



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELCA NO. 9 OF 2019

JOHNSON KINYUA WAMAI.....APPELLANT

VERSUS

ELIUD MWAI WAMAI.....1ST RESPONDENT

JOHNSON MUGO WAMAI.....2ND RESPONDENT

RULING

Background

The Applicants Eliud Mwai Wamai and John Mugo Wamai have moved this Court vide a Notice of Motion dated 5th February 2020 seeking the following orders:-

- 1. That the orders of this Court given on 24th February 2010 be discharged and the Land Registrar, Kirinyaga be directed to lift the same from the Register of land parcel number Kirinyaga/Gathigiriri/441.**
- 2. That the costs of this application be provided for.**

Grounds in support of the Application

- a. That this Honourable Court issued injunctive orders on the 24th day of February, 2010 for the purpose of preserving the suit land herein.
- b. That the said orders were to be valid until this suit is heard and determined.
- c. That this suit has already been heard and determined and it is now mete and just that the orders sought be issued.

Applicant's Statements of Facts

The applicant filed an affidavit in support of the said application and deponed as follows:-

1. That the aforesaid orders were given on 24th February 2010 (Annexed hereto and marked **EMW-1** is a copy of the said order).
2. That the aforesaid order was duly lodged on the register of the aforesaid land (Annexed hereto and marked **EWM-2** is a copy of the certificate of official search).
3. That the said orders were to the effect that the suit land was to be preserved pending the hearing and determination of the main suit herein.
4. That the said orders were to the effect that the suit land was to be preserved pending the hearing and determination of the main suit herein.
5. That the main suit herein was heard and determined on the 12th day of April 2019 (Annexed hereto and marked **EWM-3** is a copy of the decree).

6. That we have made several attempts to execute the decree herein but the aforesaid order has been impeding the said execution.
7. That we now pray that the said injunctive orders be vacated and the same be discharged at the Lands registry.
8. That it is in the interest of justice and fairness that this application be allowed and the orders sought be issued in order to enable us enjoy the fruits of our judgment.

Appellant's Statements of Facts

The Appellant in the said application filed a replying affidavit in opposition to the application and deponed as follows:-

1. That the application dated 5th May 2020 is a non-starter and an abuse of this Court's process.
2. That it is not in the interest of justice that the orders granted be lifted for reasons that there is a pending appeal against the judgment in Kerugoya Civil Suit No. 420 of 2009. (Attached and marked as "JKW 1" is a copy of the Memorandum of Appeal).
3. That the purpose of the injunctive orders placed on land parcel No. KIRINYAGA/GATHIGIRIRI/441 are meant to preserve the subject matter until when the matter is finalized. That the applicant has already disclosed to Court under paragraph 9 of his supporting affidavit that he intends to execute the decree of the Court issued on 21st June 2019.
4. That if the Court allows the application and lift the injunctive orders, then my appeal will be rendered nugatory. If anything, the orders sought to be lifted were not issued by this Court and the applicants should have gone to the same Court that issued those orders.
5. That I have an arguable appeal and the Court ought to give me an opportunity to demonstrate the same. If this Court allows the application, it will undermine my appeal.
6. That the injustice that the applicants would suffer if the application is disallowed is fair less than the injustice that I will suffer if the orders are granted and the Court must balance the same.
7. That in view of the foregoing, I pray that this Court exercises its discretionary power and allows the injunctive orders in force until the hearing and the determination of the appeal.

Applicants Written Submissions

The applicants filed submissions in further support of the said application reiterating the factual contents contained in the supporting affidavit. In addition, the counsel for the applicants submitted on points of law that if indeed the appellant feels that he stands to suffer any prejudice and/or loss if the decree of the trial Court is executed, it is trite law that he ought to move this Honourable Court for stay pending appeal. They stated that having secured a judgment in their favour, it would be immensely unjust to prevent the applicants from executing the said judgment whereas there is no stay orders. The learned counsel also submitted that whereas the appellant has filed an appeal to this Honourable Court, an appeal in itself does not operate as an automatic stay of execution under *Order 42 Rules, 2010*. He argued that the applicants herein are entitled to enjoy the fruits of their judgment and that they should not be curtailed from enjoying the same unless there are stay orders in place. He cited the case of *Asset Recovery Agency Vs Charity Wangui Gethi (2020) e K.L.R.*

Appellant's Written Submissions

The appellant through the firm of Maina Kagio & Co. Advocates submitted that the applicant has invoked *Section 34 of the Civil Procedure Act* which dictates that the Court which has the jurisdiction to vary or discharge the orders issued on 24/2/2010 is the Court that issued the orders. As such, this Court has no jurisdiction to vary the orders as it is not the Court that issued the orders in the first instance. He submitted that the orders sought in the application ought to have been made before the trial Court. The learned counsel cited the following authorities:-

1. Carl Ronning Societe Vs Naval Chargeurs Delmas Viel Jelix (The Francois Vieljeux) (1984) K.L.R.
2. Edward Karanja Ragui Vs Barclays Bank of Kenya (Nairobi Milimani Commercial Courts, HCCC No. 927 of 2002).
3. Pithon Waweru Maina Vs Thika Mugiria (1983) e K.L.R.
4. Mobile Kittale Service Station Vs Mobil Oil Kenya Ltd & Another (2004) e K.L.R.

Legal Analysis and Decision

I have considered the application and the affidavit evidence. I have also considered the submissions by the counsels and the applicable law. The applicant in the application under review is seeking to discharge orders allegedly issued by this Honourable Court on 24th February 2010. A copy of the said order is attached to the supporting affidavit and marked **EMW-1**. Upon perusal of the said order, it is clear that the same was a temporary injunction order issued by the trial magistrate Hon. S.N. Mbungi (P.M.) on 24th February 2010. The said injunctive order clearly stated that the temporary injunction issued was meant to restrain the defendant/Appellant either by himself, servants, employees and/or any person acting on their instructions from dealing with the suit land No. KIRINYAGA/GATHIGIRIRI/441 pending the

hearing and determination of the main suit. It appears that the said order was lodged with the Land Registrar who placed it on the concerned Register. From the affidavit evidence, it also appears that the suit was heard and on 12th April 2019, the trial Court rendered himself and gave judgment in favour of the plaintiffs against the defendant/Appellant. Being aggrieved by the trial Court findings, the defendants preferred an appeal before this Honourable Court on 30/9/2019. This appeal was admitted and the same is now pending directions. Before directions are taken on the hearing of the appeal, the respondent filed the present application. The applicant has invoked the provisions of *Section 34 of the Civil Procedure Act Cap. 21 Laws of Kenya* which provides as follows:-

“34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate Court”.

The orders being sought in the present application is for the discharge of temporary injunction orders which was issued by the trial Court. I agree with counsel for the appellant that the orders sought in this application ought to have been made before the trial Court which is the Court executing the decree and not in a separate suit. This Court being an appellate Court from decision by the subordinate Courts, I find the present application a non-starter and an abuse of the Court process. The same is hereby struck out with costs to the appellant. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 5th day of February, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Makazi holding brief for C.S Macharia

2. Appellant – present

3. Kabuta – Court clerk.