



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC APPEAL CASE NO. E45 OF 2021

RAPHAEL MULINGE MUTHUSI

FRANCIS MAITHYA MUTAVI

JAMES MUTISYA WAMBUA (Being the officials of KIVAA

15 ALIVE SELF HELP GROUPAPPLICANTS

VERSUS

MARY NDILA NYOLORESPONDENT

RULING

1. By a Notice of Motion dated 1st October 2021, the Appellants/Applicants sought for the following orders;

a. Spent

b. Spent

c. That pending the hearing and determination of the Appellant's Appeal herein, the Respondent, her agents and or servants be restrained from constructing, disposing and/or transferring Plot No. 58, 60 and 137 in Kivaa Market in Masinga Sub-County, Machakos County.

d. That costs of this application do abide the appeal.

2. The application is supported by grounds on the face thereof together with the affidavit sworn on 1st October 2021 by Francis Maithya Mutavi, the 2nd Applicant. The applicant has deposed that they are the owners of Plot Number 58 in Kivaa Market, while the Respondent claims ownership of Plot Number 60 in Kivaa Market which plot the Respondent claims to be Plot No. 137 on the ground; that on 15th August 2021 the Respondent invaded the suit property claiming the same to be plot number 137 and began excavating a foundation and constructing thereon; that the Applicant's application for injunction was dismissed in the lower court on 24th September 2021 resulting in the appeal herein; that the appeal has high chances of success; that the Respondent is constructing on the suit property and unless she is restrained, the Applicant is apprehensive that she will continue with the construction and change the subject matter of the suit before the dispute is determined.

3. The application is opposed. The Respondent filed her replying affidavit sworn on 12th October 2021 where she deposed that the application is incompetent, fatally defective, an abuse of the court process, lacks merit and ought to be dismissed; that the application is full of contradictions and false allegations; that the Respondent has no claim over plot number 58; that plot number 58 does not exist on the ground; that plot number 60 was reregistered as plot number 137 and therefore there is no plot number 60; that her plot is formerly plot number 60 which is now registered as plot number 137; that plot number 137 Kivaa Market (formerly Plot Number 60) was originally allocated to Ebrahim Murage, then sold to Bernice Mueni who sold it to Phoebe Njeri Kariithi and later sold to the Respondent; that the Respondent has faithfully been paying the rates in respect of plot no. 137; that in 2018 the Respondent started developing the plot when the applicants laid claim on it.

4. The Respondent further stated that the dispute between her and the Applicants was escalated to Masinga Police Station, where the DCI investigated the matter and on reviewing the report of the County Surveyor, it was established that Plot No. 58 does not exist on the ground and that the plot on the ground is plot no. 137; further that the applicants had no ownership documents; that the applicants bought a non

existing plot and their only recourse was to sue the person who sold the plot to them; that the applicants had not met the conditions for grant of temporary injunction and that the lower court ordered that the Respondent remains in possession of the suit property.

APPLICANT'S SUBMISSIONS

5. The Applicants reiterated the averments of their supporting affidavit and submitted that their appeal is an interlocutory appeal as the ownership of the suit property had not been determined and therefore for the court to grant the orders sought it was incumbent upon the applicant to prove that they had an arguable appeal, that the appeal would be rendered nugatory if the orders sought are not granted and that the applicant had established the basis for the grant of conservatory orders. The applicants argued that the Respondent was not candid on the issue of change of Plot No. 60 to Plot No. 137.

6. The applicants further submitted that they only seek for the court to preserve the status quo of the disputed plot pending hearing and determination of the appeal. They relied on the case of *Central Bank of Kenya Deposit Protection Fund Board vs. Uhuru Highway Development Ltd & 4 Others, Nairobi Civil Appeal No. 91 of 1999*; which this court has considered. They argued that it was unfair and unreasonable for the subordinate court to order that the case be heard and determined expeditiously on one hand and on the other hand allow the Respondent to continue with the construction of the plot.

7. It was the applicants' contention that since the Respondent already had possession, she should be allowed to keep possession of the plot but ordered to stop construction transferring or disposing the disputed plot pending hearing and determination of this matter.

8. On the issue as to whether damages shall be an adequate compensation to the applicants, the applicants argued that the rights to own property under Article 40 of the Constitution should not be violated merely because they can be compensated in damages. Reliance was placed on the cases of *Joseph Siro Mosiomo vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR* and *Said Almed vs. Mannasseh Benga & Another [2019] eKLR*, which the court has considered.

THE RESPONDENT'S SUBMISSIONS

9. The Respondent submitted that the applicants had not met the conditions for grant of an injunction as laid down in the case of *Gella vs. Cassman Brown [1973] EA 358*, to the effect that the applicant must show that he has a prima facie case with a probability of success, that he must demonstrate that if the injunction is not granted he shall suffer irreparable harm that cannot be compensated by damages and that the court if in doubt should decide the application on a balance of convenience.

10. On the issue as to whether the Applicants had established a prima facie case, the Respondent argued that the report of the County Surveyor dated 28th April 2021 clearly shows that plot no. 58 does not exist and that the ground where the Respondent is constructing is Plot No. 137 which was formerly Plot No. 60. The Respondent further argued that as the Applicants were not in possession of the suit property, they had not demonstrated that they stand to suffer irreparable damage that cannot be compensated by damages. Reliance was placed on the cases of *Elizabeth Muthoni Hussein vs. Vikesh Jinit Shah [2018] eKLR* and *Fredrick Nganga Thuo vs. Peter Mungai Njuho [2019] eKLR* for the proposition that unless the applicant demonstrates that they shall suffer irreparable injury that cannot be adequately compensated in damages an injunction will not normally issue.

11. On the question of the balance of convenience, the Respondent submitted that the balance of convenience tilts in her favour and relied on the case of *Nehemiah Charles Omwoyo vs. Attorney General & 2 Others [2021] eKLR*, which this court has considered. The Respondent concluded by arguing that the application lacks merit and the same ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

12. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions. In my considered view, the sole issue that arise for determination is whether the applicant has met the threshold for grant of temporary injunction pending hearing and determination of the appeal herein. This court in the exercise of its appellate jurisdiction has power to grant a temporary injunction pending appeal, where the ends of justice demand so, and where the procedure for instituting an appeal has been complied with.

13. 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.”

14. The principles for grant of temporary injunction pending appeal are settled. In the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR*, the court gave the following principles as governing grant of temporary injunction pending appeal;

a. “An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.

b. The discretion should be refused where it would inflict great hardship than it would avoid.

c. The applicant must show that to refuse the injunction would render the appeal nugatory.

d. The court should also be guided by the principles in *Giella vs. Cassman Brown [1973] EA 358*.”

15. In the case of *Giella vs. Cassman Brown [1973] EA 358*, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

16. A prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others [2003] e KLR* as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

17. In the instant case, the applicants have stated that they have a prima facie case in that their appeal raises arguable grounds with probability of success. They argue that the status quo should be maintained to protect their interest before the dispute is determined. The applicants have argued that they are the owners of the suit property being plot no. 58 at Kivaa Market, having purchased it from one John Wambua, who had been allocated the same by Masaku County Council. The respondent on the other hand contend that Plot No. 58 does not exist and that the property where she is in occupation is Plot No. 137 which was formerly Plot No. 60, which she purchased from one Njeri Kariithi. It is therefore clear that the question of ownership is highly contested.

18. The applicant has faulted the finding of the lower court on the issue as to whether the applicant had a prima facie case, where the lower court appears to agree with the applicant in one instant and disagrees with them in another instant in the same ruling. Ground 5 of the Memorandum of Appeal that the learned trial magistrate erred in dismissing the appellant’s application after holding that the appellant had established a prima facie case, is an arguable issue which among other issues should be determined on merit.

19. On the issue as to whether the Appellant/Applicant shall suffer irreparable injury should the temporary injunction not be granted, the applicant has argued that the Respondent is constructing on the disputed plot and that the same will change the subject matter before the dispute is resolved. The respondent has on her part argued that as the applicants are not in occupation of the suit property then the injury suffered cannot be termed as irreparable or incapable of being compensated in damages. I agree with the applicants that construction of the suit property will alter the subject matter of the suit which will render the appeal nugatory.

20. On the question of the balance of convenience, I note that the Respondent is in possession of the suit property, which fact is conceded by the applicants. The applicants have argued that the Respondent can remain in possession for now but they should be ordered not to do any further construction or development of the suit property.

21. This court has considered the rival positions on this matter and notes that it is enjoined by Sections 1A and 1B of the Civil Procedure Act to ensure the ends of justice are met in a manner that is just, expeditious, proportionate and affordable. Having noted that both parties in this suit claim ownership of the property in issue, and the questions as to whether Plot No. 58 exists or not, and whether or not the Plot No. 137 is the same as Plot No. 58; are questions that are yet to be determined conclusively by the subordinate court, it is only just and reasonable that the suit property be preserved before the determination of the dispute herein.

22. In the premises, the Appellants/Applicants Notice of Motion Application dated 1st October 2021 be and is hereby allowed as follows;

a. That pending the hearing and determination of the Appellant’s appeal herein, the Respondent, her agents and/or servants be and are hereby restrained from constructing, disposing and or transferring Plot No. 58, 60 and 137 in Kivaa Market in Masinga Sub-County, Machakos County.

b. That costs of this application shall abide the appeal.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Mutua for the Appellants/Applicants

Mr. Musya holding brief for Mr. Muumbi for the Respondent

Ms Josephine Misigo – Court Assistant