



**Mutisya v Muinde (Environment and Land Appeal E020 of 2024)
[2025] KEELC 3488 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E020 OF 2024
A KANIARU, J
MARCH 27, 2025**

BETWEEN

RAVASPAUL KYALO MUTISYA APPLICANT

AND

STANLEY MUSYOKA MUINDE RESPONDENT

*(Being an appeal arising from the Judgement of Hon.
David Mburu (CM) delivered on 20th June, 2024)*

RULING

1. Before me for determination is a motion on notice dated 9.7.2024 filed in court on even date. It is expressed to be brought under Orders 40 rules 1, 2 and 3, 51 Rule 1 and 21 Rules 5 and 26 of Civil Procedure Rules, 2010, Sections 3, 3A and 63 (e) of Civil Procedure Act (Cap 21), and all other enabling provisions of law. The applicant – Ravspaul Kyalu Mutisya – is the appellant in the appeal while the respondent in the application – Stanley Musyoka Muinde - is the respondent in the same appeal.
2. The application came with four (4) prayers but prayers 1 and 2 are now moot as they were meant for consideration at the ex parte stage. The prayers for consideration are therefore two – prayers 3 and 4 – and they are as follows:

Prayer 3: That pending the hearing of this application interpartes, this honourable court be pleased to issue a preservative order preserving the suit property within Kitui County pending the hearing and determination of Kitui ELC Appeal No. ELCA No. E020 of 2024.

Prayer 4: That the costs of this application be in the cause.
3. The application is premised on grounds, *inter alia*, that the applicant has filed the appeal now before the court; that the appeal is arguable and has overwhelming chances of success; that the applicant will suffer prejudice if the property is not preserved; that there are pending criminal charges against the



respondent at Milimani Chief Magistrate's Court; and that the appeal will be rendered nugatory if the orders are not granted.

4. The grounds are amplified in the supporting affidavit that came with the application.
5. The respondent responded to the application in two ways: vide grounds of opposition dated 23/7/2024 and a replying affidavit dated 7/8/2024 and filed on 13/9/2024. It is stated in the grounds of opposition that the application is bad in law, devoid of merits, an abuse of the court process, and that the applicant has not made a prima facie case to warrant issuance of the orders sought.
6. In the replying affidavit, the respondent stated, *inter alia*, that the application is a misguided one as there is no positive judgement to be stayed; that it lacks merit as the property regarding which the orders are sought is not particularized; that the respondent is the one in possession of the property; and that if the respondent wished to dispose of the same he would have done so even prior to the institution of the suit in the lower court.
7. The response by the respondent provoked the filing of a supplementary affidavit by the applicant. In the affidavit, the applicant denied the substance of the respondent's replying affidavit and averred that the respondent has misunderstood the application by construing it as one for stay of execution orders while it is actually seeking orders of injunction and/or inhibition. The respondent was said to be having fake ownership documents which are actually the subject of pending criminal proceedings against him. The further supplementary affidavit dated 18.12.2024 was filed without leave of the court.
8. The application was canvassed by way of written submissions. The applicant's submissions are dated 5/8/2024 and the applicant started by faulting the respondent for not filing the replying affidavit on time. The applicant was then said to be facing the risk of dispossession of his property at Kalundu market. This is said to be likely to happen if the respondent sells, charges, leases or transfers the land as he allegedly tried to do way back in 2015. It was pointed out that if this happens, the applicant's constitutional rights to own property would be violated. It was emphasized that the respondent's claim to ownership of the suit land is based on fake registration and that the applicant bought the land innocently and for value.
9. Further, the court was said to have wide discretion to grant preservative orders including the order of injunction or inhibition. In order to drive the message home or persuade the court, the cases of *Cheparwasi Ibrahim & Others -vs- Christopher Laptia & Others* ELC No. 53 of 2021, Kitale, *Kabobo -vs- Secretary General*, EACJ Application No. 5 of 2012, *Daniel Kipkemoi Siele -vs- Kapsasian Primary School & 2 Others* [2016] eKLR, *Rose Njeru Ndegwa -vs- Samuel Sobi J. Misingu* [2019] eKLR, *Giella -vs- Cassman Brown & Another* [1973] EA 358, *Mrao Ltd. -vs- First American Bank of Kenya Ltd & 2 Others*; Civil No. 39 of 2002, and *Robert Mugo Wa Karanja -vs- Eco Bank (Kenya) Limited & Another* [2019] eKLR were all cited and quoted as deemed appropriate. This court was urged to allow the application.
10. The respondent's submissions are dated 27/8/2024. The applicant was faulted for not defining the suit property. The dispute revolves around property or properties variously described as Kyangwithya/Misewani/1939 and plot No. 83, Kalundu market for which the applicant blames the trial court for treating as one. The respondent is wondering whether the applicant is talking of plot No. 83 Kalundu market or Kyangwithya/Misewani/1939, particularly given his position regarding the treatment of the two properties by the trial court.
11. The respondent also took issue with orders sought in the application. It was noted that the applicant is seeking for preservative orders and this is done without clarifying whether the said preservative orders are to take the form of injunctions, inhibitions, or stay of execution orders.



12. The law invoked by the applicant was also faulted and the applicant was further blamed for not meeting the threshold or conditions required by that law. Further still, the risk necessitating the protection of the court was said not to be indicated.
13. The cases of *Muriungi –vs- Mwebia & 2 Others* (ELC, E027 of 2024) KEE LC 4558 (KLR) (6th June 2024) (Ruling), *Waithera & 13 Others –vs- Wambui* (ELCA E027 of 2023) [2024] KEELC 960 (KLR) (22 February 2024) Ruling, and *Kenleb Cons. Ltd. –vs- New Gatitu Service Station Ltd & Another* [1990] eKLR, were cited and quoted to persuade the court.
14. Ultimately, the court was urged to dismiss the application with costs to the respondent.
15. I have considered the application, the response and counter response made, and the rival submissions. The hallmark of a good prayer or any order asked for in a suit or application consists in its clarity and specificity. The respondent has taken issue with the prayers asked for by applicant precisely for the reason that the exact nature of the orders is not stated. I am in general agreement with the respondent on this issue. When I first read the application now under consideration, it struck me immediately that the prayers as sought and formulated were wanting. The phrase “Preservatory Order” is broad and as pointed out by the respondent, it can be subsumed under injunction, stay of execution, inhibition orders and others. All this is so because all these specific orders play a preservatory role in their functionality. Besides, each of these orders is governed by different principles of law and it is therefore wrong in my view to assume that they can be covered under the broad term “Preservatory Orders.”
16. The applicant tried to assert later that he is looking for “injunction” or “inhibition” but this came rather late in the day and he seemed also not to appreciate that the orders of injunction and inhibition are governed by different principles of law. Besides, the attempted clarification as to the exact nature of the orders sought came via what is styled as further supplementary affidavit which was filed without leave of court.
17. I have also mentioned something about formulation of the prayer now being considered. It is prayer 3 in the application and it is sought “Pending the hearing of the application inter partes.” This essentially means that the prayer was for consideration at the ex parte stage. It was meant to be granted while the application was still awaiting to be heard inter partes. And as formulated, it was supposed to stay in force till the conclusion of the appeal. I say this because it is clearly stated that it was to stay in force “Pending the hearing and determination of Kitui ELC Appeal No. ELCLA/E020 of 2024” (sic), which is actually this appeal itself. What all this essentially means is that the prayer as sought was supposed to be ex parte and was meant to last throughout the period that the appeal remains un concluded. That ideally should not be the case as such order is usually considered at the inter partes stage. One may argue that we are considering the prayer at inter partes stage now but the point is that as formulated, it is meant for consideration at the ex parte stage.
18. The applicant also had a duty to demonstrate to the court that there was a real and imminent risk to be suffered by him if the order or orders sought are not granted. In his submissions, it appears like he wants an order of injunction. He has dwelt at length on the order of injunction. In fact, the order of inhibition is not submitted on. It is not clear that he had veracious or credible information that the respondent intended to sell, lease or in any manner dispose of the disputed land. The respondent seems to have no such intentions as he has stated that were he intending to do so, that would have happened long ago.
19. It appears clear to me that the applicant’s fears are based on what may possibly happen. The law on injunction is about probabilities, not possibilities. In this regard, the applicant needed to show that it is more likely than unlikely that the respondent is going to deal with the disputed land in a manner



prejudicial to him and/or his interests. This is obviously not demonstrated. Unfounded fears can never be the basis of granting a temporary restraining order.

20. But even assuming that the applicant had demonstrated this, it would still be required that he demonstrates that the loss or damage arising is not compensable with damages. In *Helga –vs- Charles Mumba Mwangandi* [2008] eKLR Justice L. Njagi (as he then was) cited with approval the reasoning of the Court of Appeal in *Mureithi –vs- City Council of Nairobi* [1976 – 1985] EA 331 where Madan, JA (as he then was) had expressed himself as follows:

“The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages, recoverable in the action if the uncertainty were resolved in his favour at the trial If the damages in the measure recoverable at the common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

21. The applicant has not demonstrated that what he is likely to suffer cannot be compensated adequately by way of damages. He has not also demonstrated that the respondent cannot pay damages.
22. Ultimately, what is before me is an application with grave legal shortcomings. And even if it is assumed that what the applicant is – as evident in his submissions – seeking is an order of temporary injunction, then the merits of such order have not been demonstrated.
23. The upshot is that the application herein is dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 27TH MARCH, 2025.

In the presence of,

Momanyi for Applicant

M/s Kiama for Respondent

Court Assistant - Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

27/03/2025

