



**Nyaga & another v Mugambi (Environment and Land Appeal
E014 of 2024) [2024] KEELC 13323 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

CK YANO, J

NOVEMBER 20, 2024

BETWEEN

REGINA GATERIA NYAGA 1ST APPELLANT

FRANCIS KINOTI MUTEGI 2ND APPELLANT

AND

ANNESTINE KANYUA MUGAMBI RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion application dated 9th September, 2024 said to be brought pursuant to Section 3A, 63 (e) of the Civil Procedure Act, Order 42 Rule 6, (2) and rule 7 Order 40(1) and Order 51 Rule 1 of the Civil Procedure Rules. The appellants/applicants are seeking orders of stay of execution of the judgment delivered on 22nd August, 2024 and all subsequent orders arising therefrom in Marimanti SPM Court ELC Case No 5 of 2023 and an order of temporary injunction to issue restraining the respondent pending the hearing and determination of the application and the main suit.
2. The application is premised on the grounds thereon and supported by the affidavit of Francis Kinoti Mutegi, and 2nd applicant/appellant, sworn on 9th September, 2024.
3. The applicants aver that by a judgment delivered on 22nd August, 2024 in Marimanti SPM ELC Case No. 5 of 2023, the appellants were ordered to move out of LR. Tharaka/Chiakariga “A”/1317 or they be evicted. The Applicants have annexed a copy of the judgment marked “FKM 1”.
4. The applicants who are mother and son state that they are a part of a larger family. That the appellants and their family have been in occupation and use of the suit land for 38 years on the part of the 1st appellant and 28 years on the part of the 2nd appellant.



5. The Applicants state that they have extensively developed the suit land for the entire period they have been in occupation and use of the land and have 3 residential houses, cowshed, goat pen, mortal and stone house under construction and assorted trees. The Applicants have annexed photographs marked “FKM 2” showing these developments.
6. The Applicants aver that they have now appealed against the findings and the judgment of the trial court and that the appeal raises a number of triable issues. The applicants have annexed a memorandum of appeal marked “FKM 3”.
7. The Applicants state that in the circumstances, it is only fair that the court be pleased to issue stay of execution pending the hearing and determination of the instant application and the main suit so that the status quo can be maintained pending the hearing and determination of the instant application and the main suit. That if the court does not issue stay of execution of the judgment delivered on 22nd August, 2024 and all subsequent orders arising therefrom, the appellants and their family stand to suffer irreparable loss and damage particularly if they are evicted.
8. The Applicants aver that failure to issue stay of execution of judgment of the trial court and all subsequent orders arising therefrom will render the entire household of the appellants landless, homeless and destitute. That the appellants and their family rely on the development on the suit land for livelihood and if the orders of stay are not granted, the entire household of the appellants stand to suffer irreparable loss and damage.
9. The Applicants state that it is in the interest of justice and fairness that the judgment delivered by the trial court and any subsequent orders arising therefrom be stayed pending the hearing and determination of the instant application and the main suit.
10. The Applicants contend that the instant appeal poses a situation where by an interim injunction should issue against the respondent restraining her, servants, agent or assigns from evicting or interfering with the applicants’ peaceful possession and enjoyment of the suit land pending the hearing of the instant application and the main suit.
11. The Applicants contend that they have satisfied the threshold of issuance of interim injunction in that they have an appeal with triable issues with likelihood of success, that the appellants cannot be adequately compensated by way of damages in the event that the court does not issue an order of temporally injunction and that on the balance of convenience, there is the danger of the appellants to suffer if the orders of interim injunction are not issued as opposed to the respondent who stands to suffer no loss or damage if the orders of interim injunction are granted.
12. The Applicants state that land matters are emotive and the court is enjoined to allow the appellants exhaust the due process of the law before they are evicted from the suit land which they have occupied for a period in excess of 38 years on the part of the 1st appellant and 28 years on the part of the 2nd appellant.
13. The Applicants aver that no party stands to suffer any prejudice in the event that the orders of stay of execution and interim injunction are granted by the court particularly noting that the current status quo has been in existence for a period of over 38 years and that the issuance of stay of execution and interim injunction will not affect the respondent for the time being.
14. The Applicants state that if the orders of stay of execution and interim injunction are not granted, the same will render the appeal nugatory.



15. In opposing the application, the respondent filed a replying affidavit dated 19th September 2024. The respondent states that judgment in Marimanti ELC Case Number E005 of 2023 was entered in her favour on 22nd August, 2024.
16. The respondent states that the applicants' application is defective, incompetent, premature and bad in Law as the applicants have not annexed any decree or order against which they are seeking a stay of execution and the same ought to be struck out.
17. The respondent contends that the applicants were restrained by the lower court from interfering with the suit land pending the hearing and determination of the said Marimanti ELC Case No. E005 of 2023 and they did not appeal or challenge the court orders hence they are now estopped from seeking an order of temporary injunction in the appeal.
18. The respondent states that the appellants are trespassers on the suit land hence there is no justification for their application. That the applicants' application is speculative in nature and the same does not justify the issuance for orders of stay of execution.
19. The respondent urged the court to find that there are no valid reasons to deny her from enjoying the fruits of her judgment. She urged the court to find that the application has no merits and dismiss the same with costs.
20. The application was canvassed by way of written submissions. The applicants filed their submission dated 18th October, 2024 through the firm of I.C Mugo & Co. Advocates while the respondent filed her submissions dated 9th October, 2023 through the firm of Kiogora Arithi & Associates Advocates.
21. The Applicant identified three issues for determination, namely, whether the court is seized with the requisite jurisdiction to hear and determine this application, whether the applicants have met the threshold of issuance of stay of execution and interim injunction as prayed and costs.
22. It was submitted that the court has the requisite jurisdiction to hear and determine the issues raised in the application. That this court has the appellate and original jurisdiction and can exercise its discretion to determine the application. The applicants submitted that there is nothing in Order 22 Rule 22(1) preventing the court from hearing and determining the issues in this application. The Applicants cited Order 22 rule 22(1) and submitted that an application like this can be made in the court that delivered the judgment or the high court upon appeal by the dissatisfied party and therefore the court has the requisite jurisdiction.
23. The Applicants submitted that they meet the threshold to issue stay of execution as prayed. The Applicants cited Order 42 rule 6(2) (a) and (b) of the Civil Procedure Rules and submitted that if the orders of stay are not granted, they will be evicted from the suit land and all their properties will be destroyed.
24. Regarding the prayer for interim injunction, the applicants relied on the case of Giella Vs. Cassman Brown and Mrao Ltd. Vs. First American Bank Limited & 2 Others (2003)eKLR. They also referred to the definition of prima facie case in the Black's Law Dictionary. The applicants submitted that they have raised several triable grounds in the appeal.
25. It was submitted that the applicants are likely to suffer irreparable loss if evicted from the suit land, arguing that issues of land are very emotive. That if they are evicted, the appeal will be rendered nugatory.



26. The applicants submitted that the balance of convenience tilts in their favour in order to maintain the status quo pending the hearing and determination of the appeal. The applicants relied on the case of *Suleiman Vs. Amboseli Resort Ltd.* [2004]eKLR.
27. The respondents submitted that the appellants having been aggrieved by the trial court's decision filed an Appeal and thereafter the present application in the Appellate Court and not in the trial court that delivered the judgment which is in contravention of Order 22 rule 22 (1) of the Civil Procedure Rules. The respondent cited Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rules and submitted that the applicants have not proven the alleged substantial loss they will suffer if the application is not allowed. That the Applicants have not satisfied the court that if the orders sought herein are not granted, the same will affect them negatively and cause them irreparable loss. The respondent prayed for the application to be dismissed with costs to the respondent.
28. I have considered the application, the response and the submissions filed by the respective parties. The issues for determination are:
- i. Whether the court has jurisdiction to determine the application.
 - ii. Whether the application is defective for failure to attach a decree
 - iii. Whether the court should issue orders of stay.
 - iv. Whether the court should issue orders of injunction.

Whether the court has jurisdiction to determine the application.

29. The application herein has been brought pursuant to the provisions of Order 42 rule 6(2) of the Civil Procedure Rules. That rule clearly states that the court to which an appeal is preferred shall be at liberty, on application being made, to consider the application. Therefore, this application is properly before this court.
30. On whether the failure to attach the order/decreed would render the Application fatally defective, this court notes that there is a judgment attached herein, therefore failure to attach the decree is not fatal. This requirement appears to have arisen from practice. Being a procedural requirement, it is the circumstances curable by Article 159 (2) (d) of *the Constitution* of Kenya 2010 and hence, in those instances, it is not fatal to the application.

Whether the court should issue orders of stay.

31. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides 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 sub rule (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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

32. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on sufficient cause being shown by an Applicant that substantial loss may result to the Applicant if the order is denied; the application is made without unreasonable delay and on provision of such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. (See *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012]eKLR). It is also noteworthy that the three (3) conditions must be met simultaneously as they are conjunctive and not disjunctive.
33. On the likelihood of suffering substantial loss the Appellants pleaded that the entire household of the appellants will be rendered landless, homeless and destitute if they are evicted from the suit land which they have lived on for decades. That if stay is not granted and eviction is done, the appeal will be rendered nugatory. Whilst I would agree that the successful party should not be denied the fruits of his/her judgment, the court ought to balance the interest on both parties. With this in mind, it is my view that the applicants have, prima facie, been able to demonstrate that they stand to suffer irreparable loss if the stay is not granted and the appeal may be rendered nugatory. This case warrants maintenance of status quo pending the determination of the appeal.
34. The second pre-requisite is whether there has been any delay in filing the instant application. The Application was filed on 9th September, 2024 and the judgment was delivered on 22nd August, 2024. I find that the application has been filed timeously.

Whether an interlocutory injunction should issue against the defendant.

35. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus 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.”



36. Consequently, the applicants ought to, first, establish a prima facie case. In *Mrao Ltd. Vs. First American Bank of Kenya Ltd.* (2003)eKLR 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.”

37. In this case, the court should bear in mind that there is an appeal pending and therefore it would consider the prospects of the appeal succeeding to determine whether the applicants have a prima facie case, the ultimate objective of court being to safeguard the rights of the applicants so that the appeal is not rendered nugatory and the rights of the respondent to enjoy the fruits of the judgment. In that regard, the court will determine if the appeal is arguable and not frivolous.

38. In support of their application, the Applicants aver that they have been in occupation and use of the suit land for over 28 to 38 years. That they have developed the land extensively for the entire period and if the orders of stay are not granted they will be evicted from the suit land and all their properties will be destroyed. I have perused the memorandum of appeal filed. In my view, the same raises serious points of law and is not frivolous.

39. In my opinion, therefore, the applicants have met the first criteria for grant of orders of temporary injunction.

40. Secondly, the applicants have to demonstrate that irreparable injury will be occasioned to them if the order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

41. The Applicants have stated that they are emotionally attached to the land and removal from the suit land will hurt them emotionally and financially and there is no money that can compensate emotional damage and mental anguish and loss if they are evicted.

42. Thirdly, the applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai* (Supra) the concept of convenience was defined as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants.

Inconvenience be equal, it is the Plaintiff who will suffer.



In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it.”

43. In the case of Paul Gitonga Wanjau Vs. Gathuthis Tea Factory Company Ltd. & 2 Others (2016)eKLR, the court dealing with the issue of balance of convenience expressed itself thus:

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies”.

44. In the decision of Amir Suleiman Vs. Amboseli Resort Limited [2004]eKLR the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

45. I am persuaded that in the instant case, the balance of convenience tilts in favour of the applicants.

46. As a result, the applicants’ application is allowed as prayed.

47. Costs shall be in the cause.

48. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

I.C. Mugo for Appellants/Applicants

Ms. Mugo for Respondent

C. K. YANO

JUDGE

