



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC NO. 87 OF 2012**

**KYALO TUTA (suing as the legal**

**representative of the estate of**

**WANZA TUTA deceased).....PLAINTIFF/APPLICANT**

**-VERSUS-**

**TITUS WAMBUA NGOLOMA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DOMINIC MUTUNE NTHENGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MWEA FARMERS CO. LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION:**

1. This Ruling is in relation to two applications; dated 10<sup>th</sup> June 2020 and 5<sup>th</sup> October 2020 respectively. I will first determine the application dated 10<sup>th</sup> June 2020 before embarking on the application dated 5<sup>th</sup> October 2020.

**THE APPLICATION DATED 10<sup>TH</sup> JUNE 2020**

2. In the application dated 10<sup>th</sup> June 2020, the Plaintiff/Applicant sought for orders restraining the Respondents from evicting the Applicant from the parcel of land known as Ndithini/Mananja Block 1/285 pending the hearing and determination of the intended appeal.

3. The application is supported by grounds on its face as well as the affidavit of the Plaintiff sworn on 10<sup>th</sup> June 2020 where he deposed that Judgment was entered in favour of the Defendants/Respondents in Machakos ELC No. 87 of 2012 on 15<sup>th</sup> May 2020 requiring him to give vacant possession of the parcel of land known as Ndithini/Mananja Block 1/285 (hereinafter the Suit Property) to the Defendants; that the trial court did not issue interim orders of stay pending appeal and it was in the interest of justice that this court grants the orders as prayed in the motion since the Defendants had resorted to evicting him from the suit property; that he had already lodged an appeal against the judgment of this court and his appeal stands a good chance to succeed; that he stands to suffer substantial loss if the judgment is executed as he has been residing on the suit property for a long time; that the said appeal will be rendered nugatory if the orders sought are not granted and that both the appeal and application have been brought without unreasonable delay.

4. The application was opposed vide the 1<sup>st</sup> Defendant's Replying Affidavit sworn on 8<sup>th</sup> September 2021 in which he averred that the application herein was frivolous, vexatious, bad in law, misleading and an abuse of the court process; that despite judgment being rendered in their favour, they have never tried to evict the Plaintiff from the suit property or execute the Decree; that the Plaintiff has continued harvesting sand in bulk on the suit property and selling the same, prompting them to file the application for eviction dated 5<sup>th</sup> October 2020; that the Plaintiff's actions were depreciating the suit land and if the prayers sought are granted then the Defendants will suffer irreparable loss and that the intended appeal has no chances of success.

5. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on 9<sup>th</sup> November 2021 and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions filed on 2<sup>nd</sup> November 2021.

**SUBMISSIONS**

6. Counsel for the Applicant submitted that the applicant had met the threshold for grant of interlocutory injunction as provided for under

Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules. Counsel relied on the case of *National Bank of Kenya Limited v Juja Coffee Exporters Limited [2021] e KLR* for the proposition that the applicant had met the threshold set out in the case of *Giella v Cassman Brown Co. Ltd [1973] EA 358* by demonstrating that he had a prima facie case, that he was likely to suffer irreparable injury if injunction is not granted and that the balance of convenience tilted in his favour. Counsel also referred to the cases of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR* and *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, both of which this court has considered. Counsel contended that the Applicant's mother had been on the suit property openly, exclusively, continuously since 1984, while the Respondent sought to evict him in 2009 and therefore this court erred in its decision of 15<sup>th</sup> May 2020 and that evicting the applicant will render him homeless.

7. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that the right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. For that proposition, counsel relied on the cases of *Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat [2013] eKLR* and *Congress Rental South Africa v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & Another (Garnishee) [2019] eKLR*.

8. Counsel contended that although the applicant had sought for stay of execution pending appeal, he had neither filed a record of appeal nor prosecuted his appeal, a year after filing a Notice of Appeal. Counsel also argued that there was delay in filing the application, and therefore, the same was merely a delaying tactic. It was also argued for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the applicant had not demonstrated that he stands to suffer irreparable injury and that it is the Respondents who continue to suffer loss due to the applicant's act of harvesting sand in the suit property.

#### **ANALYSIS AND DETERMINATION**

9. I have considered the application, the affidavit in support, the submissions, the judgment on record as well as all the material on the court record. In my considered view, the issue that arise for determination is whether the Applicant has met the threshold for grant of a temporary injunction pending appeal.

10. This application was brought under Order 42 Rule 6 (6) of the Civil Procedure Rules. The same provide as follows;

**Notwithstanding anything contained in sub rule (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 the subordinate court or tribunal has been complied with.**

11. My understanding of Order 42 Rule 6 (6) is that this court has jurisdiction to grant a temporary injunction in matters where it is exercising its appellate jurisdiction over matters emanating from subordinate courts or tribunals. I do not think that this court has jurisdiction to grant a temporary injunction pending an appeal filed in the Court of Appeal. In my considered view, the provisions of Rule 5 (2) (b) of the Court of Appeal Rules are the proper provisions governing filing and grant of such temporary injunctions pending appeal to the Court of Appeal, and therefore the application herein ought to have been filed before the Court of Appeal.

12. I therefore have no difficulty in associating myself with the reasoning in the case of *Bartholomew Mwanyungu & 3 Others v Florence Dean Karimi [2019] e KLR*, where the court stated as follows;

**It should be noted from the above provisions of the law, and in particular Order 42 Rule 6 (6) that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the court has already rendered its decision and the applicant has stated that she intends to appeal to the court of appeal against the decision of this court given on 18<sup>th</sup> April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This court is no longer exercising its appellate jurisdiction.**

13. In view of the foregoing, the applicant ought to have invoked Rule 5 (2) (b) of the Court of Appeal Rules and moved the Court of Appeal for orders of injunction pending appeal, and not this court. In my view, the inherent jurisdiction of this court cannot be invoked in respect of a matter where a superior court has jurisdiction by dint of specific legal provisions to exercise jurisdiction.

14. In any event, this application amounts to an abuse of the court process and a waste of precious judicial time. The Applicant filed his Notice of Appeal on 20<sup>th</sup> May 2020. There is no evidence that the applicant has filed a record of appeal in respect of this matter. The applicant has argued that the judgment of this court was in favour of the Defendants and that the effect of the judgment is to have the applicant evicted from the suit property. I have perused the judgment of this court delivered on 15<sup>th</sup> May 2020 and I note that the final order of the court was the dismissal of the Plaintiff's suit with costs. There is no order of eviction on record, therefore the allegation that the judgment has the effect of evicting the applicant is not correct.

15. For the above reasons, I find and hold that the application dated 10<sup>th</sup> May 2020 is wrongly placed before this court, is an abuse of the court process and the same is hereby dismissed with costs.

#### **THE APPLICATION DATED 5<sup>TH</sup> OCTOBER 2020**

16. In the application dated 5<sup>th</sup> October 2020, the Defendant/Applicant sought for the following orders; -

**a) Spent**

b) That as per the Judgment in ELC 87 OF 2012 Kyalo Tuta (suing as the legal representative of the Estate of Wanza Tuta (Deceased) v Titus Wamba Ngoloma & 2 others [2020] eKLR and the title, the applicants are the joint legal registered owners of Ndithini/Mananja Block 1/285 formerly plot number 370.

c) That the continued possession and utilization of the property known as Ndithini/Mananja Block 1/285 formerly plot number 370 by the respondent and or his agents, subjects or personal representatives is illegal and a violation of the indefeasibility nature of the applicant's title to the land

d) That the respondent, his agents and or personal representatives be and are hereby ordered to immediately vacate from the property known as Ndithini/Mananja Block 1/285 formerly plot number 370 together with all their property and structures permanent or otherwise.

e) That the applicants be and are hereby allowed to lawfully recover possession of their land by evicting the respondent therefrom.

f) That the Ocs Masinga Police Station does oversee a smooth recovery of possession and utilization of the property known as Ndithini/Mananja Block 1/285 formerly plot number 370 from the respondents to the applicants.

g) That the costs of this application be borne by the respondents.

17. The Application is supported by the grounds on the face of the application and the affidavit sworn on 5<sup>th</sup> October 2020 by the 1<sup>st</sup> Defendant, who deposed that the defendants are the joint owners of the suit property and the Plaintiff herein sued them over that parcel of land and their matter was dismissed; that despite the matter being dismissed the Defendants have continued to illegally occupy and utilize the suit property for commercial gains while depreciating its value; that the dismissal of the suit validated the defendants' ownership of the suit property; that the courts did not act in vain and the judgment must bear its intended fruits; that the purpose of this application was to enforce the judgement and prayed the orders sought be allowed.

18. There is no response to the application. The application was heard by way of written submissions and on record are the Applicants' submissions dated 20<sup>th</sup> May 2021.

#### **APPLICANT'S SUBMISSIONS**

19. Counsel for the applicant relied on sections 24 and 26 (1) of the Land Registration Act and submitted that the applicants hold indefeasible title over land reference No. Ndithini/Mananja Block 1/285 formerly plot No. 370 as per the judgment in this matter. Counsel argued that in the judgment of this court made on 15<sup>th</sup> May 2020, the court dismissed the plaintiff's suit by finding that the plaintiff failed to prove that the defendants acquired the suit land fraudulently. Reliance was placed on the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another (2013) eKLR*, which this court has duly considered.

20. Counsel further submitted that the plaintiff's continued possession and utilization of the suit property is illegal and a violation of the indefeasibility nature of the applicant's title to the suit land. Counsel pointed out that the Plaintiff was harvesting sand from the suit property and therefore the Respondents should be ordered to vacate the suit land. Counsel cited the case of *Dr. Joseph N.K. Arap N'gok v Justice Moijo Ole Keuwa & 4 Others*.

#### **ANALYSIS AND DETERMINATION**

21. I have considered the application as well as the submissions and authorities cited. In my considered opinion, the issue that emerge for determination is whether eviction orders should issue in view of the judgment herein.

22. I have considered the judgment delivered by the court on 15<sup>th</sup> May 2020. I note that the court dismissed the Plaintiff's suit with costs on grounds that the plaintiff failed to prove that the defendants acquired the suit property fraudulently. There is no positive order of eviction made in favour of the defendants in this case. Indeed, there was no counterclaim by the defendant for orders of eviction as currently sought. In my considered view, the orders sought cannot be obtained after delivery of judgment dismissing the plaintiff's suit. The allegations that the Plaintiff is harvesting sand from the suit property and that he ought to be evicted are matters that were not litigated upon in this suit. The argument that the dismissal of the plaintiff's suit presupposed indefeasibility of the defendants' title is misplaced as the court pronounced itself on the issue as to whether the plaintiff had proved his claim as against the defendants. At this stage, this court is now *functus officio* having determined the issues and prayers that were presented in court before judgment was entered. Therefore, the orders sought by the Defendants can only be obtained in a fresh suit and not by way of notice of motion application in this matter. In the premises therefore, the application dated 5<sup>th</sup> October 2020 lacks merit and the same is dismissed with costs.

23. The upshot is that the applications dated 10<sup>th</sup> June 2020 and 5<sup>th</sup> October 2020 lack merit and are both dismissed with costs.

24. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3<sup>RD</sup> DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Mugwe holding brief for Mr. Wainaina for the Defendants

No appearance for the Plaintiff

Josephine Misigo – Court Assistant