



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL APPEAL NO. 34 OF 2010**

**JULIUS NJUGUNA NDUATI .....APPELLANT**

**VERSUS**

**LUCY NYOKABI MWANGI.....RESPONDENT**

**RULING**

1. The applicant's application by way of chamber summons is brought under the provisions of section 1(A) 1(B) and 3(A) of the Civil Procedure Act as well as Order 39 of the Civil Procedure Rules. The applicant is seeking for a temporary order of injunction to restrain the respondent, her agents, or servants from carrying out construction or interfering with plot No. 3 A, which is forming part of plot No. 838/3 at Moi's Bridge Trading centre pending the hearing and determination of the appeal. The brief background of this matter is that the applicant had filed a suit being **SPMC at Kitale Civil Suit No. 490 of 2004** in which he sought for the following orders:-

- (a) An order that the plaintiff is the owner of that plot No. 3A forming part of the original Plot No. 838/3 measuring 100 x 100ft at Moi's Bridge Trading Centre and that the defendant has no proprietary interest or right of use of the said suit plot.
- (b) An injunction do issue to restrain the defendant, her agents, servants and/or any person claiming through her from
- (c) entering, occupying, constructing, wasting, alienating and/or dealing in any way whatsoever in the suit land.

2. That suit was fully heard determined and by an order of **Hon. Miss T. A. Odera, Senior Resident Magistrate** issued on 21<sup>st</sup> September, 2010 that suit was dismissed with costs to the defendant. Being aggrieved by the said order, the applicant has preferred an appeal and listed several grounds of appeal. Meanwhile, this application was filed to seek for an order of injunction pending the determination of the appeal. The application is predicated on the grounds that the appellant is the owner of plot No. 3A forming part of plot No. 838/3 at Mois Bridge Trading Centre. The applicant has put up permanent buildings on the suit premises he has been in possession since 1975. The respondent entered the suit property in 2004 and proceeded to construct a building which is rapidly progressing to completion that is when the applicant filed the suit which was dismissed.

3. Counsel for the applicant argued that the appeal raises triable issues, it has high chances of success and unless an order of injunction is issued the applicants appeal will be rendered nugatory. To demonstrate the appeal has good chances of success, counsel submitted that there was a case filed in Eldoret being **Eldoret HCC No. 93 of 1977** where a consent judgment was recorded that the applicant should get plot No. 3A measuring 0.07 acres. Thus the applicant contends he has satisfied the conditions for granting an

interim order of injunction.

4. Several authorities were cited in support of this proposition among them, the cases of; **Samson Okun Orinda Vs Ayub Muthee M'igweta & 2 others (2010)eKLR and also the case of Kenya Anti Corruption Commission Vs Bhangra Limited & another (2009) eKLR** In both cases the Court of Appeal granted a temporary injunction pending the hearing of the appeal to preserve the subject matter. It was further argued that the applicant's application satisfied the test and conditions set out in the oft' cited case of **Giella Vs Casman Brown Ltd {1973} E A 358.**

5. This application was opposed; counsel for the respondent relied on the replying affidavit sworn by **Lucy Nyokabi Mwangi** on 12<sup>th</sup> October, 2010. The application was faulted as it is brought under the provisions of order 39 of the Civil Procedure Rules instead of the laid down procedure set out under Order 41 which makes provisions on appeals, stay and injunction orders pending appeal. The Provisions of order 39 refers to an existing suit in this case there is no suit that is pending it was determined and judgment delivered. The decisions by the Court of Appeal which were cited in support of the applicant's application were also distinguished because they invoked the provisions of Rule 5 (2) b of the Court of Appeal Rules.

6. According to the respondent, the application does not meet the thresh hold of the test set out for granting an interim order of injunction. The applicant has not been able to challenge the ownership of the suit premises. The issue of ownership was before the lower court, it was determined in favour of the respondent because she produced the title deed, or the grant which was conclusive evidence of ownership. The lower court had no Jurisdiction to cancel a title which was a first registration, the court relied on the report of a surveyor who visited the scene and identified the two plots belonging to the applicant and the respondent.

7. Moreover, it was submitted that the applicant has his own distinctive plot where he has constructed his shops. Further the respondent is only constructing on her plot and in the event that the appeal is successful, there is no way the applicant can suffer irreparable loss. The plot will always be there. The applicant has also not challenged the ownership by the respondent of the suit premises. The order he is seeking to rely on, which was issued by the High Court Eldoret was brought to the attention of the trial Magistrate who found no relationship between plot 3A and title held by the respondent. Counsel urged the court to find the application lacks merit and also relied on the case of **Mrao Ltd V First American Bank of Kenya Ltd & 2 others {2003} Kenya Law Report p. 125.** That case sets out the element that constitutes a prima facie case with a probability of success.

8. The above is the summary of the arguments for and against this application. I agree with counsel for the respondent that this application was brought under the wrong provisions of the law. This application should have been brought under the provisions of order 41 Rule 4 especially sub rule (6) of the Civil Procedure Rules which provides as follows:-

***“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”***

This application should also have been filled by way of a notice of motion and not a chamber summons. However, since the respondent has not been prejudiced by this Slovenes, I will proceed to evaluate the merit of this application. Although the applicant did not annex a copy of the judgment by the learned trial Magistrate, I endeavored to obtain the original file SPMCC No. 490 of 2004. I wish to quote part of the judgment which I find relevant;

***“On whether the plaintiff owns the suit land, what he said is that he owns plot 3A which is part of the original LR 838/3. The defence denies that she occupies the same and she says her late husband's plot is L R No. 13638/2 and that the plaintiff's plot is L R No. 13638/1 have marked boundary on the two fences. From the evidence adduced by parties herein, It is not clear whether***

*plot 3A and LR No. 13638/2 are one and the same. It is clear to me that the parties herein have a dispute on the ground. DW 3 said he re surveyed and established the boundaries between LR 13638/1 and LR 13632/2 and that he found that the defendant was occupying the former while the plaintiff occupied the later. The defendants produced certificates of search for the said land i.e LR 13638/1 (DEXH 7) which is different from plaintiff's plot No. 3A. It appears to me that the parties herein have a dispute on the ground the plaintiff had the burden to prove that the land the defendant is occupying belonged to him. This was not done. The defendant has shown that she occupies LR 13638/2 and produced a Grant for the same . Section 23 (1) of the Registration of titles Act Provides that such certificate is conclusive evidence of proprietorship. This shows that the deceased Zacharia Mwangi Kambo owned the said LR 13638/2”*

Counsel for the applicant was categorical in his submissions that the ownership of the suit premises was not an issue before the trial court. This is curious because the kind of orders the applicant sought could not have been determined without going into determination of the ownership of the suit plot. In any event the first prayer in the applicant's suit was for a declaration that the applicant is the owner of plot No. 3A. This was followed by a prayer for an order of injunction. It follows the applicant had a duty to prove his case on a balance of probability.

On the issue that the Learned trial Magistrate exceeded her jurisdiction by making a judgment against the High Court Decision in Eldoret, a casual perusal of the judgment, shows that the learned trial Magistrate found there was no connection, or she could not tell the connection between **plot No. 3A** and the title held by the respondent that is **LR No. 13638/2**. Without having to delve into the evaluation of the evidence which might prejudice the appeal, I am not satisfied that the applicants application meets the thresh hold of granting an order of injunction pending the hearing of the appeal.

I have also considered the fact that the respondent's plot is only being developed and in the event that the applicant will be successful in the appeal, any damages suffered can be compensated. For the aforesaid reasons, the chamber summons dated 7<sup>th</sup> October, 2010 is disallowed with costs to the respondent.

RULING READ AND SIGNED THIS 29<sup>TH</sup> DAY OF OCTOBER 2010

**MARTHA KOOME**

**JUDGE**