



**Maithya v Maithya & another (Environment and Land Appeal
E009 of 2022) [2023] KEELC 22620 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 22620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E009 OF 2022
LG KIMANI, J
FEBRUARY 15, 2023**

BETWEEN

JOSHUA MUTEMI MAITHYA APPELLANT

AND

KITHEKA MAITHYA 1ST RESPONDENT

MUSEE MAITHYA 2ND RESPONDENT

*(Being an appeal from the Judgment and orders of John Aringo
Senior Resident Magistrate at KYUSO in ELC Case No.8 of 2020)*

JUDGMENT

1. The appellant/applicant filed the notice of motion application dated June 29, 2022 under certificate of urgency seeking the following orders:
 - a. Spent.
 - b. Spent
 - c. That the honourable court be pleased to stay execution of the judgment dated 23rd May 2022 pending the hearing and determination of this appeal.
 - d. That the 1st and 2nd Respondents, their servants and agents be restrained from dealing with the unsurveyed land located at Makoto village in Mbarani Sublocation in Mumoni sub-county within Kitui County, that is not to lease, sell, transfer, charge or in any manner change or alter ownership of the same pending hearing and determination of the Appeal
 - e. That the costs of this Application be provided for



2. The Application is supported by the affidavit of the applicant in which he states that the respondents are his blood brothers who have always plotted to disinherit him of their late father's unsurveyed land. He claims that his case at Kyuso Law Courts was dismissed and he preferred this appeal. In the meantime he states that he has been prohibited from accessing and utilizing the suit land by the Respondents and unless the orders sought are granted, he and his family stand to suffer irreparable loss and damage.
3. The background to the Appeal herein is Kyuso Principal Magistrates Court ELC No. 8 of 2020 where the appellant was the plaintiff and he claimed that his later father had two wives with his mother as 1st wife and the second wife the mother of the defendants. He averred that his father established a permanent home for his second wife where the defendants were born and raised in Mbarani and another permanent home for him and his siblings at Makotoni.
4. The Appellant claimed that sometime in January 2020, the defendants encroached into his land, cleared trees and put up a fence with the aim of establishing permanent structures and a shamba. He stated that the defendants have their own piece of land at Mbarani, 4 kilometres away from the suit land. He prayed for an order to be issued directing the Respondents to vacate the suit property as well as general damages for trespass.
5. In his judgment, the Trial court noted that the land is not unsurveyed but survey was done in the applicant's absence and that it is actually in the process of land adjudication. The Trial Court noted that that the appellant had nothing more than his oral testimony to show that the land belongs to him. The court found that the plaintiff's case fails to meet the threshold of proof and that it was a foul section 30 of the *Land Adjudication Act* cap 284 and he dismissed the suit.
6. The defendants/respondents filed grounds of opposition dated August 1, 2022 opposing the application on grounds:
 1. That the application herein is frivolous, an abuse of the court process.
 2. That the application herein is incomplete and should be struck out.
 3. The application herein is an afterthought and meant to embarrass the Respondents.
 4. That the application for appeal is res-judicata.
 5. That the application herein is unmeritorious.
 6. That the appeal herein was filed on May 2, 2022 while the judgment was delivered on 23rd May 2022.
7. The application was heard on 17th January 2023 and the applicant prayed that the court stops destruction of the land pending the hearing of the appeal for the reason that the Respondents were destroying what was on the land.
8. The 1st and 2nd Respondents denied destroying the land and asked to be allowed to continue working on the land as the appeal is being heard.
9. The Respondent stated to the court that they are both on the suit land and that the Appellant chose not to live on the suit land.



Analysis and Determination

10. The first issue for determination is the Respondents contention that the appeal was filed on May 2, 2022 while the judgment was delivered on May 23, 2022. Section 79G of the [Civil Procedure Act](#) provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. The Judgment was delivered on 23rd of May 2022 while the Notice of Appeal in the court file is undated but the Memorandum of Appeal was filed on 6th June 2022 and the forwarding letter is dated June 7, 2022. I am therefore not sure where the Respondents got the notion that the appeal was filed on 2nd May 2022 even before delivery of the judgment.
12. I have considered the application and the documents filed in opposition, I am of the view that what remains for determination are prayer (c) and (d) of the application dated 29th June 2022.
13. Prayer C) seeks an order stay of execution of the Trial Court’s judgment of 23rd May 2022. Order 42 rule 6(2) of the [Civil Procedure Rules](#)(2010) provides that:

“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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”
14. The purpose of stay of execution order pending appeal as was emphasized in the case of [RWW vs. EKW](#) (2019) eKLR cited by Musyoka J. in [HE V SM](#) (2020) eKLR is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.
15. The Trial case was dismissed by the Court and there were no further orders made. In my opinion, there is nothing to stay since the trial court did not make any specific orders that are capable and/or require execution. The case of [Co-operative Bank of Kenya Limited -vs- Banking Insurance & Finance Union \(Kenya\)](#) [2015] eKLR, the Court of Appeal (Kantai J.A) held as follows: -

“...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal



of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No.13 of 1984) where it was stated:

‘...an order for stay of execution must be intended to serve a purpose...’

16. In the present case there is no positive obligation that the Trial Court ordered to be performed; therefore the prayer for stay of execution serves no specific purpose.
17. Prayer d) seeks an order of injunction to restrain the Respondents from dealing with the suit land by selling, transferring, charging or in any manner changing or altering ownership of the suit land pending the hearing and determination of the appeal. This court has the requisite jurisdiction to grant an order of injunction under section 13 (7) of the *Environment and Land Court Act* No. 19 of 2011 which provides that;

In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

18. This court is further empowered to grant a temporary injunction pending appeal under order 42 rule 6(6) of the *Civil Procedure Rules* which 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.”

19. Alnashir Visram, J (as he then was) while dealing with an application for injunction pending appeal stated as follows in the case of *Patricia Njeri & 3 Others V National Museum of Kenya* [2004] eKLR.

“In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 (cited in *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*))
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
- (d) The Court should also be guided by the principles in *Giella vs Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).



20. Following the criteria set out in the above case, I have looked at the Memorandum of appeal and the judgement of the trial court and I am satisfied that the appeal herein cannot be said to be frivolous, there are issues raised that require investigation by way of substantive hearing. These are issues relating to the adjudication process, if any, and ownership of the suit land.
21. I have also considered whether an order of injunction as presented by the applicant will inflict greater hardship than it would avoid. The appellant sought before the trial court orders that the Respondents be evicted from the suit land meaning that the Respondents are in possession and use of the land. An order that disturbs that possession will in my view cause greater hardship than it avoids. However, from reading of the trial court judgement it appears that there is a possibility that the respondents were awarded the land through the adjudication process. They therefore have the ownership documents for the suit land. In my view there is need to preserve the suit land from change of ownership pending hearing and final determination of the appeal. I therefore make the following orders;
1. The application dated June 29, 2022 be and is hereby allowed in the following terms;
 2. An order be and is hereby issued that the current status quo pertaining to the suit land located at Makoto village in Mbarani Sublocation in Mumoni sub-county within Kitui County, be maintained pending hearing and final determination of this appeal.
 3. The current status quo is that the Respondents shall remain in possession and use of the suit land.
 4. The Respondents are hereby restrained from leasing, selling, transferring and/or charging the suit land pending hearing of this appeal.
 5. Each party will bear their own costs of this application.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF FEBRUARY 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A Musyoki

Joshua Mutemi Maithya present in person

Kitheka Maithya present in person

Musee Maithya present in person

