



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 219 OF 2013

GRACE MULEWA NDAMBUKI.....1ST APPELLANT/APPLICANT

OBADIAH NDAMBUKI2ND APPELLANT/APPLICANT

VERSUS

PATRICK MUSYOKI MAITHYARESPONDENT

RULING

1. By a notice of Motion dated the 6th November, 2013 the applicants seek:-
 - i. An order of stay of execution of the judgment/award of the Minister in **Land Appeal Case No. 295 of 2009 - Utangwa Adjudication Section** regarding Plot No. 3272 as delivered on the 23/3/2013 or any action by the **Chief Land Registrar** and the **Director of Adjudication and Settlement** with regard to plot No. 3272, Utangwa pending hearing and determination of the Appeal;
 - ii. Subsequently an injunction order to issue against the Respondent by himself, his servants and/or agents from interfering with, trespassing, encroaching or in any other way infringing onto plot No. 3272, **Utangwa Adjudication Section** pending the hearing and determination of the appeal .
2. The application is based on grounds that the Applicants have appealed against the judgment/award, and it will be in the interest of justice that an order of stay be granted; if stay is not granted an interest adverse to the appellant will be registered; the appeal has high chances of succeeding and it will be rendered nugatory if execution is not stayed; the applicant will suffer substantial loss if the order is not granted and the application has been brought without unreasonable delay.
3. The applicants swore an affidavit in support of the application whereby they deponed that following the award by the Minister of Lands and Settlement, Plot No. 3272 ought to be registered in the name of the Respondent; no stay of the judgment/award was granted, an appeal has already been lodged; they have been in possession of the land where extensive developments have taken place, the Respondent has entered the land hence the need to have the Chief Registrar of Lands and the Director of land Adjudication and Settlement, Makeni restrained from effecting changes regarding proprietorship.
4. The Respondent filed a replying affidavit whereby he deponed that he bought an un-surveyed land from **Sammy Muthoka** who had purchased the same from **Mbula Muketu** who in turn bought it from **Ndambuki Kilitu** (now deceased) husband and father to the 1st and 2nd appellants/applicants respectively. The Land was later exchanged with another by **Sammy Muthoka**. On 20/10/1996 he was summoned by the Adjudication Committee with **Ndambuki Kilitu Mutungi** and

Onesmus Musyoki. The decision was made in his favour on 14/11/1996. The two (2) failed to appeal within the requisite time but instead sued him before the **Utongwa Adjudication Arbitration Board**. He appeared but was not given a time to prepare for the case therefore declined to take part in the process. The **Utangwa Adjudication Section** ruled that a portion of land belonging to **Mbula Mukeku** was combined with his (respondent) portion and given plot Number 2972. **Ndambuki Kilitu Mutunga** and **Mbula Mukeku** took possession of the land. He raised an objection to the Utongwe Land Adjudication Board and his land plot No. 3272 was returned to him while the 1st appellant who represented **Ndambuki Kilitu** was given plot No. 2972.

5. Grace who was dissatisfied by the decision appealed to the Minister who ruled in his (respondent's) favour. Consequently, the Applicants vacated the land. Nine months later they filed an application which was done with unclean hands.
6. In a further affidavit, the respondents denied having vacated the land after the decisions of the Minister.
7. The application herein has been brought pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** which stipulated conditions for stay namely:-

- i. The applicants must show that failure to grant stay will make them suffer substantial loss;
- ii. That they can offer security;
- iii. The application was filed without delay; And what must be considered is whether the appeal will be rendered nugatory.

8. It is argued by the applicants that unless orders sought are granted, the applicant shall be evicted from the parcel of land as the same will be registered in the name of the Respondent. Stay of execution sought is of judgment of the Minister of Land Appeal Case Number 295 of 2009 or any action by the Land Registrar and Director of Adjudication and Settlement with regard to the suit premises in registering interest of the suit premises in favour of the respondent.
9. According to **Section 29** and **30** of the **Land Adjudication Act**, this court ought not entertain Civil proceedings unless the land is registered in favour of the beneficiary after an appeal and the register is altered by the Chief Land Registrar to reflect the decision of the appeal.
10. This application has been sought pursuant to the provisions of **Order 42 rule 6** and **Order 50 rule 10** of the **Civil Procedure Rules**, but the governing law involving the dispute that resulted into this case mainly is the **Land Adjudication Act** as the land in issue is in an Adjudication area.
11. The relevant sections of the law in this matter are the ones aforementioned- **Section 29** and **30** of the **Land Adjudication Act**. It is stated that an appeal was determined by the Minister. **Section 29(3)** of the **Act** provides that once an appeal to the Minister is determined, the Director of the Land Adjudication shall alter the duplicate adjudication register and certify that the same is final and send details to the **Chief Land Registrar**. No documents or evidence has been adduced to show that the register for the **Adjudication Section** has become final in all respects as required by **Section 30(1)** of the **Act**. The alluded to Section is couched in mandatory terms. For a court to entertain any suit in respect of an interest in land in an Adjudication Area there must be a consent in writing of the Adjudication Officer. What was availed was the adjudication proceedings and the order of the Special District Commissioner dated 25th February, 1986 dismissing the appeal. It was therefore erroneous for the suit to be instituted. (see **Mucheke M'anari- versus- E. Mwebia M' Afugi [2006] eKLR**).
12. This therefore brings us to the issue whether injunctive orders should issue. The principles for issuing interlocutory injunction were clearly stated in the case of **Giella -versus- Cassman Brown Ltd [1973] E.A. 358**. The applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally issue unless the applicant will otherwise suffer irreparable loss not capable of being compensated in damages. Thirdly, if the court is in doubt it will decide the matter on a balance of convenience.
13. A Prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is more than an arguable case. (see **Mrao Ltd versus First American Bank of Kenya Ltd and 2 Others. Civil Appeal No. 39 of 2002**).
14. Looking at the facts of this case, the **Minister of Lands and Settlement Adjudicating on Land Appeal Number 295 of 2009 –Utangwa Adjudication Section** delivered a judgment against the

appellants and directed that the suit premises be registered in the name of the respondent. The appellant's claim is that they had been in possession of the suit premises where they made extensive developments until the judgment in 2013, when the Respondent trespassed on the land. On the other hand the respondent claims that he bought the suit premises from a third party who had purchased it from another party who purchased it from the deceased, the husband and father to the appellants. These facts will have to be proved by way of evidence to be tendered at trial. At this stage it hangs in the balance. This would suggest that it may be an arguable case. However, as a pointed out, no consent from the Adjudication Officer was availed as required by the law. This would inhibit the court from hearing or proceeding with the case before it. Consequently the injunctive order sought would not issue.

15. From the foregoing, the stay of execution order sought cannot issue. In the result the application fails and is dismissed with costs to the Respondent.

16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS THIS 18TH day of MARCH, 2015.

L.N. MUTENDE

JUDGE