



**Mwagambo v Haro & another (Environment & Land Case  
1 of 2024) [2024] KEELC 5676 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 1 OF 2024  
FM NJOROGE, J  
JULY 31, 2024**

**BETWEEN**

**NELSON GAMBO MWAGAMBO ..... APPELLANT**

**AND**

**CHILANGO KARISA HARO ..... 1<sup>ST</sup> RESPONDENT**

**KINGI HARO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the whole of the Judgment and order of  
the Senior Principal Magistrate at Kilifi (Hon J.M. Kituku) SPM  
delivered on 19th of December 2023 in Kilifi ELC No. E034 of 2022)*

**RULING**

1. This Ruling is in respect of the Notice of Motion Application dated 11<sup>th</sup> January, 2024 by the Counsel for the Applicant brought under Article 139 of the Constitution of Kenya 2010, Section 1A, 1B Rule 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6(1), Order 22 Rule 29 Order 51 Rule 1 Civil Procedure Rules which sought the following orders:
  1. Spent
  2. That pending interpartes hearing of this application, this Honourable Court be pleased to order stay of execution of the Order of Hon J.M Kituku SPM delivered on the 19<sup>th</sup> December, 2023 in Kilifi ELC No E034 of 2022 and in particular the imminent and pending burial of the remains of Fatuma Karisa Haro on the Appellant's /Applicant's property on Plot Number Tezo/Roka Settlement Scheme/111 and all the consequential orders.
  3. That this Honourable Court be pleased to order stay of execution the Judgment delivered on the 19<sup>th</sup> of December 2023 in Kilifi Elc No E034 of 2022 and in particular the imminent and



pending burial of the remains of Fatuma Karisa Haro on the Appellant's/Applicant property on Plot Number Tezo/Roka Settlement Scheme/III.

4. That cost of this application be provided for.
2. The application is premised on a long list of grounds at its foot. I will set them out verbatim as hereunder:
1. That the Appellant/Applicant filed a suit in Kilifi ELC Court vide PMCC ELC No E034 of 2022 for orders of injunction to restrain the defendants/respondents therein from burying the remains of the late Fatuma Karisa Haro.
  2. That the Honourable Court after having witnesses and the parties submissions on 19<sup>th</sup> January 2023 delivered judgment where the court found and held that neither party is entitled to the parcel of land but granted an order of permanent injunction barring the appellate from ever dealing with the property while allowing the respondents to bury the remains of Fatuma Karisa Haro on the suit land.
  3. That the appellants were claiming ownership of the land by virtue of the fact that their father settled on the land before he welcomed the respondents father to till but not to grow permanent trees and truly to his word, conditions and understanding the Oldman maintained that condition until his demise and left the deceased Fatuma Karisa Haro.
  4. That the appellant went to court after realizing that the respondents were intending to bury the remains of their late mother on the appellant's land despite a consistent history that they are not allowed to burry on the appellants land.
  5. That the Honourable Court also slammed the appellant with huge costs without laing any basis for such drastic orders yet the appellants had gone to court to protect their rights and even after court found that they cannot declare the respondent's beneficial owners since adjudication had not been completed nor has a title deed been acquired by either party.
  6. That the bundle of documents seeking to be allocated the land only goes to show that there was a protracted unresolved dispute and to condemn the appellant with such costs is open bias on the part of the learned magistrate.
  7. That the respondents/applicants are the bonafide owners of the land having been born, raised, utilized the land even before the appellant's father obtained title in 1978.
  8. That, the basis of such pronouncements, burial preparatins are underway and the remains of the late Fatuma Karisa Haro shall be leaving the mortuary for burial anytime on the suit land plot number III Tezo Roka Settlement Scheme at the Applicant's prejudice unless the orders of stay are issued.
  9. That unless the Honourable Court intervenes by issuing the orders sought herein, the appellant risks suffering irreparably since the respondents shall bury the remains aforesaid this weekend.
  10. That the applicant has filed a Memorandum of Appeal which is not only prima facie arguable case, but has chances of success in particular the applicant has established in its memorandum of Appeal that:
    - i. The Judgment of the Honourable Court self-contradictory and plainly wrong both in law and in principle.



- ii. The Learned Magistrate erred in law and fact by leaving the issue of ownership hollow despite overwhelming evidence to the effect that the appellant's father owned the land and the respondents were invited to live there conditionally.
11. That unless this application is heard and orders granted execution shall commence and the applicant shall suffer irreparable loss and damage and the appeal rendered nugatory.
12. That the slap on costs and payment of mortuary charges on the appellant was not only unfair but against the evidence rendered since there is evidence to the fact the remains of the deceased husband had been interred elsewhere and therefore there were no compelling reasons to leave the body at the morgue all the while during the pendency of the suit.
3. The respondents filed a replying affidavit sworn on 26/1/2024 and the applicant filed a further affidavit on 15/2/2024. The parties also filed submissions. the application came up before me on 12/1/2024 when I issued interim orders.
4. I have considered the application the response and the written submissions. above all I have considered the grounds of appeal in the memorandum of appeal and I find that the appeal is arguable. In the interests of expediting that appeal I find that there is need to allow the application and consider the next step. This is the position this court took upon perusing the present notice of motion and on 9/5/2024 gave a date for a ruling but ordered that in the meanwhile the appellant do file the record of appeal and the lower court file be brought to this court soonest to expedite the giving of directions regarding the hearing.
5. I therefore allow the application dated 11/1/2023 in terms of prayer no 3. Consequently, the execution of the judgment in Kilifi PMC ELC No E034 is hereby stayed pending the hearing and determination of the appeal. the orders I made on 9/5/2024 shall be complied with by the Deputy Registrar of this court and the appellant respectively. This matter shall be mentioned on 23/10/2024 for confirmation of compliance and issuance of directions.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

