



REPUBLIC OF KENYA



KENYA LAW
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**Thuo v Githinji (Environment and Land Appeal 97 of 2021)
[2022] KEELC 2269 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 97 OF 2021**

JG KEMEI, J

MAY 19, 2022

BETWEEN

DANIEL KANJA THUO APPELLANT

AND

AMOS NJUGUNA GITHINJI RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion Application dated 30th November, 2021 seeking Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. The Honorable Court do grant an order of injunction restraining the Respondent whether by himself, or by his servants or agents or any of them or otherwise howsoever from dealing with the property known as Karai/Karai/8942 whether by trespassing, occupying, constructing, selling, alienating, disposing, charging, mortgaging or creating a lien, charge, caveat or any other illegal encumbrances on the said property pending the hearing and final determination of Kikuyu SPMCC MCELC 7 OF 2021 between the same parties herein and/or until the hearing and determination of this appeal.
 - d. The Honorable Court do issue such orders as may be necessary to ensure compliance with these orders in the interests of justice.
 - e. Costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of even date of Daniel Kanja Thuo, the Appellant. He deponed that the instant Application is pursuant to an interlocutory appeal against the Trial Court Ruling in Kikuyu SPMCC ELC Case No. 7 of 2021. See



copy of the Ruling annexed as DKT1. That the Appellant is a bona fide purchaser of a parcel of land known as KARAI/KARAI/8942 measuring 0.045 Hectares (the suit land) being a subdivision from Karai/Karai/3429 (parcel 3429) measuring 0.035 Hectares. That the larger parcel 3429 registered in the name of the late Elijah Mwangi Mbugua has been a subject of Succession proceedings for over ten years whereas the Respondent is the registered owner of the suit land as evidenced by DKT2; a title deed and official search thereof.

3. The Appellant further averred that the Respondent is a beneficial owner of the parcel 3429 pursuant to Kikuyu SPMCC Succession Cause No. 166 of 2014. That on 23/6/2015, the Respondent sold to the Appellant the beneficial estate of parcel 3429 for Kshs. 650,000/- whereby a deposit of Kshs. 300,000/- was paid upon execution of the sale agreement, DKT3 and the balance of Kshs. 350,000/- was payable after the succession proceedings and subsequent transfer to the Appellant. That despite the Appellant's willingness to complete the sale transaction, the Respondent was unwilling and uncooperative to honour his obligations prompting the Appellant to institute his case at the trial Court and his Application seeking interim reliefs was denied hence this appeal. That it is necessary the suit property be preserved pending the hearing of the case and/or appeal.
4. The Application is unopposed despite service as evidenced by the Return of Service dated 14/2/2022.
5. Be that as it may the Application was canvassed by way of brief written submissions dated 9/3/2022 filed by Learned Counsel James Makori for the Appellant.
6. It was submitted that the Appellant seeks to challenge the trial Court Ruling that declined his Application for an injunction to preserve the suit land. That the Respondent ought to be restrained from adversely dealing with the suit land having reneged on the sale agreement without any legal justifications whatsoever. The Appellant relied the principles for grant of temporary injunction as cited in the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR that an order for injunction pending appeal is discretionary that can be exercised against an Applicant whose appeal is frivolous; the discretion should be refused where it would render the appeal nugatory and that the Court should be guided by the principles in *Giella v Cassman Brown* [1973] E.A 358 that were also applied in the case of *Raphael Mulinge Muthusi & 2 others v Mary Ndila Nyolo* [2022]eKLR.
7. The singular issue for determination is whether the Application is merited.
8. The Court's power to grant a temporary injunction pending appeal is provided for under Order 42 Rule 6(6) of the *Civil Procedure Rules* that;

“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.”
9. The guiding principles for grant of temporary injunction pending appeal were summarized by the Court in the case of *Patricia Njeri & 3 others v National Museum of Kenya* [2004] eKLR that;
 - (a) The discretion will not be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840 (cited in *Venture Capital*).
 - (b) The Applicant must state that a reasonable argument can be put forward in support of his appeal (*JK Industries v KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*).
 - (c) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).



- (d) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
- (e) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Sbitukha Mwamodo & others* (1986) KLR 445 (also cited in *Venture Capital*).
10. The Applicant's case is that despite being a bonafide purchaser of the suit land from the Respondent, the Respondent has adamantly refused to transfer the land to him hence the filing of a suit in the lower Court. Simultaneously he filed an application seeking orders of temporary injunction against the Respondent vide a notice of motion dated the 9/2/2021. The Court in its finding held that the application was unmerited and dismissed the same. This is the decision that has provoked the current appeal.
11. I have perused the Memorandum of Appeal filed on the 17/11/2021 and the grounds thereof where the Applicant has impugned the trial Court ruling on 16 grounds. At this stage the Court is not required to go into the merits of the case but it suffices to state that based on the grounds raised the appeal is not an idle adventure. This Court shall constraint itself so as not to prejudice the outcome of the appeal.
12. Guided by Order 40 rule 1 of the Civil Procedure Rules, this Court is of the view that to preserve the property pending the hearing and determination of the appeal, the Court hereby orders status quo to be maintained in terms of prayer No c for a period of 6 months within which the Applicant should have set the appeal down for hearing and determination.
13. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Katee for Appellant/Applicant

Respondent - Absent

Court Assistant - Phyllis

