

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & MUCHELULE JJ.A.)

CIVIL APPEAL NO. E054 OF 2025

BETWEEN

**LUCAS OTIENO OTIENDE 1ST
APPELLANT DANKAN ODHIAMBO OKUMA.....2ND
APPELLANT
PAUL OTIENO OKEYO.....3RD APPELLANT
JARED OTIENO AYOO.....4TH APPELLANT
MILDRED GUMBO.....5TH APPELLANT
JENNIFER ODHIAMBO GUMBO.....6TH APPELLANT**

AND

**MICHAEL OGINGA DACHE 1ST
RESPONDENT KISUMU DISTRICT LAND REGISTRAR 2ND
RESPONDENT
KISUMU DISTRICT LAND SURVEYOR 3RD
RESPONDENT THE COMMISSIONER FOR LANDS
4TH RESPONDENT THE ATTORNEY GENERAL...5TH
RESPONDENT**

*(Being an appeal against the ruling and order of the Environment
and Land Court at Kisumu (E. Asati, J.) dated 1st July, 2024*

in

ELCA No. E032 of 2024)

JUDGMENT OF THE

COURT

1. The appellants had by a Notice of Motion application dated 11th June 2024, sought orders for interim relief pending the hearing

and determination of the appeal before the Environment and Land Court at Kisumu. By an interlocutory ruling delivered by Asati, J.

on 1st July, 2024 in Kisumu ELCA No. E032 of 2024, their prayers were dismissed, leading to them filing this appeal.

2. The genesis of this appeal is a suit filed by 1st the respondent, being ***Kisumu CMCC ELC No. 266 of 2018 - Michael Oginga Dache vs. Kisumu District Land Registrar & Others***, where he sought an order of permanent injunction restraining the appellants from trespassing into LR No. Kisumu/Kogony/5551 ("the suit property"); an order directing the Land Registrar (the 2nd respondent herein) to amend the Registry Map Sheet No. 5 of Kogony registration section by deleting and or removing the access road illegally created over the suit property.
3. The appellants, who described themselves as the registered proprietors of land parcels, known as Kisumu/Kogony/8994, Kisumu/Kogony/8995, Kisumu/Kogony/9090, Kisumu/Kogony/1024, Kisumu/Kogony/5550, Kisumu/Kogony/7037 and Kisumu/Kogony/6615, opposed this saying the parcels had for years been served by a public access road which the respondent sought to be closed and deleted from the Registry Map Sheet. Nevertheless, the 1st respondent neither joined them as defendants in the suit nor notified them of its existence, despite

the significant ramifications in the event the claim was allowed and the access road closed.

4. In a decision rendered on 31st May, 2023, the Magistrate's Court allowed the claim and issued a permanent injunction restraining the Defendants from trespassing on the suit property and ordered the amendment of the Registry Map by deleting the access road created over the property. On the strength of this Order, the public access road which was serving the appellants properties was blocked and/or fenced off the public access road, effectively denying the appellants access to their respective homes and properties. According to the them, they were constructively evicted from their homes leaving them homeless and destitute.
5. Upon learning about the existence of the judgment from the Magistrate's Court, the applicants filed an application dated 5th May, 2025, seeking to be joined in the suit as Defendants; and an order of temporary stay of execution of the judgment delivered on 31st May, 2023 pending hearing and determination of the application. The application was heard, and by a ruling dated 14th June, 2014, dismissed on grounds that the court was "*functus officio*", thus unable issue the orders sought.
6. Aggrieved by that outcome, the applicants lodged an appeal before the Environment & Land Court; and accompanying the

appeal, was an application dated 11th June 2024, seeking an order of temporary

stay of execution of the judgment delivered by the trial court, hoping that the trial court's judgment would eventually be set aside; and have the appellants joined as Defendants in the suit. The appellant's position was that they had a high chance of success; and that the respondents stood to suffer no prejudice if the orders sought were granted, as the appellants' properties were completely landlocked with no public access road to the main road. Any attempt to remedy this with the help of the area Chief, police, and County Surveyor's office had become futile. It was also pointed out that the application was brought without undue delay; and it was in the interest of justice that the application be allowed.

7. The application was opposed by the 1st Respondent on the grounds that the suit land was undisputedly registered in his name; that the access road which was ordered to be closed vide the judgment, was created on the 1st respondent's land parcel No. Kisumu/Kogony/5551 (suit land); that the appellant's usage of that illegally created access road constituted acts of trespass by the appellants; that the appellants' instant application purported to seek an illegal perpetration of gross continuing trespass which constituted an offence in the law; that the

alleged access road was created without due process as contemplated in the Public Roads

and Roads of Access Act; and that the instant application was bad in law, frivolous, misconceived and otherwise an abuse of the court process, as it sought to assist the appellants in perpetrating acts of gross trespass.

8. In her determination, the learned judge noted that the appeal was against the ruling of the Chief Magistrate's decision in ***Kisumu CMCC ELC No. 266 of 2018 Michael Dache vs. Kisumu District Land & 3 others***; and the application dated 5th June 2024 filed before the trial court sought to set aside the judgment delivered on the 31st May 2023; and to have the appellants joined in the suit as Defendants. In her considered view, it was the ruling in respect of that application which was the subject of the appeal therein.
9. The learned judge further noted that one of the substantive issues to be determined in the appeal was whether or not the trial court was right in not setting aside the judgment as prayed to find that doing so, would amount to compromising the appeal without the same being heard. The application was thus dismissed with costs.
10. Dissatisfied, the appellant preferred the present appeal faulting the learned judge for dismissing the appellant's application and

failing to find that the appellants were not parties in the lower court proceedings; and failing to grant the order of stay of execution yet

the threshold under Order 42 Rule 6 of the Civil Procedure Code were met.

11. In rebuttal, it was submitted for the 1st respondent that the prayers sought in the application dated 11th June 2024 could not be granted, as doing so would have effectively determined the substantive appeal pending before the court.
12. It was further contended that save for the prayer for stay, the other prayers in the appellants' memorandum of appeal sought the setting aside of the trial court's judgment, reliefs which can only be granted upon determination of the substantive appeal before the appellate court, not at an interlocutory stage; and that granting such prayers at this juncture would amount to determining the pending appeal prematurely. The appellants' contention that they were not parties to the proceedings before the Magistrate's Court, as well as the issue of reopening the access road, are substantive grounds of appeal currently before the first appellate Court. It is argued that to address these issues now would effectively place this Court in the position of hearing an appeal directly from the subordinate court, contrary to its jurisdiction.
13. At the plenary hearing, learned counsel Mr. Kungu appeared for

the appellants while learned counsel Ms. Anuro appeared for
the

1st respondent. There was no appearance for the 2nd to 5th respondents nor did they file their submissions despite being properly served.

14. In support of the appeal, the appellant submitted that the learned Judge failed to exercise her discretion judiciously in declining to grant a stay of execution despite the appellants satisfying the requirements under Order 42 Rule 6 of the Civil Procedure Rules; that they had demonstrated how they stood to suffer substantial loss through the closure of a public access road to their residences, contrary to the rules of natural justice and Article 50 of the Constitution having been condemned unheard in proceedings to which they were not parties; and that they had also expressed willingness to provide security as the court might direct.
15. It was further submitted that the right to be heard is a non-derogable constitutional guarantee under Articles 25 and 50, as affirmed in the cases of **Kidero & 4 Others vs. Waititu & 4 Others [2014] KESC 11 (KLR), Patel & Another vs. Kimundia & 4 Others (2023), and A/Maki & Others vs. Macharia & Another (2005) 2 EA 206** as such the learned Judge's refusal to grant stay aggravated the denial of this right.

- 16.** Drawing from the decision in **John Florence Maritime Services Ltd & Another vs. Cabinet Secretary, Transport & Infrastructure & 3 Others [2021] eKLR**, where the Supreme Court of Kenya held that an appellate court may interfere with a discretionary decision where it is shown to be based on a whim, capricious, prejudicial, or founded on a misapplication of law, the appellants urge us to adopt these principles which principles were reiterated in **Apungu Arthur Kibira vs. IEBC & 3 Others [2019] eKLR and Ieynes Muriithi & 4 Others vs. Law Society of Kenya & Another [2016] eKLR.**
17. It is contended that the learned Judge failed to consider relevant factors, that the appellants were not parties to the original proceedings and that the impugned judgment effectively rendered them homeless. The appellants urge this Court to intervene and remedy the grave injustice occasioned.
18. The singular issue that arises for determination is whether the learned judge in exercising her discretion, acted judiciously, or whether it was exercised whimsically and capriciously. According to the appellants, this discretion was not exercised judiciously because the learned judge failed to properly assess

whether the conditions for granting a stay under Order 42 Rule
6 of the Civil

Procedure Rules had been satisfied; that in particular, the Court did not take into account critical and relevant considerations that the applicants were not parties to the proceedings before the Magistrate's Court; and that the judgment led to the closure of a public access road, effectively denying them access to their homes.

19. The learned judge considered the nature of the application, applied the legal principles to make her conclusion. It may not have had the desired effect, but we fail to detect any action spurred by whim or caprice. In the case of **Mbogo and Another vs. Shah [1968] EA 93 at 96**) this Court differently constituted, affirmed the decision of the High Court thus:

“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

20. We are persuaded by the approach that to upset an exercise of discretion by a Judge, a party must demonstrate the alleged whimsical or prejudicial approach to a decision; this has not been demonstrated. Consequently, we find that the appeal lacks merit; and is dismissed with costs to the 1st respondent.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR