



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO.91 OF 2005

HADIJA NANJALA CHEMIATI.....PLAINTIFF

VERSUS

JAMIN WASIKE CHEMIATIDEFENDANT

AND

RAMADHAN MUSUMBA CHEMIATI..... APPLICANT

AND

GAYANI ENTERPRISES..... INTERESTED PARTY

RULING

1. This ruling is made in respect of two applications. The first application is dated 16th September 2013 and brought under sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 24 3, 5 (i) (i) of the Civil Procedure Rules. It is an application by Ramadhan Musumba Chiemati referred to as the applicant. The second application is dated 26th November 2013 brought under section 3, 3A and 63 (e) of the Civil Procedure Act and was commenced by the interested party Gayani enterprises. The advocates for the parties agreed that both applications be heard at the same time. I have perused the two and I am satisfied that the matters raised in both applications are related.

2. The application dated 16/9/2013 sought the following orders;

- a) This application be certified as urgent and consequently heard on a priority basis.
- b) THAT this honourable court be pleased to make the applicant the plaintiff in this matter in the stead of the plaintiff who has passed on.
- c) Pending the hearing and determination of this application interparties the interested party be restrained from selling, taking possession of and/or collecting rent from the tenants in the premises on, that parcel of land comprised in title number Bungoma/Town/228.
- d) Pending the hearing and determination of the Applicant's notice of motion dated 20th May, 2013 filed on the 29th day of May 2013 the interested party, its agents and/or servants be restrained from selling, taking possession of and/or collecting rent from the

tenants, in the premises on that parcel of land comprised in title number Bungoma/town/228.

e) Subject to the outcome of the aforesaid notice of motion, pending the hearing and determination of Civil Appeal No.234 of 2011, in the Court of Appeal at Eldoret, the interested party, its agents and/or servants from selling, taking possession of and/or collecting rent from Bungoma/Town/228.

f) Costs of this application be provided for.

3. It is supported by the three grounds listed on the face of it and supporting affidavit deposited by the applicant. The advocates also filed submission in support and opposition of the two applications. The applicant in the first application submits this court has jurisdiction to grant the orders sought. He also submitted on the importance of and principles governing granting of injunctions pending appeal. He cited the cases of;

i) Madhu Paper International Ltd vs Kerr Nairobi Civ App. No.116 of 1985.

ii) Erinford Properties Ltd vs Chesire County Council (1974) 2 ALL ER 443.

iii) Faraj Maharus vs J. B. Martin Glass Industries Civ App. No.153 of 1998.

The applicant also submitted that the replying affidavit filed by the interested party and sworn by Joseph Mwangi offends the provisions of Order 19 rule 4 of the Civil Procedure Rules. Further the deponent of that affidavit did not annex a document to show he was managing director of Interested Party therefore authorized to depose the affidavit on its behalf.

4. The interested party submitted that there was no prima facie case established against the interested party hence the applicant is not entitled to the orders sought. Mr Onchiri submits further that there is no case pending between the applicant and the interested party and an injunction cannot issue in a matter pending appeal. He annexed an extract from Odunga's digest on Civil Procedure.

5. Having perused through this file, the prayers for my determination is (c) and (e). The interested party did oppose prayer (b) which sought an order to make the applicant as plaintiff in this suit. I hold the view that such opposition is already overtaken by events as the applicant was already made a party in the case pending before the Court of Appeal by a ruling of that court in an application delivered on 16th October, 2013. I am bound by the decision of the appellate court and it is only prudent for consistency and continuity that he is made a plaintiff in this suit too. Consequently, I allow prayer (b) thus the applicant be and is hereby made the plaintiff in place of Hadija Nanjala Chemiati-deceased.

6. As regards to prayer (c) & (e), the applicant seeks to restrain the interested party from selling, taking possession and or collecting rents from the suit premises, pending hearing and determination of his appeal vide Eldoret Civil appeal no 234 of 2011. In paragraph 8 and 9 of the supporting affidavit, the applicant deposes his predecessor had tenants from whom she was collecting rents in the suit premises. In par. 10, he deposes that the interested party is a stranger to the estate of the deceased. For clarity of issues in dispute, Hon. Muchemi J. in her judgment delivered on 13th July 2011 made several orders inter alia;

b) That plot no.489 was illegally disposed of by the plaintiff while plot no.228 was fraudulently and unlawfully disposed of by the defendant.

c) That in the interest of justice, the two plots cannot be taken back to form part of the estate of the deceased and be distributed in the pending succession cause.

d) *That save for the proceeds of sale for plot no. 228, there are no other assets for distribution to the heirs of the deceased's estate.(underline mine for emphasis)*

7. The applicant has appealed against this judgment. In his submissions, he is clear he is not seeking stay of execution as provided for under order 42 of the Civil Procedure Rules. This property in my view from that judgment above does not form part of the estate of the deceased plaintiff as deposed by the applicant. The applicant is not keen to stay execution of that judgment if at all. The applicant other than making a statement did not demonstrate that the deceased was collecting rent from the suit premises. However, in the interest of justice, it would be important to maintain a status that would not prejudice either of the parties to this suit during the pendency of the appeal. This court is not in a position to question at an interlocutory stage the manner in which the Interested Party secured title in his name while at the same time the court cannot ignore the fact that the Interested Party is currently the registered owner of the suit property. The court is also aware of the plaintiff's claim to the suit property.

8. It is true as submitted by counsel of the interested party that the interested party does not have any case pending between the applicant and itself. However it has acquired registration as owner of a property the subject of the dispute. Any actions it or the applicant takes will render the subject property in dispute result in litigation which may prejudice the outcome of the pending appeal. In balancing the interests of both parties awaiting the determination of the appeal in the court of appeal, the title to the property must be and need be secured. Therefore to ensure the title to the property does not change hands and to maintain the status quo. I hereby grant an order of injunction directed at the Interested party, it's agents and/or servants from selling and/or taking possession of the suit premises pending hearing and determination of Civil Appeal no. 234 of 2011.

9. On the limb of collection of rent, the interested party filed an application seeking the rents be deposited in this court during the pendency of the appeal. The interested party secured title in its name as per copy of certificate of lease annexed on 18.2.2013. The applicant doubts how the restriction on the title was removed. As said earlier, I cannot question how the changes in the title occurred through the interlocutory proceedings. The applicant submitted that the interested party filed this application to sway the court to decide in a certain manner. I hold the view that he who comes to equity must do equity. The applicant should appreciate positive proposal even if it is made by opposing party. Since the property has changed hands, the rights of the applicant must be weighed against the rights of the current title holder who is assumed to be legally entitled to use the property as per the provisions of section 25 of the Land Registration Act until such time when that title is cancelled.

10. Consequently in light of the circumstances of this case, it is in the interest of justice that rent collected from the premises be put in a neutral place so that when the appeal is finalized, no party is exposed to unnecessary hardship in accessing the funds. I am satisfied that the interested party's application has merit. It basically brought up an issue which in my view they could still put in their replying affidavit. The rents collected from the suit premises effective from 1st October 2014 will be deposited in a joint interest earning account in the names of Ocharo & co. advocates and Onchiri & co. advocates pending the hearing and determination of the Eldoret Civil Appeal No.234 of 2011.

11. On the issue of costs I have found for both applications. I direct that each party to bear their respective costs in each of the applications.

DATED, SIGNED and DELIVERED this **22nd** day of Sept. 2014

A. OMOLLO

JUDGE.