



**Chesire & 2 others v Kwambai & 7 others (Civil Appeal (Application)
E177 of 2021) [2022] KECA 1026 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1026 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E177 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
SEPTEMBER 23, 2022**

BETWEEN

**ISAAC KIPKEMBOI CHESIRE 1ST APPLICANT
ISAAC KIMUTAI 2ND APPLICANT
MARY CHEPKOECH CHESIRE 3RD APPLICANT**

AND

**JOSEPH KIMITEI KWAMBAI 1ST RESPONDENT
JOHN MALAN SAWE 2ND RESPONDENT
GROWEL FARM LIMITED 3RD RESPONDENT
LAND REGISTRAR UASIN GISHU 4TH RESPONDENT
ROSE CHERUIYOT RONO 5TH RESPONDENT
HENRY BARMAO 6TH RESPONDENT
KIBET KANGOGO 7TH RESPONDENT
KIMAIYO RONO 8TH RESPONDENT**

*(Being an application for temporary injunction pending appeal against
the ruling of the Environment and Land Court in Eldoret (S. M
Kibunja J.) dated 15th December 2021 in ELC Case No. 520 of 2012)*

RULING

1. The applicants have lodged this interlocutory application dated December 22, 2021 under the provisions of Rule 1(2), 20, 42, 43 and 53 of the [Court of Appeal Rules](#) 2010. They seek a temporary injunction restraining the respondents, their agents or servants from trespassing,



cultivating, constructing, fencing sub-dividing, selling or in any other manner dealing or interfering with the applicants' occupation and status of the suit properties Kiplombe/Kiplombe/Block 10 (Growel) 44, 45 and 310 pending the hearing and determination of their intended appeal against the ruling dated December 15, 2021.

2. The grounds on which the application is based are that there exist orders of *status quo* in respect of the suit property but the respondents have, from time to time, trespassed on the suit land. This prompted the applicants to file contempt proceedings against the respondent but the said applications were dismissed. The applicants state that they were dissatisfied with the ruling of the trial court dismissing their applications and they intend to appeal against it. They have filed a notice of appeal dated December 17, 2021, and their appeal has high chances of success as they have been in occupation of the suit properties since 1984.
3. The applicants assert further that the actions of the respondents are likely to alter the status of the suit property, thereby rendering the main suit and the intended appeal nugatory. Should the court not issue the injunctive orders sought, to preserve the suit property and maintain *status quo*, they are likely to suffer irreparable injury.
4. The application is opposed through an affidavit sworn by the 1st respondent, Joseph Kimitei Kwambai, on January 22, 2022. The 1st respondent observes that given that the suit before the trial court is substantially heard, the present application is frivolous, vexatious and an abuse of the court process. The 1st respondent avers that he acquired the suit land in 1996 and a title deed was issued in his name in 2005. He has been in exclusive and physical occupation of the said parcel to date. In 2008, he had subdivided the subject parcel into several land parcels, namely Kiplombe/Kiplombe/Block 10 (Growel) 538-551, and neither the Chesire family nor the applicants have been in occupation and use of the suit land. As at 1984, parcel No. 44 was not in existence, having come into existence in 2005.
5. The 1st respondent further avers that the applicants are trying, through the present application, to evict him in order to gain access to his parcel of land yet he is in possession and occupation. The status quo that should be maintained is that he has been in continued possession and occupation of the suit land. It is his deposition that he regrets having made the mistake of sub-dividing his land parcel number 44 during the pendency of the suit. He had been punished for this by the court, had learnt his lesson and would not change the status of the land during the pendency of the suit before the trial court.
6. The 5th, 6th, 7th and 8th respondents opposed the application by way of an affidavit sworn by the 8th respondent, Kimaiyo Rono, on February 11, 2022. He avers that the application lacks merit as the applicants have not demonstrate that the intended appeal is arguable and will be rendered nugatory if the injunctive orders are not granted. Further, that the 4th (sic) to 8th respondents are on a separate parcel of land known as Kiplombe/Kiplombe Block 10 (Growel) 45 and they cannot trespass on land which belongs to them. It is their deposition further that when the trial court conducted a site visit on the suit land, it had established who was in occupation.
7. At the plenary hearing of the application, Mr. Njuguna, learned Counsel for the applicants, submitted that the main target in the application is the 1st, 5th, 6th, 7th and 8th respondents. After the impugned ruling which deemed the orders of status quo as an error, there have been attempts to re-enter the suit land, thereby necessitating the present application for orders of injunction to maintain the status quo.
8. He maintained that since May, 2009, there have been subsisting orders of status quo over the suit land; that one of the orders restrained the respondents from gaining ownership of the land which ownership goes to the issue of occupation. He submitted that the applicants have been in occupation of the suit land, have constructed permanent houses in which they stay with their families, and are



doing cultivation. From July 2021, the 1st, 4th, 5th and 8th respondents have been attempting to take occupation, leading to the applications for contempt. The suit before the ELC was partly heard and there would be interference by the respondents unless this Court issued the injunctive orders.

9. To the question whether the appeal would be rendered nugatory, it was submitted for the applicants that the respondents would enter into the property and alter the status of the suit land.
10. In submissions dated January 24, 2022, the 1st respondent argues that in the present application, the applicants are seeking injunctive orders which are equitable remedies granted at the discretion of the court, citing in support the case of *Giella vs Cassman Brown & Company Ltd* (1973) EA 358. It is his submission further that there is no order of status quo in force. The orders of May 29, 2009, which had been specific orders and not orders of status quo, had lapsed on May 29, 2010. It is the 1st respondent's case that he has been in exclusive actual physical possession, occupation control and use of land parcel No. 44 while the applicants have been on their own parcel Kiplombe/Kiplombe/Block 10 (Growel)43 on which their homes are situated. They would therefore not suffer any injury, loss or damage if their application is dismissed.
11. In brief oral submissions, Mr. Kuria, learned Counsel for the 4th respondent, observed that in his ruling, the trial judge made provision to protect the suit land and also punished the 1st respondent as the contemnor and thus there is no need to grant the orders sought.
12. The application before us is expressed to be brought under Rule 1 (2), 20, 42, 43 and 53 of the [Court of Appeal Rules](#) 2010. However, the jurisdiction of this Court to issue the orders sought is granted to the Court pursuant to Rule 5(2) (b) of the Court's Rules which provides that:
 - (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.
13. Under the above Rule, an applicant is required to satisfy the Court as to the existence of two conditions as enunciated in the case of [Stanley Kangethe Kinyanjui vs. Tony Ketter & Others](#) [2013] eKLR. The first is that he has an arguable appeal and, secondly, that the appeal will be rendered nugatory if the orders sought are not granted.
14. Regarding the nugatory aspect, this Court in [University of Nairobi v Ricatti Business of East Africa](#) [2020] eKLR held that:

“On the 2nd limb of nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

See also [Nelson Andai Havi vs Law Society of Kenya & 3 others](#) [2018] eKLR.
15. In the ruling sought to be appealed against, the court dismissed the applicants' applications seeking to condemn the respondents for contempt of court. It held, inter alia, as follows:
 - “(c) That from the foregoing, it is clear that the status quo orders referred to on the applications dated the February 8, 2021 and March 17, 2021 are the orders of May 29, 2009. The application dated the March 31, 2021, is based on the



orders issued/extended on the March 22, 2021, which from the analysis above has its origin from the orders of May 29, 2009. Therefore, with a degree of confidence, the orders which all the three applications complain to have been contravened are the orders of May 29, 2009....

16. The trial court reproduced the said order and observed as follows:

“That from the above order, the following observations are discernable (sic). The first one is that the order did not mention “status quo” to be maintained. That it is through subsequent extensions of these orders that the term status quo began to be used in reference to the orders of 29th May, 2009. That loosely speaking, if the order was to be read to mean there was some status quo to be maintained, then it could only have been concerned with the ‘surveying, implementing, mutilating, claiming title and effecting changes to title of the suit property’. Therefore, at the very least, any claims of contempt of court based on this would have to demonstrate that there were acts or attempts at alteration of title or surveying being undertaken by a party/parties to the suit in preparation of alteration of the title to the suit properties. Secondly, the orders of 29th May, 2009 were issued at the ex-parte stage, obviously to prevent wastage of the suit properties pending an inter-partes hearing. That after the exparte order was issued, it was incumbent upon the applicants to take steps to prosecute the application inter-partes without undue delay, or risk the order lapsing under the provisions of Order 40 Rule 6 of the Civil Procedure Rules...”

17. The trial court concluded that the orders of May 29, 2009 lapsed on the same day one year later, the May 29, 2010. Further, that they had not tendered proof of the order and notice for inter partes hearing of that earlier application on the respondents. Their applications before the trial court therefore had no foundation as the court was bound by the provisions of Order 40 Rule 6 of the *Civil Procedure Rules*. In the trial court’s view:

“The three applications have all failed to establish one essential aspect of applications for contempt of court, that there was a valid order in the first place.”

18. The extracts above show that the issue before the trial court was whether to punish the respondents for contempt of court. The basis of the application for contempt was an order issued on May 29, 2009, which the court found to have lapsed after the passage of 12 months as no application had been made for its extension. The question that the applicants would wish to place before this Court, then, would be whether the trial court was correct in making this finding, and in dismissing the applications for contempt. That may well be an arguable point.

19. The second factor in an application under Rule 5(2)(b) is whether the appeal will be rendered nugatory if the orders sought are not granted. The arguable point in this case, as observed above, is whether the trial court erred in finding that there had been no order for the maintenance of status quo issued on May 29, 2009; and that even if there had been, such order had lapsed in 12 months, having been issued ex parte and not extended.

20. Have the applicants satisfied this Court that their appeal would be rendered nugatory should the injunctive orders not be issued? We note that the trial court had, while finding that the respondents were not in contempt of court for breach of the alleged order of May 29, 2009, nonetheless found the



1st respondent in breach of the principle of lis pendens, and punished him for contempt of court. The court observed as follows:

“(h) That as shown above, the doctrine clearly injuncts parties to a dispute from alienating the suits subject matter, by granting rights to third parties over the suit property. In this case, it is unarguable that the 1st defendant has acted in a manner afoul of this doctrine. By his own admission in his affidavit of March 18, 2021, he caused the parcel number 44 to be subdivided into parcel numbers 538–551 in 2011. The record confirms this suit was filed in May, 2009. Further, by his own admission in the same affidavit, he sold some of the parcels that is 541 and 544 subdivided from parcel 44 to third parties known as Micah Kipkoech Ngeno and Isaac Kiptarus Mutai. The 4th plaintiff in his affidavit of March 18, 2021 has annexed copies of the sale agreements that he alleges the 1st defendant used to offer the illegally subdivided portions of land for sale. The agreement concerns property described as Kiplombe/ Kiplombe Block 10 (Growel) 541 and 544. These are clearly portions resulting from the subdivision of Kiplombe/ Kiplombe Block 10 (Growel) 44 which forms part of the suit properties. The 1st defendant action of selling the two parcels of the suit property was undoubtedly aimed at alienating the parcels and to keep or hide them from the court’s reach. These actions clearly purport to grant rights over the suit property to third parties during the pendency of the suit. This runs afoul of the lis pendens doctrine.

21. The trial court proceeded to fine the 1st respondent Kshs. 200,000 to be paid in 7 days in default of which he would be arrested and committed to civil jail for a period of six months. It further issued the following orders:

“(ii) That the Land Registrar Uasin Gishu [4th defendant] is hereby directed to rectify the register under section 80 of the Land Registration Act No. 3 of 2012 by cancelling all transfers on all the parcels subdivided from Kiplombe/ Kiplombe/ Block10 (Growel) 44, that were done after 2009, and restore ownership to the name of Joseph Kimitei Kwambai [1st defendant].

(iii) That an inhibition order in terms of section 68 of the Registration of Land Act No. 3 of 2012 do issue and registered by the Land Registrar [4th Defendant] in respect of all the parcels subdivided from Kiplombe/Kiplombe/Block 10 (Growel) 44, to be in force until this suit is heard and determined.”

22. Given these orders by the trial court, we find and hold that the applicants have not satisfied this Court that their appeal will be rendered nugatory. The trial court’s orders above have the effect of protecting the subject land pending the completion of the matter before the trial court, which is partly heard. The trial court has already invoked the doctrine of lis pendens to protect the substratum of the suit, and has the jurisdiction to do so again should the need arise.

23. Accordingly, we find that the present application is without merit and it is hereby dismissed. With regard to costs, we direct that they shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022.

P. O. KIAGE



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JUDGE OF APPEAL
MUMBI NGUGI

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JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

