



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 135 OF 2003

RODAH K. CHEBON.....APPELLANT

VERSUS

SUSAN NYABOKE ONSOMU.....RESPONDENT

*(An appeal from the Ruling and Order in Nakuru C.M.C.C.NO.986 of 2003 by
Hon. T. M. Wekulo, Senior Resident Magistrate, Nakuru dated 4th August, 2003)*

JUDGMENT

This is an appeal arising from an interlocutory decision of the subordinate court delivered on 4th August, 2003 in which the learned magistrate, Mrs. T. Wekulo dismissed the appellant's application for injunction and allowed the respondent's similar application. The appellant was therefore restrained from developing, cultivating, constructing or interfering in any other manner with the suit land - L.R. NO.NAKURU/MUNICIPALITY BLOCK 17/213.

Those were the interim orders pending the hearing and determination of the suit. There is evidence that the suit was eventually heard and judgment delivered on 26th November, 2007. In that judgment, the learned trial magistrate dismissed the appellant's suit but granted the respondent's counterclaim finding that the latter is the lawful registered proprietor of the suit land. That has prompted this appeal in which the appellant argues that the learned trial magistrate erred in holding that the appellant's application did not disclose a *prima facie* case.

The respondent has opposed the appeal arguing that it lacks merit and that it has been overtaken by events. The respondent has applied separately in a motion dated 17th February, 2008 that the appeal be dismissed for the reason that it has been overtaken by events. I reiterate that this appeal arises from an interlocutory decision of the court below and wish to note the following three points:

- i) An injunction is an equitable remedy of a preventive or protective character.
- ii) A temporary injunction is a provisional order to restrain the doing of a specific act pending the happening of an event specified in the order.
- iii) A temporary injunction is granted where the applicant shows, among other things, *prima facie* case.

The appellant's application, the subject of this appeal sought restraining orders pending the hearing and determination of the main suit. The main suit having been heard and determined, what purpose will the outcome of this appeal, even if in favour of the appellant, serve?

If the appeal is allowed, there will be confusion as this court will have confirmed that the appellant had a *prima facie* case that the suit property is hers yet the lower court has in fact found that the respondent is the lawful owner of the suit property. The situation is further compounded by an appeal preferred against the final finding of the lower court.

The question whether the lower court erred in finding that the appellant has not established a *prima facie* case is but an academic exercise that is not sensitive to judicial economy.

Now that H.C.C.A.No.222 of 2007 has been filed, the appellant has an opportunity to challenge the entire decision of the court below.

In the result, this appeal is dismissed with costs to the respondent. It follow also that the respondent's application dated 17th February, 2008 is allowed.

Dated, Signed and Delivered at Nakuru this 26th day of February, 2010.

W. OUKO
JUDGE