



Benson (Suing on behalf of the Estate of Benson Mbuuria alias Benson M’Buuri M’Ncheere alias Kathakaa Benson M’Mburi – Deceased) v M’Mukunga & 3 others (Environment and Land Appeal E006 of 2024) [2024] KEELC 3891 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E006 OF 2024
CK YANO, J
APRIL 30, 2024**

BETWEEN

LYDIA KANARIO BENSON (SUING ON BEHALF OF THE ESTATE OF BENSON MBUURIA ALIAS BENSON M’BUURI M’NCHEERE ALIAS KATHAKAAI BENSON M’MBURI – DECEASED) APPELLANT

AND

M’MWORIA M’MUKUNGA 1ST RESPONDENT

THE LAND ADJUDICATION & SETTLEMENT OFFICER RUIRI/ RWARERA, IMENTI NORTH AND SOUTH, CENTRAL IMENTI & BUURI 2ND RESPONDENT

THE MINISTRY OF LANDS AND PHYSICAL PLANNING .. 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By a notice of motion dated 14th February, 2024 brought under Section 13 of the [Environment and Land Court Act](#), Section 68 of the [Land Registration Act](#), Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#), Order 40 rules 1 & 2 and Order 42 Rule 6 of the [Civil Procedure Rules](#) and any other enabling laws of Kenya, the appellant/applicant mainly prays for an order of temporary stay of execution of the judgment/decree in Meru CMC ELC No 22 of 2019 delivered on 30th January, 2024 pending the hearing and determination of this appeal and an order of temporary injunction to issue restraining the respondents their agents, relatives or any other person authorized by them from trespassing into, entering into, building in, subdividing, selling, leasing or in any other way interfering with the applicant’s peaceful possession, occupation, use and development of land parcel LR No



- Ruiri/Rwarera/130 and its subsequent excision LR No Ruiri/Rwarera/2107 pending the hearing and determination of the appeal herein.
2. The application is supported by the affidavit of Lydia Kanario Bensonsworn on 14th February, 2024 and a supplementary affidavit dated 5th March 2024 and is premised on the grounds on the face of the motion. The applicant avers that she is aggrieved by the entire judgment of the lower court and has already appealed against the same. That the applicant and her family have been and still live and utilize the suit land to the exclusion of the respondents, their relatives and agents.
 3. The applicant avers that there has always been an order restraining the respondent, their relatives and agents from interfering with the applicant's peaceful occupation of the suit land since 29th July, 2019. That the respondents are now threatening to evict the applicant from the suit land on the basis of the impugned judgment which threat if actuated will occasion the applicant and other family members great and irreparable loss. That if stay is not granted, the applicant shall suffer substantial loss and the appeal shall be rendered nugatory.
 4. The applicant contends that she has an arguable and merited appeal which may be rendered nugatory if the judgment of the trial court is implemented before the appeal is heard. That the respondents will not suffer any prejudice should the orders be granted.
 5. The applicant avers that the impugned judgment was delivered without notice to the applicant or her advocates against the law. In her supporting affidavit, the applicant has annexed copies of Grant of Letters of Administration Intestate and certificate of confirmation of grant in respect to the estate of her late husband, Benson M'buuri in Meru ELC Case No 69 of 2018, title deed for LR No Meru Central Ruiri Rwarera 2107, Judgment in Meru CMC ELC case No 22 of 2019, Email cause list, letters, order in Meru CMC ELC No 22 of 2019 and letter dated 20th November, 2018.
 6. The applicant urged the court to exercise its power and discretion and grant the orders sought in the interests of justice.
 7. Mr. Thangicia, learned counsel for the applicant relied on the above grounds, the supporting affidavit and the annexures thereof. He referred to annexure "LKB 3" in which the 1st respondent is asking the Land Registrar to transfer the land to him. He pointed out that the owner died on 12th October, 2014 while the transfer is sought in 2017.
 8. The applicant's counsel also referred to annexure "LKB 4" which is a plaint by the 1st respondent seeking plot No 130 to be transferred to him. In the said suit, the 1st respondent had sued the appellant. It is submitted on behalf of the applicant that the 1st respondent irregularly caused subdivision of parcel No 130 and on 5th December, 2017 had himself registered as owner of part of that land being plot No 2107 as per annexure "LKB 5(b)". That immediately the 1st respondent withdrew the suit (Meru ELC case No 69 of 2018) and as per annexure "LKB 11" demanded that the applicant vacates from the said portion of land hived from parcel No 130.
 9. Learned counsel for the applicant also referred to annexure "LKB 10" which is an order by the trial court restraining the 1st respondent from entering the suit land pending the hearing and determination of Meru ELC Case No 22 of 2019. It was submitted that the applicant and her family members have been on the suit land all along and therefore urged the court to allow the application as prayed.
 10. In opposing the application, the 1st respondent filed a replying affidavit dated 1st March 2024 sworn by Moses Munene Kabiti, the 1st respondent's guardian ad litem. He has annexed an order marked "MMK1" issued on 14th December, 2020 in Meru High Court Petition No E002 of 2020 appointing



him guardian ad litem for the 1st respondent. The deponent avers that the application and the supporting affidavits consist of falsehoods.

11. The 1st respondent agreed that there was an order of temporary injunction issued against him by the lower court pending the determination of the suit. That by then, the applicant had misled the trial court to believe that the 1st respondent was claiming land parcel No Ruiiri/Rwarera/130 and that land Parcel No Ruiiri/Rwarera/2107 was part of it. The 1st respondent avers that prior to issuance of the said orders, they were always on the land since buying the same in portions of 6 acres in 1988, 2 acres in 1992 and 5.5 acres in 1997. That upon conclusion of Meru CMC ELC Case No 22/19, the lower court was satisfied that the 1st respondent had legally bought land parcel No Ruiiri/Rwarera/2107 from the applicant's deceased husband, Benson M'Iburi, and the same measures 13.5 acres and he had an absolute title thereto. That the court proceeded to dismiss the applicant's suit.
12. It is averred that neither the applicant nor her children were ever in occupation of land parcel No Ruiiri/Rwarera/2107, and that they live on land parcel No Kiirua/Ruiiri/5074 where the applicant's husband was also buried. The 1st respondent has annexed photographs marked "MMK 2". That even land parcel No Ruiiri/Rwarera/130 is occupied, built and utilized by one Kathaku Benson who is a nephew to the applicant. Photographs marked "MMK 3" allegedly showing the developments on the said land are annexed.
13. It is further averred that land parcel No Ruiiri/Rwarera/130 is not 14 acres and even on the grant marked annexure 'LKB 2' does not state the acreage. The 1st respondent avers that all that the applicant has done was to lease the land to third parties. A copy of a sketch map marked "MMK 4" is annexed.
14. It is stated that the applicant's suit Meru CMCC 22 of 2019 was dismissed by the lower court on 30th January, 2024 upon which the temporary orders of injunction then in place became spent. The 1st respondent avers that his agents took possession of land parcel No Ruiiri/Rwarera/2107, fenced it, put a gate, renovated the farm house therein and tilled the same. Copies of said judgment and bundle of photographs marked 'MMK 5' & "6) have been annexed. That the person who had leased the suit land from the applicant voluntarily harvested the maize crop he had planted thereon and left.
15. The 1st respondent avers that on 27th February, 2024, the applicant and her children hired goons and descended on the suit land, battered the 1st respondent's son by the name Joseph Kirimi and brought down the gate and cut down large portions of the barbed wire fence and posts. A bundle of photographs marked "MMK 7" have been annexed. That the matter was reported to Tutua Police Station who are processing the 1st respondent's complaints. OB extracts marked "MMK 8 (a) & b" have been annexed. The 1st respondent argues that the applicant and her agents cannot take the law in their own hands and come to court to seek equitable remedies or any other remedies known in law. That the applicant did not disclose all facts to the court at the ex-parte stage and deliberately misled the court. That what happened in the lower court was dismissal of the applicant's suit which is not a positive order deserving stay. It is the 1st respondent's contention that the applicant has not met the conditions for granting of temporary injunction in that the appeal has no chances of success, and that if any damages are incurred, it can be met by an award of damages. That the balance of convenience tilts in favour of the 1st respondent because he is not only the registered owner of the suit land, but in occupation.
16. Mr. Arithi, learned counsel for the 1st respondent submitted that the application is misconceived and an abuse of the court process. He relied on the replying affidavit by Moses Munene Kabiti and the annexures thereto.



17. Learned Counsel for the 1st respondent submitted that the prayer for stay is misconceived as the applicant was the plaintiff in the lower court case and her suit was dismissed for want of merit. That there were no positive orders granted and that the only positive order was for costs to the 1st respondent. It is submitted that under Order 40 Rules 1 and 2 of the *Civil Procedure Rules*, it is clear that injunctive orders cannot be given because the applicant has no property to preserve. That it is admitted that parcel No 2107 measuring 13.0 acres belongs to the 1st respondent while parcel No 130 measuring 1.3 acres belongs to the estate of the applicant's late husband and is occupied by the applicant's nephew. It is denied that the applicant has all along been in occupation of parcel No 2107. That the applicant only misled the lower court to issue injunctive orders pending the determination of the suit and which orders were obeyed by the 1st respondent. That those orders have now gone with the suit which was dismissed. That even during the pendency of the suit, the applicant was never on the land, but had hired it out to third parties. That when the suit was dismissed, the 1st respondent took possession of the land, fenced it and tilled it but the applicant hired goons who invaded the land and destroyed property. That the matter was reported to the police and is pending investigations. The court was urged to dismiss the application with costs since the applicant failed to disclose full facts at the ex-parte stage.
18. I have considered the application, the affidavits in support and against as well as the submissions made. The issues for determination are whether this court should grant the orders of temporary injunction and stay pending the hearing of the appeal herein. Order 42 Rule 6 (6) of the *Civil Procedure Rules* states 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 tribunals has been complied with.”
19. Similarly, Order 42 rule 6(1) and 2 provides as follows-;
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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 the decree or order as may ultimately be binding on him has been given by the applicant.



20. It is therefore clear from the above provisions of the law that the court has power to grant the orders sought. However, the power of a court to grant orders of injunction and stay of execution are discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision (See *Butt v Rent Restrictions Tribunal* [1979] EA).
21. The purpose of temporary injunction and stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case (See *R.W.W v EKN*) [2019] eKLR.
22. In this case, the decision of the lower court was made on 30th January, 2024 and the memorandum of appeal was filed on 14th February, 2024. That the applicant has complied with the procedure for filing of an appeal before this court as provided for under Section 79 (G) of the *Civil Procedure Act* is not in doubt. The issue, however is whether the applicant has met the prerequisites for grant of the orders sought.
23. Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of *Giella v Cassman Brown & Co.* [1973] EA 358. The applicant must show that she has a *prima facie* case with probability of success, that she will suffer irreparable damage which cannot be compensated by an award of damages, and if in doubt, the court will decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of the appeal succeeding in order to determine whether the applicant has a *prima facie* case, the ultimate objective of course being to safeguard the rights of the appellant in the appeal so that the appeal is not rendered nugatory and the rights of the respondent to enjoy the fruits of the judgment.
24. In considering whether or not to grant an injunction pending appeal, the court will ascertain if the appeal is arguable or put differently, whether the appeal raises serious questions for determination without going deeply into the appeal itself.
25. In this case, it is not in dispute that the suit property is in the name of the 1st respondent. In the plaint dated 25th February, 2019 the applicant sought inter alia, an order for cancellation of the title and register of parcel No Ruiriri/Rwarera/2107. Upon considering the matter, the trial court found that the applicant herein had failed to prove that the suit land was registered in the name of the 1st respondent fraudulently. The applicant's case was therefore dismissed. In this case, I am not persuaded that the applicant has demonstrated that the appeal is arguable. In my view, the applicant has not demonstrated that the appeal would be rendered nugatory if the injunction orders sought are denied. I say so because the subject of the suit is land which will still be there post the appeal, and if the appeal succeeds, the 1st respondent's title can still be cancelled. As regards the prayer for stay of execution, this court notes that there were no positive orders issued by the trial court. All that the trial court did was to dismiss the applicant's suit. Accordingly, the court will not grant the order of stay of execution since there were no positive orders issued capable of being executed, save for costs of the suit.
26. For the foregoing reasons, this court finds that the applicant's notice of motion dated 14th February, 2024 is not merited and the same is dismissed with costs to the 1st respondent.
27. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL 2024

In The Presence Of



Court Assistant – Tupet

Thangicia for appellant

No appearance for respondents

C.K YANO

JUDGE

