENT**

**DELIAH NAMAIE WASIKE .....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Ruling and Orders of Hon. Mr. Mwenda E.N - SENIOR RESIDENT MAGISTRATE delivered in BUNGOMA CHIEF MAGISTRATE'S COURT ELC CASE NO. 99 OF 2019 )**

**CATHERINE NASIMIYU KHISA AND GLADYS NAKHUMICHA KHISA**

**(Suing as the Administrators and Legal Representatives of the Estate of the**

**Late SHADRACK KHISA NALIAKHO – (DECEASED)**

**- VS-**

**JACOB WANGILA WANYAMA & DELIAH NAMAIE WASIKE)**

**R U L I N G**

**CATHERINE NASIMIYU KHISA and GLADYS NAKHUMICHA KHISA (the Appellants herein and suing as the Administrators of the Estate of one SHADRACK KHISA NALIAKHO (the deceased) filed a suit in the (CHIEF MAGISTRATE'S COURT BUNGOMA ELC CASE NO 99 OF 2019) seeking various orders against JACOB WANGILA WANYAMA and DELIAH NAMAIE WASIKE (the Respondents herein) with respect to land parcel NO EAST BUKUSU/SOUTH KANDUYI/6033 (the suit land).**

Contemporaneously with the said suit, the Appellants filed a Notice of Motion premised under the provisions of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders: -

**1. Spent**

**2. Spent**

**3. Pending the inter – parte hearing and determination of the suit on merits, an order of injunction be issued restraining the Respondents, whether acting by themselves, their servants, agents, contractors and/or any other persons whatsoever, from constructing the storey building, remaining on, re – entering upon, trespassing upon, taking over, developing or in any other manner howsoever from interfering with the Appellant's quiet occupation, possession and enjoyment of the property known as land reference number EAST BUKUSU/SOUTH KANDUYI/6033.**

**4. An order of mandatory injunction directing the Respondents to pull down the permanent structures erected on the suit property.**

**5. An order of eviction and demolition of the illegal structures constructed on the suit property land parcel number EAST BUKUSU/SOUTH KANDUYI/6033.**

**6. An order be made requiring the Officer – in – Charge of Police Division (Bungoma Police Station) and the Officer Commanding Station (Bungoma Police Station) to assist in facilitating the execution of the orders herein if and when required.**

**7. That the costs of this application be provided for.**

The application was predicated on the grounds set out therein and also supported by the affidavit of the 1<sup>st</sup> Appellant (**CATHERINE KHISA**).

The gist of the application was that the deceased was the registered proprietor of the suit land while the Respondents are the registered proprietors of land parcel number **EAST BUKUSU SOUTH KANDUYI/9332** which they are developing by constructing a storey building which has encroached on the suit land. That a survey had been carried out by the County Surveyor in the absence of a representative of the deceased and arrived at erroneous findings including that four (4) metres had been hived from the suit land for purposes of road construction. Aggrieved by that finding, the Appellants sought the intervention of the County Land Registrar in ascertaining the boundaries, acreage and physical location of plot **NO EAST BUKUSU/SOUTH KANDUYI/9332** vis-a-vis the suit plot and among the findings in the report made on 28<sup>th</sup> October 2019 was that the Respondents had trespassed onto the suit land and were constructing on it. The Appellant, in light of that report, was convinced that she had established a prima facie case hence the application seeking the above orders.

The application was opposed and **JACOB WANGILA WANYAMA** the (1<sup>st</sup> Respondent herein) by his replying affidavit dated 18<sup>th</sup> November 2019 deponed, inter alia, as follows: -

Ø **That he and the 2<sup>nd</sup> Respondent (DELIAH NAMAHEH) are the registered proprietors of the land parcel number EAST BUKUSU/SOUTH KANDUYI/9332 on which the disputed construction is being carried out.**

Ø **That the said land is adjacent to the suit land which borders an access road (Amani road) initially measuring 5 metres wide but currently measuring 9 metres wide which was created entirely from the original land parcel number EAST BUKUSU/SOUTH KANDUYI/72 upon it's sub – division in 1987 to give rise to land parcels number EAST BUKUSU/SOUTH KANDUYI/4151 and 4152.**

Ø **That the suit land and land parcel number EAST BUKUSU/SOUTH KANDUYI/9332 were a sub – division of land parcel number EAST BUKUSU/SOUTH KANDUYI/5292 which was a sub – division of parcel number EAST BUKUSU/SOUTH KANDUYI/4151.**

Ø **That sometime in July 2019, the Appellant made a complaint of malicious damage on the suit land at the Bungoma Police Station following which the County Surveyor was requested to conduct a survey and establish the positions/locations of the parties respective land parcels and the ownership.**

Ø **The County surveyor made a report to the effect that the suit land had been partially consumed by Amani road during the rehabilitation process when a decision was made to expand the said road following a public participation process in which a decision was made to expand the said road from 5 metres to 9 metres.**

Ø **That 3 metres of the said Amani road was obtained from the suit land because the other side of the road had electric posts and the Respondents have therefore not encroached on the suit land.**

Ø **That there was no joint survey and, in any event, the boundary of the suit land was pointed out by one STELLA NAFULA KHISA a lay person and there was no conclusive determination of the dispute between the parties and so they were advised to seek legal redress.**

Ø **That in view of the two conflicting reports, the Appellants had not established a prima facie case and it is therefore dangerous to conclude that there was trespass on the part of the Respondent.**

Ø **That the Respondents are persons of means capable of sufficiently compensating the Appellants on whatever terms the Court may deem fit and the balance of probability (sic) does not tilt in favour of the Appellants.**

Ø **That any injunction will lead to a breach of contract on the part of the Respondents and the issue at hand is whether the expansion of Amani road affected the Appellants' land an issue that can only be conclusively resolved by a joint survey under the Court's supervision and orders 4, 5, and 6 are final in nature and cannot be granted at any interlocutory stage and the application be dismissed with costs.**

The application was canvassed inter – parte before **HON. E. N. MWENDA (SRM)** who delivered a ruling on 2<sup>nd</sup> December 2019 dismissing it with costs being in the cause.

That ruling precipitated this appeal and pending the hearing and determination of the same, the Appellants filed a Notice of Motion dated 3<sup>rd</sup> December 2019 citing **Sections 3 1A, 1B and 3A of the Civil Procedure Act Order 42 Rule 6 and Order 51 Rule 1 of the Civil**

**Procedure Rules.** That Notice of Motion is the subject of this ruling and seeks that following prayers: -

1. Spent

2. Spent

3. That pending the hearing and determination of this appeal, an order for preservation and conservation of the suit property be issued restraining the Respondents, their contractors, agents and employees from proceeding with the ongoing construction of the storey building on the suit property known as land reference number EAST BUKUSU/SOUTH KANDUYI/6033.

4. Spent

5. That pending the hearing and determination of this appeal there be a stay of execution of the ruling delivered in BUNGOMA CHIEF MAGISTRATE'S COURT ELC CASE NO 99 OF 2019 CATHERINE NASIMIYU KHISA & GLADYS NAKHUMICHA KHISA (suing as the Administrators of the Estate of the late SHADRACK KHISA NALIAKHO (deceased) -vs- JACOB WANGILA WANYAMA & ANOTHER and any consequential and resultant orders.

6. That the costs of this application be provided for.

The application was premised on the grounds set out therein and was supported by the affidavit of the 1<sup>st</sup> Appellant.

The application sets out the grounds of appeal and adds that unless the orders sought are granted, the Appellants will suffer substantial loss since the on-going construction of the storey building will cause deterioration, misuse, damage, waste and destruction of the suit land to the detriment of the Appellants and the beneficiaries of the Estate of the deceased. That the appellants have a high chance of succeeding in the appeal and the trial magistrate erred in law and in fact in failing to appreciate the fact that the Appellants had a prima facie case with a probability of success. That the learned trial magistrate erred in law and in fact in failing to issue preservative orders over the suit land pending the hearing of the suit on its merits and unless the orders sought are granted, the trial of the suit will be an academic exercise and any irreparable damage is not capable of compensation given the unique nature of the suit land.

The application is contested and the 1<sup>st</sup> Respondent has sworn a replying affidavit describing the application and the appeal as lacking in merit, misleading and brought in bad faith with the aim of delaying the suit and that the conditions set out in the case of **GIELLA V CASSMAN BROWN & CO LTD 1973 EA 358** were not satisfied. That the Appellant's land parcel **NO EAST BUKUSU/ SOUTH KANDUYI/6033** and the Respondents' land parcel number **EAST BUKUSU/ SOUTH KANDUYI/9332** are adjacent to each other and both measure 0.02 Ha but the Appellants have never occupied their portion since its acquisition in 2006 to-date and they cannot therefore suffer any loss leave alone substantial loss. That the Appellants have no arguable appeal which may be rendered nugatory and the prayers sought herein are the same ones that were sought in the trial Court but couched in a different form. That the trial Court rightly found that the Appellants had not established any prima facie case to warrant the grant of injunctive orders since it has not been established that the Respondents are constructing a storey building on the suit land. That the order sought to be stayed is a negative order and therefore incapable of being stayed and this application should therefore be dismissed with costs.

When the application was placed before **MATHEKA J** at **KAKAMEGA ENVIRONMENT AND LAND COURT** on 16<sup>th</sup> December 2019, the Judge directed with the parties' consent, that it be canvassed by way of written submissions. The Appellants duly filed and served their submissions through **EBOSO & COMPANY ADVOCATES** while **MS WAKOLI ADVOCATES** for the Respondents told the Court that she would rely on the replying affidavit.

I have considered the application, the rival affidavits and submissions by counsel.

**Order 42 Rule 6 of the Civil Procedure Rules** upon which this application is founded provides that: -

*6(1) "No appeal on second appeal shall operate as a stay of execution or proceeding 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 from, 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 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.*

*(3) Notwithstanding anything contained in sub - rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

(4) *For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court Notice of Appeal has been given.*

(5) *An application for stay of execution may be made formally immediately following the delivery of Judgment or ruling.*

(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.”*

It is clear from the Notice of Motion that what the Appellants seek are: -

1. **A temporary injunction pending the hearing and determination of the appeal herein - prayer NO 3 and;**
2. **An order of stay of execution of the ruling delivered on 8<sup>th</sup> November 2019 dismissing the Appellant’s application for temporary injunction pending the trial of the suit in the subordinate Court – prayer No 5.**

When the parties appeared before me on 13<sup>th</sup> January 2020, MS WAKOLI counsel for the Respondents informed the Court that prayer No 2 of the Notice of Motion which, though not so elegantly framed, is, in my view, a prayer for temporary injunction pending appeal, was not available to the Appellants because it had been sought and rejected in the trial Court. I made no orders on that prayer. It is clear, however, from the provisions of **Order 42 Rule 6(6)** which I have cited above, that this Court in the exercise of its appellate jurisdiction can grant an order of temporary injunction pending the hearing and determination of an appeal. The proper prayer is actually prayer No 3 of the Notice of Motion which I have already referred to above but which I shall cite again for purposes of clarity. It reads: -

*“That pending inter – partes hearing and determination of this appeal, an order for preservation and conservation of the suit property be issue restraining the Respondents, their contractors, agents and employees from proceeding with the on – going construction of the storey building on the suit property known as land reference number E. BUKUSU/S. KANDUYI/6033.”*  
Emphasis added.

The reference to the terms *“preservation and conservation of the suit property”* and *“restraining the Respondents, their contractors, agents and employees”* leaves no doubt in my mind that what is being sought in prayer No 3 is an order for temporary injunction pending appeal.

I shall first consider prayer No 5 which seeks the substantive order for stay of execution of the ruling delivered in **BUNGOMA CHIEF MAGISTRATE’S ENVORNMENT AND LAND COURT CASE NO 99 OF 2019**. In that ruling which was delivered on 8<sup>th</sup> November 2019, the trial magistrate only dismissed an application for temporary injunction pending trial. He did not order any of the parties to do anything. The trial Court therefore only issued a negative order which is incapable of execution save only for purposes of costs. Such an order is incapable of execution and cannot therefore be stayed. In **KANWAL SARJIT SING DHIMAN .V. KESHAVJ JIVRAJ SHAH 2008 eKLR** the Court of Appeal while dealing with an application for stay of execution stated that: -

*“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior Court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only (see WESTERN COLLEGE OF ARTS & APPLIED SERVICES .V. ORANGA & OTHERS 1976 KLR 63 of paragraph C.”*

See also **CO – OPERATIVE BANK OF KENYA LTD .V. BANKING INSURANCE & FINANCE UNION KENYA 2015 eKLR**, **SHIMMERS PLAZA LTD .V. NATIONAL BANK OF KENYA LTD C.A CIVIL APPEAL NO 38 OF 2013 [2013 eKLR]** and **KENYA HOTEL PROPERTIES LTD .V. WILLSDEN INVESTMENTS LTD C.A CIVIL APPEAL NO 131 OF 2010 [2011 eKLR]**.

In the application now before me, the Appellants are seeking a stay of the dismissal of the injunction application by the trial Court. That was a negative order which as is clear from the cases cited above, is incapable of being stayed. Prayer No 5 of the Notice of Motion must therefore be dismissed which I hereby do.

Prayer No 3, as I have already stated above, seeks the main order of a temporary injunction pending appeal. There is no doubt that the provisions of **Order 42 Rule 6 (6) of the Civil Procedure Rules** donates to this Court the jurisdiction to grant such an order. However, I must caution myself that at this stage, I am determining an interlocutory application. The hearing of the main suit will take place before the trial Court and be determined on it’s own merits. I must therefore refrain from expressing any conclusive views on an issue that is yet to be canvassed before the trial Court. The 1<sup>st</sup> Respondent in paragraph 14 of his replying affidavit avers that the conditions for the grant of a temporary injunction were not met by the Appellant. He states as follows: -

*14 “That I am advised by my advocate of (sic) record, advice I verily believe to be true and correct that both conditions set out in the much celebrated case of GIELA .V. CASSUAN BROWN ought to have been satisfied by the Appellants in the trial Court before their application would be allowed. It is not enough to merely observe some or ignore others.”*

What I am called upon to determine in this application is whether or not the Appellants have met the threshold for the grant of an order of temporary injunction pending the hearing and determination of the appeal herein.

The Respondents take the view that the Appellants do not deserve that relief and that the trial magistrate correctly dismissed the application.

The 1<sup>st</sup> Appellant on her part has averred as follows in paragraph 10(11) of her supporting affidavit:-

**10(11) “The learned magistrate erred in law and fact in dismissing the Appellant’s application and declining to grant the injunctive orders yet the Appellants had demonstrated that they had a prima facie case since both the survey reports by the Assistant Director – Survey and the Boundary determination Report by the Land Registrar confirmed that the Respondents had invaded, illegally occupied and trespassed on the Appellant’s property.”**

The conditions precedent to granting of injunctive orders were settled in the **GIELLA** case (supra) where it was held: -

**“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.”**

A prima facie case was defined in the case of **MRAO LTD .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 eKLR** as: -

**“ ..... a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

When a Court is considering an application for injunction pending appeal, it shall be guided by the principles set out in **PATRICIA NJERI & OTHERS .V. NATIONAL MUSEUM OF KENYA 2004 eKLR** which are: -

- (a) An order for injunction pending appeal is a discretionary one and the discretion will not be exercised in favour of an applicant whose appeal is frivolous.**
- (b) That discretion should be refused where to grant the order will inflict greater hardship than it would avoid.**
- (c) The Applicant must demonstrate that to refuse the injunction would render the appeal nugatory.**
- (d) The Court should be guided by the principle set out in **GIELLA .V. CASSMAN BROWN LTD (supra)****

Therefore, whereas this Court is dealing with an application for injunction at an appeal stage, I must also be satisfied that the Appellant has made out a case within the parameters set out in **GIELLA .V. CASSMAN BROWN** (supra) which I have already alluded to above. I must bear in mind that there is a pending appeal and consider it’s prospects of success so that it is not rendered nugatory. As was held in **MUKOMA .V. ABUOGA 1988 KLR 645**, where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory by preserving the status quo. In **CHARTER HOUSE BANK LTD .V. CENTRAL BANK OF KENYA & OTHERS 2007 eKLR**, the Court of Appeal held as follows: -

**“ ..... the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.”**

I must therefore consider whether the appeal which is pending is arguable and raises serious issues that need to be determined and form my own opinion whether in the circumstances, there is need to preserve the property in dispute. Unlike in a monetary decree, in a case such as this one where the appeal involves immovable property, the Court must be alive to the fact that it may be difficult to reverse the property to it’s original state if the complaint is that it is being wasted, damaged or developed.

It is common ground that the parties own property adjacent to each other. The Appellant’s case however is that in developing their property, the Respondents have in fact trespassed onto the suit land. That allegation has been rebutted by the Respondents who claim that they are developing their property and that in fact it was the expansion of the Amani road that took up some portion of the suit land. In a case such as this, if the Respondents proceed with the construction of their storey building and it turns up, after the trial, that in fact the said building or part of it, is on the suit land, the Appellants will have suffered irreparable injury since their property would no longer be in the condition in which it has always been. It must be born in mind that the trial Court has already made a finding that the Appellants have established a prima facie case. This is what the trial magistrate states in paragraph 11 of his impugned ruling: -

**“At this juncture, and for purposes of determining the application, the Court proceeds on the presumption that the facts stated by the parties are correct. The Applicant says that the defendants have trespassed onto the suit land and are in occupation of it. That they are currently building on the land. The Respondent says that is not true as the suit land was eaten into by the expansion of the road. Upon reading the material presented by the parties it seems to me that they are both claiming the same piece of land. The survey maps and the title deeds may christen the land in different terms but it is apparent from the documentation that the suit land was subsumed by the adjacent land or vice versa. The learned counsels admitted as much when they appeared before me. This is the controversy that is live for the determination of the Court after trial. Therefor there is a prima facie case presented by the plaintiff for trial. However, this limb is not enough in the circumstances of this case to elicit an injunctive relief.”** Emphasis added.

Like the trial Court, I am equally persuaded that the Appellants had established a prima facie case. However, the Appellants are also required to demonstrate that if the order sought is not granted, their appeal, if successful, will be rendered nugatory. From what I have already observed above, if the Respondents are not enjoined from continuing with the construction of their building on the disputed portion of the land and the Appellants succeed in their appeal, the same will clearly be rendered nugatory.

I have also considered the Memorandum of Appeal. I do not consider it to be frivolous. Among the issues that will come up for determination include whether or not the Appellants had demonstrated that they would suffer irreparable injury and whether, on the balance of convenience, the Appellants were entitled to the orders sought in the trial Court. Those are not frivolous issues.

Further, the discretion to grant the orders sought will be denied if it will inflict greater hardship than it would avoid. The 1<sup>st</sup> Respondent has deponed in paragraph 23 of his replying affidavit that the construction of the building is being financed by a Bank loan and therefore has to be finalized within specified time lines stipulated in the loan document. No evidence was placed before me to prove that the construction is being financed through a Bank loan. But even if that is the position, I take the view that a greater injustice and hardship will ensue if the Appellants succeed yet there is standing on their land, a building that they did not intend to construct thereon. It is obviously much easier to re – negotiate a Bank loan rather than bring down a storey building.

The remedy sought is a discretionary one and having considered all the matters herein, I am satisfied that the Appellants are deserving of the orders of temporary injunction sought in the Notice of Motion dated 3<sup>rd</sup> December 2019.

Accordingly, I make the following orders: -

- 1. Prayer No 5 is dismissed.**
- 2. Pending the hearing and determination of the appeal herein, an order of injunction is issued restraining the Respondents, their contractors, agents and employees from proceeding with the on – going construction of the storey building on the suit property known as land reference NO E. BUKUSU/S. KANDUYI/6033 or any disputed portion thereof until this appeal is heard and finally determined.**
- 3. The record of appeal be filed within 30 days of this ruling.**
- 4. Costs shall be in the appeal.**

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> January 2020.**

Ruling dated delivered and signed in Open Court at Bungoma this 23<sup>rd</sup> day of January 2020.

Ms Wakoli for Respondent present

Mr Otsiula for Mr Osino for the Applicant present

Joy/Okwaro – Court Assistants

**Boaz N. Olao.**

**J U D G E**

**23<sup>rd</sup> January 2020.**