



**Mwarania & 2 others v Kathambi (Environment and Land Appeal E069 of 2024) [2025] KEELC 778 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E069 OF 2024  
BM EBOSO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ANNE MWARANIA ..... 1<sup>ST</sup> APPELLANT**

**ERIC MBAABU ..... 2<sup>ND</sup> APPELLANT**

**SAMMY MWITI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**TABITHA KATHAMBI ..... RESPONDENT**

**RULING**

1. Falling for determination in this ruling is the appellants’ notice of motion dated 29/10/2024, through which they seek an order of stay of execution of the Judgment rendered on 20/8/2024 by Hon D Nyambu, Chief Magistrate, in Meru MCELC No. 253 of 2018. It also seeks an order of inhibition in relation to land parcel number Nyaki/Kithoka/3996 pending the hearing and determination of this appeal.
2. The appeal challenges the said Judgment. Through the impugned Judgment, the trial court dismissed the appellants’ primary suit and allowed the respondent’s counterclaim. The trial court decreed the appellants and the late David Muriithi to vacate land parcel number Nyaki/Kithoka/3996 [the suit land] within 90 days. In default, eviction was to ensue.
3. The suit land was previously registered in the name of the late David Muriithi, the deceased husband of the 1st appellant. The 2nd and 3rd appellants are children of the couple. David Muriithi sold and transferred the land to the respondent. The three appellants sued David Muriithi as the 1st defendant and the respondent as the 2nd defendant. David Muriithi died during the pendency of the suit in the trial court. The appellants interred his remains on the land. At that point in time, the land was registered in the name of the respondent and the appellants were privy to the fact that the land had



been sold to the respondent and was registered in the name of the respondent. I say so because they had challenged the sale in the Lower Court.

4. The application dated 29/10/2024 is premised on the grounds outlined in the motion and in the supporting affidavit of Anne Mwarania. It was canvassed through written submissions dated 24/1/2025, filed by M/s Mokuia Obiria & Associates. The case of the applicants is that they were aggrieved by the Judgment of the trial court and they brought this appeal to challenge it. They add that the suit land is ancestral land where they reside. They fault the trial court, contending that it fell into error by failing to find that there existed a customary trust over the land. The appellants contend that the respondent “influenced” the late David Muriithi into selling the suit land to her due to the late Muriithi’s “love of the bottle.” They urge the court to grant the orders sought.
5. The respondent opposed the application through a replying affidavit dated 9/1/2025 and written submissions dated 25/1/2025, filed through M/s John Muthomi & Co Advocates. The case of the respondent is that the purpose of the application is to prevent her from enjoying the fruits of the Judgment of the Lower Court. She contends that the motion is full of malice and falsehoods, adding that the appellants have approached the Court with unclean hands and are guilty of non-disclosure of material facts.
6. On the aspect of unclean hands, the respondent contends that, while aware that:
  - (i) the late David Muriithi had sold and transferred the suit land to the respondent,
  - (ii) there was a judgment and a subsisting eviction order in Meru CMC Civil Case No. 162 of 2013 authorising eviction of the late David Muriithi and his family from the suit land;
  - (iii) their suit [the appellants’ suit], Meru MC ELC 253 of 2018 was pending determination in the Lower Court, the appellants buried the late David Muriithi on the suit land in late July, 2024.
7. On non-disclosure of material facts, the respondent contends that the appellants have concealed the fact that there subsists an eviction order against the late David Muriithi and his family, issued in Meru CMC Civil Case No. 162 of 2013, adding that the appellants applied to set aside the said eviction order but their application was rejected and they have never appealed against the rejection order. She contends that the appellants have concealed the fact that they have an alternative piece of land, to wit, Nyaki/Thuura/1982, registered in the name of the late David Muriithi [husband to the 1st appellant and father to the 2nd and 3rd appellants]. She adds that pursuant to the sale agreement relating to Nyaki/Kithoka/3996, she purchased parcel number Nyaki/Thuura/1982 land for David Muriithi and built a house for him on the land.
8. The respondent further contends that the application does not meet the criteria in Order 42 rule 6(2) of the *Civil Procedure Rules*, adding that:
  - (i) substantial loss has not been demonstrated;
  - (ii) no security has been offered; and
  - (iii) the delay of 71 days has not been explained. She urges the court to dismiss the application.
9. The court has considered the application, the response to the application, and the parties’ respective submissions. The two questions that fall for determination in the application are:
  - (i) Whether the criteria for grant of an order of stay of execution by this court has been met; and



- (ii) Whether the criteria for grant of an injunction by this court when exercising jurisdiction as a first appellate court has been satisfied. I will be brief in my analysis. I will make one observation before I analyse and dispose the two issues.
10. It is clear from the materials presented to the court that the late David Muriithi was the 1st defendant in the trial court. He is the deceased husband of the 1st appellant. He is the deceased father to the 2nd and 3rd appellants. Put differently, the three appellants are part of the family of the late David Muriithi. Indeed, the 1st appellant deposed as follows in paragraphs 3 and 9 of the supporting affidavit:
- “ 3. That the 1st defendant [the late David Muriithi] in the trial court was my husband and the father to the 2nd and 3rd appellants; he unfortunately passed on during the pendency of the proceedings.
9. That when the 1st defendant passed on, we had his remains interred on the suit land.”
11. For reasons that only the appellants know, they have left the estate of the late David Muriithi out of this appeal. The late David Muriithi was the registered proprietor of the suit land and he is the one who sold it and transferred it to the respondent. He is the one who received purchase price from the respondent. He is the alleged trustee. I do not know how the appellants expect this court to dispose the key issue (s) in this appeal in the absence of the estate of the late David Muriithi. The court will expect the appellants to address it on this omission. I will now turn to the identified issues in the application
12. Does the application satisfy the criteria for granting an order of stay of execution by this court pending the disposal of an appeal before it? The principles that guide the jurisdiction of a first appellate court to grant an order of stay of execution are spelt out in Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows-;
- “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 such decree or order as may ultimately be binding on him has been given by the applicant.”
13. On substantial loss, the appellants contended that the suit land is ancestral land on which they have their home. On her part, the respondent faulted the appellants for concealing the fact that they have a home on parcel number Nyaki/Thuura/1932, adding that the said land and the house thereon were proceeds of the purchase price that she paid to the late David Muriithi. The respondent’s averments were not controverted by the appellants.
14. On timeous filing of the application, the court notes that the impugned Judgment was rendered on 20/8/2024. The appellants brought their appeal on 19/9/2024. The present application was brought on 29/10/2024, a period of 69 days. No attempt has been made to explain the delay of 69 days.
15. On security, no attempt has been made to address the mandatory requirement for security. The appellants were decreed to vacate the suit land. If they want to continue occupying the suit land while they prosecute their appeal, they are expected to present to the court reasonable proposals on what they are offering as security during the period of their continued stay on the land. They have said nothing on the requirements for security.



16. It is clear from the above brief analysis that the applicants/appellants did not bother to address the requirements of Order 42 rule 6(2) of the *Civil Procedure Rules*. In the circumstances, this court has no proper basis upon which to grant an order of stay of execution.
17. That is not all. Evidence has been presented indicating that there subsists an order issued in Meru CMC Civil Case No. 162 of 2013 authorising eviction of the appellants. The appellants elected not to challenge the order. Clearly, by concealing the above material fact, the appellants want to create confusion and expose the judicial system to disrepute.
18. For the above reasons, the finding of the court on the first issue is that the application dated 29/10/2024 does not meet the criteria for grant of an interlocutory injunction in a pending appeal.
19. Does the application meet the criteria for grant of an injunction in an appeal before this court? It is important to observe from the onset that, although the applicants did not cite Order 42 rule 6(6) of the *Civil Procedure Rules*, it is clear from the plea for inhibition that they invited the court to exercise the jurisdiction granted under the above provisions. Order 42 rule 6(6) 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.”
20. Over the years, Kenya’s superior courts have developed principles that guide the exercise of the above jurisdiction (see
  - (i) *Madhubaper International Limited Vs Kerr* [1985] KLR840;
  - (ii) *Venture Capital & Credit Limited Vs Consolidated Bank of Kenya Ltd*; Civil Application No. 349 of 2003 (174 of 2003 UR); and
  - (iii) *Butt V Rent Restriction Tribunal* (1982) KLR 417).
21. Suffice it to state that, the jurisdiction of a first appellate court to grant an interlocutory injunction under Order 42 Rule 6(6) of the *Civil Procedure Rules* is a discretionary and equitable one. Secondly, the discretion will not be exercised in favour of an applicant whose appeal is frivolous; the applicant must demonstrate that a reasonable argument can be put forward in support of his appeal. Thirdly, the discretion should be refused where it would inflict greater hardship than it would prevent. Fourthly, the applicant must show that refusal to grant the injunction would render his appeal nugatory. Fifth, the court is to be guided by the principles in *Giella Vs Cassman Brown & Company Ltd* [1973] EA 358. Lastly, whenever disposing a plea for an interlocutory injunction, the court does not make definitive or conclusive pronouncements on the key issues in the dispute.
22. The suit land was at all material times registered in the name of the late David Muriithi. He sold and transferred the land to the respondent for valuable consideration. The respondent is currently the registered proprietor. The appellants sued the late David Muriithi as 1st defendant in the trial court. When he died during pendency of the suit, they buried him on the suit land while aware that the respondent was the registered proprietor of the land and their claim was pending determination. They excluded the estate of David Muriithi from this appeal yet the estate is the one that is supposed to respond to the key questions in this appeal. In the circumstances, I doubt that the appellants can be said to have demonstrated a prima facie case with the probability of success.
23. On irreparable damage, the respondent’s evidence to the effect that the proceeds of the sale were used by David Muriithi to buy land and build a home for his family [the appellants] has not been controverted.



The appellants' contention that the suit land is their only home has been impeached to the above extent. It has also been demonstrated that they are on the land in contempt of a court order which they have elected to ignore. In the circumstances, I do not think they have satisfied the second limb of *Giella v Casman Brown*.

24. For the above reasons, I do not think the applicants have satisfied the criteria for grant of an interlocutory injunction by this court when exercising jurisdiction as a first appellate court.
25. In the end, the application dated 29/10/2024 lacks merit and is rejected and dismissed. In tandem with the requirements of Section 27 of the *Civil Procedure Act*, the applicants shall bear costs of the application.

**DATED SIGNED AND DELIVERED THIS 20TH DAY OF FEBRUARY, 2025**

**B M EBOSO [MR]**

**JUDGE**

In the Presence of

Mr. John Muthomi for the Respondent

Court Assistant - Doris

