



**Mburu v Karua (Civil Appeal (Application) E211 of 2023)
[2025] KECA 1151 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1151 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E211 OF 2023
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

JOSEPH NDEGWA MBURU APPLICANT

AND

NDUNGU KARUA RESPONDENT

(Being an application for temporary injunction from the Judgment of the Environment and Land Court of Kenya at Muranga (L. Gacheru, J.) delivered by on the 29th June 2023 in ELC Case No. E006 of 2021)

RULING

1. This is an application dated 12th July 2024 brought by the applicant pursuant to, inter alia, Rule 5 (2) (b) of the *Court of Appeal Rules* seeking orders of temporary injunction against the respondent, his representatives, agents and/or assigns from trespassing, entering into and/or evicting him from the suit property, or in any way interfering with his quiet possession and/or occupation thereof pending the hearing and determination of the application and thereafter of the appeal.
2. The facts of the case are that by the judgment of the trial court dated and delivered on 29th June 2023, L. Gacheru, J. found the applicant's claim in ELC (OS) No. E006 of 2021 for adverse possession for a portion measuring 0.2400 hectares out of land title number Loc.6/Gikarangu/1258 (herein referred to as the 'suit land') lacked merit and dismissed it in its entirety.
3. Aggrieved and dissatisfied with the judgment, the applicant preferred an appeal to this Court and subsequently filed this application under Rule 5 (2)(b) of this Court to wit; Civil Application No. E107 of 2023, and sought a stay of the said judgment and decree pending the hearing and determination of the intended appeal. This Court, by its ruling dated and delivered on 5th July 2024, dismissed the applicant's application on the ground that the orders the applicant sought to stay were negative orders incapable of being stayed.



4. The applicant has again brought an application before this Court under the same Rule and this time, he seeks orders of temporary injunction against the respondent over the suit land. The application is supported by the grounds set out on the face thereof and those in his supporting affidavit of the even date.
5. The application is unopposed. Although served with the application as evinced by the affidavit of service of Emmanuel Elijah Otieno the applicant's advocate, sworn on 23rd July 2024, the respondent did not file any response thereto, nor were they in Court when the application was called for hearing.
6. At the hearing, learned counsel Mr. Emmanuel Otieno was present for the applicant. As stated earlier, there was no appearance for the respondent despite being served with a hearing notice. Mr. Otieno stated that he had filed the applicant's written submissions dated 12th August 2024. He indicated that the respondent had not filed any submissions.
7. In his submissions, Mr. Otieno admitted that the applicant had filed a similar application under Rule 5 (2)(b) of this *Court's Rules*. The same was dismissed on 5th July 2024 on the grounds that the Court could not stay a negative order. Before us, counsel argued that in the previous application, the applicant sought a stay order of the impugned ELC judgment as opposed to the instant application where he seeks injunctive orders which Counsel opined, the applicant deserved the audience of this Court a second time, and that the Court had the jurisdiction to entertain the instant application. He relied on the applicant's written submissions.
8. In the written submissions the applicant relies on the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2020] eKLR and *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR which set out the principles governing the grant for injunctive orders and maintains that firstly, he has an arguable appeal and secondly, that he stands to be evicted from the suit land which would render his appeal nugatory. The applicant also relies on the case of *Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo – Deceased v Mutunkei* (Civil Appeal (Application) E041 of 2020) [2021] KECA 235 (KLR) (3 December 2021) (Ruling) and submits that a final finding of law or fact must not be made at this stage as doing so may embarrass the ultimate finding on the main appeal. Further, the applicant relies on the case of *Deynes Muriithi & 4 Others v Law Society of Kenya & Another* [2016] eKLR and submits that applications under Rule 5 (2)(b) arise at an interlocutory stage and are meant to safeguard the subject matter of the appeal.
9. Lastly, the applicant submits that the instant application was brought timeously and in good faith. In addition, the orders sought therein would not in any way prejudice the respondent, who would ultimately enjoy the fruit of the judgment of the court should his appeal fail.
10. The first issue we must determine is whether this Court has the jurisdiction to entertain this application. It has been stated that this is a second application, the first one sought stay of execution of judgment and was dismissed on 5th July 2024. In the ruling, this Court differently constituted dismissed the application stating that "we consider that the suit before the ELLC was dismissed with costs. This was therefore a negative order that was not capable of being stayed because the court did not ask any party to do anything or refrain from doing anything ... we find that the application cannot be granted as there is nothing existing out of the ELC judgment for this Court to stay."
11. There are two ways of looking at this application, both on jurisdiction. First, this Court has already determined a similar application. The only difference is that the first sought for a stay, the current seeks for a temporary injunction. Second, the consideration and the principles that apply in orders of stay and injunction are the same. As this is not an application for review, we think that the doctrine of



res judicata applies. The applicant should have applied for the orders within the previous application. Having neglected to do so, he cannot come back for a second ‘bite.’

12. We have come to the conclusion that we do not have the jurisdiction to entertain the matter in the circumstances. We must therefore down our tools, and consequently, we dismiss the application dated 12th July 2024 with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

S. ole KANTAI

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

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ALI-ARONI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

