Isaya v Limiri & 3 others (Environment and Land Appeal E008 of 2023) [2023] KEELC 18475 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18475 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E008 OF 2023

CK YANO, J

JULY 5, 2023

BETWEEN

DOMINIC ISAYA ..... APPELLANT

AND

STANLEY M'MARIO LIMIRI ..... 1ST RESPONDENT

OFFICE OF SURVEY & PHYSICAL PLANNING ..... 2ND RESPONDENT

MINISTRY OF LANDS SETLEMENT TIGANIA EAST ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. By a notice of motion dated January 31, 2023, the appellant/applicant is seeking for orders of injunction restraining the 1st respondent, his agents, servants, employees, assignees, or anybody else claiming under his name from further fencing, trespassing, changing boundaries, planting or harvesting any crops, causing any developments or interfering with the appellant's land at Kangara Amugaa area which is mapped as 10062 Ankamia measuring approximately 1 acre until hearing and determination of this application and until the hearing and determination of the appeal herein. In the alternative, the appellant prays that status quo as at January 13, 2023 be maintained in that the appellant remains in uninterrupted occupation on the suit land until the appeal is heard and determined. The application is brought under section 3, 3A, 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 and Order 40 Rule 1, 2 & 3 of the *Civil Procedure Rules* and is premised on the grounds in the face of the motion and supported by the affidavit of Dominic Isaya, the applicant sworn on January 31, 2023.

2. The applicant avers that he has been in occupation of the suit land since the year 2011 where he has been doing farming such as planting tea bushes without any interference until July 2022 when the 1st respondent started interfering with the applicant's occupation by trying to fence part of the land

and the applicant filed suit in the subordinate court. The applicant avers that he bought the land from the 1st respondent in 2012 and has been in occupation of 1 acre thereof and annexed a copy of the agreement for sale. The applicant states that title to the land was issued at the end of the year 2021. He has also annexed copies of the title deed and documents showing that he has been harvesting and selling the said tea bushes.

3. It is the applicant's contention that the trial court misunderstood his application for injunction and/ or status quo until the suit is heard and determined. The applicant avers that unless the orders sought are granted, he may lose his livelihood which cannot be compensated and he may suffer immensely.

4. In opposing the application, the 1st respondent filed a replying affidavit sworn on February 20, 2023 wherein he avers, inter alia, that the principles underpinning grant of temporary injunction were established in the case of *Giella v Cassman Brown* being prima facie case with high probability of success, that the applicant stands to suffer irreparable loss which cannot be compensated by way of damages should the injunction not be granted and if the court is in doubt, it determines the application on a balance of convenience. It is the 1st respondent's contention that these principles must all be proven.

5. The 1st respondent states that the application herein fails on the first limb because they both possess titles to different parcels of land in different area, and in different map sheets. i.e Tigania East Ankamia/10062, (the suit property)belonging to the 1st respondent and Tigania East/Ankamia/11875 belonging to the appellant. That the applicant has not availed any evidence to show that an error exists in the mapping and or registration of the suit property, that he admits to illegally harvesting crops over the suit property which he states amounts to trespass hence should not be aided to continue trespassing on the land, and that the payment slip do not prove that the tea crop was harvested from the suit property. That the applicant has also not demonstrated any irreparable harm he is likely to suffer which cannot be compensated by way of damages should his application fail. The 1st respondent states that the livelihood the applicant alleges to obtain from harvesting tea can easily be valued and the same compensated by award of damages should his appeal succeed.

6. The 1st respondent avers that he is the true and legal owner of the suit land which he was sold by one Francis Michubu who is now deceased while the appellant is the owner of the property known as Tigania East/Ankamia/1185 adding that he will be highly prejudiced should the injunction be granted since he will be restrained from user of his land. It is the 1st respondent's contention that the application is unmerited and should be dismissed with costs. The 1st respondent has exhibited title deeds and maps for the two parcels of land as well as an agreement for sale dated January 10, 2012.

7. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have read and considered and I need not reproduce in this ruling.

8. I have considered the application, the affidavits in support, the response and the rival submissions. In my considered view, the only issue for determination is whether the applicant has met the threshold for grant of temporary injunction pending the hearing and determination of the appeal herein. Order 42 Rule 6(6) of the *Civil Procedure Rules* provides that-:

> "Notwithstanding anything contained in sub rule (1) of this rule, the High court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

9. Going by the above provision of law, it is clear that this court in the exercise of its appellate jurisdiction has powers to grant a temporary injunction pending appeal where the ends of justice demand so. The power of the court to grant an injunction pending appeal, is however discretionary and the said discretion should be exercised judicially not arbitrarily by following laid down certain principles. The discretion will be exercised against an applicant whose appeal is frivolous or where it would inflict greater hardship against the respondent than it would avoid, and the applicant must show that to refuse the injunction would render the appeal nugatory. The court should be guided by the principles in *Giella v Casman Case*. In the case of *Mirao Ltd v First American Bank of Kenya & 2 others* [2003] eKLR, a *prima facie* case in a civil case include but is not confirmed to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

10. In this case, the appellant has filed a memorandum of appeal dated January 3, 2023. The appellant has stated that he has been in occupation of the suit land since the year 2011 and that the 1st respondent has threatened to evict him from the said land. The 1st respondent has on the other hand termed the applicant a trespasser.

11. On the question of prima facie case, and as guided by the decision in the case of *Mrao Ltd* (*supra*) the court has noted that the applicant is the one in occupation and use of the suit land. In my view should the applicant be evicted as threatened, the appeal may be rendered nugatory. In my view, this is a case that calls for the maintenance of the status quo.

12. I will therefore exercise my discretion and grant the injunction in terms of prayer 2 of the motion dated January 31, 2023 but on condition that the applicant deposits the sum of Kshs. 100,000/= in an interest earning account in the joint names of the advocates for both parties in a reputable bank of their choice as security. The said amount to be deposited within thirty (30) days from the date of this ruling. In default of payment the injunction granted herein shall automatically be discharged. Costs of this application to abide the outcome of the main appeal.

13. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF JULY 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu

No appearance for appellant

No appearance for respondents

C.K YANO

JUDGE