



**Ndiritu v Ndiritu (Environment & Land Case 9 of 2019)
[2024] KEELC 6838 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 9 OF 2019
JO OLOLA, J
OCTOBER 17, 2024**

BETWEEN

SAMUEL MWANGI NDIRITU APPELLANT

AND

MBUTHIA NDIRITU RESPONDENT

RULING

1. By the Notice of Motion dated 2nd October 2023, Samuel Mwangi Ndiritu (the Appellant) urges the court to be pleased to issue an order of temporary injunction restraining the Respondent, his agents and/or servants from disposing and/or transferring LR. No. Othaya/Kihugiru/1861 or in any other manner interfering with the applicant’s possession thereof pending the hearing and determination of the Appeal herein.
2. The application which is supported by an affidavit sworn by the Appellant is premised inter alia, on the grounds that:
 - a). The Applicant is in occupation of the suit property which he claims to be entitled to by virtue of a trust created between himself and the Respondent;
 - b). In a Judgment delivered on 22nd February 2019, the Appellant’s suit seeking orders to compel the Respondent to transfer the suit property to the Appellant’s name was dismissed with costs;
 - c). The Respondent is in the process of selling and transferring the suit property despite the fact that the Appellant has filed the Appeal herein and that the same is pending for hearing and determination;
 - d). Unless the orders sought are granted, the Respondent will proceed to sell the suit property thereby rendering the instant court process nugatory and a mere academic exercise; and



- e). The Appellant stands to suffer irreparable loss through the loss of his home and it is in the interest of justice that the orders sought herein be granted.
3. Mbutia Ndiritu (the Respondent) is opposed to the grant of the orders sought in the application. In his Replying Affidavit sworn on 2nd February 2024, the Respondent avers that after the Judgment was delivered in the Lower Court, the Appellant fraudulently and illegally caused the suit property to be transferred to his name.
 4. The Respondent avers further that after he learnt of the fraud, he reported the matter to the DCI Nyeri and upon completion of the investigations, the Appellant was charged and was found guilty of fraudulently transferring the title to his name in Othaya PM's Criminal Case No. E561 of 2022.
 5. The Respondent asserts that by his said conduct, the Appellant has clearly demonstrated that he can defy and does not respect court orders and he is therefore underserving of the orders sought herein.
 6. The Respondent further avers that the Appeal herein does not raise any triable issues and it would be unfair for the court to issue any form of injunctions while there is a valid judgment delivered by a competent court of law.
 7. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
 8. By his application filed herein, the Appellant prays for an order of injunction to issue restraining the Respondent, his agents and/or servants from disposing, transferring and/or interfering with the parcel of land known as LR. No. Othaya/Kihuguru/1861 pending the hearing and determination of this Appeal.
 9. In respect to an order of injunction pending an Appeal, Order 42 Rule 6 (6) of the Civil Procedure Rules provides as follows:
 - “(6) Notwithstanding anything contained in sub rule (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.”
 10. Under section 79G of the *Civil Procedure Act*, an Appeal from the subordinate court to this court ought to be filed within thirty days from the date of the decree or order appealed from. Upon perusal of the material placed before the court, I was satisfied that the said Section 79G aforesaid had been complied with as the Memorandum of Appeal herein dated 25th February 2019 was lodged only 3 days after the decision appealed from was rendered by the Othaya SRM's Court on 22nd February 2019.
 11. The principles applicable in considering an application for an injunction pending appeal were pronounced by Visram J (as he then was) in *Patricia Njeri & 3 others –vs- National Museum of Kenya [2004] eKLR* as follows:-
 - a. An order of injunction pending appeal is a discretionary one which will be exercised against an Applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict greater 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 set out in *Giella –vs- Cassman Brown Ltd* [1973] EA 358.”
12. In the matter before me, the Appellant had sought for a declaration that LR. No. Othaya/Kihugiru/1861 is registered in the name of the Respondent in trust for the Applicant. As a result, he had sought an order that the Respondent as his trustee be ordered to transfer the suit property into the Appellant’s name and for the Land Registrar to be directed to cancel the Respondent’s name on the title.
13. The Appellant’s claim was dismissed by the Lower Court and being aggrieved by the decision he has preferred the Appeal herein. In support of his application for injunction, the Appellant avers as follows at Paragraphs 5, 6 and 8 of the affidavit filed in support of his application.
- “ 5. That the appeal is yet to be heard and determined by the court. However, I have reason to believe that the Respondent is in the process of selling and transferring the subject property to third parties, thereby rendering the instant appeal nugatory;
 6. That my belief is premised on the fact that the Respondent has been entering the property whilst in the company of third parties, showing them the beacons on the land and outrightly negotiating the cost of the land in my presence; and
 8. That the subject of the appeal is LR. No. Othaya/Kihugiru/1861 upon which land I have been living for over fifteen (15) years and which I believe I’m entitled to the title on account of a trusteeship between the Respondent and myself. I therefore stand to suffer irreparable loss which cannot be compensated by costs unless the orders sought herein are granted,”
14. As it were, the Respondent has not denied that he has been entering the suit property with third parties in circumstances that have made the Appellant to become apprehensive that the Respondent wants to dispose off the suit property to the third parties. More significantly, the Respondent has not denied that the Appellant has been using the suit property as his home for the past 15 years. Indeed from a perusal of the proceedings before the trial court, it was evident to me that the Respondent conceded that the Appellant has been residing on a structure built on the suit property and even picking the tea grown thereon.
15. That being the case, I was persuaded that unless the orders sought herein are granted, the Appellant might otherwise suffer irreparable injury as he stood to lose what he considers to be his home.
16. In the premises, I am persuaded that there is merit in the Motion dated 2nd October 2023. I allow the same in terms of Prayer No. 3 thereof.
17. The costs of the application shall be in the Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17TH DAY OF OCTOBER, 2024.

J. O. OLOLA

JUDGE



In the presence of:

Ms. Ndirangu holding brief for Nderitu for the Appellant.

Mrs. Macharia for the Respondents.

Court Assistant: Kendi

