



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 133 OF 2011

EPHANTUS MAINA

CHEGE.....APPELLANT

Versus

KIMARI KAHIA
MUCHIRI KAHIA

LUCY

WAMATHIOYA.....RESPONDENTS

RULING

The Application before me is that dated 16th September 2011 which was filed under certificate of urgency on the same date and brought under order 40 rules (1)(a) of the Civil Procedure Rules and sections 1A and 3A of the Civil procedure Act wherein before this court the applicant is seeking order:

That this Honourable court do issue order restraining the Respondents and or their agents/and or servants from demarcating and or subdividing or surveying and or installing boundary features on land parcel No. Loc15/Gathukiini/985 pending the hearing and determination of this appeal.

That cost of the application be provided for.

In support of the application is an affidavit sworn by Ephantus Maina Chege with annexures thereto sworn on 16th September 2011.

The Respondents through M/s Karweru & Co. Advocates filed grounds of opposition to the application on 24th November 2011 stating the following grounds:

- 1. That the appeal herein and the application dated 16th September 2011 are a gross abuse of court process and only meant to delay and vex the Respondents and embarrass the proceeding herein generally.***
- 2. That the application does not meet the threshold established by law for granting of the orders sought.***

3. **That as a tenet and public policy litigation has to come to an end.**

Before going into the merits of this application it is in the best interest of justice that I do set out the brief history of this matter.

The applicant filed a suit in the Murang'a Senior Principal Magistrate's court being Civil Case No. 132 of 2011 on 7th June 2011 and took out a notice of motion under certificate of urgency seeking similar orders of injunction, while in the main suit the same sought a declaration that the mode of demarcation and subdivision of land parcel number Loc 15/Gathukiini/985 as proposed by the same was the most honorable fair and accurate and therefore ought to be implemented and or effected forth with. He also sought costs.

In answer to the said application the Respondents herein took out a notice of preliminary objection to the effect:-

That The proceedings therein to mean suit and application are all resjudicata the various judgments and rulings in Nyeri High Court Civil Appeal No. 57 of 1996 and Nyeri C.M.'s SUCC. Cause No. 45 of 1983.

That the proceedings are a grave abuse of the court process.

Based upon the said preliminary objection the Principal Magistrate's court upheld the objection and struck out the suit with costs and being dissatisfied with the said ruling the applicant filed the present appeal before this court through a memorandum of appeal filed on 16th September 2011 with nine (9) grounds of appeal as follows:

1. ***The honourable learned magistrate erred in fact and in law by failing to hold that the proceedings in Nyeri CMC Succ. Cause No. 45 of 1983 Estate of the late Kahia Ichanyaga alias Kahia Kanyaga and consequent Nyeri HCCA no. 57 of 1996 Paul Karanja & 2 Others vs Kimari Kahia & 2 others were different in substance and jurisprudentially with instant civil proceedings before the court and thus re-judicata does not apply.***
2. ***The honourable learned magistrate erred in fact and in law by his failure and or refusal to abide and adhere with the findings made by the high court in Nyeri HCCA no. 57 of 1996 which had held that the Law of Succession Act does not specify how distribution of the estate should be done on the ground and thus that issue had remained unaddressed and was therefore amenable for determination by a civil court.***
3. ***The honourable learned magistrate erred in fact and in law in failing to hold that no court of competent jurisdiction has ever heard the instant dispute being tussle about the most reasonable and fairest form of demarcation of land parcel no. Loc. 15/Gathukeini/985 amongst its registered co-owners on merit and hence the rule of res-judicata does not apply.***
4. ***The honourable learned magistrate erred in fact and in law in failing to hold that the appellant***

had the right to be heard on merits.

5. *The honourable learned magistrate erred in fact and in law in failing to hold that the court exercising its succession jurisdiction became functus officio and the process of succession was concluded upon the registration of transmission documents in the lands registry and new title issued and thus dispute herein being about demarcation on the ground was a new and novel dispute.*

6. *The honourable learned magistrate erred in law and in fact in holding that the dispute herein had been heard and decided on merits by previous courts.*

7. *The honourable learned magistrate erred in law and in fact in failing to consider any and or all the authorities submitted by the counsel for the appellant.*

8. *The honourable learned magistrate erred in law and in fact in failing to exercise its inherent jurisdiction and principles of equity to achieve the ends of justice.*

9. *The honourable learned magistrate erred in law and in fact in considering matters he ought not to have considered and failing to consider matters he ought to have considered.*

The applicant also took out the present application under certificate of urgency.

When the matter first came before the court Mr. Kangata learned Counsel for the applicant proposed that the appeal be first tracked in the place of the application herein with status quo being maintained which proposal was opposed by Mr. Karweru for the Respondent on the basis that he was not comfortable with the status quo.

I therefore need to point out that what is before me is the interlocutory application under order 40 rule 1(a) which states as follows:

1. Where in any suit it is proved by affidavit or otherwise.

(a) That any property in dispute in a suit is in danger of being wasted damaged or alienated by any party to a suit or wrongfully sold in execution of a decree - the court may by an order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienating sale renewal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

There is no dispute that this court can in a proper case grant an injunction pending appeal. The principles to guide the court have been stated in *VENTURE CAPITAL & CREDIT LTD vs CONSOLIDATED BANK OF KENYA Ltd Civil Application No. NAIROBI 349 of 2003*. The Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must however be exercised judicially and not in whimsical or arbitrary fashion". The discretion is grounded by certain principles:

(a) The discretion will be exercised against an applicant whose appeal is frivolous. The Applicant must state that a reasonable argument can be put forward in support of the appeal.

(b) The discretion should be refused where it would inflict grueling hardship than it would avoid.

(c) *The applicant must show that to refuse the injunction would render his appeal nugatory.*

(d) *The court should also be guided by the principle in Grelle vs Cassman brown & co. Ltd (1973) EA 358.*

All the above principles were stated by Vishram J as he then was in *PATRICIA NJERI & 2 OTHERS vs NATIONAL MUSEUM of KENYA NAIROBI HIGH COURT Civil Appeal No. 492 of 2004 unreported.*

Having stated the law it is now for the court to see whether the application before me falls within the scope of the law.

The facts in respect of this matter are not in dispute. This was confirmed by Mr. Kangata in his submission. The only issue in dispute is how the distribution of the estate of one KAHIA ICHANYAGA alias KAHIA KANYAGA should be reflected on the ground. The applicant has taken issue with the respondents attempt to survey the land which he considers fraudulent. He would like the same to be done in conformity with his proposal. That was the subject matter of the lower court from which he has lodged an appeal.

The Respondents on the other hand submitted that the matter herein was resjudicata having been the subject of the cases which started in the applicant affidavit and that his application is an abuse of the court process.

Having heard all the submissions of the parties herein I am of the considered opinion that the applicant has not shown to this honourable court that the appeal will be rendered nugatory if the order sought is refused or that the applicant would incur substantial loss should the Respondents proceed with the intended survey. The Respondents have appointed a surveyor to enable them effect the distribution herein consent by the parties at the confirmation of the Letters of grant herein.

I take the view that any hardship or inconvenience by the applicant can be avoided if the applicant cooperates with the respondents and present his proposal to the surveyor when the same is on the ground. As the matter stand there is no evidence that the surveyor has acted in a manner unfavourable to the Applicant and it would therefore be an injustice to stop the exercise.

Further it is my considered opinion that the applicant has not shown that the application has merit as the issues which the same is complaining of were looked at by Honorable justice M.S.A. Makhandia in NYERI Civil Appeal No. 57 of 1996 produced by the applicant in the affidavit as annexure GM3 wherein at pages 6-7 thereof the judge had this to say.

“It appears that though the parties are in agreement as regards distribution, they have however been unable to agree how the partition should proceed on the ground. This cannot be in the realm or province of the court to determine. The appellants opposition to the partition proposed by the respondents is hinged on three grounds; accessibility to the road, accessibility to the river and whether their developments need to be taken into account in the partition. Surely these are not matters which are justiciable” emphasis added

I take note that Justice Makhandia had ruled that the issues which the applicant is complaining about are not justiciable and since no appeal was lodged against the said finding I am guided by the same and hold that the application before this court lacks merit. I have also noted that the appeal herein has not been admitted by the court and therefore I will not comment on whether or not the same has a chance of success. There is also the issue raised by Mr. Karweru that this matter is resjudicata and as pointed out Justice Makhandia had looked at the issues herein at the appeal and ruled on the same. It is therefore clear to me that the applicant has not met the legal threshold for the grant of the orders sought at this stage. It is also clear that the applicant has not approached this court with clean hands as he who seeks equity must be prepared to do equity.

The upshot of this is that the application is dismissed with cost to the respondents.

Dated and delivered at Nyeri this 3rd day of February 2012.

J. WAKIAGA
JUDGE