# Sekento v Muntet & 11 others (Environment & Land Case 83 of 2017) [2022] KEELC 3327 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3327 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ENVIRONMENT & LAND CASE 83 OF 2017**

**CG MBOGO, J**

**JUNE 16, 2022**

**BETWEEN**

**LIRIAN OLE SEKENTO ............................................................ APPLICANT**

**AND**

**NAIKISI OLE MUNTET ............................................................ 1ST RESPONDENT**

**KIRIMONI OLE MUNTET NAMPUSHI ................................ 2ND RESPONDENT**

**TOIPANI OLE MUNTET ............................................................ 3RD RESPONDENT**

**TIMOTHY LEO OLE MUNTET ............................................... 4TH RESPONDENT**

**RERIN OLE MUNTET ............................................................ 5TH RESPONDENT**

**JAMES SIMIREN OLE NAMPOSHI ......................................... 6TH RESPONDENT**

**LETOWUON OLE MUNTET .................................................... 7TH RESPONDENT**

**TILAL OLE NAMPOSHI MUNTET ......................................... 8TH RESPONDENT**

**SAMAIRE OLE MUNTET ........................................................ 9TH RESPONDENT**

**TOBIKO OLE MUNTET ........................................................ 10TH RESPONDENT**

**THE ATTORNEY GENERAL ................................................ 11TH RESPONDENT**

**NAROK COUNTY COUNCIL ................................................ 12TH RESPONDENT**

## RULING

1. What is before me for ruling is the notice of motion application dated September 21, 2021 and a notice of preliminary objection filed by the 12th respondent dated November 15, 2021 respectively.

2. The notice of motion application dated September 21, 2021 is expressed to be brought under order 51 rule 1 of the *Civil Procedure Rules,* section 1A,1B,3A and 63 (c)and (e) of the *Civil Procedure Act*, sections 5 and 25 of the *High Court (Organisation and Administration) Act* No. 27 of 2015 in which the applicant is seeking the following orders: -

    1. That the defendants/respondents by themselves, their agents and or servants be restrained from evicting, demolishing, any structures erected thereon, trespassing into, interfering with the possession of, selling, transferring or in any other way disposing the parcel of land known as Cis Mara/Enare/Boolkesi/1 to wit Cis Mara/Enare Boolkesi/2 to 14 or any other part thereof pending the hearing and determination of this application.

    2. That their defendants/respondents by themselves, their agents and or servants be restrained from evicting, demolishing, any structures erected thereon, trespassing into, interfering with the possession of, selling, transferring or in any other way disposing the parcel of land known as Cis Mara/Enare/Boolkesi/1 to wit Cis Mara/Enare Boolkesi/2 to 14 or any other part thereof pending the hearing and determination of the appeal to be filed against this honourable court's judgment delivered on 23rd July, 2021.

    3. That costs of this application be provided for.

3. The application is premised on the grounds on its face and on the supporting affidavit of the applicant sworn on 21st September, 2021.The applicant in his affidavit deposes that it is not in dispute that he has occupied land known as Cis Mara/Enare Boolkesi/1 to wit Cis Mara/Enare Boolkesi/ 2 to 14 since 1992 and has carried out substantial developments of a permanent nature on the suit land and that being aggrieved by the judgment of this honourable court, he has lodged an appeal which raises arguable grounds to challenge the decision and is, therefore, apprehensive that unless an injunction is granted for a limited period of time, the respondents may evict him thus rendering the appeal nugatory. The applicant has annexed copies of photographs and a notice of appeal and receipt of payment of typed proceedings in support thereof.

4. In opposition to the application, the 1st respondent filed a replying affidavit sworn on 2nd December, 2021 on his behalf and on behalf of the 2nd to the 10th respondents. The 1st respondent deposed that the application is frivolous, vexatious, scandalous and an abuse of the court process for the reason that this court having rendered the decision, is now functus officio and the grounds of appeal listed therein are untenable with low chances of success. The 1st respondent further deposed that it is not sufficient for the applicant to state that he will suffer substantial loss but must prove specific details and particulars of the loss and in that case, the applicant has not tendered evidence of eminent threat to the effect that the respondents are likely to expose the suit land to adverse dealings.

5. Further, that this being an old matter, the respondents should be allowed to enjoy the fruits of their judgment and if at all this court is inclined to stay execution of the decree, then the applicant should be compelled to deposit security for costs within a time period set by the court as a show of commitment.

6. The 12th respondent filed a notice of preliminary objection dated November 15, 2021 challenging the notice of motion application on the following grounds: -

    1. That the 1st 1plaintiff's said application is misconceived, is unfounded in law and is fatally defective given that it seeks to stay the execution of the judgment of this court delivered on July 23, 2021 wherein this court issued negative orders for the dismissal of the plaintiff's entire suit against the defendants herein that are incapable of being stayed.

    2. That the 1st plaintiff's said application is otherwise an abuse of this Honourable court's process.

7. In support of the notice of preliminary objection, the 12th respondent has relied on the list and bundle of authorities dated October 15, 2021.

8. The applicant filed written submissions dated 2nd December, 2021.The applicant submitted that the 12th respondent's notice of preliminary objection is baseless. The applicant has raised two issues for determination as follows: -

    a. Whether this honourable court has jurisdiction to grant orders of injunction pending appeal; and

    b. Whether the applicant has satisfied the conditions for granting orders of injunction pending appeal.

9. On the first issue, the applicant submitted that this court can invoke inherent jurisdiction pursuant to section 3A of the *Civil Procedure Act* as was affirmed in the case of *James Juma Muchemi & Partners Limited versus Barclays Bank of Kenya Ltd* [2011] eKLR and further that it is this honourable court that is first clothed with the jurisdiction to grant the injunction pending the appeal as was in the case of *Madhupaper International Limited versus Kerr* [1985]eKLR.

10. On the second issue, the applicant while relying on the case of *Patricia Njeri & 3 Others versus National Museum of Kenya* [2004] eKLR and *Julius Kireka versus Wilson Kaata* [2019]eKLR submitted that the appeal raises reasonable arguments, is not frivolous and has legal backing which appeal raises fundamental questions of law. The applicant further submitted that it is settled law that in assessing an arguable appeal, it is not mandatory for it to succeed but it should be sufficient for interrogation by the court. The applicant relied on the recent Court of Appeal decision *in Re Estate of Harish Chandra Hindocha (deceased)* [2021] eKLR.The applicant submitted that the issues raised in the intended appeal are on substantive issues of law and fact which are highly triable.

11. The applicant further submitted that he has no other home and has known the suit property to be his home since the year 1992 and for this reason, it would be in the interest of justice that status quo be maintained till the Court of Appeal makes a determination. The applicant believes that he has satisfied the test as per the case of Giella versus Cassman Brown. The applicant submitted that if the injunction is not granted pending the appeal, greater hardship will be inflicted on the applicant as the respondents will proceed to evict him and his family.

12. In conclusion the applicant submitted that there is no requirement for the applicant to issue security for costs for an injunction pending appeal to be granted for the reason that the court in this case is called upon to exercise its inherent jurisdiction under section 3A of the *Civil Procedure Act*.

13. I have carefully analysed the application, the notice of preliminary objection and the written submissions and authorities cited and the issue for determination is whether this court can grant temporary orders of injunction pending appeal.

14. Whereas the instant applicant has not been brought under Order 42 Rule 6 of the Civil Procedure Rules, to a great extent it refers to a similar situation where a party is seeking temporary injunction pending appeal. In the case of *Bartholomew Mwanyungu & 3 others v Florence Dean Karimi* [2019] eKLR, the court, when confronted with a similar application brought under the provisions of order 42 rule 6, stated thus:

> "It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant

has stated that she intends to appeal to the Court of Appeal against the decision of this Court given on 18th April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant."

15. In *Clesoi Holdings Limited versus Prime Bank Limited* [2021] eKLR, the court was of the view; "The reasons as to why a party whom judgment has been entered against is estopped from seeking an injunction pending appeal in the same court were explained in the case of *Chembe Katana Changi v Ministry For Lands & Settlement & 4 others* [2014] eKLR where the court pronounced itself as follows when dealing with a similar application;

    14. . There is no provision in the *Civil Procedure Rules* allowing a party against whom Judgment has been entered to file an Application for injunction pending appeal.

    15. The absence of such a provision, in my view, is for good reason. It will be an absurdity for the trial court to grant to a party an injunction after delivery of Judgment considering that one of the principles that must be established by an Applicant in such an Application is to show that he has a prima facie case with chances of success.

    16. Once a Judgment has been delivered, there will be no pending suit. It therefore follows that a party challenging a Judgment cannot at the same time show by way of an application that he has a prima facie case with chances of success. A trial court which attempts to deal with such an application, as I have already stated above, will be sitting on its own appeal." (emphasis added).

40. I cannot add more save to emphasize that I entirely concur with the above pronouncement. It is trite that an injunction is granted for purposes of protecting a subject matter awaiting the determination of the main suit. Once the final judgment in the suit is pronounced against a party in whose favour the injunctive orders were issued, the injunction ceases to operate. Thus, the same court that issued the injunction whilst the suit was pending cannot undo its judgment by issuing a second injunction after the judgment.

41. To that end, not even this court's inherent jurisdiction under section 1A, 1B and 3A of the *Civil Procedure Act* can salvage the application presented by the Plaintiff. The injunctive orders sought can only be granted by the Court of Appeal in which the Plaintiff has already lodged a notice of appeal. Indeed, rule 5(2) (b) of the *Court of Appeal Rules* empowers the Court of Appeal to grant an injunction in civil proceedings, on such terms as the court may think just, where a Notice of Appeal has been lodged in accordance with Rule 75 of the said Rules, so long as the requisite conditions are met.

42. Since this court is by law estopped from considering the Plaintiff's application, it will not dwell on the lengthy submissions presented by the parties herein regarding whether or not the Plaintiff has met the requisite conditions for the grant of an injunction pending appeal.

43. Further, I am in agreement with the Defendant's submissions that this court became functus officio upon determining the Plaintiff's case to finality and as such, it cannot revisit issues that it had already pronounced itself on. The court's jurisdiction at this juncture can only be invoked in situations which may be incidental to the judgment or decree such as on an application for stay of execution. In so holding, I align myself with the decision in the case of Chembe Katana Changi[supra] where the court held:

    " It is true that once the trial court decides the suit on merit, it becomes functus officio. The trial cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial court sitting on its own appeal

which is improper. The only occasion that the trial court can deal with a matter it has already heard and determined is during the execution process or when an Application for review of the Judgment has been filed pursuant to the provisions of Order 45 or when an Application for stay of execution pending appeal has been filed pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules."

44. Similarly, in *Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another;Geminia Insurance Co. Ltd (Interested Party)* [2018] eKLR, the court stated as follows:

> " The doctrine of functus officio was well stated by the Court of Appeal in Telcom Kenya Ltd -vs- John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd. (2014 e KLR that:
>
> "Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon—
>
> The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.---"
>
> ......the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only."

45. In the instant case therefore, an application for stay of execution would have been better suited had the court, in its judgment of 30th July, 2020, issued an order that is capable of being executed. However, as it stands, the judgment only dismissed the Plaintiff's suit and thus a stay of the same would also be inconsequential as the judgment only took back the parties to the position they were in before the suit was filed."

16. As regards the application before me, I would agree with the 12th respondent that on July 23, 2021 the court issued negative orders for the dismissal of the applicant's entire suit against the respondents herein and which orders are incapable of being stayed. The application is, therefore, an abuse of the court's process and the same must fail.

17. Arising from the above, I find that the applicant's notice of motion dated 21st September, 2021 without merit and the same is hereby dismissed. The notice of preliminary objection dated November 15, 2021 is hereby upheld. There are no orders as to costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON 16TH JUNE, 2022.**

**Mbogo C.G**

**Judge**

**16/6/2022**

In the presence of: -

CA: Timothy Chuma

Applicant: