

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCOS NO. E005 OF 2021

JOHN KEENE GICHANA PLAINTIFF

VERSUS

JOSPHAT MOSWAGI MABEYA..... 1ST DEFENDANT

ALFRED GICHANA MABEYA 2ND DEFENDANT

RULING

(Application for injunction filed by the defendants to restrain plaintiff from being on suit land pending an appeal that the plaintiff has filed to the Court of Appeal; application brought pursuant to Order 40 of the Civil Procedure Rules; Order 40 not applicable after suit has already been determined and Order 42 would be the Order applicable after judgment; even then the application here is not filed by the unsuccessful party appealing but the defendants; such party does not need an injunction because decree is in his favour; application dismissed)

1. The application before me is that dated 9 May 2025 filed by the defendants. It is an application said to be brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and ‘all other enabling provisions of the law.’ The substantive prayer sought in the application is prayer (c) which seeks the following.

(c) That pending the hearing and determination of Civil Appeal No. E295 of 2024 at Kisumu, a temporary injunction do issue against the (appellant) restraining him from entering unto, cultivating, tilling, erecting of any structures, cutting down of any trees, and/or in any manner deal or interfere with land parcel No. West Kitutu/Mwakibagendi/1099.

2. The application is opposed.
3. To put matters into perspective this suit was commenced by the respondent John Keene Gichana through an Originating Summons filed on 29 April 2021. The respondent sought orders that he has acquired title, by way of adverse possession, to the land parcel West Kitutu/Mwakibagendi/1099 (the suit land). I heard the case but dismissed it in a judgment delivered on 26 September 2024. Aggrieved, the respondent filed an appeal to the Court of Appeal, being the case Kisumu Civil Appeal No. E295 of 2024. He did not however file any application for stay of execution pending appeal. Instead, it is the defendants/applicants who are now seeking that he be restrained from the suit land by way of an injunction, pending the hearing and determination of his appeal before the Court of Appeal. They state that the respondent has erected some structures and is tilling the land.
4. The respondent has sworn a replying affidavit to oppose the motion. He has inter alia averred that he is the one who filed the suit and after it was dismissed, he preferred an appeal to the Court of Appeal. He asserts that he is the one who has been in occupation of the suit land from 1977. He deposes that the applicant had filed a suit against him for

eviction, being Kisii CMELC No. E031 of 2021, which was dismissed, and he preferred an appeal i.e Kisii ELCA No. E013/2022 which is pending. He deposes that the applicants did not file any counterclaim in this matter nor have they filed a cross-appeal before the Court of Appeal. He avers that there is nothing pending before this court so as to entertain an application under Order 40 Rules 1, 2 and 3.

5. I directed the application be canvassed by way of written submissions and I have taken note of the submissions of Mr. Soire, learned counsel for the applicants and Mr. Momanyi learned counsel for the respondent.
6. I actually find the application to be a curious one. After pronouncement of judgment and filing of an appeal, it is ordinarily the aggrieved appellant who files an application for stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. But what I have before me is an application filed, not by the appellant, but by the successful defendants. It is of course an application brought under Order 40 Rules 1, 2 and 3 which provide as follows :

Order 40 Rule 1 : Cases in which temporary injunction may be granted

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 40 Rule 2 : Injunction to restrain breach of contract or other injury

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

Order 40 Rule 3 : Consequence of breach

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

7. Straight away, I do not see the place of Order 40 Rule 2, which is for injunction to restrain a breach of contract, nor the place of Order 40 Rule 3, which relates to consequences of breach. Order 40 rule 1, does provide for an injunction in relation to property, but it will be seen that it is an injunction pending the hearing and disposal of the suit. This case is already determined so I do not see how I can issue any order of injunction under Order 40.
8. Where there is an appeal, it is Order 42 which applies, and not Order 40. But again, you would expect that the party applying for stay or an order of injunction pending appeal would be the unsuccessful party. The successful party does not need to make any application for injunction, or stay, for he already has a decree in his favour and the avenue is to execute it. However, the nature of decree here was nothing more than a dismissal of the case of the respondent as the applicants did not have a counterclaim seeking any adverse orders against the respondent. I do not see how they can now ask for an injunction which would be seeking adverse orders through the back door without having any pleadings to that effect. I have taken note that in the reply of the respondent, it was said that the applicants had a suit for eviction which was dismissed, and now they have preferred an appeal. If so then I do not see how they can seek an order of injunction here; maybe they can try their luck in the other suit that they have.
9. I appreciate the frustration that the applicants may have as the respondent has already lost the suit for adverse possession but I am afraid that they are going it the wrong way if what they wish for is for the respondent to be evicted from the suit land or be restrained from it. Certainly, the path cannot be to seek an injunction under Order 40 of the Civil Procedure Rules.
10. In short, I find no merit in this application and it is hereby dismissed with costs.
11. Orders accordingly.

DATED AND DELIVERED THIS 22 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

Delivered in the presence of :

Mr. Soire for the applicant

N/A on part of Mr. Momanyi Aunga for the respondent

Court Assistant – Michael Oyuko