



**Gatai v Mwangi (Environment & Land Case E008 of 2024)
[2024] KEELC 6122 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE E008 OF 2024
YM ANGIMA, J
SEPTEMBER 19, 2024**

BETWEEN

HENRY MWANGI GATAI APPELLANT

AND

ERASTUS MATHIA MWANGI RESPONDENT

RULING

A. Introduction

1. By a judgment dated 05.03.2024 in Engineer SPMC ELC No E001 of 2023 the trial court dismissed the Appellant's suit against the Respondent seeking, inter alia, recovery of Nyandarua/Mumui/198 (the suit property) and nullification of the purported gift thereof to the Respondent.
2. Being aggrieved by the said judgment the Appellant filed the instant appeal against it. During the pendency thereof, the Appellant filed an application seeking stay of execution of the decree and an interim injunction against the Respondent pending the hearing and determination of the appeal.

B. Appellant's applications

3. Vide a notice of motion dated 03.05.2024 brought under Sections 1A, 3A & 3B of the *Civil Procedure Act* (Cap.21), Order 22, Order 42 rule 6, Order 51 rule 1 of the *Civil Procedure Rules* (the Rules) and any other enabling provisions of the law the Appellant sought a stay of execution of the decree of the trial court pending the hearing and determination of the appeal. It was supported by an affidavit sworn by the Appellant on 03.05.2024. The Appellant contended that he was still in possession of the suit property and that he stood to suffer substantial loss if the stay sought was not granted. He further stated that he stood the risk of being rendered homeless and destitute if the Respondent executed the said decree as he had some assorted crops growing thereon.



4. The Appellant also filed a second notice of motion dated 03.06.2024 brought under Order 40 of the Rules, articles 40 and 159 of the Constitution of Kenya as well as all other enabling provisions of the law seeking a temporary injunction restraining the Respondent from entering, cultivating, demolishing structures, surveying, or undertaking any activities on the suit property pending the hearing and determination of the appeal.
5. The application was supported by an affidavit sworn by the Appellant on a date which is not indicated in the affidavit. The Appellant relied essentially upon the same grounds as those in his application for stay. He further stated that the Respondent had since entered the suit property, destroyed his fence and other structures thereon and proceeded to plough the land. It was the Appellant's contention that unless the injunction sought was granted he stood to suffer substantial loss and that the appeal might be rendered nugatory. The Appellant also filed a further affidavit dated 11.06.2024 in support of his applications which mainly raised arguments going into the merits of the appeal.

C. Respondent's Response

6. The Respondent filed a replying affidavit sworn on 14.05.2024 in opposition to the Appellant's application for stay of execution pending appeal. He stated that the Appellant had failed to demonstrate any of the principles for the grant of a stay of execution of a decree under Order 42 rule 6(2) of the Rules. He pleaded that the Appellant had conceded that he had himself caused sub-division of his larger Parcel 78 and caused the suit property to be transferred to him as a gift inter vivos. It was pleaded that upon such transfer the Appellant ceased to have any legal interest in the suit property hence he could not possibly suffer substantial loss in the absence of a stay. The rest of the Respondent's responses were geared towards prosecution of the main appeal hence the court ought not to consider the same at this interim stage.
7. The Respondent also filed a supplementary affidavit sworn on 14.06.2024 in response to the Appellant's further affidavit dated 11.06.2024. The affidavit primarily raised arguments touching on the merits of the appeal.

D. Directions on Submissions

8. When the matter came up for directions, it was directed that both applications shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed written submissions dated 12.06.2024 whereas the Respondent's submissions were dated 18.06.2024.

E. Issues for Determination

9. The court has considered the Appellant's said applications, the Respondent's response thereto as well as the material on record. The court is of the view that the following key issues arise for determination herein:
 - a. Whether the Appellant has made out a case for the grant of a stay of execution pending appeal.
 - b. Whether the Appellant has made out a case for the grant of an interim injunction pending appeal.
 - c. Who shall bear costs of the applications.



F. Analysis and Determination

a. Whether the Appellant has made out a case for the grant of a stay of execution pending appeal

10. The court has considered the material and submissions on this issue. Whereas the Appellant submitted that he had satisfied all the requirements for the grant of a stay pending appeal, the Respondent submitted otherwise. It was the Appellant's contention that since he was in possession of the suit property on which he cultivated crops and reared livestock then he stood to suffer substantial loss in the absence of a stay. He further contended that his pending appeal stood the risk of being rendered nugatory in the absence of a stay.
11. It is evident from the material on record that by its judgment dated 05.03.2024 the trial court merely dismissed the Appellant's suit with costs. It did not make any order capable of being executed in the normal manner save, perhaps, the payment of costs. The court is thus of the opinion that the dismissal order of the trial court was a negative order which is incapable of being stayed in the circumstances. In the case of *Western College of Arts and Applied Sciences v Oranga & 3 others* [1976] eKLR it was held, inter alia, that:

“But what is there to be executed under the judgement, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of the fund. In the instant case the High Court has not ordered any parties to do anything or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or restrain by an injunction...”

b. Whether the Appellant has made out a case for the grant of an interim injunction pending appeal

12. The court has also considered the material and submissions on record on this issue. The material on record shows that the Appellant did not make any submissions on the prayer for an interim injunction. However, the Respondent submitted that the Appellant had failed to satisfy the principles for the grant of an interim injunction. In particular, it was submitted that the Appellant had failed to demonstrate a *prima facie* case with a probability of success as set out in the case of *Mrao Limited v First American Bank of Kenya Ltd & 2 others* [2003] eKLR. It was further submitted that the Appellant had failed to demonstrate that he stood to suffer irreparable loss or injury which could not be adequately compensated by an award of damages.
13. It would appear from the material on record that the Appellant had voluntarily subdivided his Parcel 78 and transferred the suit property (measuring about 2 acres) to the Respondent so as to secure his future. The Respondent was not supposed to sell or dispose of the suit property since that would have frustrated the purpose for which it was gifted to him. It would appear that the Appellant decided to change his mind long after the transfer upon becoming suspicious that the Respondent intended to sell the suit property. The Appellant also raised additional grounds for seeking to reverse or nullify the transfer which shall be the subject of the main appeal.
14. It is thus clear that by the time the Appellant filed the recovery suit before the trial court, he was no longer the registered proprietor of the suit property. That position obtains to date. The court is of the view that since the Appellant is not the registered owner of the suit property, he has not demonstrated a *prima facie* case within the meaning of the first principle for the grant of a temporary injunction as set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA.358.



15. The court agrees with the Respondent that there is no evidence on record to demonstrate that in the absence of an injunction, the Appellant stands to suffer irreparable injury which cannot be adequately compensated by an award of damages. The nature of irreparable injury was explained in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

16. The court is unable to find any evidence on record to demonstrate that the suit property is incapable of monetary quantification or that damages, of whatever amount, shall not provide adequate compensation to the Appellant bearing in mind that at all material times he had agreed to donate the suit property to the Respondent on condition that the latter shall not sell the same. As a result, the court finds and holds that the Appellant has failed to satisfy the requirements for the grant of a temporary injunction.

c. Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Respondent shall be awarded costs of the application.

G. Conclusion and Disposal Order

18. The upshot of the foregoing is that the court finds no merit in the Appellant’s applications for both stay of execution pending appeal and an interim injunction pending appeal. As a result, the court makes the following orders for disposal thereof:

- a. The Appellant’s notice of motion dated 03.05.2024 is hereby dismissed.
- b. The Appellant’s notice of motion dated 03.06.2024 is hereby dismissed.
- c. The Respondent is hereby awarded costs of the applications.
- d. The appeal shall be mentioned on 17.10.2024 for directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF SEPTEMBER, 2024.

In the presence of:

Mr. Mugo for Mr. Ndegwa Wahome for the Appellant



Mr. Matagaro for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

