



Brenchley (Appealing as the Legal Representative of the Estate of David Lee Brenchley – Deceased) v Imathiu (Environment and Land Appeal E076 of 2022) [2024] KEELC 1538 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E076 OF 2022
CK NZILI, J
MARCH 20, 2024**

BETWEEN

SUSAN MWARI BRENCHLEY (APPEALING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID LEE BENCHLEY – DECEASED) APPELLANT

AND

PETER KIRIMA IMATHIU RESPONDENT

RULING

1. The court is asked to issue an order of injunction barring and restraining the respondent by himself, his representatives, agents, or servants from selling, charging, leasing, or in any way whatsoever disposing of LR No's. Nyaki/Munithu/1480 and 1481. The grounds are set out on the face of the application and in the supporting affidavit sworn by Kibe Mungai advocate on 29.11.2021.
2. Briefly, the deponent avers the appellant is the legal representative of her late husband's estate, who permanently resides in the United States of America. Further, that the deceased was the beneficial owner of LR No. Nyaki/Munithu/1480 and 1481, which he bought for Kshs.300,000/= through the respondent to hold for him for he had not obtained Kenyan citizenship as per copies of receipt of confirmation for money paid towards the purchase of the suit properties, photographs of the suit properties, an application to the land control board, copy of an email dated 13.5.2015 and judgment in the lower court marked SMB 1-6, respectively.
3. The deponent avers the respondent resorted to transferring the land despite earlier representations of willingness to do so until the deceased passed on and the widow instituted the suit whose judgment established that the respondent has no good titles to the subject parcels of land.



4. The deponent avers he has received reliable information that the respondent is sourcing for potential buyers to sell the subject matter, notwithstanding the pending appeal. Unless orders herein were granted, the applicant says she is apprehensive that the suit properties could be disposed of or otherwise be compromised.
5. The applicant avers that as long as the respondent's workers or agents were in occupation of the suit property, there was no significant damage or hardship that the respondent stands to suffer if the orders sought are granted.
6. When this matter came up for an interparty hearing on 14.12.2023, counsel for the respondent prayed for time to put in a reply. The court granted the respondent seven days to file a response. None had been filed as of 18.01.2024 when this ruling date was given. Parties were also directed to put in written submissions before 18.1.2024. The respondent filed written submissions dated 8.1.2024 to the effect that the applicant has failed to meet the threshold set in *Orawo & another vs Mistri & others* (1988) eKLR.
7. A party seeking temporary injunction pending appeal under Order 42 Rule 6 of the Civil Procedure Rules has to show that he has an arguable appeal, which would be rendered nugatory if the application is refused, that by not granting the injunction, it would inflict more hardship than it would avoid. The party must also meet the principles in *Giella v Cassman Brown* [1973] EA 358. See *Patricia Njeri & others v National Museums of Kenya* [2004] eKLR.
8. In *Madhupaper International Ltd v Kerr* [1985] eKLR, the court held it would be wrong to grant a temporary injunction pending appeal when the appeal was frivolous or would inflict greater injustice than it would avoid. In *Kenya Commercial Bank v Ombija* [2009] eKLR, an arguable appeal was described as one that might not necessarily succeed but ought to be argued fully before the court. See *Stanley Kang'ethe Kinyanjui v Tony Keter & others* [2013] eKLR.
9. An appeal would be rendered nugatory if what needed to be stayed was irreversible or if reversible damage would be unlikely to compensate the aggrieved party.
10. Applying the preceding tests, the applicant's appeal was admitted for hearing on 16.11.2023. The appellant was directed to file the record of appeal within 60 days. The appeal was to come for mention on 23.1.2024. There was no record of an appeal filed in compliance with the court orders. The respondent prayed for the striking out of the appeal, which the court acceded to. So therefore, there is, in essence, no pending appeal for the court to stay or grant an injunction pending its hearing.
11. The applicant's fear or apprehension has not been confirmed by any source(s). In *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court said that speculative injury would not do and that there must be more than unfounded fear or apprehension on the part of the applicant. The court said grave and irreparable injury was what is actual, substantial, and demonstratable.
12. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court said a balance of convenience caused to the applicant was more significant than what would be caused to the respondent if an injunction was granted but ultimately dismissed. A party has to prove that inconvenience; it is not for the court to infer it.
13. In this application, other than saying that the appeal has high chance, the applicant has not set out exactly what she stands to lose as opposed to the respondent if the appeal were to succeed. There is no evidence that the applicant has been utilizing the suit land for the last ten years. There is no evidence that the suit land is being misused or vandalized. The upshot is that I find the application lacking merits. The same is dismissed with no order as to costs.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 20TH DAY OF MARCH, 2024**

In presence of

C.A Kananu

Wairimu for Kobe Mungai for the applicant

Gideon for the respondent

HON. C K NZILI

JUDGE

