



Fund v Gachiege Water Resource Users Association (Suing through the Chairperson Joseph Muthinja) (Environment and Land Appeal E046 of 2025) [2026] KEELC 112 (KLR) (19 January 2026) (Ruling)

Neutral citation: [2026] KEELC 112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E046 OF 2025
BM EBOSO, J
JANUARY 19, 2026**

BETWEEN

WATER SECTOR FUND WATER SECTOR FUND APPELLANT

AND

GACHIEGE WATER RESOURCE USERS ASSOCIATION (SUING THROUGH THE CHAIRPERSON JOSEPH MUTHINJA) RESPONDENT

RULING

1. M/s Gachiege Water Resource Users Association, through its Chairman, Joseph Muthinja [the respondent], initiated a suit in the Chief Magistrate Court at Meru, which they caused to be registered as Meru CMC E & L Case No E046 of 2023. They sought the following reliefs against the Water Sector Trust Fund [the appellant]: (i) a permanent injunction restraining the appellant from interfering with their use of funds for the intended project of protecting and conserving Rurii Swamp; (ii) an order stopping the appellant from interfering with their tendering process; (iii) an order of specific performance on the part of the appellant to allow them to protect and conserve Rurii Swamp as per the terms of the contract between them; (iv) general damages for breach of the contract; and (v) specific damages.
2. The respondent's case was that, at all material times they had a contract with the appellant, involving implementation of Gachieng Water Management Project, whose goal was the protection and conservation of Rurii Swamp. On 26/4/2023, they received a letter from the appellant informing them that the contract had been terminated and requiring them to refund to the appellant the money which had been disbursed to them and to submit a final technical and financial report. The respondents contended that the appellant's decision was in breach of the contract and was made out of malice. They itemized various particulars of breach and malice and urged the trial court to grant them the above reliefs .



3. In response to the suit, the appellant filed a defence and counterclaim dated 8/3/2024 in which they averred that their mandate under the Water Act was to provide conditional and unconditional grants to Counties, in addition to the Equalization Fund and to assist in financing the development and management of water services, including community level initiatives for the sustainable management of water resources. They admitted that a tripartite contract existed between them, the respondent and the Water Resources Authority, for the purpose of implementation of Gachieng Water Resources Management Project. They added that the said contract was lawfully terminated in April 2023 in line with Clause 2.6.1 following an unprocedural procurement process. They denied the allegations that the termination was in breach of the contract and that their actions were actuated by malice.
4. By way of counterclaim, they contended that, in line with their mandate, vide a financing agreement dated 16/6/2021, between them and the respondent, they agreed to finance the respondent with a sum of Kshs.7,781,200 which was to be disbursed on the terms set out in the agreement. They contended that the said sum was for the purposes of implementation of the Gachieng Water Resources Management Project located within Gachieng Sub-catchment of Meru Sub-Region, Tana Region, adding that the funding was under the Upper Tana Resources Management Project – a project financed by the IFAD, a programme that ran from 2012 to 2020 and was subsequently extended to 2023.
5. The appellant averred that Clause 2.6.2 of the agreement permitted them to terminate the agreement if the respondent failed to remedy a failure in the performance of any of their contractual obligations within 30 days of notification by the Water Resources Authority or within any further period prescribed by the appellant. They added that the clause also empowered them to terminate the agreement if, in the judgement of the appellant, the respondent engaged in corrupt or fraudulent practices in competing for, procuring for or executing the contract. The contract further provided that upon termination, the respondent would pay back to the appellant any unspent project monies.
6. It was the case of the appellant that they terminated the said contract vide a letter dated 26/4/2023 after the respondent breached the contract and demanded a refund of the unspent project monies. They prayed for orders compelling the respondent to refund to them the sum of Kshs 7,653,000 held in the project account domiciled at Kenya Commercial Bank, Meru Branch, together with interest. They also prayed for costs of the suit.
7. The trial court [Hon J. M. Njoroge CM] conducted trial and thereafter rendered a judgment in the matter on 4/6/2025 in which it found that the respondent had proved its case and issued the following verbatim disposal orders:-
 - a. A permanent injunction to issue restraining the defendant from interfering with the plaintiff's use of the funds for the intended project for conserving of Rurii Swamp.
 - b. The defendant through their representatives and or employees/officers are restrained from unlawfully interfering with the plaintiff's procurement and/or tendering process.
 - c. An order of specific performance to issue compelling the defendant to allow the plaintiff to protect and ensure Rurii Swamp as per the terms of the contract. The project shall run for a period of 9 months from the date hereof.
 - d. That in the alternative and in the interest of justice, the defendant to pay general damages of Kshs.7.613,000/= for breach of the financing agreement.
 - e. The defendant's counterclaim is hereby dismissed.
 - f. The defendant to pay the costs of the suit plus interest at court rates.



8. Aggrieved by the judgment of the trial court, the appellant brought this appeal vide a memorandum of appeal dated 1/7/2025. In addition, the appellant brought a notice of motion dated 2/7/2025 seeking: (i) an order staying execution of the judgment and decree of the trial court; (ii) an order of interlocutory injunction prohibiting the respondent against interfering with, transferring or in any way dealing with the funds held in Kenya Commercial Bank Meru Branch A/C Number 1227380232 pending the hearing and disposal of this appeal. The said application is the subject of this ruling.
9. The application was premised on the grounds set out in the motion and in the supporting affidavit of Halima Ali, dated 1/7/2025, and her supplementary affidavit dated 7/7/2025. It was canvassed through the appellant's written submissions dated 27/7/2025 and supplementary submissions dated 3/10/2025. The respondent opposed the application through a replying affidavit by Joseph Muthiga dated 23/7/2025 and written submissions dated 1/8/2025.
10. The case of the applicant is that the trial court granted an order for specific performance of a contract for a project under a national government programme that had ended. They argue that without the stay and the interlocutory orders, there is a live risk that the respondent will proceed to access the funds and will not be able to utilize them on the project.
11. The case of the respondent is that the applicant has come to court with dirty hands, contending that the applicant has not deposited in court the sum of Kshs 7,613,000 which he was alternatively decreed to pay as damages. They further contend that the funds in the Bank were sourced from donors for the purpose of conserving the Giaki-Kirima-Itune-Rurii Swamp but the applicant's officials wanted to corruptly swindle the funds by awarding the tender to their agents. They argue that the appeal has no chances of success and that the applicant has not satisfied the requirements for granting orders of stay of execution and interlocutory injunction by a first appellate court. They urge the court to decline to grant the orders.
12. Seized of the appeal and the application for the first time on 7/7/2025, the court, suo motto, invited the parties to address it on the question of jurisdiction of the Environment and Land Court on the appeal. Both parties insisted that the court with appellate jurisdiction to hear and dispose the appeal is the Environment and Land Court.
13. The court has considered the application, the response to the application and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. The following are the two issues that fall for determination in the application: (i) Whether the criteria for granting an order of stay of execution pending disposal of an appeal before a first appellate court has been met; and (ii) Whether the criteria for granting an interlocutory injunction by a first appellate court has been met. I will be brief in my sequential analysis and disposal of the two issues.
14. Does the application meet the criteria for grant of an order of stay of execution by this court? The relevant criteria is spelt out in Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

“No order for stay of execution shall be made under subrule (1) unless—

 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



15. The court has considered the subject of substantial loss in the context of the decree of the trial court and the circumstances of the appeal. At stake is public funds that are held at the Meru Branch of Kenya Commercial Bank. The applicant contends that if the decree is executed, the public funds which were meant for a lapsed National Government Project will vanish. The amount involved is over 7 million. This, in my view, is a substantial sum and its dissipation may, without doubt, occasion substantial loss to the public.
16. On security, the court has considered the nature of the decree. The subject matter of the dispute are public funds that are safely held in the Bank. The alternative award in the decree remains superfluous when the above amount is secure in the Bank.
17. On unreasonable delay, the court notes that the impugned judgment was rendered on 4/6/2025. The appeal and the application were presented within 30 days of delivery of the judgement. The court is, in the circumstances, satisfied that there was no unreasonable delay.
18. Taking the foregoing into account, the court comes to the finding that the criteria upon which this court exercises jurisdiction to grant an order of stay of execution pending disposal of an appeal before it has been met.
19. Has the criteria for granting an interlocutory injunction by a first appellate court been met. The jurisdiction is granted by Order 42 rule 6(6) of the Civil Procedure Rules. Over the years, Kenya's superior courts have developed principles that guide the exercise of the above jurisdiction (see (i) Madhupaper International Limited v Kerr [1985] KLR 840; (ii) Venture Capital & Credit Limited v Consolidated Bank of Kenya Ltd; Civil Application No. 349 of 2003 (174 of 2003 UR); and (iii) Butt V Rent Restriction Tribunal (1982) KLR 417).
20. Suffice it to state that, the jurisdiction of a first appellate court to grant an interlocutory injunction under Order 42 Rule 6(6) of the Civil Procedure Rules is a discretionary and equitable one. Secondly, the discretion will not be exercised in favour of an applicant whose appeal is frivolous; the applicant must demonstrate that a reasonable argument can be put forward in support of his appeal. Thirdly, the discretion should be refused where it would inflict greater hardship than it would prevent. Fourthly, the applicant must show that refusal to grant the injunction would render his appeal nugatory. Fifth, the court is to be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358. Lastly, whenever disposing a plea for an interlocutory injunction, the court does not make definitive or conclusive pronouncements on the key issues in the dispute.
21. The court has considered the plea for an interlocutory injunction in the context of the above criteria and the unique circumstances of the dispute. The applicant had a counterclaim in the trial court. They sought a refund of a public money which had been entrusted to the respondent under an environmental project financing agreement. There is common ground that the public money is held in the Meru Branch of Kenya Commercial Bank. The applicant contends that if the interlocutory injunction is not granted, the public money will dissipate because the National Government Project for which it was meant has lapsed.
22. Taking the above into account, this court takes the view that on the balance of convenience, an injunction is merited purely for the purpose of preserving the public funds pending disposal of the appeal.
23. In light of the above findings, the application dated 2/7/2025 succeeds and is allowed in terms of prayers 4 and 6. Costs of the application shall be in the appeal. The above orders shall lapse on disposal of the appeal or on expiry of 12 months from today.



DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JANUARY, 2026.

B M EBOSO [MR]

ELC JUDGE

