



**Peter v Muthee & 2 others (Environment and Land Appeal E080 of 2024)
[2024] KEELC 13910 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E080 OF 2024
CK NZILI, J
DECEMBER 18, 2024**

BETWEEN

DANIEL KIMAITA PETER APPELLANT

AND

CYRUS MUTHEE 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR MERU 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The court is asked to grant a temporary injunction restraining the 1st respondent either by himself, agents, servants, employees, or personal representatives from interfering with L.R No. Abothuguchi/Makandune/1455 measuring 0.61 ha pending hearing and determination of this appeal. The grounds are set out on the face of the application and in a supporting affidavit sworn by Daniel Kimaita Peter on 5.11.2024. The applicant avers that the 1st respondent has entered into his land, which he bought from the 1st respondent's father and has occupied the same for 28 years and was trying to cultivate it.
2. The applicant avers that the 1st respondent knew of the sale, his workers have been taking care of food crops on the land, and he has semi-permanent structures but unfortunately, the 1st respondent, in about September 2023, went into the land, caused havoc and damaged his structures as per the attached photographs marked DMP a – d.
3. The applicant avers that the land is located in a very strategic place, and that is why the 1st respondent is interested in it. Further, the applicant avers that the land was his retirement plan, which is now being thwarted by the 1st respondent to his detriment and that of his family, who are unable to derive profit from the project.



4. Equally, the applicant avers that unless the court comes to his protection, he shall suffer; otherwise, it was in the interest of justice to grant the orders sought. In a further affidavit sworn in November 2024, the applicant avers that on 7.11.2024, the 1st respondent's agent and or servants entered into the suit land and sprayed herbs on his crops, causing much damage as per attached photographs marked DMP (a) & (b).
5. The application was served upon the 1st respondent as per a return of service sworn by Grace Njoroge on 18.11.2024. There is no evidence that the 2nd & 3rd respondents were served with the same.
6. The applicant relies on written submissions dated 18.11.2024. It is submitted that the trial court declined to issue temporary orders of the injunction pending hearing and determination of the suit, yet the applicant was suffering at the hands of the 1st respondent, who has caused wanton destruction to his developments on the suit land as per the photographic evidence attached to the application.
7. The applicant also submits that he bought the land from the late M'Anampiu Mutema Nkuru Kijimu, who is the father of the 1st respondent, in 1995, and his portion was to be excised as per the green card going by the attached copies of mutation forms and green card marked DMP 4 (a) & (b), respectively.
8. Again, the applicant submits that under Order 40 Rule 1 & 2 of the Civil Procedure Rules, the court has powers to grant interim orders of injunction, where a party has met the parameters set in *Nguruman Ltd vs Jan Bonde Nielsen & others* (2014) eKLR, *Mrao Ltd vs First American Bank of (K) Ltd* (2003) eKLR, *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR, *Paul Gitonga Wanjau vs Gathuthi Tea Factory Co. Ltd & others* (2016) eKLR and *Hezron Kamau Gitbu vs Kianjogu Ltd & others* (2022) eKLR.
9. What the applicant is seeking is a temporary order of injunction pending the hearing and disposal of an appeal against a lower court's refusal of a temporary injunction pending the hearing of the suit. The grant or refusal of an order of temporary injunction is within the discretion of the trial court to be considered in accordance with the law and the available case law.
10. In dealing with an appeal arising out of the exercise of discretion, an appellate court may not interfere with the exercise of that discretion unless the court is satisfied that the trial court, in exercising its discretion, misdirected itself in some matters and as a result, arrived at an erroneous decision or unless it was manifest from the case as a whole, that the trial court was been clearly wrong in the exercise of its discretion, hence occasioning an injustice.
11. Order 42 Rule 6 (6) of the *Civil Procedure Rules* grants this court the power to issue an injunction at the appellate stage. A party seeking an injunction pending appeal has to demonstrate that he has an arguable appeal whose absence of an order of injunction will render it nugatory. There must also be exceptional circumstances why the court should grant the injunction.
12. In *Patricia Njeri & others vs National Museum of Kenya* (2004) eKLR, court said that an order of injunction pending appeal is discretionary which will be exercised against an applicant whose appeal is frivolous and if it would inflict more hardship than it would avoid. In *Madbupaper International Ltd vs Paddy Kerr* (1985) KLR 840, the court said that the purpose of an injunction pending appeal is to preserve the subject matter to ensure that the appeal, if successful, will not be rendered nugatory. The discretion is to be exercised judicially and carefully, in the light of the circumstances of each case.
13. In this application, the applicant says that he bought interest on the land from the 1st respondent's late father and acquired a title deed on 25.10.1996. He has attached a copy of the mutation form, a copy of the title deed and a copy of the records. The title deed is yet to be impeached by the respondents.



A title deed is to be taken as prima facie evidence of ownership of a land subject to Sections 24 & 25 of a *Land Registration Act*.

14. A prima facie case is established where, based on the material presented to the court, it will conclude that there exists a right that has apparently been infringed by the opposite party, to call for an explanation or rebuttal from the latter. See *Mrao Ltd* (supra). I think the appeal by the applicant is not frivolous. It raises some arguable points. An arguable appeal must not necessarily succeed but one that ought to be argued fully before the court as held in *Kenya Commercial Bank Ltd vs Nicholas Ombija* (2009) eKLR.
15. In *Mavoko Water & Sewerage Co. Ltd vs Ederman Property Ltd & another (Civil Appeal) Application E112 of 2024 (2024) KECA 918 (KLR) (26th July 2024) (Ruling)* the court said that other than considering the nature of the dispute the element of public interest was a late entrant to be considered as held in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & others* (2014) eKLR. The court aims to do justice to the parties. See *William M'Mauta M'Ethenya Sued as M'Mauta Nkari vs Baikiamba Kirimania* (2017) eKLR. The court has to be judicious in exercising its discretion. See *Toshika Construction Co. Ltd vs Harambee Cooperative Savings & another* (2019) eKLR.
16. A party should not be denied a right to be heard on appeal. See *Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs Kariuki Marega & another* (2018) eKLR.
17. The applicant seeks to preserve the substratum of the appeal pending the hearing of his appeal. He has demonstrated that there is imminent danger of dealing with the suit property otherwise now that the 1st respondent has a confirmed grant over the mother's title. See *Attorney General vs Okiya Omtata Okoiti & another* (2019) eKLR. I find there is a need to preserve the subject matter of appeal by granting a temporary injunction pending appeal to last only for one year.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DECEMBER, 2024

In presence of

C.A Kananu

Mrs. Bundi for the appellant

HON. C K NZILI

JUDGE

