



REPUBLIC OF KENYA



**Ogutu v Osore & another (Environment and Land Case 605 of 2014)
[2025] KEELC 6521 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 605 OF 2014
A NYUKURI, J
SEPTEMBER 24, 2025**

BETWEEN

ABDUL KWEYU OGUTU PLAINTIFF

AND

OMARI OSORE 1ST DEFENDANT

ALI SHIKUKU WERE 2ND DEFENDANT

RULING

1. Before court is a Notice of Motion dated 15TH October, 2024 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. That the firm of M/S Marisio Luchivya & Company Advocates be allowed to come on record in place of Oscar Wachilonga & Associates Advocates.
 - c. Spent
 - d. That pending the hearing of the applicant’s appeal to the Court of Appeal an inhibition be registered against the title No. East Wanga/Isongo/ 977 inhibiting the registration of further dealings.
 - e. That pending the hearing of the applicant’s appeal to the court of appeal an order of temporary injunction do issue restraining the respondents from interfering with the applicant’s use and occupation of the suit land.
 - f. That costs hereof be provided for.
2. The application is predicated on the affidavit sworn by the plaintiff on 15th October 2024. The applicant’s case is that the applicant has appealed against the judgment of this court at the Court of



Appeal and that on the basis of this court's judgment, the respondent has removed the caution on the suit property and is in the process of disposing the suit property to third parties because they have secured consent to subdivide the suit property. That if orders sought are not granted, the appeal shall be rendered nugatory. That the principle of *lis pendens* applies so as to maintain status quo. That he intends to change counsel on record and he needs leave of court. That the respondent shall not be prejudiced and that they have become hostile and intend to evict the plaintiff. He attached a notice of appeal dated 18th July 2022.

3. The application was opposed. The respondent filed grounds of opposition dated 27th November 2024. He stated that the application was fatally defective and failed to meet the criteria for grant of the orders sought. That there was no evidence of any further dealings on the suit property or disposal of the same by the defendant and that the application is incompetent.
4. Parties filed submissions, which this court has duly considered.

Analysis and determination

5. The court has carefully considered the application, grounds of opposition and submissions. The issue that arise for the court's determination is whether the applicant deserves the orders sought.
6. Order 9 Rule 9 of the Civil Procedure Rules requires that after entry of judgment, a party who wishes to change his or her advocate or act in person having previously been represented by an advocate, can only do so upon obtaining leave of court. Legal representation by counsel of one's choice is a constitutional right which the applicant is entitled to. There being no reason to deny the applicant the right to be represented by the firm of Marisio Luchivya & Company advocates, that prayer is merited and the same is hereby allowed.
7. On the prayer for inhibition and temporary injunction. An inhibition is an order prohibiting for the time being the registration of dealings on a title and therefore, it is an order in the nature of an injunction.
8. Section 68 of the [*Land Registration Act*](#) provides for the power of the court to grant inhibition as follows;

The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
9. The power of this court to grant injunction is provided for in Order 40 Rule 1 and Order 42 Rule 6 (7) of the Civil Procedure Rules.

Order 40 Rule 1 of the Civil Procedure Rules provides that;

Cases in which temporary injunction may be granted [Order 40, rule 1]

Where in any suit it is proved by affidavit or otherwise—



(a)	that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
(b)	that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Order 42 Rule 6 (7) of the Civil Procedure Rules provides that;

Stay in case of appeal [Order 42, rule 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 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 subrule (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.
3.
4.
5.

Notwithstanding anything contained in subrule (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.”

10. Therefore, this court has power to grant injunction while exercising its original jurisdiction in a case where the suit is yet to be heard; and also, while exercising its appellate jurisdiction in regard to a decision from the subordinate court. There is no provision granting power to this court to grant an injunction pending hearing of an appeal to the Court of Appeal. The only intervention this court can make in regard to an appeal from this court to the Court of Appeal is grant stay of execution pending appeal to the Court of Appeal, but it cannot grant an injunction. Stay pending appeal and temporary injunction pending appeal are two different orders.
11. Principles for grant of injunction are well settled. The applicant must demonstrate prima facie case, irreparable loss and show that the balance of convenience tilts in favour of granting an injunction. (See *Giella v Cassman Brown* [1973] EA 358) In the instant matter, this court has already determined the issues, disposed the suit herein and pronounced itself on the rights of the parties and found in its judgment of 28th June 2022 that the plaintiff failed to prove his claim of adverse possession. Therefore, the court having determined the rights of parties substantively, fully and conclusively having heard parties on merit, cannot revert to the issue of whether or not the applicant has a prima facie case. It is the Court of Appeal that can determine if the appeal raises triable issues with chances of success and not this court. In the premises, I find and hold that this court has no jurisdiction to grant inhibition and injunction pending hearing of the appeal at the Court of Appeal. Save for the order that the firm of Marisio Luchivya is granted leave to come on record for the plaintiff in the place of Oscar Wachilonga & Associates Advocates in this matter, I find and hold that the application dated 15th October 2024 lacks merit and the same is hereby dismissed with costs.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Munyendo for the applicant

Ms. Khisa holding brief for Mr. Kamau for the respondent

Court Assistant- Delphine

