



**Wanjue v Githitu & another (Environment and Land Appeal  
E204 of 2024) [2025] KEELC 733 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E204 OF 2024  
CG MBOGO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JOSEPH KARIAH WANJUE ..... APPELLANT**

**AND**

**ALEX KAGAI GITHITU ..... 1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application filed by the Appellant dated 7<sup>th</sup> December, 2024 and pursuant to Orders 40, 42, 50 and 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 75 of the Civil Procedure Act and Articles 50(1) and 159 of the Constitution of Kenya 2010. The Appellant seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Respondent by himself, his servants, agents, clients, employees or any developers from in any way dealing or interfering with the Plaintiff's rights in the property by trespassing, disposing off, wasting, damaging, alienating, dealing, selling, transferring, constructing or in any other way encumbering the parcel of land known as Parcel No. 136/11096, Embakasi Ranching pending hearing and determination of this Appeal.
  - d. Any other orders as this honourable court may deem fit.
2. This application is predicated on the grounds on its face and the supporting affidavit sworn by the Appellant, Joseph Kariah Wanjue. The Appellant asserts that he filed this appeal being dissatisfied with the judgement and/or decree delivered on 27<sup>th</sup> November, 2024 dismissing his suit by Hon. Lucy



- Njora. He states that the main effect of the dismissal was that the temporary injunction in force during trial in the lower court lapsed. He is therefore apprehensive that without the orders sought, the 1<sup>st</sup> Respondent will encumbrance the said property as it had already encroached, trespassed and erected a structure (toilet) onto the suit property, without right permission or any court orders.
3. Joseph Kariah Wanjue deponed that he is a bona fide purchaser for value of Plot No. 136/11096 Embakasi Ranching with effect from 18<sup>th</sup> April, 1988, having purchased the plot (Share Certificate No. 11926) at a total amount of KShs. 24,000/-. He stated that he and his late wife, Anna Muteti purchased shares from the 2<sup>nd</sup> Respondent in 1988 and were issued with share certificates for the said parcel under Embakasi Ranching Company Limited, which were signed by the 2<sup>nd</sup> Respondent's Director and Secretaries/ registrars. He averred that by virtue of the said share certificate, on or about 8<sup>th</sup> February, 1996, the 2<sup>nd</sup> Respondent allocated him Parcel Ni. 136/11096.
  4. He indicates that the 2<sup>nd</sup> Respondent then commenced the process of issuing shareholders and plot owners for their respective plots, and on 7<sup>th</sup> November, 2018, there was a site visit after payment of Kshs. 20,000 by himself. The plots were confirmed on the same day by the 2<sup>nd</sup> Respondent's land Surveyor one S.K Maina, and it was entered into the register as Plot number P3287. This was later confirmed by the 2<sup>nd</sup> Respondent's Vice Chair on 13<sup>th</sup> August, 2019 by signing and stamping.
  5. However, in 2021 when he submitted his documents for issuance of title deed, a process which had stalled for several years, he was shocked to discover that the same plot was being claimed by the 1<sup>st</sup> Respondent herein. He then realized in early 2021 that the 1<sup>st</sup> Respondent had erected a structure on it. He sought redress in the lower court suit though Milimani MCELC No. 1 of 2022 Joseph Wanjue Kariah v Alex Kagai Githitu & Embakasi Ranching Company.
  6. The Appellant asserts that the Respondents are interfering or have already interfered with his rights in the suit property and the 2<sup>nd</sup> Respondent has enabled the 1<sup>st</sup> Respondent to claim ownership of the said plot despite evidence to the contrary. They contend that the suit property is therefore at risk of being encumbered or alienated by the 1<sup>st</sup> Respondent to the Appellant's detriment, which would render the current appeal nugatory.
  7. It is the Appellant's position that neither Respondents have any interest in the suit premises, reversionary interest or otherwise. They contend that they do not stand to suffer any irreparable loss or damages if the orders sought herein are granted.
  8. The 1<sup>st</sup> Respondent opposed this application through a replying affidavit dated 18<sup>th</sup> December, 2024. Alex Kagai Githitu asserts that a suit was filed at the lower suit through an amended plaint dated 27<sup>th</sup> April, 2022; that the Appellant filed an application under Certificate of Urgency on 4<sup>th</sup> April, 2022 seeking the same orders as are sought in this application; that the Appellant obtained orders from the said application restraining the 1<sup>st</sup> Respondent from dealing with the suit property in any way pending hearing of the main suit; that the said orders remained in force for two years until the hearing of the main suit and when the amended plaint was dismissed, the temporary orders were similarly dismissed.
  9. The 1<sup>st</sup> Respondent urged that this application is barred in res judicata and is an outright abuse of court process. They argued that the application is fatally defective, misconceived, bad in law, a waste of court time and resources and should therefore be dismissed with costs. They further averred that the Appellant seeks to deny him the right to enjoy the fruits of the judgment by seeking the orders again.
  10. Alex Kagai Githitu deponed that the Appellant has failed to attach any evidence to show or demonstrate that he is the bona fide owner of the suit property and has relied on the very same evidence



tabled before the lower court. They contend that this application is a foul attempt to have a second bite at the cake.

11. The 1<sup>st</sup> Respondent contended that lapse of time for an order does not necessarily mean that the orders are null and void and such orders may be extended upon time lapsing if they are legitimate. He asserts that on the other hand, dismissed orders are orders that are null and void and no longer have legal basis or grounding, and can therefore not be extended.
12. The 1<sup>st</sup> Respondent averred that he is the legal owners of the property known a Nairobi/Block 136/11096, having purchased the same from Peter Mathenge Wamurangi, who was a shareholder of Embakasi Ranching Company who held a non-member certificate of plot ownership number NMC 006362. He asserted that at the time of purchase, the plot was unregistered since it had been excised from LR No. 10904/2, which was registered in the name of the 2<sup>nd</sup> Respondent. He therefore conducted due diligence by visiting the 2<sup>nd</sup> Respondent's offices, inspecting the books and registering the transfer with them.
13. He stated that he made payment to the 2<sup>nd</sup> Respondent via cheque to effect transfer, and on 13<sup>th</sup> April, 2010, took possession of the property, planted trees and eventually put a toilet therein. He further stated that in 2017, upon issuance of a presidential directive to the Ministry of Lands and Physical Planning and to the 2<sup>nd</sup> Respondent, that all land owners of Embakasi Ranching be issued their documents of title, the 2<sup>nd</sup> Respondent with its surveyor came to his land and he was issued parcel number Nairobi/ Block 136/11096. He also paid Kshs. 20,000/- to the 2<sup>nd</sup> Defendant for a site visit so that they may clear him for issuance of certificate of lease, and he was thereafter issues a certificate of clearance.
14. The 1<sup>st</sup> Defendant deponed that since he bought the property in 2005, he has enjoyed quiet possession over the land and he has been in continuous and uninterrupted use of the land until 2021, when he was notified that somebody was laying claim over his land. He stated that the toilet has been on the property for 11 years as it was constructed in 2010.
15. The 1<sup>st</sup> Defendant averred that the Appellant is not the bonafide purchaser of the property as prior to the institution of the suit at the lower court, the 1<sup>st</sup> Defendant and the Plaintiff were both summoned by the Dispute Resolution Committee where it was resolved that the 1<sup>st</sup> Defendant was the true owner of the land. This was further confirmed through a letter by the 2<sup>nd</sup> Respondent dated 3<sup>rd</sup> March, 2022.
16. He contended that the suit property is not at risk of being dissipated, sold or transferred and therefore there is no risk if the status quo is maintained until the Appeal is heard and determined. He argued that issuance of the orders sought by the Appellant would greatly prejudice him as he had previously been kept away from his property throughout the duration of the suit. He urged that this would be tantamount to double condemnation and being denied the fruits of the judgement as issued.
17. This application was canvassed through written submissions.
18. Counsel for the Appellant filed written submissions dated 23<sup>rd</sup> January 2025. Counsel set out the orders sought in the application and the facts of this case. They identified two issues for determination, which are whether the application satisfies the requirements for grant of temporary injunction and who should bear the costs of the application.
19. On the first issue, Counsel submitted that grant of interim injunction is prescribed on the three conditions elaborated in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. They submit that the Appellant has proved a prima facie case with a probability of success, as he has demonstrated that he is the lawful bona fide owner of the suit property, and that failure by the 2<sup>nd</sup> Respondent's



- officers to intervene or restrain the 1<sup>st</sup> Respondent from trespassing and laying claim on his property is part of the Respondents' scheme to defraud the Appellant of the suit property. Counsel further relied on the definition of a prima facie case as set out in *Mrao Ltd v First American Bank of Kenya & 2 others* [2003] eKLR Civil Appeal No. 39 of 2002 as well as Order 40 Rule 1 of the Civil Procedure Rules.
20. Appellant's Counsel submitted that the Appellant shall suffer irreparable harm if the order is not granted, as the suit property is owned by the Appellant and his late wife, and it has sentimental value to the Appellant, which surpasses any monetary value. Counsel submitted that a party should never be allowed to take an advantageous position over another because he is able to pay for it. They relied on the Court of Appeal case of *Thomas Smith Aikman, Alan Malloy & Others v Muchoki & Others* [1982] eKLR where this principle was highlighted.
  21. Counsel further submitted that the balance of convenience tilts in favour of the Appellant as he has adduced evidence of good title to the suit property and that the 1<sup>st</sup> Respondent has unlawfully trespassed on the Appellant's property. They relied on the Court of Appeal's determination in *Alice Awino Okello v Trust Bank Ltd LLR No. 625 (UK)* as quoted on *Kisimani Holding Ltd & Another v Fidelity Bank Ltd* [2013] eKLR.
  22. As to the issue of costs, Counsel submitted that as set out in Section 27 of the *Civil Procedure Act*, costs follow the event. They also relied on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR where it was held that in determining costs, the court is entitled to look into the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the proceedings.
  23. They submitted that the Appellant is the successful party herein and has acted in good faith and in thirst for justice by filing this application. They thereby sought that the Appellant be awarded the costs of this application as prayed.
  24. In their submissions, Counsel pleaded that if the orders prayed are not granted, then this court should grant orders of stay of proceedings in the trial court. They relied on the cases of *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR and *Trade Winds Express Limited & Another v Eurocraft Agencies Limited* [2010] eKLR.
  25. Counsel for the 1<sup>st</sup> Respondent filed written submissions dated 7<sup>th</sup> February, 2025. Counsel submitted that the issue for the determination of this court is whether the Appellant's application has attained the legal threshold of temporary injunction pending appeal.
  26. On the first issue, Counsel submitted that the difference between seeking a temporary injunction and a temporary injunction pending appeal is established. Counsel referred the court to the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR where the court held that an order for injunction pending appeal is a discretionary matter which discretion is guided by the principles that it will be exercised against an applicant whose appeal is frivolous; that the discretion should be refused where it would inflict greater hardship than it would avoid; that the applicant must show that to refuse the injunction would render his appeal nugatory, and that the court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358.
  27. Respondent's Counsel contended that the Appeal is frivolous and lacks grounds. This is as the Appellant had an opportunity to present a suit before the trial court, in which suit he had all the advantage as it was a formal proof hearing, but he failed to table any evidence for the court to rule in his favor and failed to satisfy the truth threshold. Counsel relied on the case of *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR.



28. It was Counsel's submission that with the dismissal of the amended plaint, all orders theretofore enjoyed within the suit were nullified, and did not lapse, as claimed by the Applicant. This, they assert, mean that they are null and void and no longer have legal basis or grounding, and cannot be extended. They further assert that this application is bad in law as it contravenes the principle of res judicata as set out in Section 7 of the Civil Procedure Act and as defined in Black's Law 10<sup>th</sup> Edition.
29. Counsel also urged this court to refuse to exercise its discretion as it would inflict greater hardship upon it than it would avoid. They argued that the ruling of the lower court in 2022 meant that the 1<sup>st</sup> Respondent could no longer proceed with the intended projects on the property and he has suffered losses as the building materials meant for the building of his matrimonial home on the property such as sand, have been washed away and stolen. He argued that even if not to commence construction, the Respondent should be allowed access to the suit property to protect it and to prevent destruction and dissipation of the construction materials upon it. They further submitted that refusing to grant the injunctive orders would not render the appeal nugatory.
30. With respect to the principles in *Giella v Cassman Brown & Company Limited Ltd* (1973) EA 35, Counsel submitted that this application falls short of a prima facie case and that any injury which the Appellant may suffer can be compensated by damages and is not irreparable. They alternatively submit that status quo orders can be issued and maintained throughout the course of the appeal. Lastly, they contend that the balance of convenience tilts in their favor as the suit before the trial court was dismissed on its merits and that as at the time of filing this appeal, the Ministry of Lands and Physical Planning had already prepared a title in the 1<sup>st</sup> Respondent's favor.
31. Counsel relied on the case of *Pius Kipchirchir Kogo v Frank Kimei Tenai* [2018] eKLR and *Madhupaper International Ltd v Kedd* [1985] eKLR.
32. Upon consideration of the pleadings and submissions filed by the parties, the issues for the determination of this court are:
- a. Whether the application is res judicata.
  - b. Whether this court should issue the injunction orders sought pending hearing and determination of this appeal.
33. The principle of res judicata is provided under Section 7 of the Civil Procedure Act, which provides as follows :-
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
34. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR the Supreme Court ably set out the five essential elements to be satisfied in a claim of res judicata: -
- “The doctrine will apply only if it is proved that:
- i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.



- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

35. The Respondent has contended that the application for injunction pending appeal is res judicata as a similar application for injunction made before the trial court in 2022 and the injunction orders were issued. However, the injunction orders issued by the trial court were for the purposes of preventing undue injustice pending the determination of the original suit, while the injunction orders sought in this case, are sought pending the determination of the appeal filed before this court. This application can therefore not be said to be res judicata.

36. This position was upheld by the Court of Appeal in *Nyambura v Ndungu t/a Kingpin Auctioneers & another* [2023] KEHC 17288 (KLR) where it held that the plea of res judicata is not applicable where the cause of action and issue, though determined by a competent court, is the subject of appeal.

37. There is then the matter whether this court should issue orders of injunction pending the appeal before this court. This application has been made pursuant to 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.

38. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the court gave the following principles as governing grant of temporary injunction pending appeal;

- a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- b. The discretion should be refused where it would inflict great hardship than it would avoid.
- c. The applicant must show that to refuse the injunction would render the appeal nugatory.
- d. The court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358.

39. In the case of *Giella v Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”



40. A prima facie case was defined in the case of Mrao Limited v First American Bank of Kenya & 2 others [2003] eKLR as follows:-

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

41. It is noteworthy that the Appellant failed to annex a copy of the impugned judgement by the trial court and is furthermore, yet to file a record of appeal in this matter. This court is thereby frustrated in adjudicating this application as it cannot know the basis of the judgement and cannot appraise itself on the contents of the judgement itself.

42. All the same, this court is guided by Sections 1A and 1B of the *Civil Procedure Act* to ensure the ends of justice are met in a manner that is just, expeditious, proportionate and affordable. Taking into consideration the interests of the parties herein, and the willingness of the Respondent, it would be prudent to issue orders of status quo, pending the hearing and determination of the appeal.

43. The court in TSS Spinning & Weaving; Company Ltd vs Nic Bank Limited & another [2020] eKLR, highlighted the purpose of a status quo order as follows:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

44. Further, in Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & another [2020] eKLR, it was held as follows:

“...By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

45. This court hereby orders that status quo be maintained pending hearing and determination of the appeal. Costs to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HON. MBOGO C.G.**

**JUDGE**

**20/02/2025**

In the presence of:

Mr. B. Agunga – court assistant

Mr. Kaviah for the Appellant/Applicant

No appearance for the Respondent

