



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugo & another v Riverside Court Welfare Group & another (Environment & Planning Appeal E001 of 2023) [2024] KEELC 6127 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6127 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & PLANNING APPEAL E001 OF 2023**

**JG KEMEI, J**

**SEPTEMBER 24, 2024**

**BETWEEN**

**DANIEL WAWERU MUGO ..... 1<sup>ST</sup> APPELLANT**

**EDMOND JAMLEK KABAYA MUINAMIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RIVERSIDE COURT WELFARE GROUP ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellants/Applicants' filed the instant Notice of Motion Application dated 14/7/2023 expressed under Sections 1A, 1B, 3, 3A, 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 (2), Order 45 and Order 50 Rules 1,2,3,4,5,6 & 7 and Order 51 rule 1 of the Civil Procedure Rules craving Orders That; -
  - a. Spent.
  - b. This Hon Court be pleased to issue a Stay of execution, implementation and/or operation of the Determination issued on 16<sup>th</sup> June 2023 pending the lodging, hearing and determination of the Appeal against the said Determination dated 16/6/2023.
  - c. A temporary injunction be issued by this Hon Court to restrain the 2<sup>nd</sup> Respondent herein, its servants, agents, employees and/or any other persons acting pursuant to its authority, from enforcing the Enforcement Notice issued on 18<sup>th</sup> May 2023 pending the lodging, hearing and determination of this Application interpartes.
2. The Application is based on grounds thereat which are restated in the Supporting Affidavit of Daniel Waweru Mugo, the 1<sup>st</sup> Applicant. He deposed that he is aggrieved with the County Government of Kiambu Physical & Land Use Planning Liaison Committee (hereinafter the Liaison Committee –



LC) determination dated 16/6/2023 (annexed as DWM1-) which directed the Applicants to comply with the Enforcement Notice No TKA-EN 102 issued on 18/5/2023 marked as DWM-2. That the Enforcement Notice entails bringing down the development already constructed despite the Applicants having made an Application for regularization of the development in accordance with the *Physical and Land Use Planning Act* (PLUPA) with the blessing of the 2<sup>nd</sup> Respondent. Further that the County issued the Applicants with an invoice dated 25/5/2023 annexed as DWM-3 to make payments for the said approval which was duly paid. See copy of receipt (DWM-4) dated 26/5/2023. That contemporaneously the Applicants were also penalized Kshs. 208,510/= for commencing construction without all the requisite approvals. The deponent denied that the developer is not developing multi-dwelling units and annexed the Building Plan as DWM-5.

3. Opposing the Application, Samuel Thuo Kamau, the 1<sup>st</sup> Respondent's Chairman swore his Replying Affidavit on 4/8/2023. He avowed that the parties herein appeared before the Liaison Committee over an illegal development undertaken by the Applicants on Title No Thika Municipality Block 24/267 in which the Applicants were directed to comply with Enforcement Notice issued on 18/5/2023. That prior to the said determination, the 2<sup>nd</sup> Respondent officers visited the site of construction and served the Applicants with a stay order dated 31/3/2023 annexed as STK1. That the Applicants submissions in the Liaison Committee confirm receipt of the said stay order. That notwithstanding, the deponent averred that the Applicants continued with the construction and put up a slab which triggered issuance of subsequent Enforcement Notice dated 18/5/2023. That in their response to the complaint dated 10/5/2023 (STK3) before the Liaison Committee, the Applicants averred that all requisite approvals had been granted as evidenced by the invoice dated 29/5/2023 and thus the deponent swore, that regularization in itself does not constitute approval to continue with construction.
4. In a rejoinder, the Applicants filed a Further Affidavit dated 5/9/2023. Denying the 1<sup>st</sup> Respondent's averments in the Replying Affidavit, the Applicant reiterated his assertions in the Supporting Affidavit and maintained that they cannot be condemned to demolish a structure after its regularization and payment of a fine. That that would amount to double jeopardy on their part.
5. On 12/10/2023 directions were taken to canvas the Application by way of written submissions.
6. The Applicants through the firm of Gachie Mwanza & Co Advocates filed submissions dated 19/1/2024 whereas the firm of Soita Siundu & Co. Advocates filed the 1<sup>st</sup> Respondent's submissions dated 24/1/2024 which I have read and considered.
7. On the issue of granting stay of execution pending appeal, the Applicants urged that if the subject matter herein is demolished, it will create a state of affairs that will irreparably negate the essence of their appeal. That the provisions of Order 42 rule 6(2) of the Civil Procedure Rules operate with the aim of protecting the subject matter from being rendered nugatory. That the Applicants having already paid a hefty fine of Kshs. 250,000/-, and if the intended demolition is not stopped, they will suffer double jeopardy.
8. In rebuttal the 1<sup>st</sup> Respondent posited that the Applicants have not demonstrated any substantial loss as envisioned under Order 42 rule 6(2) of the Civil Procedure Rules. That it is evident from their Supporting Affidavit that the Applicants failed to obtain the requisite approvals before commencing the construction. That such failure to obtain approvals is an offence under Section 57(2) and 72(5) of the PLUPA leading to issuance of the Enforcement Notice. That the Applicants move to regularize the construction was merely meant to sanitize what they had mischievously committed.



9. On the prayer for temporary injunction, the 1<sup>st</sup> Respondent submitted that the Applicants have come to Court with tainted hands and have failed to prove a prima facie case in their favor and any irreparable loss they stand to suffer.
10. The germane issue for determination is whether the Application is merited addressed as follows.

### **Stay of execution**

11. The legal provisions for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the Civil Procedure Rules that:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.”

12. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of Butt Vs. Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an Application for stay of execution and held that: -

- “1. The power of the Court to grant or refusal an Application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or refusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion. (sic) (trial Court Judgement).
3. A Judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.



4. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon Application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
13. Have the Applicants satisfied the conditions set on Order 42 rule 6 (2) of the Civil Procedure Rules above? The Applicants decry the Liason Committee Ruling which directed them to comply with the Enforcement Notice No TKA-EN 102 issued on 18/5/2023 marked as DWM-2. The effect of the orders of the Committee is for the Interested Party to put in place mechanisms to kickstart the enforcement of the notice issued on 18/5/23.
14. The explanation tendered by the Applicants is that the development by the Interested Party who duly accepted payments and therefore they are being subjected to double jeopardy. In objection, the 1<sup>st</sup> Respondent inter alia avowed that that regularization in itself does not constitute approval to continue with construction.
15. The instant motion was filed just about two days to the lapse of the aforesaid 30 days for. To my mind therefore, the Application was not timeously filed if their grievances was anything to go by.
16. Clearly there are arguments and counterarguments posited by each party and the same can only be resolved by the Court on appeal. So as not to render the appeal nugatory, the Court is inclined to grant the stay.

#### **Temporary injunction pending appeal**

17. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

  - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”
18. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Vs. Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan Courts and more particularly in the case of *Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable



injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

19. Consequently, the Plaintiff ought to, first, establish a prima facie case. In the case of Mrao Ltd Vs. First American Bank of Kenya Ltd (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The Court stated that:

“... In civil cases, it is a case in which, on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

20. Later on the same Court in the case of Moses C. Muhia Njoroge & 2 Others Vs. Jane W. Lesaloi and 5 Others [2014]eKLR, defined prima facie in the following terms;

“A Prima facie case in a civil Application includes but not confined to a genuine and 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.”

21. The Applicants contend that they stand to suffer double jeopardy if demolition is allowed to proceed despite them having paid a fine and regularized the construction.
22. The proviso to Order 40 rule 1 of the Civil Procedure Rules above allows a Court to grant status quo orders aimed at staying and preventing inter alia the wasting, damaging, or alienation of the property as the Court thinks fit until the disposal of the suit or until further orders. In this case and purely in the interest of justice only, I allow the Application.
23. For purposes of clarity allowing the Application does not give the Applicant license to commence construction.
24. The Applicants be and are hereby directed to prosecute their appeal within the next ninety (90) days failing which the orders herein shall automatically lapse.
25. The Applicants to meet the costs of the Application.
26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mbiu HB Gachie for 1<sup>st</sup> and 2<sup>nd</sup> Appellants

Soita for 1<sup>st</sup> Respondent

Ms. Muchiri for 2<sup>nd</sup> Respondent



