



**Mbugua v Mathara Holdings Limited & another (Civil Application
E169 of 2022) [2023] KECA 1033 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1033 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E169 OF 2022
HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA
AUGUST 4, 2023**

BETWEEN

SAMUEL MUGO MBUGUA APPLICANT

AND

MATHARA HOLDINGS LIMITED 1ST RESPONDENT

VICTORIA NYAMBURA KARUGU 2ND RESPONDENT

(Being an application for injunction and stay of further proceedings pending the hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court at Thika (Eboso, J.) dated 9th May 2022 in ELC No. EO72 of 2021)

RULING

1. The application before this Court is by way of the notice of motion dated May 18, 2022 brought under Certificate of Urgency pursuant to rule 5(2) (b) of the *Court of Appeal Rules*, 2010 in which the applicant seeks orders that, pending hearing and determination of the intended appeal, an order of injunction be issued restraining the respondents from denying the applicant and his family unlimited user and/or access through the public road comprised of LR No 14274.8.1, LR No 14274.9/1 & LR No 14274/7/1, or from howsoever dealing in and using the said public road in any manner whatsoever that diminishes or change its status of a public road pending the hearing and determination of the intended appeal.
2. The applicant also prays for a mandatory injunction to issue compelling the respondents to remove barriers erected on LR No 14274/7/1 & 14274/8/1 manned by the respondent's security guards and impeding access to the public road towards No 14274.8.1, LR No 14274.9/1 & LR No 14274/7/1 and water downstream; demolish the pit latrine and guard house constructed on LR No 14274/7/1 being part of the said public road; fill the pit dug thereon; and to return the property to a useable condition of a public road pending hearing and determination of the intended appeal; and, further,



- that an order do issue to stay further proceedings in Thika ELC case No, E072 of 2021 pending the hearing and determination of the intended appeal. The application is supported by the affidavit of even date sworn by Esther Mwikali.
3. The genesis of this matter is that the applicant filed a Notice of Motion dated May 18, 2022 seeking orders of injunction and stay of further proceedings in Thika ELC Case No E072 of 2021; the trial court considered the said application, certified it urgent and directed the parties to file responses, written submissions and any other relevant documents. Parties complied, and are awaiting notification of a hearing or ruling date for the said application. Meanwhile, the court delivered a decision in Thika ELC Case No E072 of 2021 striking out the applicant's suit at a preliminary stage during the pendency of the applicant's application dated May 18, 2022. The applicant's case is that the respondents have excavated trenches at the entrance of the properties owned by the applicant and his family, completely denying them access to their farms/properties and the only source of water through the public road.
 4. In view of the respondents' conduct, the applicant is apprehensive that he faces a real risk of death of his 15 Friesian cows on his plot accessed only through the public road. According to him his cattle have been denied movement and supplies, including water, feeds, equipment and services, which will culminate in a total destruction of his business and livelihood.
 5. In a bid to demonstrate his interest in the suit property, the applicant points out that he is the son to Johnson Mbugua Mugo and Jane Wambui Mbugua (Deceased), who were/are the beneficial owners of LR No 14274/8/1, LR No 14274/9/1 & LR No 14274/7/1, 14274/7, 14274/8 14274/9 registered in the name of J.M/Mugo Investment Company, a family business, alongside James Ngethe Mwareri; that the applicant is also the personal representative of the estate of Jane Wambui Mbugua; that, on diverse dates between June 17, 2009 and December 31, 2009, the family business and administrators of the estate of James Mwareri surrendered LR No 14274.8.1, LR No 14274.9/1 & LR No 14274/7/1, the (suit properties) free of cost to the government towards establishment of public road access on LR Nos 14274/7, 8 & 9 for the benefit of the applicants' family and the deceased's estate as owners of the remaining parcels.
 6. The applicant contends that a 15 metre wide public road was created on the suit properties registered belonging to the applicant and the estate; the applicant used the road freely without restriction until the year 2016 when the respondents constructed a guard house, stationed private security guards on the road on LR No 14274/7/1, developed a pit latrine thereon for use by the guards manning the road; and, in the year 2019, erected a barrier across the public road at the beginning of LR No 14274/7/1 restricting access to LR 1427/8/1 and the river. In effect they encroached on the public road and the river, confining it to their own access and use.
 7. In order to enforce the illegal barriers and stamp their purported ownership of the road and the river, the respondents have resorted to violence by use of their security guards. The applicant and other owners of properties adjoining the road cannot freely access their properties, farms, developments and their only source of water from the river. There is a real risk of the applicant's Friesian cows dying due to restricted movement and shortage of supplies, water, feeds equipment and services. Further, that the illegal barriers have frustrated the development of the applicant's plot and impeded his user rights.
 8. On May 9, 2022, the Environment and Land Court struck out the applicant's suit for want of locus standi, and decline to hear his application for an injunction against the respondents. The applicant intends to appeal against the said decision. He filed a notice of appeal and requested for proceedings for purposes of the appeal.
 9. In separate replying affidavits dated May 26, 2022 and May 30, 2022 sworn by Victoria Nyambura Karugu, the (2nd respondent) on her behalf and on behalf of the 1st respondent, it is deposed that she is



a director of the 1st respondent, a duly incorporated company under the *Companies Act*, and a separate entity therefore, she has been wrongly joined as party to the suit; that the suit should have been directed against the 1st respondent; that the impugned ruling was as a result of the applicant's lack of locus standi. She contends that the applicant has produced no evidence to show that he was denied access to his plot, or that the 2nd respondent has prevented his use/ownership of the suit premises.

10. It is further contended that the applicant has no proprietary interest in the suit properties, and that he is neither a shareholder nor director of the J.M. Mugo Investment Company, which is in dispute with the 1st respondent, and hence the question as to whether the applicant is competent to file suit; that the proprietors of the adjoining land to the alleged public road and the users thereof are a limited liability company, J.M. Mugo Investment Company Limited and the Estate of James Ngethe Mwareri, who are not parties to the suit; that the applicant is a stranger in the suit as he only has limited grant of letters of administration ad litem limited to *HCCOM No 008 of 2020 & Nairobi Civil Appeal E288 of 2020*; and that he has no arguable appeal.
11. With regard to the appeal being rendered nugatory, it is argued that the applicant has not demonstrated what harm will be occasioned to him that cannot be compensated for in damages; further the applicant has no interest in the suit properties and that, in any event, should the appeal succeed, the structures erected by the 1st respondent can be pulled down.
12. In considering whether the applicant has satisfied the requirements necessary for granting an order for injunction and stay of proceedings, we take note that this Court has stated in many decisions that, whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. We have considered the application, the grounds in support thereof, the affidavits in support and in reply, the submissions, the authorities cited and the law. The jurisdiction of this Court under rule 5(2) (b) of this *Court's Rules* is discretionary and guided by the interests of justice. In exercise of this discretion, the Court must be satisfied that the impugned ruling and orders are capable of being stayed.
13. Be that as it may, we take note that the ruling and orders sought to be stayed in this matter constitute negative orders incapable of being stayed. This Court in *Co-operative Bank of Kenya Limited v Banking Insurance & finance Union (Kenya)* [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estate limited v Kenya Posts & another* [2005] 1 E.A 53 where it stated:

“The order which dismissed the suit was a negative order which is not capable of execution...”
14. Likewise, the Court of Appeal in *George Ole Sangui & 12 Others v Kedong Ranch Limited* [2015] eKLR held that:

“20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant



was not retitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

15. Having considered the arguments presented to us, and the nature of the orders issued from which the present prayers are pegged, we need not say more, the writing is on the wall that, since they were negative orders issued by the trial court, the applicant’s motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

