



REPUBLIC OF KENYA



KENYA LAW
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Akwalu (Suing as guardian of Samwel Akwalu) v Maingi (Environment and Land Appeal 100 of 2019) [2023] KEELC 374 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 100 OF 2019**

CK NZILI, J

JANUARY 25, 2023

BETWEEN

FAITH KANANU AKWALU (SUING AS GUARDIAN OF SAMWEL AKWALU) APPELLANT

AND

DAVID MWENDA MAINGI RESPONDENT

RULING

1. The court through an application dated October 21, 2022 is asked to grant orders of injunction pending the hearing and determination of Nyeri Civil Appeal No E044 of 2022 in the alternative to grant orders of the maintenance of *status quo* to wit that the respondent should not take any further developments on parcel No 2249 Kianjai/Uringu Adjudication Section. The grounds are that following the judgment, the respondent has embarked on huge developments on the suit land which are likely to permanently change its status to the detriment of the applicant.
2. Faith Kananu Akwalu the applicant has deposed in the supporting affidavit sworn on October 24, 2022 that respondent has taken occupation of four acres while she is in occupation of 2 acres out of the total 6.18 acres. Further, she averred that she has been on the land for 30 years and her developments therein are likely to be wasted more so when the lower court and this court ignored to find any triable issues in the intended defense and counterclaim.
3. Miss Kaume advocate for the applicant in her oral submissions urged the court to find the appeal with high chances of success since title deeds issued had anomalies. That the applicant was seeking at the Court of Appeal for a retrial. That she was ready to offer security for costs of Kshs 20,000/= pending hearing and given that land is always an emotive issue the court should exercise its inherent powers and grant the orders sought.



4. The respondent opposed the application through a replying affidavit sworn on November 14, 2022 for lacking merits, as a delaying tactic to the realization of fruits of the judgment and out to cause an injustice to him given he took possession immediately after the judgment at the lower court in 2019. Further the respondent urged that the Court of Appeal would be the most appropriate forum to file the application which court was the one to determine if the appeal has merits or not, otherwise he was of the view that the appeal under the circumstances of the evidence obtaining had no chances of success. He further reiterated that this court was *functus officio*.
5. Lastly, the respondent averred that no substantial loss has been demonstrated hence the application lacked merits.
6. Miss Gitonga counsel for the respondent orally submitted in support of the replying affidavit and its entire grounds. Counsel reiterated there has been inordinate delay in filing the application and to grant the orders would be detrimental to the respondent who has been on the land since 2019 and that since the appeal is already filed, the applicant should seek such orders at the appellate court.
7. Miss Kaume counsel for the applicant in her rejoinder reiterated that the developments being made were of permanent nature and that her client was not given a chance to ventilate her case hence the appeal before the Court of Appeal.
8. The law relating to the issuance of injunction pending appeal is governed by order 42 rules 6 of the [Civil Procedure Rules](#). It provides that “Notwithstanding anything contained in sub rule 1 the High Court shall have powers 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”.
9. In [Patricia Njeri & 3 others vs National Museum of Kenya](#) (2004) eKLR, the court considered the principles relating to grant of temporary injunction pending appeal. The court stated that the power was discretionary and which should not be exercised in a frivolous appeal; that the discretion should not be exercised if it would inflict greater hardship than it would avoid; that the applicant must show that to refuse the injunction would render the appeal nugatory and that the court should also be guided by the principles in [Giella vs Cassman Brown](#) (1973) EA 358.
10. In [Madbupaper International Ltd vs Kerr](#) (1985) eKLR the court that held it would be wrong to grant a temporary injunction pending appeal where the appeal was frivolous or where it would inflict greater injustice than it would avoid. As to what an arguable appeal is the court in [KCB Ltd vs Nicholas Ombija](#) (2009) eKLR stated that it was not one which must necessarily succeed but one which ought to be argued fully before the court.
11. In this application, the court has already determined the appeal to finality. What is before the Court of Appeal is an appeal against the judgment of this court. The court is no longer sitting as an appellate court. It cannot therefore be in a position to determine whether or not the pending appeal at the Court of Appeal is frivolous, meritorious or arguable. The issues are better left to the court possessed of them to establish and pronounce on them. The applicant has mentioned there were substantial developments being undertaken by the respondent likely to change the substratum of the appeal. The nature, particulars and status of the land and the developments as alleged have not been substantiated. Substantial loss as held in [James Wangalwa vs Agnes Naliaka Cheseto](#) (2020) eKLR, must be proved by way of tangible and credible evidence.
12. The application is being brought eight months down the line following judgement and after three years from the date the respondent took vacant possession in 2019. The delay has not been explained. The court is also asked to in the alternative, order for *status quo* to be maintained. The affidavit in support of



the motion has not sufficiently defined what the *status quo* is currently by way of tangible and scientific evidence. The exact permanent developments as at the time the application was made have not been defined or particularized. The court is also alive to the confirmed grant which apparently was never challenged on appeal.

13. Given the foregoing I make a finding that even if the court had jurisdiction to grant the orders sought, more harm would be visited upon the respondent as opposed to the applicant by granting the orders sought. In the circumstances I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JANUARY, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: Kananu

Respondent

