



**Mwanza v Mwanza & 3 others (Environment and Land Appeal  
E006 of 2024) [2024] KEELC 4300 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4300 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

**LG KIMANI, J  
MAY 23, 2024**

**BETWEEN**

**MUTUKU MWANZA ..... APPELLANT**

**AND**

**MARTHA MWANZA ..... 1<sup>ST</sup> RESPONDENT**

**MWENDE MWANZA ..... 2<sup>ND</sup> RESPONDENT**

**MUTINDI MWANZA ..... 3<sup>RD</sup> RESPONDENT**

**KAMENE MWANZA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellant/applicant filed the Notice of Motion Application dated 13<sup>th</sup> March 2024 under a certificate of urgency seeking the following orders:
  1. Spent.
  2. Spent
  3. That the honourable court be and hereby issued to restrain the defendants whether by themselves, their agents, servants or representatives or any other person acting on their behalf from trespassing into the plaintiff's premises at House No.309 Bondeni Estate, Kitui Town and Parcel No. 12 Kalitini Adjudication Section and performing so-called witchcraft or cleansing rituals or placing, spreading or scattering items of witchcraft medicine or in any other manner whatsoever interfering with the plaintiff's quiet possession of the said premises pending the hearing and determination of the appeal hearing.
  4. The costs of this Application be provided in the appeal.



2. The Application is supported by the affidavit of the applicant in which he deposes that he resides at House No.309 Bondeni Estate in Kitui town and also has a farm on land Parcel No.12 Katilini Adjudication Section. He sought and obtained the consent of the Land Adjudication and Settlement officer to file the suit before the trial court, CMELC NO.073 of 2023. He also filed an application dated 28<sup>th</sup> September 2023 seeking an interlocutory injunction against the Respondents.
3. In his ruling dated 12<sup>th</sup> March 2024, the trial magistrate dismissed the application for an interlocutory injunction. Being dissatisfied with the ruling, the applicant filed the appeal herein.
4. Now that the interim orders granted are no longer in place, he states that the Respondents can resume their activities of invading his premises and planting items of witchcraft. The applicant stated that the Respondents accuse him of practicing witchcraft which led them to trespass on his land and place strange items.
5. The Applicant deposed that his family and his employees are now living in fear of being harmed by the Respondents through the so-called witchcraft cleansing and he has lost some employees who fled in fear of the rituals by the Respondents and seeks the court's intervention.

### **The 2nd Respondent's Replying Affidavit.**

6. The 2<sup>nd</sup> defendant filed a replying affidavit on her behalf and on behalf of the other respondents. She deposed that the Applicant is their only brother and that the allegations of witchcraft are bereft of any substance and merit.
7. Regarding the suit parcels of land, she deposed that Parcel No. 12 Katilini Adjudication Section is where all the parties grew up and where their mother resides while House No.309 Bondeni Estate Kitui town is the Applicant's residential home where they only visited their ailing father before he died.
8. She further deposed that it was their parents who acquired Parcel No.12 Katilini Adjudication Section in 1972 and built their residential home, where they co-existed peacefully until their father, Mwanza Mutiso fell sick and got hospitalized in 2018. Their parents temporarily resided on the Appellant's land at Kwa Vonza and when their father's health deteriorated in 2022, he lived with the Appellant in House No.309 Bondeni Estate Kitui Town.
9. During this time, the respondents depose that the applicant had started becoming hostile to them and told them to stop visiting his house, an act which caused their mother anguish. Upon their father's passing on 19<sup>th</sup> August 2023, the applicant who was the organizer of the funeral buried their father in secret with only one of their sisters present.
10. They stated that they now have no reason to visit the Applicant's house No.309 Bondeni Estate, Kitui Town but they were surprised that the Applicant purports to be the owner of Parcel 12 Katilini Adjudication Section, which is their ancestral land, to their exclusion and their mother.
11. Further, the respondents depose that it is extremely unfair and prejudicial to deny them access to their mother contrary to their constitutional right to family as provided by Article 45 of the [Constitution](#).

### **The Applicant's further affidavit**

12. The Applicant filed an affidavit in response to the 2<sup>nd</sup> respondent's replying affidavit, denying that Land Parcel 12 Katilini Adjudication Section was bought in 1972, stating that he participated in the acquisition of the land in the year 2002 when he exchanged his parcel of land in Kaunguni village with his cousin Samuel Masesi to vacate a portion of the land.



13. That there are only 3 houses in the parcel No.12 Katilini Adjudication Section, with one being his house the 2<sup>nd</sup> occupied by his mother and the third is for his workers which also acts as a store.
14. The Applicant stated that the claim herein is not one of ownership of land and if any they can only be resolved through the adjudication process. As it stands, he deposes that the respondents have no right to go into his house and perform strange acts which instils fear in workers and family members.
15. He further deposed that their mother is living with one of the Respondents, without interfering with his premises or inciting neighbours against him on allegations of witchcraft. He states that he lives in fear of being attacked or having his property destroyed as the community may rise against him due to the witchcraft allegations.
16. This court issued an order that the status quo be maintained on Plot No.309 Bondeni Estate since there is no dispute on ownership and occupation. However, both parties claim to have homes on the Parcel No. 12 Kalitini Adjudication Section and as a result, the Court declined to make any interim orders therein.

### **Appellant/Applicant's Submissions**

17. Counsel for the Applicant submitted that the Appellant has an arguable appeal and is likely to suffer irreparable harm if the interlocutory injunction pending appeal is not granted. He relied on Order 42 Rule 6(6) of the *Civil Procedure Rules* submitting that the applicant has complied with the procedure of instituting an appeal. They submitted that the prerequisites for the exercise of the court's jurisdiction to grant an injunction pending appeal which should be exercised judicially to avoid hardship and not to render an appeal nugatory. They also submitted that the court should not go deeply into the appeal itself. Counsel relied on the decision in the case of *Patricia Njeri & 3 others v National Museum of Kenya* (2004)eKLR and *Bilba Mideva Buluku v. Everlyne Kanyere* (2016) eKLR.
18. The Appellants point out that the dispute is not one of ownership, only that the Respondents contend that they too have a right to access Land Parcel 12 Katilini Adjudication Section. The Applicant complains that the Respondents are trespassing into his premises situated in the two properties and performing acts that are injurious to his quiet possession.
19. Counsel asked the court to take judicial notice of the grave nature of the allegations of witchcraft and the rampant killings and maiming of persons accused of witchcraft as well as destruction of their properties that have been going on in the country.
20. It was further submitted that the respondents have stated that they have no interest in the appellant's premises at House No.309 Bondeni Estate and would suffer no hardship if they were stopped from trespassing into these premises. Regarding Land Parcel 12 Katilini Adjudication Section, he submitted that the respondents can visit their mother without interfering with the Appellant's premises, where he has prima facie right as the owner of the land.
21. It is therefore the Applicant's submission that he has met the threshold for granting of the orders sought and urged the court to so find.

### **The Respondents' submissions**

22. Counsel for the Respondents submitted the principles for grant of an interlocutory injunction pending appeal as were given by the court in the case of *Patricia Njeri & 3 others v National Museum of Kenya* (2004) eKLR.



23. They also submit that Land Parcel 12 Katilini Adjudication Section does not belong to the Appellant as it was jointly acquired by their parents in 1972 and comprises their family home where their mother lives. That it has not been subject to succession proceedings nor transferred to him and is still subject to the adjudication process where the Appellant secretly and fraudulently called the same to be adjudicated in his name. They submit that they have as much of a right to access, visit and/or live on the property subject to their mother’s authorization even though they are married.
24. They further submit that the Appellant has not explained the injury that he has suffered from and that the nature of irreparable harm the Applicant stands to suffer has not been explained.
25. On the principle that discretion should be refused where it inflicts greater hardship than it would avoid, it was submitted that an injunction would restrict the respondents from accessing their mother in their ancestral home.
26. On whether denial would render the appeal nugatory, the respondents submitted that the rights of the parties have not been determined since this is an interlocutory application, and that they are not a threat to the suit properties. They submit that the status quo be maintained and the trial at the lower court shall not be affected adversely.
27. Submitting on whether the Applicant has met the threshold for grant of an injunction as was given in the case of *Giella- v-Cassman Brown*, they denied there being any prima facie case since the applicant only holds a letter from the adjudication officer and not a title, the nature of the injury suffered is unascertainable, the applicant produced no tangible proof of the alleged practices of witchcraft and the only party that stands to suffer irreparable harm are the respondents, therefore, the balance of convenience does not tilt in his favour.
28. They therefore submit that the application does not meet the threshold to warrant injunctive orders and urged the court to dismiss the application.

### **Analysis and Determination**

29. The Applicant seeks an order of injunction to restrain the Respondents whether by themselves, their agents, servants or representatives or any other person acting on their behalf from trespassing into the plaintiff’s premises at House No.309 Bondeni Estate, Kitui Town and Parcel No. 12 Kalitini Adjudication Section and performing witchcraft or cleansing rituals or placing, spreading or scattering items of witchcraft medicine or in any other manner whatsoever interfering with the plaintiff’s quiet possession of the said premises pending the hearing and determination of the appeal hearing.
30. This court has the requisite jurisdiction to grant an order of injunction under section 13 (7) of the *Environment and Land Court Act* NO. 19 of 2011 which provides that;
 

In the exercise of its jurisdiction under this Act, the Court shall have the power to make any order and grant any relief as the Court deems fit and just, including—

  - (a) interim or permanent preservation orders including injunctions;
31. This Court is further empowered to grant a temporary injunction pending appeal under Order 42 Rule 6(6) of the *Civil Procedure Rules* which provides as follows;
 

“Notwithstanding anything contained in Subrule (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 tribunal has been complied with.”

32. The Court has considered the application herein and the reply thereto and submissions by counsel for both parties. The court notes concerning house number 309 Bondeni Estate Kitui Town, the Respondents state that since their father died, they have no reason to visit the applicant’s house on the said plot. In Submissions, Counsel for the Respondent confirmed that his clients will not be affected adversely if an order to maintain the status quo is made concerning the said house.
33. The court thus directs that the status quo currently pertaining to house number 309 Bondeni Estate Kitui Town be maintained pending the hearing and final determination of the appeal herein. The status quo is that the applicant is in quiet possession of the said house and the said possession should not be interfered with.
34. Alnashir Visram, J (as he then was) while dealing with an application for injunction pending appeal stated as follows in the case of *Patricia Njeri & 3 Others V National Museum of Kenya* [2004] eKLR.
- “In the Venture Capital case, the Court of Appeal said that an order for an injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:
- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* (1982 – 88) KLR 1088 (also cited in Venture Capital)
  - (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
  - (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417 (cited also in Venture Capital).
  - (d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Sbitukha Mwamodo & Others* (1986) KLR 445 (also cited in Venture Capital).”
35. The 1<sup>st</sup> criterion set out above is that the discretion of the court will be exercised against an Applicant whose appeal is frivolous. The appeal herein arises from a ruling of the trial court dismissing the applicant/appellant’s application seeking an injunction. The trial court declined to grant the temporary injunction sought and the reasons for dismissal as given by the court were that the Applicant did not establish a prima facie case since a letter from the adjudication officer is not proof of ownership of land. The court further found that the applicant has not established that he would suffer irreparable damage should an injunction not be granted.
36. The Court has looked at the ruling of the trial court and the Memorandum of Appeal with the grounds set thereon. In summary, the grounds are that the trial court erred in finding that the appellant had not established a prima facie case, that he did not demonstrate irreparable harm, that the trial court in relying on mere allegations that the suit land is ancestral land and in failing to consider that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had not filed any responses to his application.



37. In the court's view, the trial court in its ruling did consider whether or not a prima facie case with a probability of success had been established. This is to be found in paragraphs 9 to 14 of the trial court's ruling. The court notes that in the present application, the applicant attached the plaint filed and the application and the replies filed before the trial court. It is noted that the Respondents have not filed a defence to the claim. In the suit before the trial court, the applicant claims to be the recorded owner of Plot No.12 Katilini Adjudication Section. He produced and relied on a letter from the Ministry of Lands dated 19<sup>th</sup> September 2023 that confirmed that the parcel has no pending dispute.
38. This ownership of the suit land is denied by the Respondents and they claim that if any such ownership exists it was obtained clandestinely and excluded them and their mother. They claim that the land Parcel No. 12 Katilini Adjudication Section is where all the parties to this suit grew up and where their mother resides. They claim that their parents acquired the land in 1972 and built their residential home, where they co-existed peacefully until their father, Mwanza Mutiso fell sick and got hospitalized in 2018.
39. The applicant accuses the Respondents of acts of trespass to the suit land by placing strange items of witchcraft cleansing in the belief that he practices witchcraft. The said acts are denied by the Respondents who have termed them as "pure conjecture entirely bereft of any substance and merit". They state that the only thing they did was conduct prayers and call a priest to pray for their ailing father. The Respondents further stated that the applicant is not a Christian and subscribes to witchcraft and sorcery practices while she and her sisters are avid Christians
40. However, it is noted that the narration by the applicant of the acts of trespass alleged to have been committed by the Respondents before the trial court was very detailed and they gave specific names of persons who witnessed the Respondent's activities. The specific allegations were not specifically denied before this court. The applicant was at pains to state that the dispute before the trial court was not an ownership dispute but one of trespass to land through acts associated with witchcraft.
41. It is the Court's view that from the foregoing, the appeal to this court cannot be said to be frivolous.
42. The second consideration is whether granting the orders sought would inflict greater hardship than it would avoid. The Respondents contend that Plot No.13 Katilini Adjudication Section is ancestral land acquired in 1972 and that they would be denied access to their mother who lives thereon if an injunction is granted. The applicant denies this and states that this is his private land where he participated in its acquisition in the year 2002. He however concedes that though the mother lives with one of the Respondent's she has a home on the suit land.
43. In the court's view, it will cause great hardship and grave injustice to the Respondents to grant the orders sought by preventing them from visiting the entire parcel of land number Plot No.13 Katilini Adjudication Section which they claim to be their ancestral land and where the applicant concedes their mother has a home. Preventing the Respondents from accessing the entire land and in particular where their mother has a home would also cause great hardship to the parties' mother if the mother would be forced to look for an alternative venue in case the respondents wish to see her.
44. On the other hand, the applicant claims the suit land and in establishing a prima facie case, the Applicant relied on a letter from the Ministry of Lands dated 19<sup>th</sup> September 2023 that confirmed that he is the recorded owner of Plot No.12 Katilini Adjudication Section and that the parcel has no pending dispute. As stated earlier, this ownership is denied by the Respondents and they claim that if any such ownership exists it was obtained clandestinely and excluded them and their mother.



45. This court notes that on the question of ownership of the suit land, the applicant did not show the stage at which the process of land adjudication has reached and whether the land adjudication register has been completed as per section 25 of the [Land Adjudication Act](#). In the court's view, the applicant has yet to show that the process of ascertainment and recording of interests in the suit parcel of land has been completed and that he has been established to be the rightful owner of the suit land. The applicant has confirmed that their mother has a home within the suit land and the court has found that it would be a grave injustice to bar the Respondents from accessing the entire suit land. However, it is confirmed that the applicant also has a house on the suit land plus workers' quarters.

46. In the Court's opinion and with a view of balancing the interests of both parties to this appeal and to maintain order in the suit property, pending hearing and determination of the appeal, an order of maintenance of the status quo would suffice in this case. Murithi J in *Abdullahi & 4 Others* in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows:

“In my view, an order for the Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at the interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

47. It was observed by the court in [Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others](#) [2015] eKLR that a status quo order must be specific and clear to the parties. The court observed as follows:

“Status quo” in this respect, as maintained by an injunctive or conservatory or stay order, is the then-existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in *American Cyanid Co.-v- Ethicon* [1975] 1 All ER 504 at 511 “where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....” The second or alternative order for the status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts' further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved. Ordinarily, where it is the court that has prompted a status quo order or has prompted the parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order for status quo is issued. It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved. Assistance of the



counsel should always be sought in such instances otherwise each party may walk away with its own state of affairs in mind.”

48. In the present case the status quo currently pertaining to the land parcel No.12 Katilini Adjudication Section is that the appellant/applicant has a home and a workers quarter while the mother to the appellant and the Respondents has a home within the said land. The Respondents shall be at liberty to access their mother’s home located within the suit parcel of land but will not enter into or interfere with the applicant’s quiet possession of his home constructed within the suit land.
49. For the foregoing reasons the court finds that the orders that commend themselves to the court are as follows;
1. An order be and is hereby issued that the status quo currently pertaining to house number 309 Bondeni Estate Kitui Town be maintained pending hearing and final determination of the appeal herein. The status quo is that the applicant is in quiet possession of the said house and the said possession should not be interfered with.
  2. The status quo currently pertaining to the land parcel No.12 Katilini Adjudication Section be maintained pending the hearing and determination of this appeal. The status quo is that the appellant/applicant has a home constructed on the land while the mother to the appellant and the Respondents has a home within the said land. The Respondents shall be at liberty to access their mother’s home located within the suit parcel of land but will not enter into, or interfere with the applicant’s quiet possession of his home constructed within the suit land.
  3. Each party is to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**HON. L. G. KIMANI, JUDGE**

**ENVIRONMENT & LAND COURT, KITUI**

The ruling is read in open court and virtually in the presence of:

C/A Musyoki

Muigai for the Appellant/Applicant

Ms. Kiama for the Respondents

