

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

CIVIL APPEAL NO. E038 OF 2024

ANNE MUTHONI KIGOTHO 1ST APPELLANT/APPLICANT

PENNINAH NJERU GICHERU 2ND APPELLANT/APPLICANT

VERSUS

HASSAN LUKU AL-AMIN 1ST

RESPONDENT

GOSO IBRAHIM BAHIJA 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 10th January 2025, Anne Muthoni Kigotho and Penninah Njeru Gicheru (the Appellants) pray for the following:

a. Spent

b. Spent

c. That the status quo in respect of registration and development of L.R. No. 6990/I/MN CR 21448 be maintained pending the hearing and determination of the Appeal to the Court of Appeal.

d. Spent

e. That in order to preserve the subject matter of the Appeal to the Court of Appeal, this Honourable Court be pleased to grant an order of injunction restraining the 1st and 2nd Respondents, their servants, agents, proxies, beneficiaries or persons claiming through for or from them from advertising, selling, sub-dividing, disposing, transferring, charging, leasing and/or registering any new entities regarding the property known as Title Number CR. No. 21448 Plot No. 6990/I/MN pending the hearing and determination of the Appeal.

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

2. The application is supported by the Affidavits sworn by the 2nd Appellant and is premised on the grounds inter alia that:

i) The applicants are the joint registered proprietors of the property known as Title No. CR. No. 21448 Plot No. 6990/I/MN measuring 0.1255 Ha or thereabouts situated in Shanzu within Mombasa County.

ii) Sometimes in the year 2022, without the knowledge of the Appellants, the 1st Respondent

instituted Mombasa CMELC No. E014 of 2022 seeking for an order of adverse possession over the Appellants' property which order was granted without the participation of the Appellants who were never served. The court further sanctioned the Land Registrar to delete the entries in the Appellants' name;

- iii) Upon learning of the mischievous dealings on their land, the Appellants moved the subordinate court seeking to set aside the ex-parte judgment but the application was dismissed on a technicality;**
- iv) The Appellants then moved to this court on Appeal and sought a stay of execution of the judgment pending Appeal. However, on 16th December 2024, the Court dismissed the application and the Appeal in its entirety faulting the Appellants for not filing a Notice of Appeal in the ELC Court before filing the Appeal.**
- v) The Appellants wish to exercise their undoubted right of appeal and it is therefore crucial that this court preserves the substratum of the appeal pending the hearing of the application and the Appeal by granting the orders sought herein;**

vi) That since the execution of the decree issued on 21st June 2023, the suit property has since been transferred to the 2nd Respondent and the property further risks being interfered with and/or obliterated by being demarcated, subdivided or transferred to third parties thereby irrevocably and irreversibly affecting the substratum of the Appeal. In that event the Appellants stand to suffer irreparable loss and damage as the Appeal will be rendered a mere academic exercise.

3. Hassan Luku Al-Amin (the 1st Respondent) is opposed to the application in his Replying Affidavit sworn on 31st January 2025, the 1st Respondent avers that the decision delivered on 11th October 2024 dismissing the application to set aside the judgment was proper and basically on points of law as the Defendants had sworn a Joint Affidavit.
4. The 1st Respondent avers that the suit filed for adverse possession was served upon the Appellants by way of substituted service. The Appellants failed to file their response and judgment was subsequently entered against them on 12th June 2023. He further avers that he has since sold the property to the 2nd Respondent.

5. Goso Ibrahim Bahija (the 2nd Respondent) is equally opposed to the application. In his Replying Affidavit sworn on 3rd February 2025, the 2nd Respondent avers that he is the legal owner of the property having purchased the same from the 1st Respondent at a consideration of Kshs. 7,000,000/- after conducting due diligence. The 2nd Respondent further avers that the Appellants have not given a plausible reason as to why they failed to enter appearance and defend their case in the Lower Court.
6. In addition, the 2nd Respondent accuses the Appellants of re-litigating this matter contrary to the principle of res judicata as the court had dismissed their application dated 15th October 2024. It is further the 2nd Respondent's case that the Ruling of the court delivered on 16th December 2024 was a negative order incapable of being stayed or warranting a temporary order of injunction as the Appellants have lost nothing.
7. I have carefully perused and considered the application as made by the Appellants and the response thereto by the Respondents. I have similarly perused the submissions placed before the court by the Learned Advocates representing the parties.

8. By this application before the court, the Appellants have sought for orders of status quo to be maintained pending the hearing and determination of their appeal to the Court of Appeal. In addition, the Appellants pray for a temporary order of injunction to issue restraining the two Respondents from dealing with the property known as CR No. 21448 Plot No. 6990/I/MN in order to preserve the subject matter pending the Appeal.
9. It is the Appellants' case that they are the joint registered proprietors of the suit property measuring 0.1255 Ha or thereabouts and situated in Shanzu within Mombasa County. They accuse the 1st Respondent of secretly filing a suit for adverse possession in the Lower Court and thereafter executing the ex-parte judgment and proceeding to dispose of the property to the 2nd Respondent.
10. From the material placed before the court, it was apparent that the 1st Respondent had indeed instituted Mombasa CMELC Case No. E014 of 2022 claiming to have acquired the suit property from the Appellants under the doctrine of adverse possession. On 12th June 2023, the 1st Respondent obtained an

ex-parte judgment in his favour and proceeded thereafter to transfer the property to the 2nd Respondent.

11. When the Appellants learnt of what had transpired, they filed an application in the Lower Court seeking to set aside the judgment on account that they had not been served with the summons and were therefore unaware of the suit. In a Ruling delivered on 11th October 2024, the application to set aside the judgement was dismissed by the trial court.
12. Subsequently and by a Notice of Motion dated 15th October, 2024, the Appellants moved to this Court on Appeal praying for orders as follows:
 - a) ...
 - b) ...
 - c) **That pending the hearing and determination of this Appeal, the Honorable Court be pleased to grant conservatory orders by way of stay of execution restraining the Respondents by themselves, their agents, servants, successors in title or anybody else claiming under the decree of Chief Magistrate's ELC No. E014 of 2022 from transferring, selling, building, developing or**

otherwise dealing with the property Plot No. 6990/I/MN CR. No. 21448;

- d) That the status quo in respect of the title deed for LR No. 6990/I/MN CR. 21448 be maintained pending the hearing and determination of this Appeal;**
- e) That the Court do make any further orders that the Court may deem just; and**
- f) That the costs of the application be provided for.”**

13. In a Ruling rendered on 16th December 2024, the Honorable Justice L. Naikuni then seized of the matter not only dismissed the application but also struck out the Appeal instituted on 15th October 2024 for being instituted un-procedurally.
14. By this present application, the Appellants have invoked the provisions of Order 40 and 42 Rule 6(6) of the Civil Procedure Rules urging the Court to again grant an order of status quo to preserve the subject matter of the dispute pending appeal and for the court to be pleased to grant an order of injunction restraining the Respondents from dealing with the suit property.

15. In support of those prayers, the Appellants submit that the right to be heard is fundamental and that justice can only be served to the parties herein if both are given an opportunity to present their evidence and test the opponents' evidence by way of cross-examination. While I am in agreement with the Appellants that there is something rather unfortunate in the manner in which this matter has proceeded this far, it was clear to me that there was very little this court can do to assist the Appellants. Their recourse appears to me to be in the Court of Appeal.
16. I say so because prayer 'C' on status quo is couched word for word with Prayer "d" of their Motion dated 15th October 2024 which has already been considered and was dismissed by this same court on 16th December 2024. This court cannot revisit the same as to do so would be tantamount to the court sitting on its own appeal.
17. Secondly, I was not persuaded that this Court has jurisdiction under Order 42 Rule 6(6) of the Civil Procedure Rules to grant the injunction sought. The authority for that position is indeed found at paragraph 14 of the Appellant's own submissions where they submit as follows:

“14 The position on the jurisdiction of the Court to grant injunction pending appeal was elaborated in the case of Ogumbo -vs- Kyambo & Another [Environment & Land Case 46 of 2019] (2023) KEELC 17959 (KLR) where the court held;

"On whether an injunction can be issued by this court pending hearing of an appeal to the Court of Appeal, my view is that there is no provision in law clothing this court with jurisdiction to grant injunction pending appeal to the Court of Appeal. The jurisdiction to grant injunction pending appeal provided for in Order 42 Rule 6(6) is for instances where this court is exercising its appellate jurisdiction in respect of a decision from the subordinate court. In the premises, this court has no jurisdiction to grant an injunction in respect of its decision intended to be appealed before the Court of Appeal."

18. That indeed is the clear position of the law for order 42 Rule 6 (6) of the Civil Procedure Rules provides thus:

“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."

19. Those provisions were also the subject of interpretation in the case of ***Bartholomew Mwanyungu & 3 Others -vs- Florence Dean Karimi (2019) eKLR*** where the Court held that:

"It should be noted from the above provision of the law, and in particular Order 42 Rule 6 (6) that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this court given on April 18,2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This court is no longer exercising its appellate jurisdiction. The applicant has already filed a Notice of Appeal in the Court of Appeal. Under (Rules) 5(2)(b) of the Court of Appeal Rules, the Court of Appeal may grant an injunction in civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 75."

20. Arising from the foregoing, I did not find any merit in the Motion dated 10th January 2025. I dismiss the same with costs to the 2nd Respondent.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 16th day of October, 2025

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**J.O. OLOLA
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Nyabena Advocate for the Appellants/Applicants
- c) Mr. Owino Advocate for the 1st Respondent
- d) Mr. Mitei Advocate for the 2nd Respondent