



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

Civil Appeal 203 of 2007

BEATRICE MUMBE NDWIGA APPELLANT

VERSUS

DAVID MUIMI MWINZI RESPONDENT

RULING

1. The Application dated 30/7/2008 seeks orders that a temporary injunction do issue under Order XLI Rule 4 (1) of the Civil Procedure Rules until the Appeal herein is heard and determined. Specifically, the Applicant prays that the Respondent be restrained from selling by public auction or in any manner dealing with land parcel number 478 and 1355 Mwambui Adjudication Section. The grounds in support are that:-

1. “The Applicant/appellant lost the case in the lower court and filed Machakos High Court Civil Appeal No. 203 of 2007 now pending hearing and determination.

2. The subject matter before the lower court was ownership of land parcel No. 480 Mwambui Adjudication Section which the Respondent was claiming from the applicant/appellant.

3. The Respondent filed the case before the lower court for recovery of the aforesaid parcel of land while a similar dispute was pending before the Minister for Lands and Settlement as Ministers Appeal Case No. 419 of 2003 at Mwingi District Commissioner’s office.

4. A Judicial Review Application seeking to quash the Ministers decision over Land Parcel No. 480 Mwambui Adjudication Section is pending hearing and determination, the same being Machakos H.C. Civil Misc. App. No. 157 of 2004 between the parties herein.

5. The Respondent is executing on costs.

6. The applicant filed an application for stay of execution before the lower court and same was dismissed and the applicant committed to Civil Jail for 4 months.

7. Upon coming out of Civil Jail, appellant/applicant was confronted with court orders seeking to sell

her property by auction.

8. The applicant is likely to suffer loss of a substantial nature if her only parcels of land are sold off before canvassing her case before the appellate court as well as in the Judicial Review application now listed for hearing on 22/10/2008.

9. An injunction is necessary in the circumstances and in the wider interests of substantial justice.”

2. The grounds are extrapolated upon in the Supporting Affidavit sworn on 30/7/2008, and I need only to add that the Applicant’s counsel relied entirely on the grounds and Affidavit and made no submissions on the law. As I understand it however, the law on the subject was well set out in the oft-quoted case of Erinford Properties Ltd vs Cheshire County Council (1974) All E.R. 448 where Megarry J held that:-

“ There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in Wilson v Church (No 2)^[1], where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory’. That was the principle which Pennycuik J applied in the Orion Case^[2], and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.”

3. Ransley J in Church Road Development Co. Ltd vs Barclays Bank of Kenya Ltd & Another (2005 e KLR) followed the above reasoning in granting an injunction and having read the Replying Affidavit sworn on 13/8/2008 and having heard counsel for the Respondent, the only question to consider is whether, if I do not grant the Application, the pending Appeal would be rendered nugatory.

4. I note that the issue between the parties at the moment, is costs awarded to the Respondent after he succeeded in Mwingi SRMCC No. 107/2003. When the Respondent attempted execution, the Applicant was unable to pay and was committed to civil jail. When she was released, the Respondent then attempted to sell the two parcels of land cited above to recover the said costs. The Appeal itself raises the issue whether the Appellant was a trespasser on to the disputed parcel of land and whether the order of perpetual injunction was properly and lawfully issued. The issue of costs is not per se the subject of the Appeal. However, if the suit land is disposed of in any way, then the Appeal, premised on the land question, will be rendered nugatory. Further, there are other proceedings in this court viz: H.C.Misc. 157/2004 where the same parcel of land is in issue and again unless the injunction is issued, those proceedings will be rendered nugatory.

5. Land is a sensitive subject and where parties are litigating over it, the substratum thereof should never be lost.

6. In the event, I will grant the injunction as prayed at paragraph 2 of the Application. Costs will abide the Appeal.

7. Orders accordingly.

Dated and delivered at Machakos this 26th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Musyoka K for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE

[\[1\]](#) (1879) 12 Ch D at 458

[\[2\]](#) (1962) 3 All ER 466, (1962) 1 WLR 1085