



REPUBLIC OF KENYA



Menza & another v Micro Enterprises Support Programme Trust & 2 others (Land Case Appeal E032 of 2025) [2025] KEELC 5064 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE APPEAL E032 OF 2025**

**EK MAKORI, J
JUNE 26, 2025**

BETWEEN

MASHA BIRYA MENZA 1ST APPELLANT

KADII MASHA BIRYA 2ND APPELLANT

AND

MICRO ENTERPRISES SUPPORT PROGRAMME TRUST .. 1ST RESPONDENT

PAUL JESSE MUNGATIA 2ND RESPONDENT

GOLDEN SERVICES ORGANIZATION 3RD RESPONDENT

RULING

1. The Appellants filed this Appeal through the Memorandum of Appeal dated May 29th, 2025, which they submitted to the court on the same day. The appeal arises from the ruling of May 20th, 2025, by Hon. C. Obulutsa, CM, who dismissed an injunction application and the entire case in Kilifi SPMC ELC No. E017 of 2025 *Masha Birya Menza & Kadii Masha Birya v Micro Enterprises Support Programme Trust & Paul Jesse Mungatia*. At the same time as filing the Memorandum of Appeal, the Appellants also filed a Notice of Motion seeking orders of injunction to prevent the Respondents from selling, transferring, alienating, dealing with, or disposing of the property known as Roka/Uyombo/33 located within Kilifi County (the suit property).
2. In response, the Respondents have filed Replying Affidavits. The 1st Respondent also filed a Notice of Preliminary Objection dated June 12, 2025.
3. On June 17th, 2025, this court ordered that the Notice of Motion and the Preliminary Objection be considered together through both written submissions and oral arguments. The parties complied.
4. The learned counsel representing the appellants, Mr. Odhiambho, the counsel for the 1st Respondent, Mr. Thiga, and Ms. Katsiya, representing the 2nd and 3rd Respondents, respectively, presented oral



submissions and emphasized key points on June 17, 2025, concerning the two motions currently pending before the court. I acknowledge the submissions made by the parties, which referenced applicable legal provisions and pertinent judicial precedents.

5. Based on the materials presented before me, the issues arising from the Preliminary Objection are whether the current appeal constitutes an abuse of the court process, whether an injunction should be issued pending the appeal, and who should bear the costs.
6. Mr. Odhiambo, representing the Appellant, argues that an injunction pending appeal is necessary to preserve the core of the case; the issues raised in the Preliminary Objection can be addressed and should be decided during the main appeal. For now, the court should concentrate on the foundation of the suit.
7. In contrast, counsel for the 1st Respondent, Mr. Thiga, and Ms. Katsiya for the 2nd and 3rd Respondents argue that the reliefs requested by the Appellant have already been considered in earlier lower court proceedings, and a verdict was reached that resulted in appeals to this court being dismissed. The Appellant has repeatedly raised the same issues before this court, and it is argued that these repetitive applications should cease.
8. As shown in the Respondents' Replying Affidavits:
 - a. The Appellants filed an earlier suit in Kilifi SPMC ELC No. 203 of 2019, *Masha Birya Menza & Kadii Masha Birya v Micro Enterprises Support Programme Trust & Paul Jesse Mungatia*, with a plaint dated April 30, 2019, and amended on June 4, 2019. The 1st Respondent submitted a Defense and Counterclaim, served on the Appellants, dated July 26, 2019.
 - b. The Appellants also filed a Notice of Motion application against the 1st Respondent dated April 30, 2019, seeking an injunction to prevent the Respondents from selling, transferring, dealing with, or alienating the suit property.
 - c. The Application was allowed by a ruling issued by Hon. J.M. Kituku on November 18, 2020.
 - d. The suit was scheduled for a hearing on May 2, 2023, but the Appellants were absent, and therefore, the case was dismissed due to the lack of counsel for both the Appellant and the 2nd Respondent.
 - e. The Appellants, on May 30, 2023, nearly a month later, filed an application seeking to set aside the dismissal of the suit and to have it reinstated.
 - f. The application, which sought the exercise of the court's discretion, was dismissed on March 19th, 2024, prompting an appeal in Malindi ELCA No. E024 of 2024.
 - g. The Appellants filed a Notice of Motion against the 1st Respondent dated January 21, 2025, seeking orders for a stay of execution pending appeal;
 - h. At the inter-partes hearing of the stay application before the appellate court on February 4th, 2025, the court declined to issue any orders preventing the scheduled public auction sale on February 7th, 2025. It directed the parties to submit their written arguments on the stay application with a return date of March 6th, 2025. This was primarily because the appeal filed on April 30th, 2024, was filed out of time and was therefore defective; and
 - i. Having realized they could not obtain an order of stay of execution before the Appellate Court, the Appellants purported to file a Notice of Withdrawal of the Appeal and the stay application on the same day, February 4th, 2025, and then filed this suit.



- j. (j) The Appellants immediately filed a new suit in the Kilifi SPMC ELC No. E017 of 2025 Masha Biryra Menza & Kadii Masha Biryra v Micro Enterprises Support Programme Trust & Paul Jessee Mungatia through a plaint dated February 5, 2025.
 - k. The court adopted the Notice of Withdrawal of the Appeal on March 6, 2025, thus ending Malindi ELCA No. E014 of 2024.
 - l. The Respondents opposed the new suit and the injunction application filed at the same time, and by a Ruling dated May 20, 2025, the application and the entire suit were dismissed; and;
 - m. Subsequently, the Appellants filed this Appeal and the instant application on 29th May, 2025, seeking the same orders sought previously on several occasions.
9. I agree with the Respondents that the Appellant's repeated actions show an abuse of the court process. When the suit was filed, there were ongoing related proceedings. Specifically, the case Kilifi SPMC ELC No. 203 of 2019, involving Masha Biryra Menza and Kadii Masha Biryra against Micro Enterprises Support Programme Trust and Paul Jesse Mungatia, was still under appeal in Malindi ELCA No. E024 of 2024. This was because the Notice of Withdrawal of Appeal had not yet been formally adopted by the court. The court adopted the notice and withdrew the appeal on March 6th, 2025, ending the previous case. Therefore, filing another suit on February 4, 2025, violated Section 6 of the Civil Procedure Act and constituted an abuse of court process.
10. Furthermore, it is clear that the reason for filing this suit was primarily because the Appellants failed to obtain a stay of execution pending appeal in Malindi ELCA No. E024 of 2024 during their court appearance on February 4th, 2025. Instead of taking the proper steps in the ongoing case, the Appellants devised a plan to file new proceedings to get an order they knew a higher court had already refused to grant. This is a clear example of abuse of the court process.
11. See the decision cited by the 1st Respondent with which I concur. In the case of *Stephen Somek Takwenyi & Another v David Mbutia Githare & Two Others*, Nairobi (Milimani) HCCC No. 363 of 2009, Kimaru, J., addressed the issue of abuse of court process and stated as follows:
- “This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor, it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”
12. The Appellants in this case seek the same orders as those previously requested and granted on November 18, 2020, by Hon. J.M. Kituku in a similar case before Kilifi SPMC ELC No. 203 of 2019,



Masha Birya Menza & Kadii Masha Birya v Micro Enterprises Support Programme Trust & Paul Jesse Mungatia. The claims supporting both applications are identical to those in the current case. However, I find it unnecessary to address that issue here, as I have determined that filing multiple suits amounts to an abuse of the court process. Therefore, the application for an injunction shall not succeed, in accordance with Order 42 Rule 6(6) of the *Civil Procedure Rules* and the principles echoed by the Court of Appeal in the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, which states that:

“In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* (1982 – 88) KLR 1088 (also cited in Venture Capital).
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417 (cited also in Venture Capital).
- (d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in Venture Capital).”

13. Furthermore, as articulated by the Court of Appeal in the case of *Charter House Investments Ltd v Simon K. Sang & three others* [2010] eKLR, it was stated:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties.”

14. The Appellants' request for an injunction pending appeal lacks merit because they have not acted in good faith, which is essential for the court to exercise its discretion in their favor. Their application clearly and openly amounts to abuse of the court process. Both the appeal and the application are primarily aimed at stopping the 1st Respondent from exercising its right to recover the secured loan debt. As demonstrated, this is not the first time the lower court and this court have dealt with the same issue.
15. Considering the above, the Preliminary Objection has merit and is hereby granted. Conversely, the application dated 29th May 2025 for an injunction lacks merit and is dismissed, with costs awarded to the Respondents.



DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 26TH DAY OF JUNE 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Odhiambo for the Appellants

Mr. Thiga for the 1st Respondent

Mr. Mwanzia, H/B for Katisya for the 2nd and 3rd Respondents

Happy: Court Assistant

