



Eldovasco Beauty Limited v Gumo & another (Environment and Land Appeal E017 of 2025) [2025] KEELC 6621 (KLR) (1 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E017 OF 2025
CK NZILI, J
OCTOBER 1, 2025**

BETWEEN

ELDOVASCO BEAUTY LIMITED APPELLANT

AND

OLIVER MAGERO GUMO 1ST RESPONDENT

REBECCA NEKOYE NAFUNA KHAOYA 2ND RESPONDENT

*(An Appeal originating from the Ruling of C.N. Njalale (PM)
delivered on 27/5/2025 in Kitale MCELC No. 165 of 2024)*

RULING

1. Before the court is an application dated 10/6/2025 in which the appellant seeks:
 - a. ...spent
 - b. ...spent
 - c. Temporary injunction restraining the respondents, their agents, servant or any other person acting on their behalf, from trespassing upon, selling, leasing, transferring, charging, cultivating, constructing upon, entering into, any dealings, or in any other way interfering with the appellant's quiet possession or use of five (5) acre, forming part of Land Title No. Kiminini/Kiminini Block 2/Wekhonye/ 371, demarcated on the ground as Parcel No. Kiminini/Kiminini Block 2/Wekhonye/ 393 (unregistered).
 - (d) Stay of Kitale Magistrate ELC Case No. E165 of 2024, pending hearing and determination of this appeal.
2. The reasons are contained on the face of the application and in a supporting affidavit of Patrick Hinga Kamau, sworn on 10/6/2025. The deponent, as the director of the applicant, deposes that the trial



court on 27/5/2025, delivered a ruling in ELC No. E165 of 2024, dismissing an application seeking for temporary injunction dated 4/4/2025, on the basis that there was no material placed before court to show that the applicant had purchased the subject land contrary to evidentiary material placed before the court, one of which was a sale agreement attacked as annexure PHK-2, photographs of materials deposited as PHK-3, mutation forms and Registry Index Map as PHK-4, showing the portion as parcel No. 393, then already identified, subdivided and agreed upon.

3. The applicant deposes that the 1st respondent had acknowledged in writing receipt of the part payment as per annexure PHK-5, which unfortunately was now dishonestly disowning that the transaction was unrelated to parcel No. 371, which was to be transferred upon completion of payment, given that subdivision a ground mutation had been prepared and a Registry Index Map amended accordingly.
4. The applicant deposes that upon clearance of the purchase price, the 1st respondent duly executed the transfer forms, and availed all the completion documents, including a completed Land Control Board application form annexed as PHK-6(a), (b), (c), (d), and (e).
5. The applicant deposes that despite full performance on its part, the subject land has not been registered in its name due to the 1st respondent's delay and or apparent collusion with the 2nd respondent, which parcel remains in the name of the 1st respondent as per an attached official search certificate marked PHK-7.
6. The applicant deposes that the 2nd respondent in the pending suit alleges that the land is matrimonial property, which claim is unfounded, for the land was initially inherited by the 1st respondent from the estate of his late father, Pius Magero Gumo, and has never been jointly owned or registered in the name of the 2nd respondent.
7. The applicant deposes that the 2nd respondent had expressly consented to the sale as per the spousal consent affidavit dated 28/10/2024 attached as PHK-8, confirming the subject matter of the sale as forming part of parcel No. 371 and not 393.
8. The applicant deposes that the respondents are hell-bent on frustrating the sale and defeating the ends of justice, including recent attempts to remove a caution during this litigation, which is a show of bad faith, as per annexure marked PHK-9, and unless the court intervenes, the ends of justice could be defeated. The applicant deposes that the appeal raises arguable points of law as per the Memorandum of Appeal annexure marked PHK-10, hence the prayers sought.
9. The application is opposed through a replying affidavit of Oliver Magero Gumo, sworn on 6/6/2025, the registered owner of Title No. Kiminini/Kiminini Block 2/Wekhonye/ 371 as per attached title marked OM1. It is deposed that the applicant is neither in possession nor in use of the suit land, hence there is no quiet possession or use by him in the 1st place to be interfered with by anyone, hence the reason why the lower court dismissed the application for injunction on 4/4/2025, for failing to prove any interest in the suit property.
10. The 1st respondent deposes that the sale agreement dated 23/7/2021 is for parcel No. 393 and not parcel No. 371, which the applicant seeks interim orders over, yet it has not tendered proof of its proprietary rights. The 1st respondent deposes that the sale agreement is not specific that the 5 acres of land were to be hived off Kiminini/Kiminini Block 2/Wekhonye/ 371, for the applicant to have any legitimate proprietary rights over it, otherwise the applicant is ought to mislead or hoodwink the court to grant orders for it to access a parcel of land different from what is in the substratum of the suit at the lower court.



11. The 1st respondent deposes that it is not the duty of the courts to rewrite contracts, equity follows the law, and that what the court is being asked is to allow access to the applicant of a parcel of land which had not formed part of the sale agreement.
12. The 1st respondent deposes that it is the applicant who, on 30/12/2024, lodged cautions over parcels No. 371 and 372, which do not form part of the sale agreement, hence it was within his rights to lift the illegally placed caution on his parcels of land.
13. Equally, the 1st respondent deposes that the applicant has not met the threshold for the grant of the reliefs sought, which, if granted, will prejudice him and sanction an illegal takeover of land, and that it was only prudent that the lower court suit be substantively heard on merits to determine all the issues raised.
14. The 1st respondent deposes that an appellate court should not permit the applicant to adduce new issues that were not raised before the trial court; otherwise, seeking the orders sought will undermine the ends of justice.
15. The 2nd respondent opposes the application on the grounds of opposition dated 7/7/2025, that the application:
 - (1) Does not meet the conditions for the grant of an injunction, since it has no legal or equitable interests in Title No. Kiminini/Kiminini Block 2/Wekhonye/ 371 as per *Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358* and *Patricia Njeri & Others -vs- National Museum of Kenya [2004] eKLR*.
 - (2) The application amounts to an appeal distinguished as such on issues substantively relating to the appeal.
 - (3) It offends the doctrine of equitable restraint.
 - (4) It is res judicata.
 - (5) Substantive record of appeal has not been filed.
 - (6) It is defective, incompetent, devoid of merit, misconceived, and an abuse of the court process.
16. The applicant relied on written submissions dated 17/7/2025. It is submitted that, going by annexures to the supporting affidavit, equity will not suffer a wrong without a remedy, and the court should intervene where a party's proprietary interest is under real threat of being defeated through fraud or collusion.
17. The applicant submits that the court is not being invited to rewrite an agreement that is fully performed. In this case, the court should not close its eyes to fraud, sharp practice, or unconscionable conduct, especially in a class of proprietary estoppel where the 1st respondent, by his conduct, made a representation that he had 5 acres to sell, which representation the applicant acted on, paid the entire Kshs.13,000,000/=, took possession and was preparing to develop the land.
18. Reliance is placed on *Moorgate Mercantile Co. Ltd vs Twitchings [1976] 1 QB 225*, *Sarah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR*, *Titus Muiruri Doge -vs- Kenya Cannery Ltd [1988] eKLR*, *Willy Kimutai Kitilit -vs- Michael Kibe [2018] eKLR*, *Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri [2014] eKLR*, *Nguruman Ltd -vs- Jan Bonde Nielsen & Others [2014]*, *Films Rover International Ltd -vs- Cannon Film Sales Ltd [1986] 3 ALL ER 772*, *Global Tours & Travels Ltd Nairobi HC Winding Up Cause No. 43 of 2000*.



19. The 1st respondent relies on written submissions dated 12/7/2025. It is submitted that the applicant has failed to meet the conditions set in *Giella -vs- Cassman Brown (supra)*, *Mrao Ltd -vs- First American Bank of (K) Ltd & Others [2003] eKLR*, *Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society [2001] Vol. 1 EA 86*, *Nguruman Ltd -vs- Jan Bonde Nielsen & Others (supra)*, *Stanley Anyamba Ageyo & Another -vs- Musa Matu Riunga & Others [2022] eKLR*, *Showind Industries -vs- Guardian Bank Ltd & Another [2002] 1EA 284* and *Five Forty Aviation Ltd -vs- Erwan Lanoe [2019] eKLR*.
20. The 2nd respondent relies on written submissions dated 7/7/2025, that the application does not meet the conditions set in *Giella -vs- Cassman Brown (supra)* and *Patricia Njeri & Others -vs- National Museum of (K) Ltd [2004] eKLR*.
21. The issues calling for my determination are:
 - (1) If the applicant is entitled to a temporary injunction pending hearing and determination on an appeal for refusal of a temporary injunction by the trial court on 27/5/2025.
 - (2) If the lower court suit should be stayed pending the hearing and determination of this appeal.
22. It is quite unfortunate that parties herein have spent considerable time addressing the issues allegedly raised in the pleadings at the lower court, yet none of them, including the appellant, has attached the respective pleadings at the lower court to enable this court to appreciate the facts as pleaded by the parties.
23. That said, the scope of whether or not to grant a temporary injunction pending appeal is governed by Order 42 Rule 6(6) of the Civil Procedure Rules and Section 13(7) of the *Environment and Land Court Act*. The operative words are where the court deems it fit and just. The principles to apply were set out in *Patricia Njeri & Others -vs- National Museum of Kenya (supra)*.
24. The court said that it is a discretionary power to be exercised judicially and not whimsically or in an arbitrary fashion. The appeal must not be frivolous, as held in *Madhu Paper International Ltd -vs- Kerr [1985] KLR 840*. The discretion would be refused where it would inflict greater hardship than it could avoid. The applicant must therefore show that to refuse the injunction would render the appeal nugatory. The court must also consider the principles in *Giella -vs- Cassman Brown Co. Ltd (supra)*.
25. In *Julius Musali Kyanga -vs- Kenya Commercial Bank & Another [2012] eKLR*, the court said that the object of such an injunction is to preserve the subject matter to ensure that the appeal, if successful, will not be rendered nugatory. In *Eco Bank (K) Ltd -vs- First Choice Mega Stores Ltd, Kisii ELC Misc. App. No. 20 of 2017*, the court said that such an appeal must raise serious issues deserving court's consideration, while on the same issue, in *Madhu Paper International Ltd -vs- Kerr (supra)*, the court said that the applicant must show that his appeal is arguable and what amounts to an arguable appeal was addressed in *Stanley Kangethe -vs- Tony Keter & Others [2013] eKLR*. An arguable appeal must not succeed, but it should not be frivolous, and it should be deserving of the court's consideration.
26. As to rendering an appeal nugatory, the court in *George Gathura Karanja -vs- George Gathura Thuo & Others [2019] eKLR*, said it is where, if what is sought to be stayed, if allowed to happen, is irreversible, or if not reversible, whether damages will reasonably compensate the aggrieved party.
27. What the applicant has appealed against is the refusal by the lower court to grant a temporary injunction to restrain the respondents from obstructing, or interfering with the unrestricted access to and peaceful utilization of the suit land. The grounds were that the applicant is the beneficial owner of 5 acres of land comprised of parcel No. Kiminini/Kiminini Block 2/Wekhonye/371.



28. From the body of the ruling dated 27/5/2025, it is indicated that on 18/3/2025, the trial court had dismissed an application for injunction, brought by the plaintiff, now the 2nd respondent herein, after which the 2nd respondent, now the appellant, resumed operation on the suit property, met hostility from the respondents herein, and they prevented him from accessing the land. This is what triggered the applicant to file the application dated 3/4/2025.
29. It is indicated that the supporting affidavit only attached photographs showing the ploughed land. All the annexures attached to the supporting affidavit before this court did not form part of the substratum leading to the ruling delivered on 27/5/2025.
30. As indicated above, there are no pleadings attached to the records before this court. The court cannot, therefore, fathom whether the trial court misdirected itself or used the wrong principles of law in considering the appellant's substantive pleadings in refusing to grant temporary orders of injunction. It is a trite law that parties are bound by their pleading, and issues for determination flow from the pleadings.
31. Whether or not to grant a temporary order is a discretionary power. In *Charter House Investments Ltd -vs- Simon K. Sang & Others* [2010] eKLR, the court said that an injunction is an equitable discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. An award of a temporary injunction according to the Court of Appeal is not a matter of right, even where irreparable injury is likely to result to the applicant. The court said that it is a matter of individual discretion, where a court balances the convenience of the parties and possible requirements to them and third parties.
32. In the context of whether the applicant has an arguable appeal, and if an injunction is not granted, it will be rendered nugatory, can the circumstances obtaining enable the court to find an arguable appeal, capable of being rendered nugatory?
33. To answer this, the applicant had the onus to show that what will happen to the subject matter, in the absence of an injunction, will be irreversible, and damages will not be an adequate remedy. The grounds of appeal border on the failure of the trial court to exercise its discretion correctly, based on the material availed by the applicant, and to find the need to grant unlimited access to, stop interference with, quiet enjoyment, possession, and utilization of 5 acres of land beneficially belonging to the applicant, out of Title No. Kiminini/Kiminini Block 2/Wekhonye/371, pending hearing and determination of the suit.
34. To establish an arguable appeal, the applicant must demonstrate that in exercising the discretion, the trial court misdirected itself in some matters and, as a result, arrived at an erroneous decision, and that there was an injustice as held in *Mbogo -vs- Shah* [1968] EA 93. See *Kenya National Human Rights Commission & Another -vs- Attorney General & Others* [2019] eKLR. Looking at the material before the trial court, I find no arguable point to be ventilated before this court.
35. Coming to whether the subject matter needs preservation, the test going by *American Cyanamid Co. -vs- Ethicon Ltd* [1975] AC 135, in whether there is a serious or fair issue to be tried, if damages would be an adequate remedy, and the balance of convenience. In *Mbuthia -vs- Jimba Credit Finance Corporation & Another* [1988] KLR 1, the Court of Appeal observed that the correct approach in dealing with an interlocutory application for injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's proposition.
36. The onus is on the applicant to show that it has a prima facie case as per *Mrao Ltd -vs- First American Bank of (K) Ltd* (supra). The applicant relies on a sale agreement dated 23/7/2023. It relates to 2.023



Ha out of Title No. Kiminini/Kiminini Block 2/Wekhonye/393, and not Kiminini/Kiminini Block 2/Wekhonye/371.

37. It is not the business of courts to rewrite contracts. See *National Bank of Kenya -vs- Pipe Plastic Samkolit (K) Ltd* [2011] eKLR. The respondents have rebutted that the applicant seeks to be granted orders to access or unlawfully take over unrelated suit land contrary to what is in the sale agreement.
38. The three pillars of temporary injunction must be established separately, distinctly, logically, and sequentially as held in *Nguruman Ltd -vs- Jan Bonde Nielsen & Others* (supra) and in *Kenya Commercial Finance Co. Ltd -vs- Afraha Educational Society* [2001] Vol. 1 CA 86.
39. The 2nd respondent has raised issues of spousal consent on the matrimonial home. Such are constitutional and statutory rights which cannot be ignored or overlooked by a court of law, as the applicant submits. The court cannot grant a temporary injunction on appeal if it will pose a greater risk, as held in *Madhu Paper International Ltd -vs- Kerr* (supra). In *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* [2018] eKLR, the court said that the balance of convenience looks at who will suffer more among the parties if the injunction is granted and vice versa.
40. In *Paul Gitonga Wanjau -vs- Gathuthis Tea Factory Co. Ltd & Others* [2016] eKLR, the court observed that where any doubt exists as to the applicant's right, or if the right is not disputed but its violation is denied, the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of injury. Further, in *Amir Suleiman -vs- Amboseli Resort Ltd* [2004] eKLR, the court emphasized opting for the lower rather than the higher risk of injustice.
41. I think the court has said enough to make a finding that the applicant has miserably failed to surmount the threshold of a grant of temporary orders of injunction pending appeal.
42. As to the stay of proceedings, it is governed by Order 42 Rule 6(1) and (b) of the Civil Procedure Rules. Under Halsbury's Laws of England 4th Edition, Vol. 37, page 330, it is described as a serious, grave, and fundamental interruption in the right to expeditious disposal of matters, which can only be granted sparingly and on exceptional circumstances. In *William Odhiambo Ramogi & Others -vs- Attorney General & Others (MUHURI)*, IP [2020] eKLR, the cited *Global Tours & Travels Ltd* (supra), and *David Morton Silverstein -vs- Atsango Chesoni* [2002] eKLR, that:
 - (a) There must be a pending appeal.
 - (b) The appeal must raise a substantial question.
 - (c) It would be rendered nugatory in the absence of a stay.
 - (d) Exceptional circumstances must be shown.
 - (e) It must be shown that the application was filed expeditiously and without delay.
43. In *Kenya Wildlife Service -vs- James Mutembei* [2019] eKLR, the court said that since a stay of proceedings impinges on the right to access justice, the right to be heard without delay, and the right to a fair trial, the test must be higher and stringent.
44. Looking at the material placed before the court, the trial court directed that the parties comply with Order 11 of the Civil Procedure Rules. The prejudice to be suffered if the suit is heard expeditiously and then determined one way or the other has not been indicated. The court has already indicated that the applicant has not raised arguable points of appeal. The applicant has not shown how the subject



matter risks dissipation. The trial court declined a temporary order of injunction against the appellant and the 1st respondent.

45. All in all, I find no exceptional circumstances why I should stay the proceedings. The application is dismissed with costs.

46. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 1ST DAY OF OCTOBER 2025.

In the presence of:

Court Assistant - Dennis

Nafula for Samba for applicant present

Teti for 2nd respondent present

Bunyasis for 1st respondent present

HON. C.K. NZILI

JUDGE

ELC KITALE.

