



Machebe v Muchangi; Attorney General (Interested Party) (Environment and Land Appeal E017 of 2024) [2025] KEELC 2996 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E017 OF 2024**

**BM EBOSO, J
MARCH 27, 2025**

BETWEEN

JOHN MUTHEE MACHEBE APPELLANT

AND

JOSPHAT KIRIMI MUCHANGI RESPONDENT

AND

THE HON ATTORNEY GENERAL INTERESTED PARTY

*(Appeal challenges the Judgment rendered on 20/9/2024 in
Marimanti Principal Magistrate Court MCELC No 4 of 2019)*

RULING

1. This appeal challenges the Judgment rendered on 20/9/2024 in Marimanti Principal Magistrate Court MCELC No 4 of 2019. The appeal was initiated by John Muthee Machebe through a memorandum of appeal dated 4/10/2024. He named Josphat Kirimi Muchangi as the respondent and the Hon Attorney General as an interested party. Although the District Land Adjudication & Settlement Officer – Tharaka Sub-County was the 2nd defendant in the suit in the Lower Court, he was not named as a party in the memorandum of appeal dated 4/10/2024.
2. Subsequent to lodging the appeal, the appellant brought a notice of motion dated 29/11/2024, through which he seeks an order staying execution of the Judgment rendered on 20/9/2024 in Marimanti SPMC E&L Case No 4 of 2019. The application also seeks an order of temporary injunction restraining “the respondent” together with “his” agents/servants against evicting or harassing the appellant or interfering with the appellant’s peaceful use and occupation of land parcel number Gituma/336 (herein after referred to as “the suit property”). The application is contested.



3. The application was premised on the grounds outlined in the motion and in the applicant's affidavit dated 29/11/2024. It was canvassed through written submissions dated 2/2/2025, filed by M/s I. C Mugo & Co Advocates.
4. The case of the appellant/applicant is that, through the impugned judgment, the trial court declared the respondent as the legitimate proprietor of the suit property. Dissatisfied with the judgment of the trial court, he (the appellant) brought this appeal to challenge the judgment. He contends that he acquired the suit property through the process of land adjudication after which he was registered as proprietor of the land. He adds that the respondent was a party to the adjudication process and had the right to lodge an appeal to the Minister but ignored the law and proceeded to file a case in the lower court. The applicant contends that despite lack of jurisdiction on part of the lower court, the lower court proceeded to hear the case and rendered the impugned judgment in favour of the respondent. He adds that the respondent did not prove fraud against him.
5. Urging the court to grant an order of stay of execution, the appellant avers that land is emotive, adding that unless the order is granted, he will be evicted from the suit land. The appellant further states that if an order of stay of execution is not granted, his appeal will be rendered nugatory.
6. The appellant/applicant adds that the status of this appeal calls for the issuance of a temporary injunction, contending that he has been in exclusive use of the suit land "from time immemorial including the period of the adjudication process in Gituma Adjudication Scheme." The applicant contends that, together with his family, they rely on the developments on the suit land for their livelihood, adding that if the stay order is not granted, they will suffer irreparable loss.
7. The respondent opposed the application through a replying affidavit dated 9/1/2025 and written submissions dated 18/2/2025, filed by M/s Murango Mwenda & Co Advocates. His case is that one of the reasons why the trial court found that there was fraud in the registration of the appellant/applicant as proprietor of the suit land is that he (the respondent) was born and raised on the land long before the process of land adjudication took place, adding that the appellant has never entered/occupied/cultivated the suit land. He faults the appellant/applicant for misleading the court that he is in occupation of the suit land and that he has developed the suit land. It is the respondent's case that he is the one who has been and is still in total occupation of the land. He contests the allegation that the appellant/applicant will stand to suffer injury or loss if the plea for a stay order is declined, adding that the appellant/applicant has not satisfied the criteria for a stay order.
8. The respondent states that since he is the one in occupation of the suit land and he has been in occupation of the suit land since 1971, it would be unjust to issue an order of injunction against him. He adds that the appellant's family cannot be said to rely on the suit land because they have never used the land in any manner.
9. The court has considered the application, the response to the application and the parties' respective submissions. The two key questions that fall for determination in this ruling are: (i) Whether the application meets the criteria for granting an order of stay of execution pending the hearing and disposal of an appeal by this court; and (ii) Whether the application satisfies the criteria for granting a temporary injunction under Order 42 rule 6 (6) of the Civil Procedure Rules. I will dispose the two issues sequentially in the above order.



10. Does the application meet the criteria for granting an order of stay of execution pending the hearing and disposal of an appeal in this court? The relevant criteria has been legislated under Order 42 rule 6 (2) of the Civil Procedure Rules which provides as follows:

“No order for stay of execution shall be made under subrule (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 the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. In urging the court to grant an order of stay of execution, the appellant contends that he stands to suffer substantial loss because enforcing the judgment will involve evicting him and his family from the suit land. This contention was disputed by the respondent who contended that the appellant has never entered/occupied/cultivated the suit land, adding that he (the respondent) is the one who has been in occupation and use of the land all along. The court has looked at the evidence on record in the original record of the trial court. In his evidence during cross-examination, the appellant stated that he did not have a home on the suit land. He further stated that he was not residing on the suit land, adding that he lives on his father’s land across the road. DW2 and DW3 were the appellant’s witnesses. They similarly testified that the appellant was not staying on the suit land.
12. Based on the record of the trial court, it does emerge that the appellant is not truthful in contending that him and his family stand to be evicted from the suit land if a stay order is not granted. He cannot be evicted from land that he does not occupy. In the circumstances, he cannot be said to have demonstrated likely substantial loss.
13. Secondly, the appellant elected not to offer any security in terms of the equivalent market rental value of the suit land. He expects the respondent who has been adjudged by the trial court to be the legitimate owner of the suit land to be ejected from the suit land and he be installed into the suit land without offering any form of security. I do not think that is how the discretion contemplated under Order 42 rule 6 (2) of the Civil Procedure Rules is supposed to be exercised.
14. On timeous filing of the application, it is noted that the impugned judgment was rendered on 20/9/2024. This appeal was filed on 4/10/2024 through a memorandum of appeal bearing even date. The application under consideration was subsequently filed on 10/12/2024. From the date of delivery of the impugned judgment to the date of filing the present application, there was a lapse of 80 days. No explanation has been tendered to explain the delay of 80 days.
15. The totality of the foregoing is that the application does not meet the criteria prescribed under Order 42 rule 6 (2) of the Civil Procedure Rules. That is the finding of the court on the first issue.
16. Does the application meet the criteria for grant of an injunction in an appeal before this court? It is important to observe from the onset that, although the applicant did not cite Order 42 rule 6(6) of the Civil Procedure Rules, it is clear from the plea for an interlocutory injunction that he invited the court to exercise the jurisdiction granted to it under the above provision. Order 42 rule 6(6) provides as follows:

“Notwithstanding anything contained in subrule (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.”

17. Over the years, Kenya’s superior courts have developed principles that guide the exercise of the above jurisdiction (see (i) Madhupaper International Limited Vs Kerr [1985] KLR 840; (ii) Venture Capital & Credit Limited Vs Consolidated Bank of Kenya Ltd; Civil Application No. 349 of 2003 (174 of 2003 UR); and (iii) Butt V Rent Restriction Tribunal (1982) KLR 417).
18. Suffice it to state that, the jurisdiction of a first appellate court to grant an interlocutory injunction under Order 42 Rule 6(6) of the Civil Procedure Rules is a discretionary and equitable one. Secondly, the discretion will not be exercised in favour of an applicant whose appeal is frivolous; the applicant must demonstrate that a reasonable argument can be put forward in support of his appeal. Thirdly, the discretion should be refused where it would inflict greater hardship than it would prevent. Fourthly, the applicant must show that refusal to grant the injunction would render his appeal nugatory. Fifth, the court is to be guided by the principles in *Giella vs Cassman Brown & Company Ltd* [1973] EA 358. Lastly, whenever disposing a plea for an interlocutory injunction, the court does not make definitive or conclusive pronouncements on the key issues in the dispute.
19. The plea for a temporary injunction in the present application is worded as follows:

“That pending the hearing and determination of the appeal, an order of temporary injunction do issued restraining the respondent whether by himself, servants, agents, assigns or any person acting at his behest from evicting or harassing the appellant/applicant or in any other way interfering with the appellant/applicant peaceful use and occupation of LR Gituma/336.”
20. The court has observed from the evidence on record that the applicant does not reside on the suit property. He has not presented evidence of any permanent development or any other development he has on the suit property. Secondly, the applicant has approached the court for an injunction in the above terms against the background of an existing judgment and decree in favour of the respondent. He has not tendered any justification as to why he should be installed into the suit land at this stage of the appeal. Given the above circumstances, the applicant cannot be said to have satisfied the first two requirements in *Giella vs Cassman Brown & Co Ltd* (1973) E A 358.
21. Secondly, given the above circumstances, the balance of convenience favours letting the decree-holder continue having possession of the suit land during the period of hearing and determination of the appeal.
22. The result is that the application dated 29/11/2024 does not meet the criteria for granting an interlocutory injunction under Order 42 rule 6 (6) of the Civil Procedure Rules.
23. In the end, the application dated 29/11/2024 is rejected for lack of merit. In tandem with the general principle in Section 27 of the *Civil Procedure Act*, the applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 27TH DAY OF MARCH, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Appellant – Absent



Respondents – Absent

Court Assistant – Moses

