



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 141 of 2000

JACOB MIRITI.....APPELLANT/APPLICANT

V E R S U S

SAMUEL MWANGI.....RESPONDENT

R U L I N G

1. The Application dated 18.6.2007 seeks the following orders under Order XXXIX Rules 1,2, and 2A of the Civil Procedure Rules, Order XLI Rule 4 of the Civil Procedure Rules and s.63 (c) of the Civil procedure Act;-

“(i) That this honourable court be pleased to issue a temporary injunction restraining the Respondent either by himself, his agents, servants and/or assigns from evicting or from interfering with the Applicant’s quiet enjoyment of land parcel No. Athiru/Gaiti/1890 Land Adjudication Section pending the hearing and determination of an intended appeal to the court of appeal.

(ii) That costs of this application do abide the cause”.

2. The grounds in support are:-

“(i) That the Appellant being dissatisfied with the judgment/decreed of the superior court herein dated 26th April 2007 dismissing his appeal have duly lodged a notice of appeal.

(ii) That the Appellant is desirous and determined to pursue a second appeal to the court of appeal.

(iii) That the applicant is apprehensive that he will suffer irreparable loss if he is evicted from the suit land as he has no other parcel of land.

(iv) That it is only fair, just and equitable that this application be allowed to safeguard the Appellant’s interests in the suit land and to meet the ends of justice”.

3. The same issues are replicated in the supporting Affidavit sworn on 18.6.2007 save that the Notice of Appeal is annexed to the Affidavit and I note that the same was lodged in the High Court Registry on 10.5.2007 and it is also admitted that no Appeal has yet been filed in the Court of Appeal.

4. In a Replying Affidavit sworn on 20.6.2007 the Respondent depones that the Applicant was evicted from the suit land on 12.2.2001 and the warrant to give possession to him is annexed to that Affidavit. An extract for the Occurrence Book for Maua Police Station for the same date shows that the Applicant

was indeed evicted pursuant to an order made within **PMCC No. 399/1995**. The order is also annexed to that Affidavit.

5. It is further deponed by the Respondent that the Applicant went into the suit land on 22.5.2007 and burnt property therein and was arrested and charged with arson. A copy of the charge sheet has been annexed to the Affidavit in Reply.

6. Elaborate submissions were made by both Mr. Mwanzia for the Applicant and Mr. C. Kariuki for the Respondent and useful authorities submitted for which I am grateful. The first issue to be determined and which will hopefully will put the Application to rest is whether or not the Applicant is on the suit land viz Athiru/Gaiti/1890 and whether therefore there is any reality in the fears expressed by him that he may be evicted from the said parcel of land unless the order of injunction is granted. This is because it is trite law and reasonably so, that an injunction cannot issue to restrain an event which has taken place – see **Esso Kenya Ltd vs Mark Makwata Okiya, Civil Appeal No. 69/1991**. In the present case the Applicant says that he lives and works on the suit land and that it was only on 14.5.2007 that the Respondent entered it and destroyed banana plants thereon and that a report was then made to the Maua Police Station after which the Divisional Agricultural Officer Igembe South visited the land on 19.5.2007 and assessed the crop damage. Both the O.B. Entry and the assessment by the Divisional Agricultural Officer are annexed as is a letter from the Assistant Chief, Chuuria Sub-Location.

7. I have carefully looked at the documents annexed by each party and one fact cannot be disputed; that the Applicant was evicted from the suit land on 12.2.2001 pursuant to a lawful court order made within **PMCC No.399/195**. I have seen an order made within **HCCA 141/2000** on 9.5.2002 staying execution of that order but whatever effect it had was null and void because eviction had taken place on 12.2.2001. When then did the Applicant lawfully return to the land and if he did so, on whose authority? None has been shown and even if he is on the land as he claims, then he is there illegally and cannot now seek the equitable relief of an injunction with hands tainted by that illegality. On the other hand the Respondent obtained orders of eviction lawfully and from 12.2.2001 is deemed in law and fact to be in possession and an injunction cannot be used to either return the Applicant to that land (unless by a mandatory injunction as is the law in **Belle Maison Ltd vs Yaya Towers Ltd H.C.C. 2225/1992** (Nai) per Bosire J. (as he then was) or be used in a situation where the act complained of has already taken place as is the case here. What I am in fact saying is that prayer 1 of the instant Application was overtaken by events when the eviction was effected and since that order has never been set aside, no injunction can otherwise issue.

8.

9. Suppose I am wrong and the Applicant is lawfully in possession of the land? Sadly, I would still reach the same conclusion because although I agree with the Applicant that an injunction can properly issue pending appeal, this is not a fit case for the order to issue. I say this because the law on injunctions pending appeal as set out in **Eriford Properties Ltd vs Cheshire County Council [1974] 2 All E.R. 448** and followed by this court is clear (see **Wachira vs Industrial Development Bank HCCC No. 1436/2000** (Nai) per Ransley J. and **Josephine Kioi vs Phillip Wanyungu and 3 others HCCC 2550/98 O.S** per this court). Such injunctions are granted as a matter of discretion exercised judiciously. In fact contrary to Mr. Kariuki's submissions an application for stay is not relevant in such a situation and the reason given by Ransley J. (and I agree) in **Wachira** (supra) is that “**there is nothing to stay**”. In the present case, I have said that the Applicant even if in possession can only have gone back to the land illegally and as is well known, he who comes to equity must come with clean hands and the Applicant can only be termed otherwise. No prima facie case can be said to have been made out in such circumstances and in any event the Appeal would not be rendered nugatory by fact only that the Applicant is out of the suit land.

10. In the end, the application is without merit and is best dismissed with costs to the Respondent.

11. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 18th DAY OF SEPTEMBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Mwanzia Advocate for the Appellant/Applicant

Mr. C. Kariuki Advocate for the Respondent

ISAAC LENAOLA

JUDGE