REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 7 OF 2007

GIKONDI/THANU FARMERS CO-OPERATIVE SOCIETY LTD….....APPELLANT/APPLICANT

Versus

PETER WACHIRA GACHURU…….....…….RESPONDENT

(Being an application for discharge of injunction arising out of an appeal from the Ruling and Orders of G. A. M'masi, Senior Resident Magistrate, Nyahururu, in Nyahururu PMCC No. 2 of 2007 delivered on 31st January 2007)

RULING

The relationship between the Appellant and the Respondent is set out in the plaint that was filed in the subordinate court. It is thereof pleaded that by a written agreement the Respondent leased the Appellant's property namely **GITUMBA/MUHOTETU BLOCK 4/14**. The Respondent avered that the term of tenancy is up to 31st December 2006. That by letter dated 16th November 2006 the Appellant sought by a written Notice to unilaterally terminate that tenancy. That on Respondent resisting that termination the Appellant threatened to forcibly evict him. The Respondent therefore prayed for a declaration that the purported termination was null and void and of no legal consequence. Before the full hearing the Respondent filed an application seeking temporary injunction. The subordinate court granted that injunction. The Appellant was aggrieved by the order of injunction and preferred this appeal. Before the hearing or even before the admission of that appeal, the Appellant filed an application by Notice of Motion dated 1st march 2007. The application is brought under *Order XXXIX Rule 4* of the Civil Procedure Rules. That application seeks the following order:-

"***That this Honourable court do discharge the temporary injunction orders issued on 31st January 2007, in Nyahururu PMCC No. 2 of 2007."***

The Appellant relies on the argument that the temporary injunction issued by the Nyahururu Court is enforcing a tenancy agreement which has not obtained the consent of the Land Control Act Cap. 302 and that accordingly the injunction granted is unenforceable. That the Respondent was wrong to assert that the suit property was not agricultural land since the Appellant in selling the very same land to a 3rd party the transaction was given Land Board Consent. That accordingly the Respondent had come to equity with unclean hands. It ought to be noted that the fact that consent was obtained in the sale transaction was not before the Nyahururu Court. The Appellant further stated that it would take more than one year to hear the appeal herein by which time the alleged tenancy would have ended. The Respondent's

response to the application are, that the tenancy agreement is not null and void and that to prove that consent was required was a matter of evidence which can only be entertained at the full hearing of the Nyahururu case. That the repudiation by the Appellant was wrongful, in this regard counsel relied on the book by **M. P. FURMSTON**. That there was no substantial reason to dispossess the Respondent, here reliance was on **MULA On Code of Civil Procedure 16th edition**, and The following passage:-

"***A person in possession cannot be dispossessed without due process of law. A bona fide possessor should not be dispossessed pending suit unless there is some substantial reason. The matter should be considered judicially in all its aspect."***

The Respondent also reiterated an argument made in the subordinate court that the Appellant had failed to produce evidence that the Minister had gazetted the area of the suit land as the area requiring the Land Board Consent. The Respondent submitted that this court should not interfere with the subordinate court's discretion unless the court was of the view that the subordinate court misdirected itself in some matters, in this regard he relied on the case of **MBOGO AND ANOTHER -V- SHAH (1968) E. A. 93.**

I have considered the application and the submissions of counsels. The Appellant's application is brought under *Order XXXIX Rule 4.* That rule provides:

"Any order for injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

It is clear that the courts do have the power to vary or discharge an injunction. But as much as the court has been donated that power, it is essential to consider our scenario in this case. A temporary injunction was granted by the subordinate court. The Appellant being dissatisfied filed an appeal hereof. The Memorandum of Appeal brings out the following grounds:-

1. ***The Learned Senior Resident Magistrate erred in law and in fact in allowing the Respondent's application for a temporary injunction dated 3rd January 2007 despite the Respondent having failed to disclose any valid and/or clear grounds in law and in fact for the granting of the temporary injunction.***

2. ***the Learned Senior Resident Magistrate erred in law and in fact in having totally ignored the principles laid down in*** *Giella –Vs- Cassman Brown* ***while making her decision.***

3. ***The Learned Senior Resident Magistrate erred in law and in fact in granting a temporary injunction enforcing a 'tenancy agreement' which the Land Control Act, Cap 302, has declared to be null and void for all purposes, for want of the requisite Land Control Board consent. This was in effect enforcing by injunction an illegal, null and void contract, which is to enforceable.***

4. ***The Learned Senior resident Magistrate erred in law and in fact by failing to take into consideration, and/or give due weight to, the matters, facts, the submissions by the Appellant's counsel and/or the statutory law and the authorities cited by the Appellant's counsel, thereby arriving at a wrong decision.***

5. ***The Learned Senior Resident Magistrate erred in law and in fact in granting the temporary injunction restraining the Appellant from*** *inter-alia* ***selling, transferring and charging the suit land.***

6. ***The Learned Senior Resident magistrate erred in law and in fact in granting a temporary injunction to the Respondent while the Respondent had merely sought a declaration in his Plaint and had not sought any injunctive relief.***

REASONS WHEREFORE the appellant prays that:-

1. ***The orders of the said her Honour G. A. M'masi Senior Resident Magistrate Nyahururu PMCC No. 2 of 2007 issued on the 31st day of January 2007 allowing the Respondent's Chamber Summons application for a temporary injunction, and ordering that the temporary injunction do remain in force until the suit is heard and determined be set aside and the said application be dismissed with costs to the Appellant.***

2. ***The costs of the appeal as well as the costs for the application for injunction in the Nyahururu Principal Magistrate's court in Nyahururu PMCC No. 2 of 2007 be borne by the Respondent.***

What the Appellant seeks by virtue of these grounds is what it now seeks by the present application for discharge of injunction. That, I believe captures the finding of this court wholly. I believe the Appellant was wrong to approach this court for the discharge of the injunction, such an application ought to have been filed in the Nyahururu Court. To entertain that application would wholly do away with the pending appeal. Order XLI does not envisage interlocutory applications that would defeat the appeal. I am tempted to agree with the Respondent the application is tantamount to seeking an appeal through the back door. I also find that the court donated the power to discharge an injunction is the court that issued that injunction. The Appellant court does not have that jurisdiction. I find and hold that the Appellant's Notice of Motion dated 1st March 2007 is misconceived and the same is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nyeri this 8th day of June 2007.

MARY KASANGO

JUDGE