



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. E 046 OF 2020

BEATRICE NYAMBURA.....APPELLANT

VERSUS

JUSTUS CHEGE MUCHIRI.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable Mr. D.M Kivuti, Senior Resident Magistrate, delivered on 19th October 2020

in the Chief Magistrate's Court at Milimani in Civil Case No. E5167 of 2020.)

BETWEEN

JUSTUS CHEGE MUCHIRI.....PLAINTIFF

AND

BEATRICE NYAMBURA.....DEFENDANT

NAIROBI CITY COUNTY.....INTERESTED PARTY

RULING

Through the application dated 30/10/2020, the Appellant sought stay of the proceedings in **Milimani Chief Magistrate's Court Civil Suit No. E5167 of 2020** pending determination of this appeal. She also sought an injunction under Order 42 Rule 6(6) of the Civil Procedure Rules to bar the 1st Respondent and his servants or agents from accessing, entering, fencing, demolishing existing structures, carrying away debris, erecting new structures, developing, transferring, charging, leasing, alienating, continuing to trespass onto or in any other way interfering with the Appellant's ownership and quiet possession of the whole or a portion of Plot 315 Umoja 11 Zone 8 and Plot 159 Umoja 11 Zone 8 ("the Suit Properties") pending the hearing and determination of this appeal.

The application was based on the grounds that the Appellant is the owner of the Suit Properties which are located within the Umoja area in Nairobi City County. Further, that she had appealed against the ruling of the Honourable Mr. D.M. Kivuti, Senior Resident Magistrate delivered on 19/10/2020 in Milimani **CMCCC No. E 5176 of 2020** in which the court declined to allow the Appellant to cross examine the 1st and 2nd Respondents on the contents of their affidavits filed before the trial court. She urged that it was necessary to stop the proceedings at this point to allow her to appeal against the court's refusal to allow the cross examination of the deponents of the affidavits filed in court.

The application was supported by the affidavit of Beatrice Nyambura sworn on 30/10/2020 in which she deponed that her sons Evans Mwangi and Edward Kange who are the owners of Plot No. 315 Umoja and Plot No.159 Umoja II zone 8 respectively had authorised her to file the suit through donation of powers of attorney. She deponed that the 1st Respondent was now claiming ownership of the Suit Properties under different parcel numbers. She annexed the power of attorney together with the letters of allotment for the two plots to her affidavit.

She also deponed that in the course of the proceedings before the Magistrate's Court, she filed an application seeking an injunction to restrain the 1st Respondent from interfering with the Suit Properties during the pendency of the suit. The Respondents filed responses to her application. She produced copies of the 1st Respondent's supporting affidavit sworn on 18/09/2020, the replying affidavit sworn by the 1st Respondent on 08/10/2020 and the replying affidavit sworn by the 2nd Respondent on 13/10/2020. She instructed her lawyers to file a notice to cross-examine the deponents of those affidavits on the contents but when the case came up on 19/10/2020, the trial court declined to allow

the cross-examination of the 1st and 2nd Respondents on their affidavits.

She annexed a copy of the ruling to her affidavit and deponed that she was aggrieved by the decision as it denied her a chance to bring to the fore the question of possession and status quo as they exist on the ground. She added that the cross examination was also to deal with the issue of a prima facie case, substantial loss and the balance of convenience to enable the court apportion the parties' rights fairly since both parties had documents of ownership over the Suit Properties. Further, she deponed that the 1st Respondent was now busy altering the status quo by abusing the interim orders the court granted on 18/09/2020 and that he had erected an iron sheet fence around the Suit Properties and demolished the structures which she had put up on the land and which had been standing on the suit land for several years. She annexed a bundle of photographs showing the 1st Respondent's activities on the Suit Properties and urged the court to grant the orders she sought in her application.

The 1st Respondent opposed the application through the replying affidavit he swore on 25/11/2020. He deponed that contrary to the Appellant's averments, he was the owner of the two adjacent plots known as Nairobi/ Block 107/1636 and Nairobi/ Block 107/1637 situated along Manyanja road, Umoja, within Nairobi County. He attached copies of the titles. He filed **MCCC/E5167/2020** at the Chief Magistrates' Court in Milimani contemporaneously with an application for a temporary injunction to restrain the Appellant from trespassing, taking possession of, erecting structures or in any dealing with the Suit Properties pending determination of the application and the suit. He averred that the Magistrate granted him interim *ex parte* orders then it heard the matter and set a ruling date for 09/10/2020.

While the matter was pending for ruling, the Appellant filed an application on 1/10/2020 which in his view was an attempt to arrest the ruling slated for 9/10/2020. The 2nd Respondent filed a replying affidavit dated 13/10/2020 in response to the 1st Respondent's application dated 18/09/2020 and the Appellant's application of 01/10/2020. The court set 16/10/2020 for the hearing of both applications. On that date, counsel for the Appellant filed a notice to cross-examine the deponents of the replying and supporting affidavits and despite the court's determination that there was no need for cross-examination, counsel for the Appellant refused to participate in the hearing.

The 1st Respondent deponed that the Appellant had at all times acted in bad faith and in a manner calculated to frustrate the prosecution of the suit and the two applications. He further deponed that the orders sought by the Appellant were sought by the 1st Respondent in the trial court and that the court's interim orders issued on 18/09/2020 are still in force and as such the prayers sought by the Appellant are *sub judice*. He urged the court to dismiss the application.

Parties filed submissions which the court has considered. The Appellant submitted that the prayers sought go hand in hand, without which the appeal would be rendered nugatory. On the prayer for injunction, the Appellant submitted that she had met the threshold for the grant of an injunction set out in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. She submitted that she had established a prima facie case because she was allotted the Suit Properties and had been in occupation long before the 1st Respondent showed up with titles which she was challenging in the Magistrate's Court. She submitted that having been in occupation of the Suit Properties and having developed part of it, she would suffer irreparable loss and urged that the balance of convenience tilted in her favour.

The Appellant further submitted that this court had supervisory jurisdiction over subordinate courts pursuant to Article 165(6) of the Constitution and that it could also invoke its appellate jurisdiction under Order 42 Rule 6(6) of the Civil Procedure Rules and grant the injunction she sought.

Regarding the prayer for stay of proceedings, the Appellant submitted that if this court will hear the appeal as to whether or not the Appellant should be allowed to cross-examine the Plaintiff in the Magistrate's court then if proceedings in that court were to continue it meant that the application for injunction pending in that court would be heard and determined without the Appellant first cross-examining the Plaintiff yet the intention was to first cross-examine the deponents before the court determines the matter.

The 1st Respondent submitted that the Appellant had not met the threshold for the grant of injunctions set out in **Giella v Cassman Brown & Co. Ltd**. He submitted that the Appellant had failed to establish a prima facie case, since he held titles over the Suit Properties which according to Section 26 of the Land Registration Act, was prima facie evidence of ownership while the documents presented by the Appellant could not establish a prima facie case. The Respondent submitted that the Appellant would not suffer irreparable injury since the 1st Respondent was in occupation and would not deal with the Suit Properties in a manner that may prejudice the interests of the Appellant as there were interim orders issued by the court on 18/09/2020 to preserve the Suit Properties. He added that the orders were still in place. The 1st Respondent further submitted that the balance of convenience did not tilt in favour of the Appellant since she was not in occupation but rather that it would lie in favour of the Respondent who was in occupation. The 1st Respondent added that contrary to the maxim of equity that he who comes to equity must come with clean hands, the Appellant's hands were tainted since she had misled the court that she was in occupation of the Suit Properties yet she was not and was frustrating the court proceedings by forum shopping and employing delaying tactics.

On the prayer for stay of the proceedings of the Magistrates court pending appeal, the 1st Respondent submitted that the Appellant had challenged the lower court's jurisdiction and that question had to be determined first. Moreover, he added that the orders issued by the Magistrate's court's on 18/09/2020 were for the preservation of the Suit Properties and they were still in place hence the Appellant would not suffer any prejudice if the proceedings in the Magistrates court were not stopped. The 1st Respondent suggested that to expedite this matter and prevent the Appellant from frustrating the matter, the court could consider staying the applications so that the suit proceeds for hearing.

The issue for determination is whether the Appellant has made a case for the grant of the orders she seeks in this application. On the prayer for injunction, this court is alive to the fact that there are two applications pending before the learned magistrate seeking injunctive orders and will therefore not consider that prayer. On the prayer for stay pending appeal, this court is guided by the decision of the Court of Appeal in **Benson Khatenge Wafula V Director of Public Prosecutions, Ethics and Anti-Corruption & 2 others (Interested Parties) [2020] eKLR**, where the court stated that in an application for stay of proceedings pending appeal, the applicant should demonstrate that he had an arguable appeal which was likely to be rendered nugatory if stay was not granted.

The gist of the Appellant's application for stay of proceedings is that the Learned Magistrate declined to allow her to cross examine the deponents of the affidavits sworn in support of the application for injunction with a view to establishing various facts including who between her and the 1st Respondent was in occupation of the Suit Properties. The orders issued by the court on 18/09/2020 restrained the Appellant from dealing with the Suit Property and from taking possession of the land or dealing with it. The dispute revolves around ownership of Plot Numbers Plot 159 and 315 Umoja 11 Zone 8 which on the ground appear to be the same as Nairobi/ Block 107/1636 and 1637. The Notice of Intention to Cross examine dated 15/10/2020 indicates that the Appellant wished to establish various facts including the background as to the ownership of the Suit Properties; who was in ownership of the land; what activities had taken place on the suit land; and how the 1st Respondent learned of the Appellant's claim to the Suit Properties. These are issues which in the court's view will be determined at the trial.

It will not only meet the overriding objective of the Civil Procedure Rules set out in Section 1A of the Civil Procedure Act, but it will also fulfil the duty of the court under Section 1B if the suit before the Magistrate's Court is heard and determined expeditiously. The issues that the Appellant wishes to establish from the cross examination can be canvassed during the trial so that the dispute over ownership of the Suit Properties is determined once and for all.

The order that commends itself to this court to make is for all the parties to be restrained from dealing with the Suit Property until the dispute is determined by the Magistrate and for the suit to be set down for hearing expeditiously. The Learned Magistrate is to give directions for pretrial and set down the suit for hearing within six months of the date of this ruling. The trial court will be at liberty to visit the Suit Property to establish who is in actual possession of the Suit Properties.

The court declines to grant the orders sought in the application dated 30/10/2020. Each party will bear its own costs.

Delivered virtually at Nairobi this 15th day of February 2021.

K.BOR

JUDGE

In the presence of:-

Ms. J. Mutua holding brief for Mr. M. Kimuli for the Appellant

Ms. V. Shikali holding brief for Mr. K. Chepsergon for the 1st Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Respondent and the Interested Party