



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 62 OF 2018

LUKA RUTEERE 1ST APPELLANT

MWENDA RUTEERE 2ND APPELLANT

MWIRIGI RUTEERE..... 3RD APPELLANT

VERSUS

MARCELLA KINAITORE MWIMBI RESPONDENT

RULING

1. The court rendered its judgment on 28.7.2021 in which it affirmed the lower court decree by dismissing the appeal with costs to the respondent.
2. By an application dated 28.9.2021, the appellants urge this court to issue inhibition orders over **L.R No. Kiengu/Kanjoo/833** and a temporary order of injunction restraining the respondent from in any way whatsoever evicting, selling, leasing, charging or interfering with the applicant's quiet, peaceful, actual and exclusive possession or enjoyment of the suit land pending hearing and determination of the intended appeal.
3. The application is supported by an affidavit sworn on behalf of the applicants by Mwenda Ruteere on 28.9.2021.
4. The grounds of the application are that there is imminent threat of eviction yet they have been in occupation with developments thereon in terms of farming activities; if evicted, they stand to suffer grave loss, prejudice and damage, the appeal shall be rendered nugatory if the eviction occurs and that there will be no prejudice since the respondent does not occupy the land or utilize it.
5. In the supporting affidavit, the applicant essentially repeats the above grounds save to attach photographs demonstrating the developments on the land and the fear that should the land be transferred to third parties by way of a gift or sale, the substratum of the appeal shall completely move beyond the reach or control of the applicants and the court.
6. The application is opposed through a replying affidavit sworn on 8.11.2021. It is stated though both decrees require the applicants to move out of the land, the respondent was yet to do so and that the intended appeal was a waste of court's time and resources out to delay was enjoyment of the fruits of the judgment.
7. Secondly, it was averred the applicants may not be able to pay the costs of this endless litigation and they should now be ordered to deposit at least 1,000,000/= as a condition precedent.
8. Parties were granted leave to put in written submissions by 31.1.2021 but unfortunately, there has been no compliance.
9. As regards prayer 2 of the application, a consent dated 8.10.2021 was filed by the two law firms. Unfortunately, the court was not called upon to adopt it as an order of the court so that the firm of J. Muthomi & Co. Advocates could formally come on record for the applicants. Be that as may, the said prayer is hereby allowed.
10. The applicants' application is based on the sole issue that they wish to pursue an appeal which they have started through the filing of a notice of appeal dated 6.8.2021 and now wish the subject property to preserved through both an inhibition order and a temporary order of injunction pending hearing and disposal of the intended appeal.

11. A court of law is mandated to issue inhibition orders under **Section 68 of Land Registration Act**, for a particular period of time or until an occurrence of a particular event or generally until a further order to registration of any land, lease or charge whose effect under **Section 69 of the Land Registration Act** is to stop any registration of an instrument inconsistent with the inhibition.
12. The same may also be cancelled under **Section 70 of the Land Registration Act**, upon the expiration or occurrence of event or a consequent order of the court.
13. An inhibition is in essence similar to a prohibitory injunction barring the registered owner of the land under dispute from enjoying his ownership rights under **Article 40 of the Constitution**. Therefore, a court issuing such an order must be satisfied there are good grounds to warrant issuance of such an order since like an interlocutory injunction, it preserves the property in dispute pending trial as held in **Daniel Gitau Kuria –vs- Muthoni Mbugua Ndumo & 3 Others [2021] eKLR**.
14. At the time the appeal was heard and determined, the suit land was still being described as **Parcel No. 883/Kiengu/Kanjoo** adjudication section falling under the **Land Adjudication Act Cap 284 Laws of Kenya**.
15. The applicant has not attached a current search certificate to show there was inexistence a title deed falling under the provisions of the **Land Registration Act 2012**. In absence of such evidence or documentation, this court cannot act on speculations or give orders in vain. See **Florence Cherugut –vs- Cheptum Murei Annah [2022] eKLR**
16. Coming to the issue of a temporary injunction pending hearing of an intended appeal, the court in **Patricia Njeri & 3 Others –vs- National Museum of Kenya [2004] eKLR** held such orders will not be given to an applicant whose appeal was frivolous, if it will occasion or inflict greater hardship and that the applicant must also show that to refuse the injunction would render the appeal nugatory. Similarly, the court must also be guided by the principles of **Giella –vs- Cassman Brown [1973] E.A 358**.
17. In this application, the applicants must establish a prima facie case which as defined in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others [2003] eKLR**, includes a right which apparently has been infringed by the opposite party so as to call the other party to rebut it.
18. The respondents had sued the appellants in the lower court for unlawful entry and or occupation of the suit land registered under her deceased husband.
19. The appellants counterclaimed as owners of **Parcel No. 1142 Kiengu/Kanjoo** adjudication allegedly superimposed by the respondent's **Parcel No. Kiengu/Kanjoo adjudication section** out of fraud, ostensibly based on the appellant's mistaken believe on the sequential numbering of parcels of land in dispute given the land adjacent to hers was Parcel No. 1141. She assumed that the next parcel to No. 114 should be Parcel No. 1142.
20. A land surveyor was called to unravel the issue and gave an opinion that a numbering in surveying was determined at the time when the subdivision was undertaken. His opinion was that it did not therefore follow a sequential ordering. In his view **Parcel No. 1141 Kiegoi** was therefore opposite to the respondents' parcel of land.
21. The trial court found for the respondents based on the surveyor's expert report which had been challenged through a counter report. The court confirmed the lower court finding and dismissed the appeal.
22. In my considered view therefore, I am not convinced the applicants have established a prima facie case to be entitled to any injunction pending the intended appeal. By extension therefore, I find that the applicant has not demonstrated the merits of his intended appeal so as to be entitled to an injunction under the circumstances.
23. As to whether the appellants will suffer any irreparable injury should the injunction be denied, other than farming activities, the photographs do not depict any developed buildings. In my view, the plants and crops on the land are quantifiable in monetary terms.
24. Turning to the balance of convenience, the respondent is the recorded owner of the suit land with rights and interests. The lower court has made a finding that the applicant's Parcel of land was opposite to where the respondent's land is. Therefore, the applicants have a duty to move out and occupy their land. It has not been said that the opposite land was not available for the taking up of vacant possession by the applicants. I find the balance for convenience tilts in favour of the respondent.
25. The ends of justice also dictate that the court acts proportionally and justly. The question of whether or not the two parcels of land are on the same position has been conclusively determined based on expert evidence.
26. There will be a greater risk or prejudice if the respondent was to be kept away from the land for no good reasons. It is therefore only reasonable that the suit property be taken up by the rightful owner but with a rider that it shall not be interfered with but shall remain in the names of the respondent.
27. In the premises, I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 2ND DAY OF MARCH, 2022

In presence of:

Muthomi for appellants

Nyamokeri for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE