



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC APPEAL NO. E01 OF 2021

KIBIWOTT ARAP TARUS.....APPELLANT/ APPLICANT

VERSUS

JOHN KIPKEMBOI RONO.....1ST RESPONDENT

WILLY KIPROTICH SAWE.....2ND RESPONDENT

STEPHEN KIPKOECH KEINO.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 18th January, 2021 by the Appellant/ applicant seeking the following orders:

- a) Spent
- b) THAT this Honourable Court be pleased to issue an order of temporary injunction to restrain the agents or servants or any other person acting on their (sic) injunction from selling, transferring, leasing or in any other manner dealing with land parcel NO. NANDI/CHEPTARIT/228, pending hearing and determination of this application and the appeal herein.
- c) THAT there be an order directing 1st Respondent to surrender to the Nandi Land Registrar Title (sic) Deed in respect to land Parcel NO. NANDI/CHEPTARIT/227 for save (sic) custody, pending the hearing and determination of this appeal.
- d) That costs be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant relied on the replying affidavit sworn by the applicant and stated that the applicant must meet the threshold for grant of injunctions pending appeal which is to establish that he has an arguable appeal, that the intended appeal shall be rendered nugatory if the orders sought are not granted and that he will suffer irreparable harm.

Counsel relied on the case of **STANLEY KANGETHE KINYANJUI V TONY KETTER & 5 OTHERS [2013] eKLR** where it was held that the court has wide unfettered discretion to grant a stay or injunction provided that it is just to do so.

Mr Misoi submitted that the applicant has met the threshold for grant of injunction and that the appeal will be rendered nugatory if the orders sought are not granted. The applicant has already filed the appeal.

RESPONDENT'S SUBMISSIONS

Counsel opposed the application for injunction and submitted that the application does not meet the threshold for the grant of injunctions as per the **GIELLA VS CASMAN BROWN LTD (1973) EA 358**,

Counsel also relied on the case of **PHILES NVOKABI KAMAU VS COMMERCIAL DEVELOPMENT CORPORATION (2017)** where the court held that :

We have an obligation to determine whether the supportive facts placed before the learned trial Judge met the threshold for grant of injunctions.

The Respondent further submitted that the Appellant/ Applicant's application does not meet the threshold for the grant of orders of stay of execution pending the hearing and determination of an Appeal which threshold requirements are set out in **MULTIMEDIA UNIVERSITY & ANOTHER VS. PROFESSOR GITILE N. NAITULI (2014) eKLR** wherein the Court was enjoined first to decide whether the Applicant has presented an arguable Appeal and whether the intended Appeal would be rendered nugatory if the interim orders sought were denied.

Counsel further relied on the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another [1990] K.L.R 557** where Bosire J held that

“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in an application for injunction pending appeal is whether the applicant has met the threshold for grant of injunctions as set out in the Giella Casman Case. The applicant must establish a prima facie case with a probability of success, that he will suffer irreparable loss if the order is not granted and when the court is in doubt on a balance of convenience

In **Halsbury's Laws of England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.]** it is stated that :-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm

The Court in **BILHA MIDEVA BULUKU V EVERLYNE KANYERE [2016] eKLR** was of the considered view that when a Court is considering an application for injunction pending appeal, it should be guided by the principles set out in **Patricia Njeri & 3 others v National Museum of Kenya [2004] eKLR** which principles are as follows:-

- a) *an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.*
- b) *The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c) *The applicant must show that to refuse the injunction, would render the appeal nugatory.*
- d) *The court should also be guided by the principles in **Giella v Casman Brown Ltd 1973 EA 358.***

From the record it should be noted that the Appellant/ Applicant has filed a Memorandum of Appeal seeking to appeal the decision of the Court in **KAPSABET ELC NO. 9 OF 2019 KIBIWOTT ARAP TARUS V. JOHN KIPKEMBOI RONO & 2 OTHERS** where his claim over land parcel number **NANDI/CHEPTARIT/228** was dismissed for failing to attain the standard of proof required to sustain a civil suit.

On the issue of arguable appeal, it was held in the case of **Kenya Commercial Bank Limited Vs. Nicholas Ombija [2009] eKLR** that an “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. It affirms that its appeal raises meritorious issues on both facts and law which ought to be fully heard on appeal.

The applicant submitted that he is apprehensive that the suit land may be sold rendering the appeal nugatory. In the case of **JOSEPHINE KOKI RAYMOND V PHILOMENA KANINI MAINGI (PERSONAL REPRESENTATIVE OF MAINGI MUSILA MUTAVA (DECEASED) & ANOTHER [2018] eKLR** the Court cited the case of **Reliance Bank Limited vs Norlake Investments Limited [2002] 1 E.A. 227** with approval as a definition for nugatory as follows:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

Further in the case of **Madhupaper International Ltd vs Kerr [1985] eKLR**, the Court of Appeal held that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal being rendered nugatory in the event the appeal is successful.

The purpose of an injunction pending appeal is to preserve the substratum of the case so as not to render the appeal an academic exercise in futility. The applicant is apprehensive that the respondent may sell the suit land or part with possession.

I have considered the application, the submission by counsel and come to the conclusion that the applicant has met the threshold for grant of injunction pending appeal and the same is granted as prayed, however the 2nd limb of the application seeking for the surrender of the title of the suit land to the Nandi County Land Registrar pending the hearing and determination of the appeal is hereby denied. Costs of the application to abide the outcome of the appeal.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE