



**M'Ituruchiu v M'Guatu & another (Environment & Land Case  
E003 of 2021) [2024] KEELC 3648 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 3648 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E003 OF 2021**

**CK YANO, J**

**JANUARY 18, 2024**

**BETWEEN**

**JOSEPHINE KAGIRI M'ITURUCHIU ..... PLAINTIFF**

**AND**

**M'MWIRICHIA M'GUATU ..... 1<sup>ST</sup> DEFENDANT**

**CECERINA KAROKI M'GUATU M'ITANIA (SUED AS THE LEGAL REP'  
M'GUATU) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me for determination is the Notice of Motion dated September 4, 2023 brought under Sections 1A, 1B, 3A and 63(c) and (e) of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3 & 4 of the *Civil Procedure Rules* and Articles 50(1) and 159(2)(d) of the *Constitution* of Kenya. The Plaintiff/applicant is seeking an order of temporary injunction restraining the defendant/respondent from trespassing onto, occupying, leasing, fencing, cultivating, constructing, selling, leasing, subdividing or otherwise however interfering with the plaintiff/applicant's possession, utilization and enjoyment of the portion of land measuring  $\frac{1}{2}$  an acre on KIIRUA/NAARI-MAITEI/505 (hereinafter referred to as the suit property) pending the hearing and determination of the intended appeal.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Josephine Kagiri. The applicant avers that on July 12, 2023, this court delivered Judgment against her whereby the applicant's case was dismissed with costs to the respondent. The applicant contends that she was aggrieved by the said judgment and intends to appeal to the court of Appeal and that if the order of injunction is not granted, the applicant and her family will be evicted and rendered homeless and render the intended appeal nugatory. The applicant further states that she will suffer irreparable loss and damage unless the court intervenes and grants the order sought. The applicant has annexed a copy of the Judgment delivered by this court on July 12, 2023 a copy of the Notice of Appeal and letter requesting for proceedings as well as photographs.



3. M’Mwirichia M’Guatu, the 1<sup>st</sup> respondent herein filed a Replying Affidavit dated October 17, 2023. He has deponed that the applicant is in total occupation of the suit property and contends that it is only fair and just that the status quo be maintained to allow the applicant exercise her undisputed right of appeal to the Court of Appeal. The 1<sup>st</sup> respondent further states that the applicant was sold the land by his father, one M’Guatu M’Itania and knows no other home.
4. The 2<sup>nd</sup> defendant/respondent opposed the application vide a replying affidavit dated 2 September 2, 2023 sworn by Cecerina Karoki M’Guatu. It is her contention that no appeal has been lodged nor any Memorandum of Appeal annexed and no stay of execution has been granted. That if the application is granted and the applicant fails to lodge an appeal, the 2<sup>nd</sup> respondent will suffer injustice and loss. It is therefore the 2<sup>nd</sup> Respondents contention that the application is misconceived, has not merit and should be dismissed with costs.
5. The application was canvassed by way of written submissions. The applicant filed his submissions dated October 31, 2023 through the firm of Kiautha Arithi & Company Advocates, while the 2<sup>nd</sup> respondent filed hers dated November 10, 2023 through the firm of M/s Wilson P. Mburugu & Company Advocates. The 1<sup>st</sup> respondent did not file any submissions and relied on his replying affidavit.
6. I have considered the application, the affidavits on record, the submissions filed and the authorities cited. In my opinion, there are three issues for this court’s determination: -
  - i. Is there jurisdiction to hear the application?
  - ii. If yes, what are the principles applicable in an application for injunction pending appeal?
  - iii. Should the injunction sought be granted?
7. This court’s jurisdiction to grant a temporary injunction pending hearing and determination of an appeal lies with Order 42 Rule 6(6) of the *Civil Procedure Rules*. The application herein is stated to be brought under Order 40 among others. However, I do not think that order 40 is applicable in an application for temporary injunction pending hearing and determination of an appeal.
8. Order 42 Rule 6(6) grants the court with discretionary powers to grant orders of temporary injunction pending hearing and determination of an appeal on such terms as it deems fit as long as the procedure for filing an appeal from subordinate court has been complied with. It states as follows:

“Notwithstanding anything contained in sub rule (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”
9. This court has observed that the plaintiff has submitted as if she was dealing with an injunction pending the hearing and determination of the suit instead of an injunction pending appeal. It should be noted that there is no suit pending before this court as the court delivered judgment in the matter on July 12, 2023. The question then that arises is whether this court has jurisdiction to grant an injunction pending an appeal against its own decision. It is my understanding that Order 42 rule 6 of the *Civil Procedure Rules* deals with a matter that this court is sitting as an appellate court against the decision of the Lower Court and the court can grant an injunction against the decision of a subordinate court or tribunal. However, the court cannot grant an injunction pending an appeal against its own decisions.



10. This court is persuaded by a line of judicial decisions including; *Bartholomew Mwanyungu & 3 Others V Florence Dean Karimi* [2019]eKLR, *Tabir Sheikh Said Investments Limited V Administration, TSS Grain Millers & 2 Others* [2019]eKLR and *Chembe Katana Changi v Ministry of Lands & Settlement & 4 others* [2014]eKLR where the court has rendered a judgment, the became functus officio. In this case, this court rendered its judgment on July 12, 2023 and the plaintiff filed a notice of appeal against the said decision on July 18, 2023 and lodged in court on July 26, 2023. Having considered the relevant law and being persuaded by the above referred decisions, it is my finding that this court does not have the jurisdiction to entertain the Motion and grant the orders sought by the plaintiff. Having expressed his intention to appeal to the Court of Appeal by filing a notice of appeal, the plaintiff is at liberty within the provisions of Rules 5(2) (b) of the *Court of Appeal Rules* to move the Court of Appeal in an appropriate manner.
11. In the result, I find that the Notice of motion dated September 4, 2023 is improperly before this court. The same is dismissed with costs to the 2<sup>nd</sup> defendant.

**DATED SIGNED AND DELIVERED IN MERU THIS 18<sup>TH</sup> DAY OF JANUARY, 2024.**

**Hon. C. Yano**

**ELC – Judge**

**In the presence of:**

Court assistant: Kiragu

Nyaga for applicant

No appearance for the advocate for the respondent, however respondents are present in court

**Hon. C. Yano**

**ELC – Judge**

