



REPUBLIC OF KENYA



**KENYA LAW**  
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**Barmasai v Rono & 9 others (Civil Application E025 of 2023)  
[2023] KECA 1471 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1471 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E025 OF 2023  
K M'INOTI, F SICHALE & FA OCHIENG, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**WILLIAM K. BARMASAI ..... APPLICANT**

**AND**

**CATHERINE RONO ..... 1<sup>ST</sup> RESPONDENT**

**KIPKOECH RONO ..... 2<sup>ND</sup> RESPONDENT**

**GIDEON KIPTOO RONO ..... 3<sup>RD</sup> RESPONDENT**

**MAGDALENE CHEPCHIRCHIR RONO ..... 4<sup>TH</sup> RESPONDENT**

**RITA CHELIMO RONO ..... 5<sup>TH</sup> RESPONDENT**

**KIPNGETICH RONO ..... 6<sup>TH</sup> RESPONDENT**

**ONESMUS KIPLAGAT RONO ..... 7<sup>TH</sup> RESPONDENT**

**KIMUTAI RONO ..... 8<sup>TH</sup> RESPONDENT**

**THE LAND REGISTRAR, UASIN GISHU COUNTY ..... 9<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND SURVEYOR, UASIN GISHU COUNTY .... 10<sup>TH</sup>  
RESPONDENT**

*(Being an application for stay of execution/injunction of the judgment  
and decree of the Environment and Land Court at Eldoret (E. Obaga  
J.) dated 18th May 2023) In (Eldoret ELC Case No. 89 of 2019.)*



## RULING

1. William K. Barmasai (the applicant herein), has, vide a motion dated 26<sup>th</sup> May 2023, brought pursuant to the provisions of Rule 5 (b), Rule 42, Rule 47 of the *Court of Appeal Rules* sought the following orders;
  - “ a. a. Spent.
  - b. This honourable court be pleased to grant stay of execution of the judgment and decree delivered on 18<sup>th</sup> May 2023, by Justice E. Obaga in Eldoret Environment and Land Case No. 89 of 2019 and all the consequential orders therefrom pending the hearing and determination of this application inter-partes.
  - c. This Honourable court be pleased to grant stay of execution of judgment and decree delivered on 18<sup>th</sup> May 2023 Eldoret Environment and Land Case No.89 of 2019 and all the consequential orders therefrom pending the hearing and determination of the intended appeal to this Court.
  - d. This Honourable Court be pleased to issue an order of mandatory injunction compelling the respondents by themselves, their agents or servants to reopen the blocked access road pending the hearing and determination of this application inter-partes.
  - e. This Honourable Court be pleased to issue an order of mandatory injunction compelling the respondents by themselves, their agents or servants to reopen the blocked access road pending the hearing and determination of the intended appeal before this Court.
  - f. This Honourable Court be pleased to grant a temporary injunction restraining the respondents by themselves, their agents or servants from blocking the road access into and out of the appellant’s/applicant’s land parcel known as Uasin Gishu /Elgeyo Border/260 pending the hearing and determination of the intended appeal to this Court.
  - g. The OCS Tembelio Police Station to enforce the orders herein to ensure the disputed access road is re-opened.
  - h. Such other orders be made as are just and expedient in the interests of justice.
  - i. Costs of this application be in the cause.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that he is a neighbor to the respondents; that he is the registered proprietor of land parcel number Uasin Gishu /Elgeyo Border/260 whereas the respondents are the owners of land parcel number Uasin Gishu/ Elgeyo Border 261; that he filed a suit in the Environment and Land Court (ELC) at Eldoret, on the basis that the respondents had without any justification blocked an existing access road to his home which claim was dismissed by Obaga, J. on 18<sup>th</sup> May 2023.
3. That, in dismissing the claim, the learned judge held that the Registry Index Map should be amended to show that the access road to his land was at the intersection of the two parcels of land, which access



- road was impassable as it was a water pan; that he is now not able to access his home using his car and would have to maneuver through a two kilometer swampy area to access his land on foot.
4. He further deposed that in light of the foregoing, it was only just and fair and in the interest of justice that this Court grants the orders sought herein and stay the execution of the judgment of the ELC and restrain the respondents from blocking the access road in and out of his land and that unless the orders sought herein were granted, he stands to suffer irreparable harm that cannot be compensated by an award of damages.
  5. The motion was opposed vide a replying affidavit sworn on 5<sup>th</sup> July 2023, by Kipngetich Rono (the 6<sup>th</sup> respondent herein) who deposed inter alia that an order of dismissal was incapable of being stayed as it was a negative order; that orders of mandatory injunction as sought by the applicant could not be granted after dismissal of a suit and further that orders for an injunction had been overtaken by events as the respondents had already fenced off the suit property.
  6. When the matter came up for plenary hearing on 19<sup>th</sup> September 2023, Mr. Yego learned counsel, appeared for the applicant whereas Mr. Tororei, learn counsel, appeared for the 1<sup>st</sup>-8<sup>th</sup> respondents. There was no appearance on the part of the 9<sup>th</sup> and 10<sup>th</sup> respondents despite having been served with a copy of the hearing notice on 30<sup>th</sup> August 2023. Both parties relied on their written submissions dated 7<sup>th</sup> July 2023 and 7<sup>th</sup> September 2023 which they briefly orally highlighted in Court.
  7. It was submitted for the applicant that he had satisfied the conditions to warrant an order of stay of execution as his intended appeal raised weighty and triable issues because as the disputed road had been in existence since 1963 as illustrated in the Survey Map of the year 1973. Further, that the applicant had been using the same road for the last 60 years and that his evidence in the trial court confirmed that the said road existed but was erroneously not reflected in the Registry Index Map.
  8. As to whether the intended appeal would be rendered nugatory if the orders sought were not granted, it was submitted that the applicant would suffer substantial loss and irreparable damage because the respondents had now moved to block the access road and the applicant had no way of accessing his home. Consequently, we were urged to allow the motion.
  9. On the other hand, it was submitted for the respondents that the appeal was frivolous as it was anchored on grounds that were not the foundation of the suit. It was contended that the applicant's claim was based on the alleged ground that the Registry Index Map did not abide the plans prepared by the Settlement Fund Trustees and that the appeal had now mutated to be one based on Section 20 of the [Limitation of Actions Act](#).
  10. Turning to the second limb, it was submitted that the application had been overtaken by events as the respondents had already taken possession of the land, fenced off the same and cultivated on it in its entirety and further that the applicant was seeking a mandatory injunction which could only be issued in exceptional circumstances. It was contended that the applicant had not demonstrated that there existed exceptional circumstances to warrant the issuance of the orders being sought.
  11. Consequently, it was submitted that the applicant had failed to demonstrate sufficient cause to warrant an order of stay of execution or a mandatory injunction as sought.
  12. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the judgment of the ELC, the rival submissions by the parties, the authorities cited and the law.



13. The applicant's motion is brought inter alia under Rule (5) (2) (b) of the Rules of this Court. Rule 5 (2) (b) of this Court's Rules which guide the Court in applications of this nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

a. ...

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

14. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution/proceedings or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay of execution is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR.

15. Applying the tests laid out in the Stanley Kangethe Case (supra) and in as much as the applicant has made no effort to annex a draft memorandum of appeal for the benefit of this Court's perusal, we are satisfied that the applicant has an arguable appeal worthy of consideration by this Court. The issue of whether there exists access road to the applicant's parcel of land cannot be simply wished away and as such we do not consider the applicant's intended appeal to be frivolous/ and or idle. Of course we are mindful of the fact that we cannot say more regarding this issue lest we embarrass the bench that will be eventually seized of the appeal.

16. Turning to the prayer for a mandatory injunction, the applicant has sought an order of mandatory injunction to compel the respondents to reopen the blocked access road pending the hearing and determination of the intended appeal. It is trite law that issuance of mandatory injunctive orders are akin to issuing final orders and the same is only issued in the clearest of cases and in exceptional circumstances. See the case of *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, where this Court stated;

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances which must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

17. In the instant case, the applicant has not demonstrated that there exist special circumstances to warrant the issuance of the orders of mandatory injunction. The issue as to whether there exists an access road to the applicant's land is one of the issues pending determination by this Court in the applicant's intended appeal. Consequently, we will say no more regarding this issue.

18. On the nugatory aspect, the applicant has submitted that he stands to suffer substantial loss and irreparable damage if the orders sought are not granted as the respondents blocked the access road and the applicant has now been forced to maneuver through a two kilometer area to access his home/land.



19. In the instant case, the applicant is not contending that he has been completely cut off in accessing his land/home. All he is saying is that he has now been forced to use a longer route by two kilometers to access his home/ land. From the circumstances of this case, we are not satisfied that the applicant’s intended appeal will be rendered nugatory if stay orders are not granted since the substratum of the appeal will not have been lost. All that the Court will do in the event that the applicant’s appeal is successful is to order that the disputed access road be reopened and in the circumstances it cannot be said that the applicant will suffer irreparable loss and damage if stay orders are not issued.
20. Additionally, the learned judge merely dismissed both the applicant’s suit and the respondents counter claim and essentially what was issued by the court was in the nature of a negative order incapable of execution and as such there is nothing to stay save for the order made by the learned judge where he directed that the Registry Index Map be amended to show that the access road to the applicant’s land is at the intersection of land parcel numbers Uasin Gishu/Elgeyo Border/260, 261 and 242.
21. In the case of *Western College of Arts and Applied Sciences V EP Oranga & 3 Others* [1976] eKLR the predecessor to this Court stated thus as regards negative orders;
 

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
22. From the circumstances of this case and the applicant’s motion having been merely dismissed by the superior court, (save for the order on amendment of the Registry Index Map) it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory if stay orders are not issued.
23. As to whether there exists an access road into the applicant’s parcel of land is the subject of determination in the intended appeal. In the circumstances of this application, the order that best recommends itself to us is to stay only the part of the order that of the ELC that directed the Registry Index Map be amended to show that the access road to the applicant’s land is at the intersection of land parcel numbers Uasin Gishu/Elgeyo Border/260, 261 and 242 pending the hearing and determination of the intended appeal.
24. The applicant’s motion dated May 26, 2023, is otherwise dismissed in the above terms set out in this ruling. The costs of this motion shall abide the outcome of the intended appeal.
25. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**



**F.A OCHIENG**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

