



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO. 44 OF 2019

MUSILILI KILONZO.....1ST APPELLANT

NGONDU KYALO.....2ND APPELLANT

-VERSUS-

JOSPINE SELLE JUMA (Suing on behalf of MBITHE

MUTYAMBAI (Deceased).....RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate's Court at Mutomo in Civil Case No. 7 of 2018 delivered on 18th September 2019 by Hon. Z. J. Nyakundi, Snr. Principal Magistrate)

RULING

INTRODUCTION:

1. This Ruling is in relation to two applications dated 22nd October 2020 and 4th November 2020 brought by the Appellants and the Respondent respectively. I will first address the application dated 22.10.2020 before determining the second application.

THE APPLICATION DATED 22ND OCTOBER 2020

2. In the application dated 22nd October 2020, the Appellants sought for the following orders;

- a. THAT the Court be pleased to grant to the Appellant leave to adduce further evidence, including a copy of the Survey Map of the suit property, Plot 519 and Plot 532 of Kateene Adjudication section, Mutha Location, Mutomo Sub County.**
- b. THAT the Appellants be granted leave to call the Surveyor, Ndambuki Kakosi, to produce the Survey Map of the suit property.**
- c. THAT in the alternative to prayer 2 above, this Court do admit the additional evidence by means of an affidavit and the same be filed as a Supplementary Record of Appeal.**
- d. THAT the costs of, and incidental to this application do abide the result of the appeal.**
- e. Any other orders that meet the ends of justice.**

3. The application is supported by the affidavit of the 1st Appellant who deposed that the suit property herein is Plot 519 and Plot 532 of Kateene Adjudication section, Mutha Location, Mutomo Sub County; that the Respondent did not produce any document to shed light on the precise situation of the property forming the substratum of the Appeal, and the dispute at the trial Court; that in the course of the hearing at the trial Court, although David Musembi, PW 4, indicated that the suit property had been surveyed, the Respondent did not produce the Survey Map of the property in evidence; that the applicants were unable to acquire a copy of the Survey Map of the suit property, Plot 519 and Plot 532 of Kateene Adjudication section, for use at the trial, upon exercise of all due diligence.

4. The applicants further deposed that on 1st October 2020, their Advocates applied for a certified copy of the Survey Map of the suit property, which was availed to them in October 2020; that the survey map will have an impact on the outcome of the appeal as it shows the

disputed piece of property and removes vagueness as to the precise situation of the suit land.

5. The application was opposed vide the Respondent's Replying Affidavit dated 21st April, 2021 where she averred that the Applicant had refused to serve her Advocates with signed copies of the application and instead served the draft application contrary to the law; that the application was neither commissioned nor did it have the annexures as alluded to by the Applicants; that in 2018 the land adjudication officer issued consent and drawing of the land for the prosecution of the lower court matter; that subsequently trial ensued and parties proceeded on that basis and in fact the boundaries of the suit lands were clearly captured in the proceedings.

6. The Respondent further stated that the map was described by the parties during hearing and the same could be discerned from the draft Record of Appeal, where the Respondent herein described the extent of the suit land and the Appellants did not protest the said map and description during the hearing; that having cross examined on the survey of the land, the Applicants were aware as at 2nd April, 2019 that the land had been reserved under a survey and plan numbers; that although the Respondent to date had never been served with the applicant's alluded letter requesting for a Certified map, the same is alleged to have been done in October, 2020, when Judgment was delivered on 18th September, 2019; that the applicants had not accounted for the lapse in time and may have been working in conjunction with the surveyor in altering the map.

7. She averred that she filed a Notice of Motion Application dated 4th November, 2020 seeking summoning of all the land adjudication officials but the applicant herein vehemently opposed the same and instead sought to selectively call the surveyor who was not the custodian of the adjudication records; that the issue of the maps will be dealt with by the trial court in the new case being Mutomo ELC No. E007 of 2020 and not this court; that the issue before this court on appeal is not a boundary dispute but an ownership issue and should the appeal fail, the lower court decree will be enforced which being an order of dismissal cannot therefore be executed since it's a negative order; that if the appeal succeeds then the Respondent will not have a decree to execute as the lower court decree would be set aside.

8. The Respondent also contended that the application was being made to delay finalization of the appeal as the applicant was enjoying interim orders; that there were no grounds in the Memorandum of Appeal requiring the court to determine the boundaries of the suit land nor take further evidence hence the applicant cannot sneak in the same vide a Notice of Motion application.

9. She averred that in the lower court, the Applicant did not summon the surveyor if at all they were disputing the map issued by the adjudicating officer and the court could not take evidence of a surveyor without visiting the suit land in the presence of the witnesses; that the court would be usurping the powers of the trial court as there is another suit pending on the same issues and prayed the application be dismissed with costs.

10. The Applicants filed a further affidavit in response to the Respondents reply dated 6.05.2021 and deposed that after filing the Application dated 22.10.2020 they served it to the advocates then on record M/s Nzilu Nzioka & Company Advocates on 11th November, 2020, the advocates currently on record served the Notice of change of Advocates to them on 18th December, 2020.

11. He deposed that even though there was no obligation to serve the new Advocates on record with the motion, they still served them out of good will vide soft copy which contained fully stamped and executed documents; He deposed that nevertheless they were not opposed to furnishing them with a fresh set of physical documents at their own cost; that the Respondent did not produce any maps showing the demarcation of the suit property before the trial court and it's only until they applied to put the map showing the demarcated boundaries of the suit land that the Respondent for the first time filed a map showing various parcels of land consolidated into the suit land belonging to various owners who were never joined in the suit before the lower court in Mutomo.

12. It was the Applicant's contention that the map was never referred to at the hearing nor was it produced as evidence; He deposed that even though the land had been surveyed and demarcated, the map showing the demarcation had never been filed; that the allegations that they had conjured with land officers to change the boundaries of the map was incorrect and the boundaries outlined in the map they were seeking to produce reflected the boundaries identified by the land owners during the survey of the adjudication area on 18th November, 2018 noting that the map is public record; that the allegation that the reason they intended to call the surveyor of the adjudication area to produce the map was to commit fraud was misconceived and incorrect and the purpose they were seeking to call the surveyor to produce the map was so that the respondent gets a chance to cross-examine him if necessary.

13. He deposed that this court has the power to allow the Appellants to produce further evidence, and even though the Respondent had filed a fresh suit before the subordinate court at Mutomo, the suit was not between the same parties to the appeal and will therefore have no bearing on this appeal; he finally deposed that allowing the map in evidence before this Honourable court will not prejudice the Respondent as the evidence is precise, straight forward and serves the purpose of completing the court record.

THE APPLICATION DATED 4TH NOVEMBER 2020

14. In the application dated 4.11.2020, the Respondent in this appeal sought for the following orders; -

a. Spent

b. That pending the hearing and determination of this application, injunction orders do issue restraining the Appellant/Applicants or any other person acting under their authority from cutting down trees, burning trees and vegetation, interfering with graves, subdividing, fencing, selling, allocating, further construction, transferring, charging and/or in any way dealing with all that original portion of land known as parcel numbers 519 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County.

c. That pending the hearing and determination of this application, summons do issue to Adjudication officer, Demarcation

Officer, Recording Officer and Survey officer to show cause why they interfered with the records of adjudication and acreage of the parcel numbers 529 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County by creating other smaller parcels of land within them known as parcel numbers 1151, 1152, 1153, 1154, 1155, 1156, 1157, 532 and 519 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County.

d. That pending the hearing and determination of this application, an order do issue directing the Adjudication officer, Demarcation Officer, Recording Officer and Survey officer to supply the Respondent/Applicant with a certified copy of the Adjudication register and the documents they used to sub divide parcels number 532 and 519 into smaller parcels namely parcels numbers 1151, 1152, 1153, 1154, 1155, 1156, 1157, 532 and 519 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County.

e. That pending the hearing and determination of this Appeal, an order do issue directing the Adjudication officer, Demarcation Officer, Recording Officer and Survey officer to rectify the records of adjudication by deleting all those new numbers namely parcels numbers 1151, 1152, 1153, 1154, 1155, 1156, 1157, created within the parcel numbers 519 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County.

f. That pending the hearing and determination of the Appeal herein, injunction orders do issue restraining the Appellant/Applicants or any other person acting under their authority from cutting down trees, burning trees and vegetation, interfering with graves, sub dividing, fencing, selling, allocating, further constructing, transferring, charging and/or dealing in any way with all that original portion of land known as parcel numbers 519 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County.

g. That pending hearing and determination of this Appeal, the Adjudication Officer, Demarcation Officer, Recording Officer, Survey Officer and any other officer who participated in interfering with the records of adjudication and acreage of the parcel numbers 519 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County by creating other smaller parcels of land within them known as parcel numbers 1151, 1152, 1153, 1154, 1155, 1156, 1157, 532 and 519 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County be committed to civil jail for 6 months for interfering and altering the status and acreage of the subject matter of this Appeal as well as Mutomo SPMCC No. 7 of 2018 without leave or authority of the court.

h. That costs of this application be paid by the Applicant/Respondents.

15. The Application is supported by the Respondent who deposed that she filed a suit at Mutomo Spmcc No. 7 of 2018 in respect of parcel numbers 519 and 532 KATENE ADJUDICATION SECTION within Mutomo Sub County, Kitui County; that judgment was entered in her favour and subsequently the Appellants filed an appeal together with an application for stay of execution of the lower court judgment pending the trial of the appeal; that the appellants have resorted to wasting away the land herein by cutting down trees, burning vegetation, encroaching on other areas of the land and colluding with adjudication officials to change boundaries; She deposed that unless the orders herein are issued, the judgment of the lower court would be rendered useless because the subject matter thereof will be materially altered and completely extinguished as the register will have been completely interfered with and wanton destruction carried out on the land; She deposed that it is important to have the orders issued by allowing the Application as prayed.

16. The application was opposed vide a Replying Affidavit sworn by the 1st Appellant on 2nd March 2021 where he averred that the allegation that they had embarked on cutting down trees, burning vegetation, encroaching on other areas of the land or colluding with adjudication officers to change the boundaries of the suit property was false; that the allegation that they had used the orders of stay to collude with the Adjudication Officer, Recording Officer and Survey Officer Katene adjudication section to sub divide the suit property into smaller pieces is unsupported; that whereas the history of plots 519 and 532 came up at the trial court, the history of plots 1151, 1152, 1153, 1154, 1155, 1156 and 1157 were not specifically in the records before the Court because their ownership was never disputed at the trial court.

17. She also deposed that while preparing the Record of Appeal, her Advocates realized that the demarcation of the map had not been produced before the trial court and on applying for a certified copy of the demarcation map; the same was availed to them on 7. 10.2020. She stated that the Respondent's Application should be dismissed for bringing in new parties and new issues which did not arise before the trial court.

18. On 6th May 2021, the court directed that the two applications be determined together and directed parties to file their written submissions in respect of the two applications. The Appellants filed their submissions on 26th May 2021, the Respondent filed her submissions on 21st June 2021 and the Appellant filed further submissions on 27th October 2021.

APPELLANTS' SUBMISSIONS

19. Counsel for the Appellants submitted that during the suit in the subordinate Court, the Respondent did not produce any document showing the location, acreage and boundaries of the suit property, notwithstanding that plots 529 and 532 of Kateene Adjudication section, Mutha Location, Mutomo Sub County, the subject of this appeal had been surveyed and demarcated. Counsel submitted that as it stood currently, the demarcation map of the suit property is nowhere on the court record and they prayed that this court allows the demarcation map to be filed as additional evidence to ascertain the exact location and size of the suit property. Counsel pointed to the court Section 78(1) of the Civil Procedure Act, Order 42 rule 27 of the Civil Procedure Rules and the cases of *Ladd v Marshall (1954) 1 WLR 1491* & the Supreme Court case of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR* which I have duly considered.

20. Counsel submitted that allowing the application dated 22.10.2022 will ensure that the hearing of the appeal is not merely an academic exercise because as it stands currently, the precise situation and boundaries of the suit property will remain uncertain until the map is allowed

in evidence before this court.

21. Counsel referred the court to the case of *Civil Appeal No. 13 of 2018 Ainu Shamsi Hauliers Limited v Anastasia Ndinda Mwanzia [2018] eKLR* where it was held that a court of law should not be deprived of information which will enable it reach a fair determination of the case. Counsel also cited the case of *Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR* where it was stated that the court may admit additional evidence on Appeal for sufficient reasons. Counsel also relied on the case of *John Kiplangat Barbaret & 8 Others v Isaiah Kiplagat Arap Cheluget [2016] eKLR* where the court allowed production of additional evidence being a demarcation map for L.R No. Narok/Cis-mara/ilmotio/54 showing portion of the suit land occupied by the appellants.

22. On leave to call the surveyor to produce the demarcation map, counsel relied on Section 16 of the Land Adjudication Act and Section 81 of the Evidence Act and submitted that the surveyor who did the demarcation be summoned to testify and if not the court also has powers to admit the additional evidence by means of an affidavit. Referring to the Respondent's application dated 4.11.2021 praying for injunction orders, counsel submitted that granting the injunctive orders prayed for by the Respondent served no useful purpose as the Appellants were not interfering with the suit property in any way and the Respondent had not produced any credible evidence to prove their allegations. Counsel relied on the locus classicus case of *Giella v Cassman Brown and Company Limited [1973] EA 358*.

23. On whether the applicant had colluded with land registry officers, counsel submitted that the Respondent had not produced any evidence to prove that the Appellants colluded with the Adjudication Officer, Recording Officer, Demarcation officer and Survey Officer to interfere with the records of acreage of the suit properties and prayed that the application be dismissed.

RESPONDENT'S SUBMISSIONS

24. Counsel for the Respondent submitted that despite filing a Memorandum of Appeal herein in September, 2019, the Appellant has never filed a Record of Appeal and as such the court cannot order production of any evidence without first being given an opportunity to consider in totality the evidence produced before the trial court. Counsel submitted that in 2018, the land adjudication officer issued consent and drawing of the land for the prosecution of the lower court matter as can be seen from the Respondents annexures. Counsel submitted that a party who has lost a case should never be allowed to call fresh evidence in order to make a fresh case as was held in the Supreme Court case of *Mohammed Abdi Mohamed v Ahmed Abdullahi Mohammed and 3 others (supra)*.

25. Counsel further submitted that under Sections 4, 9, 10, 11 and 12 of the Land Adjudication Act, the surveyor is not the custodian of Adjudication Records but the Land Adjudication Officer, as such therefore the said surveyor has no powers to appear and produce an alleged record which they are not the custodian and if the court allows the application dated 22.10.2020 then the Respondent will be greatly prejudiced. Counsel contended that the issue of the new map which the Appellants want to re-introduce is pending before Mutomo ELC case No. E007 of 2020 which is a separate and distinct case from the one pending before this court and that issue will be conclusively dealt with by the trial court in the new case. Counsel submitted that the Applicants should be restrained from dealing with the suit properties until a determination of this court is rendered. Counsel urged the court to dismiss the application dated 22.10.2022 and allow the application dated 4.11.2021.

APPELLANTS' FURTHER SUBMISSIONS

26. The Appellants Counsel filed further submissions and stated that ELC Suit No. E007 of 2020 had no bearing on the application and appeal before this court as the applicant herein is not a party and is a stranger to its proceedings; Counsel prayed that the Respondent's application dated 4.11.2021 be dismissed and the Appellants application dated 22.10.2020 be allowed.

ANALYSIS AND DETERMINATION

27. I have considered both applications, the replies and the parties' submissions and authorities cited. In my considered view, the issues that arise for determination are:

- i. Whether the Appellants are justified to adduce further evidence in this appeal.
- ii. Whether the orders sought by the Respondent are merited.

PRODUCTION OF FURTHER EVIDENCE ON APPEAL

28. The law governing production of further evidence on appeal is provided for in Section 78 of the Civil Procedure Act as well as Order 42 Rule 27 of the Civil Procedure Rules. Section 78 of the Civil Procedure Act provides that: -

“(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power –

- a. to determine a case finally;**
- b. to remand a case;**
- c. to frame issues and refer them for trial;**
- d. to take additional evidence or to require the evidence to be taken;**

e. to order a new trial.

(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Order 42 Rule 27 of the Civil Procedure Rules provide as follows;

“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –

a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.”

29. Essentially therefore, under Order 42 Rule 27 of the Civil Procedure Rules, production of additional evidence at the appeal stage is not a matter of course, but can only be allowed in exceptional circumstances like where the court below declined to admit evidence which it ought to have admitted, or where the evidence in issue is so necessary for the pronouncement of judgment by the appellate court, or where there is a substantive reason for such production. In all these three instances, the appellate court is under duty to record the reasons for admitting production of new evidence on appeal. It ought to be borne in mind that the main purpose of the first appellate court is to re-evaluate the evidence of the trial court and ascertain whether the conclusions arrived at were justified, and consequently make its independent decision. Its role is not to provide an avenue or a platform for a party who had a weak case in the lower court to patch up the weak areas of their case by bringing fresh facts to the case; as this would amount to enabling the party who lost in the court below, to have an undeserved second bite at the cherry.

30. Principles governing admission of new evidence on appeal are well settled. In the case of *TARMOHAMED & ANOTHER V LAKHANI & CO (1958) EA 567*, the Court of Appeal for Eastern Africa in adopting the Judgment of Lord Denning in *LADD V MARSHALL (1954) 1 WLR, 1489*, stated as follows:

“Except in cases where the application for additional evidence is based on fraud or surprise, to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

31. Similarly, in the case of *NATIONAL CEREALS AND PRODUCE BOARD V ERAD SUPPLIES & GENERAL CONTRACTS LTD (CA 9 OF 2012), THE ADMINISTRATOR, H H THE AGHA KHAN PLATINUM JUBILEE HOSPITAL V MUNYAMBU (1985) KLR 127* the Court of Appeal emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. In *Wanjie & Others v Sakwa & others (1984) KLR 275* the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules and observed at page 280 as follows:

“this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

32. On the other hand, courts ought to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired by endless litigation which would occur if parties were allowed to adduce fresh evidence at any time during and after the trial without any restrictions. See *GENERAL PARTS (U) LTD V KUNNAL PRADIT KARIACA NO 26 OF 2013 UCA*. Courts have also disallowed such applications where the evidence sought to be admitted was in possession of the applicant at the time of the hearing before the trial court. See *CHEPKOECH SALAT V JOSEPHINE CHESANG CHEPKWONY SALAT CA APP 211/2014.*

33. In the instant case, the appellant has argued that their advocate applied for the map on 1st October 2020 and the same was supplied in October 2020. Their position is that the Respondent failed to produce the Survey map as evidence on the precise situation of the suit property. And they conclude that the survey map will have an impact on the outcome of the appeal. Therefore, the appellants have tried to absolve themselves from the obligation to produce the survey maps in the lower court, and blamed the Respondent for not producing the said evidence. If that evidence was necessary for arriving at a just determination of this matter in the lower court, nothing stopped the appellants from producing the same. The fact that judgment was entered on 18th September 2019, and it is only on 1st of October when the appellants applied for the survey map, shows that they did not seek to have the maps before entry of judgment, and therefore they did not exercise

diligence. In my considered view, the Appellants want to use the survey maps to have a second bite of the apple, which actions are frowned upon by tenets of justice; which demand that litigation must come to an end. I therefore opine that the Appellants have not demonstrated any exceptional circumstances deserving production of new evidence at this stage. Consequently, I find and hold that the Appellants' application dated 22nd October 2020 lacks merit and the same is dismissed with costs.

IS AN INJUNCTION PENDING APPEAL AVAILABLE TO THE RESPONDENT?

34. Grant of temporary injunction pending hearing of an appeal is governed by provisions of Order 40 rule 1 as well as Order 42 Rule 6 (6) of the Civil Procedure Rules. Order 40 Rule 1 provides as follows:

“Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

Order 42 Rule 6 (6) of the Civil Procedure Rules provide as follows;

“Notwithstanding anything contained in subrule (1) of this rule, the High court shall have power in the 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.”

35. In the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] e KLR*, on grant of injunction pending appeal, the Court of Appeal stated that the court has to exercise its discretion judicially and not in whimsical or in an arbitrary fashion and be guided by the following principles; -

- a. The discretion will be exercised against an applicant whose appeal is frivolous
- b. 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 vs. Cassman Brown* [1973] EA 358.

36. In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR* the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

37. In *MRAO LTD VERSUS FIRST AMERICAN BANK OF KENYA LTD (2003) ECLR* the Court of Appeal gave a description of a *prima facie* case as follows;

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

38. Therefore, for the court to exercise its discretion in favour of an applicant seeking injunction pending appeal, the applicant must demonstrate that their appeal is not frivolous but raises arguable grounds, that if the injunction is not granted their appeal shall be rendered worthless and the court must consider the basic principles for grant of injunction in civil cases as provided for in order 40 Rule 1.

39. I have considered the application by the Respondent in this appeal, and I note that prayers 1, 2,3 and 4 are spent as they all sought for orders to be issued pending hearing of the application. The only remaining prayers are prayers 5, 6 and 7, which were sought to be granted pending appeal. In prayer 5, the Respondent sought for mandatory orders pending the determination of the appeal, directed at the Adjudication Officer, Demarcation Officer, Recording Officer and Survey Officer directing them to rectify adjudication records pending hearing of the appeal. Prayer 6 is for a temporary injunction against the Appellants to restrain them from cutting down trees, burning trees and vegetation, interfering with graves, subdividing, fencing, selling, allocating, further constructing, transferring, charging or in any way dealing with the suit property, pending appeal. And lastly prayer 7 is that pending hearing of this appeal, the Demarcation Officer, Recording Officer, Survey Officer and any other officer be committed to civil jail for six months for interfering with adjudication records in respect of the suit properties without leave of court.

40. The Respondent in paragraph 10 of her supporting affidavit, has argued that unless the orders of injunction sought are granted, the lower court judgment will be rendered useless because the subject matter will be materially altered and completely extinguished as the register will have been completely interfered with and physical boundaries destroyed. It appears therefore that the basis of the Respondent's application is anchored on the decision of the lower court.

41. In so far as the Respondent's prayer for injunction pending appeal is concerned, the application must fail as this court can only consider the same if the applicant has an arguable appeal and that their appeal would be rendered nugatory if the injunction is not granted. Incidentally, the owner of the application is a Respondent and has no appeal of his own upon which his application for injunction can rest. The same is therefore struck out with costs.

42. On the issue of contempt, the Respondent has sought that the Adjudication Officer, Demarcation Officer, Recording Officer, Survey Officer and any other officer who participated in interfering with the records of adjudication and acreage of the parcel numbers 519 and 532 KATENE ADJUDICATION SECTION be committed to civil jail for 6 months for interfering and altering the status and acreage of the subject matter of this Appeal as well as Mutomo SPMCC No. 7 of 2018 without leave or authority of the court. There is no order of this court to that effect annexed to the application, and neither is there evidence of contempt in the terms stated by the Respondent. To prove contempt, the applicant must show the orders that were disobeyed, the manner of the disobedience and that the disobedience was deliberate. See **SAMWEL M. N. MWERU & OTHERS VS. NATIONAL LAND COMMISSION & 2 Others [2020] eKLR**. No such evidence has been tendered by the Respondent in this matter. Therefore, the prayer for contempt is not merited and the same is rejected.

43. The upshot is that the Appellants' application dated 22nd October 2020 is dismissed with costs whereas the Respondent's application dated 4th November 2020 is struck out with costs.

44. This appeal having been filed over two years ago, it ought to be heard and determined expeditiously. Consequently, I direct the Appellants to file and serve the record of appeal within 30 days of today.

45. The Deputy Registrar of this court is directed to ensure the lower court file is placed on record before the next mention date. This matter shall be mentioned on 10th March 2022 for directions.

46. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2022

THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Nyangasi for the Applicant

Mr. Nthiwa for the Respondent

Ms Josephine Misigo – Court Assistant