

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO. 101 OF 2017

FRANCIS MUTHUI MATHANGANI.....PLAINTIFF/RESPONDENT

-VERSUS-

ALICE GATHIGIA MENJA.....DEFENDANT/APPLICANT

RULING

1. Before the court is an Application dated 25th October 2024 brought by the Defendant/Applicant by way of Notice of Motion seeking orders:
 1. Spent.
 2. **THAT the Honourable Court be pleased to stay execution of the decree issued herein on 2nd February 2023, pending hearing and determination of this application.**
 3. **THAT the Honourable Court be pleased to restrain the County Land Survey from demarcating, re-establishing, surveying and or any way interfering with boundaries of Land Parcel number KIRIAMUKUYU/MBOGOINI/1232 and 1233 on 8th November 2024 or on any other date pending hearing and determination of the application interparties.**
 4. **THAT the Plaintiff/Respondent, his servants and/or agents be restrained by way of injunction from interfering in any way in Land Parcel number KIRIMUKUYU/MBOGOINI/1232 and 1233 pending hearing and determination of Nyeri Court of Appeal Case No. E142 of 2022.**
 5. **THAT the Honourable Court be pleased to issue any other and further relief it may deem fit to grant.**
 6. **Costs be provided for.**

2. The grounds in support of the application are found on the face of the application and in the Supporting Affidavit sworn by the Applicant. The Applicant stated that the County Land Surveyor was scheduled to interfere with the boundaries of land parcels KIRIMUKUYU/MBOGOINI/1232 and 1233. She deposed that judgment was entered in this suit and a decree issued on 2nd February 2023, and that she applied to file an appeal out of time and the application was granted. Notice to Appeal was lodged on 14th November 2022 and served upon opposing Counsel. The Appeal is said to be Nyeri Civil Appeal No. E142 of 2022.
3. The Applicant claims that she was served with a letter from the lands office dated 15th October 2024 and was surprised to learn that LR Kirimukuyu/Mbogoini/563 was subdivided into two portions without her knowledge, notification, or consent. She claims to hold an official title deed to the said land.
4. The Applicant deposed that she has yet to exhaust all avenues of litigation since the matter is pending before the Court of Appeal and believes that her appeal has a high chance of success. She claims that the exercise being done by the Plaintiff/Respondent will cause huge damage to her.
5. She further deposed that Counsel for the Plaintiff/Respondent is fully aware that there is a pending appeal at the time she went ahead to execute the decree. She prays that the execution of the decree be stayed and the re-establishment of boundaries stopped pending the hearing and determination of this application and an injunction do issue against the Plaintiff/Respondent from interfering with the said land, resultant titles LR Kirimukuyu/Mbogoini/1232 and 1233.

Background to the case

6. This suit was instituted by the Decree holder/Respondent herein vide Plaint dated 5th June 2017. The Defendant, who is the Applicant in the instant application, filed her statement of defence dated 27th June 2017, denying the Plaintiff's claim.
7. The suit was fully heard and judgment was rendered on 28th July 2021 in favour of the Plaintiff against the Defendant/Applicant. The Court issued the following orders;
 - (a) ***A declaration be and is hereby made that the Defendant holds one-half of the title No. Kirimukuyu/Mbogoini/563 (the suit property) in trust for the Plaintiff.***
 - (b) ***An order be and is hereby made that the said trust is terminated forthwith and that the Defendant do transfer one half of the suit property to the Plaintiff.***
 - (c) ***That in default of the Defendant's compliance, the Deputy Registrar of the court shall sign all forms, mutations and documents to facilitate the transfer of one half of the suit property to the Plaintiff.***
 - (d) ***The Plaintiff is hereby awarded the costs of the suit to be borne by the Defendant.***
8. Counsel for the Defendant applied for a stay of execution of the decree at the time of reading the judgment and was granted for 30 days to enable the Defendant to comply with the judgment. The Decree Holder/Respondent did not respond to the instant application.

Analysis and Determination

9. The Court has considered the application dated 25th October 2024 filed by the Defendant/Applicant through the firm of Mbao Gitahi Advocates. The Applicant subsequently filed a Notice to act in person. The two issues for determination are:
- A) Whether the Defendant ought to be granted an order of stay of execution of the decree in this suit.
 - B) Whether the Defendant/Applicant ought to be granted an order of injunction as prayed.
 - A) Whether the Defendant ought to be granted an order of stay of execution of the decree in this suit.**
10. The Court notes that Prayers 2 and 3 of the application herein seek orders of stay of execution and injunction pending hearing and determination of the instant application. The two prayers do not seek orders pending hearing and determination of an appeal to the Court of Appeal. The instant application is under consideration, and the ruling hereof will lead to the determination of the same. On 29/10/2024 the Honourable Justice Olola declined issuance of interim orders directing that the application herein be served for an inter partes hearing.
11. From the foregoing, it is the court's view that Prayers 2 and 3 of the application dated 25th October 2024 are spent and do not fall for consideration by this court.
- B) Whether the Defendant/Applicant ought to be granted an order of injunction as prayed.**

12. Having determined as above, the court is left to consider Prayer 3 which seeks an order that the Plaintiff/Respondent, his servants and/or agents be restrained by way of injunction from interfering in any way in Land Parcel number KIRIMUKUYU/MBOGOINI/1232 and 1233 pending hearing and determination of Nyeri Court of Appeal Case No. E142 of 2022.

13. **Alnashir Visram, J** (as he then was), while dealing with an application for injunction pending appeal, stated as follows in the case of **Patricia Njeri & 3 Others V National Museum of Kenya [2004] eKLR.**

"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 vs 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 vs 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 vs Rent Restriction Tribunal (1982) KLR 417 (cited also in Venture Capital).

(d) The Court should also be guided by the principles in Giella vs 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).

14. The case of **Giella vs Cassman Brown & Company Limited (1973) E A 358** is the standard test that a Court will subject an application for the grant of a temporary injunction. In that case, the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

"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."

15. Order 40 of the Civil Procedure Rules provides for applications for temporary injunctions and interlocutory orders and provides at **Order 40(1)** that:

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.”

16. Two of the considerations for granting an injunction pending appeal in the **Patricia Njeri & 3 Others v. National Museum of Kenya [Supra]** quoted above are that the appeal should not be frivolous. The Court has perused the application herein and has not seen any evidence of the existence of Nyeri Court of Appeal Case No. E142 of 2022 referred to by the Applicant. Indeed, the Applicant did not attach to the application herein an application to the Court of Appeal for extension of time to file an appeal against the judgment of this court. She also did not file an order allowing the extension of time or a Notice of Appeal, though she claims all the above-mentioned documents were filed. The Court record shows that a Notice of Appeal dated 11th November 2022 was filed on 16th November 2022. The said Notice of Appeal is not accompanied by an order of extension of time to file the same, noting that it was filed over a year after the date of the judgment, which was delivered on 28th July 2021. The Court finds that there is nothing on record to show that the appeal Nyeri Court of Appeal Case No. E142 of 2022 exists and whether or not it is frivolous.
17. The other consideration for whether or not to grant an order of injunction is that such an order should not inflict greater hardship than it would avoid. The court believes that an injunction would cause greater hardship to the Decree Holder/Respondent. The rights of the party seeking a stay of execution or injunction must be balanced with the rights of the decree holder as a successful litigant who should not be deprived of the fruits of a judgment in his favour without just cause. This was the position taken in the case of **Kenya**

a Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR, where the Hancox JA was of the view that:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

18. It is noted that the Applicant was all along aware of the judgment of the court and the fact that the execution process was going on. The Applicant was represented at the time of the delivery of the judgment by her Counsel, M/S Kagoi, who held brief for Mr. Njanja. Indeed, the Counsel made an application for a stay of execution for 30 days to enable the Defendant to comply with the court orders. The Court granted the stay of execution as prayed. However, it appears that the Applicant did not comply with the orders.
19. Further, the Plaintiff/deed holder made an application dated 4th March 2022 seeking an order that the production of the original title deed for purposes of registration of LRA 33 (transfer) form in respect of land parcel No. Kirimukuyu/Mbogoini/563 be dispensed with. This application was heard and the orders granted by the Court on 10th May 2022 in the presence of Counsel for the Defendant/Applicant. As per the affidavit in support of the said application, the Deputy Registrar of this Court had, at the time of filing, already signed the mutation forms, transfer form and an application for the Land Control Board Consent.
20. From the documents filed by the Applicant and the court record, the Court is convinced that the decree of this court has, by and large, been executed with

the knowledge of the Defendant/Applicant. The Court finds no just cause for keeping the Decree Holder/Respondent from the fruits of his judgment.

21. In the Court's view, the application dated 25th October 2024 lacks merit and is hereby dismissed with no order as to costs.

Delivered, Dated and Signed at Nyeri on the 14th day of October, 2025

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Ms. Kendi - Court Assistant

Alice Gathiga Menya Defendant/Applicant Present in Person

No Attendance for the Respondent