**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 219 of 2010**

**SAMAIRE OLE MUNTET.........................................................................1ST APPLICANT**

**TOBIKO OLE MUNTET.........................................................................2ND APPLICANT**

**=VERSUS=**

**LERIAN SEKENTO..............................................................................1ST RESPONDENT**

**TETEYION SEKENTO.......................................................................... 2ND RESPONDENT**

**TARETON SEKENTO...........................................................................3RD RESPONDENT**

**RULING**

The applicants, Samaire Ole Muntet and Tobiko Ole Muntet, have brought this appeal simultaneously with the present application dated 6th April, 2011 for an order of temporary injunction to restrain the respondents from interfering with the parcels of land known as CIS-MARA/ENARE-BOOKESI/13 and 14 (the suit properties) pending the hearing and determination of the appeal herein.

It is common ground that the applicants are the registered owners of the suit properties, whereas the respondents are claiming beneficial interest, alleging that the former obtained registration through fraud. To assert their interest, the respondent instituted Nbi. HCCC NO.1034 of 2001 in which they sought, among other prayers, a declaration that the defendants, in that suit, hold the 80 acres of land wrongly taken from parcel numbers 1192 and 1193 in trust for the them; an order of cancellation of the subdivisions and transfers in respect of the parcel of land known as CIS-MARA/ENARE/BOOKESI/1to 14; and an order directing the 1st to 10th defendants, in that suit, to vacate parcels Numbers 1192 and 1193 Kipise. (which suit is apparently in respect of same parcels of land in this appeal).

By a Chamber Summons dated 16th October, 2007, the defendants in the Nairobi suit, some of whom are the appellants in this appeal, moved the court, in HCCC No.1034 of 2001, for a temporary injunction to restrain the respondents, some of whom are the respondents in this appeal:

**"……………from entering, trespassing, erecting any structures , grazing their cattle or interfering with the respondents' peaceful and quiet possession of all those parcels of land known as CIS-MARA/ENARE/ BOOKESI /2 to 14 pending the final hearing of that application."**

While the said suit and application was still pending hearing, the appellants without disclosing that fact, filed Civil case No. 80 of 2008 before the principal magistrate's court at Narok seeking a permanent injunction to restrain the respondents from interfering with the suit properties which suit was dismissed

for the reason that the issues raised in the Narok suit ought to have been dealt with through the suit filed in Nairobi.

It is this decision of the lower court which precipitated this appeal and the current application, brought pursuant to this court's appallate jurisdiction under **Order 42 rule 6** of the **Civil Procedure Rules** to restrain the respondents as explained earlier for the reason that the respondents are interfering with the suit properties.

The respondents have filed a replying affidavit in which they contend that the suit properties were fraudulently registered in the name of the applicants; that they have been and are still in occupation of the suit properties; that they are not committing any acts of waste; that the applicants obtained *ex parte* orders without disclosing to the court about their presence on the suit property and without disclosing that they had filed a similar application in Nairobi HCCC No. 1034 of 2001. They therefore, urge this court to hold that the application is an abuse of the process of the court and to dismiss it with costs.

The sole issue for determination is whether the applicants have made a case for granting of the orders sought?

**Order 42 rule 6** aforesaid provides 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".**

In exercising its jurisdiction to grant orders of temporary injunction pending appeal, the High Court applies the same principles as those enunciated in the celebrated **Giella** V. **Cassman Brown Co. Ltd (1973) E.A 358** to the effect that the applicant must demonstrate a *prima facie* case with a probability of success, that he is likely to suffer irreparable loss which cannot be compensated by an award of damages. But should the court be in doubt it must decide the application on a balance of convenience.

In considering whether or not the applicant has a *prima facie* case there must be no definite determination of matters of fact or law. **See Mrao Limited v. First American Bank of Kenya Ltd** (2003) KLR 125.

The applicants have annexed title deeds to show that they are the registered owners of the suit properties. However, their registration as such has been challenged on the grounds set out earlier in this ruling, namely, that they (the respondents) are and have been in occupation of the suit property from 1992; that the registration of the applicants was fraudulent; that it was made to defeat their interest on the suit property; that the applicants have deliberately failed to disclose to the court that there is a similar application pending in Nairobi HCCC No.1034 of 2001. They further contend that the action of the applicants of bringing this application when there is a similar application pending in another court and without disclosing that fact to the court is an abuse of the process of the court; that an injunction being an equitable remedy will not to be granted to a party who approaches the court with unclean hands. They have referred this court to the principle espoused in **Republic** V. **Kensington Income Tax Commissioners, ex parte Princess Edmond de polignac** (1917) 1 KB 486 which was quoted with approval by the Court of Appeal in **Uhuru Highway Development Ltd** v. **Central Bank of Kenya & 2 others** CA No. 126 of 1995 thus:-

**"It is perfectly well settled that a person who makes an *ex parte* application to the court -that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest disclosure of all material facts within his knowledge, and if he does not make that disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage already obtained by him."**

The applicants have been enjoying an order of temporary injunction. They obtained it on the basis of

their being the registered owners of the suit properties. From the record before me, it is clear that in obtaining that injunction they neither informed the court about the respondents' beneficial interest in the suit properties nor of the pending suit. Even though a title deed is *prima facie* evidence of ownership, under the third principle espoused in **Giella** v. **Cassman Brown** (supra) a court would not grant an injunction pending appeal if it would probably inflict greater hardship than it would avoid. See **Madhu Paper International Ltd** v. **Kerr** (1985) KLR 840.-

The issue that arises, is whether, the court would nonetheless have issued the injunction had it been seized of the correct position on the ground and all the other facts, now disclosed. No doubt, *prima facie*, the applicants are the registered owners of the suit property, there is no evidence, however, that they are in occupation of the suit property. Despite the fact that the presence of the respondents is incontravention of their rights as the registered owners, in view of the provisions of **Section 30(g)** of the **Registered Land Act** (now repealed), I find the interested of the respondents in the property to be well within the overidding interests to which the applicants registration is subjected.

**Section 30** of the **Registered Land Act** provides:-

**"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:**

**(g) The right of a person in possession or actual occupation of the land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed".**

The respondents claim to have been in possession of the suit property long before it was registered in favour of the applicants. They also contend that they were allocated the land in an arbitration proceedings. Whether or the applicants were regularly or irregularly registered as owners of the suit property will be determined in the suit filed in Nairobi or perhaps in this appeal. For now, the court is concerned with ensuring that no hardship is inflicted.

Though, it is alleged that the respondents are committing acts of waste, no evidence of such acts has been tendered. On the contrary, the respondents have demonstrated that they are in occupation of the suit properties and that if the injunction sought is granted, they would suffer irreparably as they will lose their homes.

In view of the foregoing, I am of the view that granting an injunction pending appeal would occasion, greater hardship than it would avoid. I am also of the view that the applicants can be adequately compensated by damages for trespass to land or award of mesne profits if they succeed in their appeal. Moreover, the applicants can still pursue the same orders through the application filed in the suit in Nairobi.

The upshot of the above is that the application has no merit and is dismissed with costs to the respondents.

**Dated, Signed and Delivered at Nakuru this 16th day of October, 2012**

**W. OUKO**
**JUDGE**