



REPUBLIC OF KENYA



**Munana v Bale & 3 others (Environment and Land Appeal
E028 of 2023) [2024] KEELC 916 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E028 OF 2023
MD MWANGI, J
FEBRUARY 22, 2024**

BETWEEN

PATRICK MAKANGA MUNANA APPELLANT

AND

SUPER KHALIF BALE 1ST RESPONDENT

AGGREY NYANDONG 2ND RESPONDENT

NATIONAL SOCIAL SECURITY FUND 3RD RESPONDENT

NAIROBI COUNTY LAND REGISTRAR 4TH RESPONDENT

*(Being an Appeal from the Judgement of Hon. B.M. Cheloti Principal
Magistrate, delivered on 29th September, 2023 at Milimani
Commercial Courts Nairobi in Civil Suit Number E143 OF 2020)*

RULING

(In respect of the Appellant’s application dated October 9, 2023 seeking stay of execution pending appeal)

Background

1. This ruling is in respect to the Appellant’s Notice of Motion application dated October 9, 2023. The said application is expressed to be brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 21, 40 rule 1,2 & 3 of the [Civil Procedure Rules](#).
2. The application is filed under Certificate of Urgency and seeks the following substantive orders:
 - a. That the honorable court be pleased to issue orders of stay of execution and or implementation of the judgments, decree and any other resulting from the judgment of the Chief Magistrate’s



court entered on September 29, 2023 in Milimani Chief Magistrate Civil Suit No. E143 of 2020.

- b. That the honorable court be pleased to issue order of temporary injunction restraining the respondents whether by themselves, agents, representatives or any person acting under their directions from evicting the appellant, wasting away, destroying and or in any manner interfering with the appellant possession of suit property L.R. No. 97/21190/5180 Tassia until the hearing and determination of this appeal.
 - c. That the honorable court be pleased to make any other order as the circumstances may dictate in the interest of justice.
 - d. That the costs be in the cause.
3. The Application is premised on the grounds on the face of it and further supported by the annexed Affidavit of Patrick Makanga Munala, the appellant herein deponed on the October 9, 2023. The appellant avers that the trial court entered judgement against him on the 29th September, 2023. As a result of the said Judgement, the 1st Defendant is in the process of taking possession of the suit property from the Appellant who has been in occupation. He avers that he has spent up to a sum of Kshs. 3,000,000/= in laying the foundation for an intended apartment.
 4. The Appellant/ Applicant states that he was introduced to Kwa Ndege Self-Help Group in 1998. The self-help group informed him that it was selling land in conjunction with the National Social Security Fund (NSSF). He alleges that he paid a sum of Kshs. 450,000/= to become a member. That as dutiful purchaser, he conducted a search with the 4th Respondent which revealed that indeed the 3rd Respondent was the lawful owner. He thereafter, paid a further sum of Kshs. 450,000/= and the suit property Plot LR No. 97/21190/5180 was earmarked as his.
 5. He deposes that it is after making the said payments to the Group that he was directed to make a payment of Kshs. 550,000/= to the 3rd Respondent. He avers that he only effected the said payment in 2018 hence becoming a bona- fide purchaser for value. He annexes the Bank's Deposit slip as well as a Receipt issued by the 3rd Respondent acknowledging payment.
 6. He argues that although he was not issued with an Allotment Letter by the 3rd Respondent, he was issued with an Acknowledgement Letter by the 2nd Respondent as an agent of the 3rd Respondent. He therefore became a bona fide purchaser for value.
 7. Acting on the belief that he was the rightful owner of the suit property, the Appellant/Applicant commenced construction of a commercial building on the suit property. It was then that the 1st Respondent interrupted the said construction claiming ownership of the suit property. He alleges that he was summoned by the Area Chief and the OCPD Embakasi Police Station but the dispute was not resolved. The 1st Respondent has continued to harass his Tenants residing on the temporary structures erected on the suit property and has threatened to forcefully evict them. He states that his young family is dependent on the income generated from the mabati structures which are at the risk of being demolished by the 1st Respondent.
 8. The Appellant/Applicant argues that he has a meritorious appeal with a high likelihood of success and that he stands to suffer irreparable damage if the orders sought are not granted.
 9. The 1st Respondent opposed the application *vide* a Replying Affidavit sworn by himself on the 21st November, 2023. The 3rd Respondent's Counsel on the other hand informed court that they will not be opposing the application. There was no response from the 2nd and 4th Respondents despite service of the application.



1st Respondent's Replying Affidavit

10. The 1st Respondent avers that the application is incompetent and devoid of merit aimed only at interfering with his lawful ownership, use, enjoyment and possession of his property. He asserts that he is the rightful owner of the suit property having purchased it from the previous registered owner, one Zahra Hussein Isse in 2015.
11. He states that the Chief Magistrates Court at Milimani vide its Judgment delivered on September 29, 2023 declared him the rightful owner of the suit property and directed the 3rd Respondent to issue him with an Allotment Letter. He avers that he has not been able to utilize his property due to the Appellant's trespass and the illegal construction of permanent structures thereon hence generating income from the suit property to his detriment. That the instant application is therefore a strategy by the Appellant/Applicant to deny him enjoyment of the fruits of his regularly obtained judgment.
12. The 1st Respondent argues that should the court be inclined to grant a stay of execution, then the Appellant/Applicant should be directed to give security for the due performance of the decree, costs and interest in the sum of Kshs. 3,000,000/=.
13. He contends that the Appellant/Applicant has not established a prima facie case with a probability of success to warrant the issuance of an order of injunction sought. That issuing the orders as framed will amount to issuance of final reliefs at an interlocutory stage.
14. The 1st Respondent maintains that there is no possibility that the Appellant/Applicant will suffer loss that cannot be compensated by way of damages. The value of the claimed suit property is ascertainable and can be compensated by damages in the event the Appellant is successful.
15. On the balance of convenience, the 1st Respondent argues that it tilts in favour of not granting the orders sought as it will affect his proprietary rights having invested his financial resources towards its purchase but he has not been able to enjoy its use and occupation.

Court's direction

16. The Court directed that the application be canvassed by way of written submissions. Both the Applicant and the 1st Respondent complied. The Appellant/Applicant's submissions are dated 29th December, 2023 whereas the 1st Respondent's submissions are dated 5th January, 2024. The court has had occasion to read the submissions and considered them for purposes of this ruling.

Issues for determination

- a. Having considered the application, the affidavits in support and in opposition to the application, the submissions on record, the case law relied on and the provisions cited, the issue for determination is whether the orders sought by the Appellant/Applicant herein are merited.

Analysis and determination

17. Order 42, rule 6 (2) states that:

“No order for stay of execution shall be made under sub-rule (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.”
18. The Appellant/Applicant needs to satisfy the Court on the following conditions before he can be granted the stay orders:
- i. Substantial loss may result to the applicant unless the order is made.
 - ii. The application has been made without unreasonable delay, and
 - iii. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
19. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. I agree with the decision of the court in *RWW vs EKW* (2019) eKLR where it was held that:
- “.....the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
20. It therefore means that the court should endeavor to balance the interests of both the successful party in the litigation appealed from so as not to unnecessarily bar him from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.
21. This court, on the other hand, in the exercise of its appellate jurisdiction has power to grant a temporary injunction pending appeal, where the ends of justice demand so, and where the procedure for instituting an appeal has been complied with.
22. Order 42 rule 6(6) provides 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.”
23. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 others vs. National Museum of Kenya* [2004] eKLR, the court stated the following principles as governing grant of temporary injunction pending appeal:
- a. “An order of injunction pending appeal is a discretionary order which will be exercised against an applicant whose appeal is not frivolous.
 - b. The discretion should be refused where it would inflict great hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.”



24. In the case of *Giella v Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows:
- “The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”
25. A prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 others* [2003] e KLR as follows;
- “A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
26. In the instant Application, judgment was delivered on September 29, 2023 and the appellant filed a Memorandum of Appeal on October 10, 2023. Thus, the Appellant came to this Court within the time allowed by law to file an Appeal. I have also perused through the Memorandum of Appeal and it is my considered opinion that it raises arguable issues.
27. On substantial loss, the Appellant/Applicant avers that he has been in possession of the suit property since the year 2018. He also averred that he was in the process of developing the suit property and has in fact laid a foundation of the apartment. He has also put up some mabati structures which he has rented out and that the income generated therefrom is sustaining his young family. Therefore, he stands to suffer substantial loss if the order for stay of execution is not granted.
28. The 1st Defendant/Respondent on the other hand contends that no substantial loss will be suffered by the Applicant that cannot be compensated by way of damages. He avers that should the appeal be determined in the Appellant’s favour; he will be compensated with damages as the value of the land is ascertainable.
29. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 where their Lordships stated that:
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”.
30. I have carefully considered the submission of both the Applicant and the 1st Respondent. In my considered view, it is appropriate and necessary that the appeal herein be expedited but in the meantime the suit property herein be preserved pending the outcome of the appeal which in my view raises triable issues that ought to be considered on their merits.
31. This Court has the authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see the decision of the Supreme Court of Kenya in *Board of Governors Moi High School, Kabarak and another v Malcolm Bell* (2013) eKLR.
32. Section 13(7) (a) of the *Environment and Land Court Act*, 2015 (2011) abundantly provides for this Court’s mandate to grant interim preservation orders.



33. Practice Direction Number 32 of the *Environment and Land Court Practice Directions, 2014* provides:

“During interpartes hearing of any interlocutory application, where appropriate, parties are encouraged to maintain status quo----- after considering the nature of the case or hearing both sides the judge shall exercise discretion to order for status quo pending the hearing and determination of the suit keeping in mind the overriding interests of justice.” (Emphasis laid).

34. The term “status quo” has been defined by the *Black’s Law Dictionary* 10th Edition as: -

“The situation that currently exists.”

35. In the obtaining scenario, it is the finding of this court that a *status quo* order is most appropriate in this case and will suffice in preserving the suit property pending the hearing and determination of the appeal.

36. Consequently, parties are hereby directed to maintain the prevailing status quo in respect of the suit property at the time of this ruling pending the hearing and determination of this Appeal. The costs of the application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Wang’ang’a for the Appellant/Applicant

Ms Mutegi holding brief for Mr. Omar for the 1st Respondent

Mr. Mumo holding brief for Mrs Mbabu for the 3rd Respondent

No appearance by the 2nd and 4th Respondents.

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

