



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 4 OF 2020

UTHASYO MUTHEKE.....APPELLANT/APPLICANT

VERSUS

JAMES MWANTHI MUTHEMBWA.....RESPONDENT

RULING

Introduction:

What is before Court for determination is the Appellant's Notice of Motion Application dated 11th May, 2021, brought pursuant to Section 13(7) of the Environment and Land Court Act, Sections 1A, 1B, 3, 3A and 78(2) of the Civil Procedure Act including Order 40 Rule 1 of the Civil Procedure Rules. The Appellant seeks the following Orders:

a) Spent.

b) That pending the hearing and determination of this application, the Respondent either by himself, or his servants, agents, surrogates or any other person acting or purporting to act for him be restrained by an order of injunction from entering, trespassing upon, selling offering for sale, alienating, dealing or in any manner whatsoever from interfering with land parcel number MACHAKOS KONZA NORTH BLOCK 1/440.

c) That pending the hearing and determination of the Appellant's appeal herein the Respondent either by himself, or his servants, agents, surrogates or any other person acting or purporting to act for him be restrained by an order of injunction from entering, trespassing upon, selling, offering for sale, alienating, dealing or in any manner whatsoever from interfering with land parcel number MACHAKOS KONZA NORTH BLOCK 1/440.

d) That pending the inter partes hearing of this application, the Honourable court do issue an interim order in terms of prayer number 2 hereof.

e) That the cost of this application be provided for.

The application is premised on the grounds on the face of it and supported by the affidavit of the Appellant UTHASYO MUTHEKE where he deposes that he is the absolute proprietor of all that land known as title number MACHAKOS/KONZA NORTH BLOCK 1/440 hereinafter referred to as the "Suit Property." He explains that he filed a suit for a permanent injunction on the 23rd July, 2002, which was dismissed vide a judgment dated 22nd January, 2020 after it was found that a Certificate of Confirmation of Grant granted to the 1st Defendant had been revoked therefore she lacked legal capacity to transfer the suit property to him.

He contends that he has since lodged an appeal against the same as the court relied on an illegally and unprocedurally introduced documentary evidence to reach its decision and the Respondent has been trespassing on the suit property. He reiterates that the court should grant the orders as sought.

In opposition, the Respondent JAMES MWANTHI MUTHEMBWA filed a Replying Affidavit and denied trespassing on the suit property. He insisted no evidence had been tendered as proof of the same. He averred that the title held by the Appellant was declared a nullity by the trial court and not unless the decision was overturned then it would remain the same.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 11th May, 2021 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the court should grant a temporary injunction as regards the suit property pending the determination of the Appeal.

In his submissions, the Appellant insists at the time of sale of the suit property, the deceased registered owner Grace Mwelu Muthembwa had a valid title which was transmitted to her pursuant to a Certificate of Confirmation of Grant in Succession Cause No. 55 of 1999 – in the matter of the estate of REUBEN MUTHEMBWA MUKUVI. Further, that Grace Mwelu Muthembwa passed to him a valid title and her actions as the administratrix were valid and legally binding. He contends that his Appeal is not frivolous; has overwhelming chances of success and if an injunction was to be denied at this stage it would render the appeal nugatory as he stood to suffer substantial loss. He referred to Section 93(1) of the Law of Succession Act Cap. 160 and relied on the principles in *Giella v Cassman Brown Co. Limited (1973) EA 358* to support his arguments.

The Respondent in his submissions insisted there existed a valid judgment in favor of them in the lower court and there being no prayers for stay of execution of the said judgment, the Respondent should not be barred from enjoying the fruits of his judgment. He reiterated that the application herein did not meet the threshold set in *Giella v Cassman Brown (supra)*, as the Appellant cannot seek injunctive orders as he has nothing to support his case other than the fact that he believes the trial magistrate erred in making his decision and has alluded to this, in the memorandum of appeal annexed to the supporting affidavit of his application.

It is not in dispute that the Appellant holds a title to the suit property. It is further not in dispute that the Certificate of Confirmation of Grant which was issued to Grace Mwelu Muthembwa (*deceased*), that enabled her to sell the suit property to the Appellant was revoked. Further, that the Chief Magistrate's Court vide its impugned judgement dismissed the Appellant's suit. The Appellant has now sought for orders of injunction pending appeal which application is opposed by the Respondent who was a stepson to the 1st Defendant in the lower court.

On the issue of injunction pending appeal, Order 42 Rule 6 (6) of the Civil Procedure Rules provides inter alia:

“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.”

In the case of *Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR* it was held as follows:

- “a. An order of injunction pending appeal is a discretionary which 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 Cassman Brown [1973] EA 358.”***

While in the case of *Kenya Commercial Bank Limited Vs. Nicholas Ombija [2009] eKLR* it was held that ‘An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.’

On perusal of the proceedings in the lower court including the exhibits produced, I note the Appellant has been the registered proprietor of the suit property from the 2nd February, 2001. Further, it emerged that he purchased the suit property from the 1st Defendant in the lower court who was a step mother to the 2nd Defendant who is the Respondent herein. The Respondent contends that he should not be barred from enjoying the fruits of his judgement while the Appellant argues that it legally purchased the suit property. On a cursory glance at the Memorandum of Appeal, it is my considered view that the Appellant has an arguable Appeal. Further, since he has been the registered proprietor of the suit property which is the subject matter of this Appeal, I opine that the said subject matter should be preserved so that the Appeal should not be rendered nugatory.

Based on the facts as presented while relying on the legal provisions I have cited and associating myself with the quoted decision, I am of the view that indeed the Appellant has fulfilled the principles in the case of *Giella v Cassman Brown Co. Limited (1973) EA 358* as he has made out a *prima facie* case to warrant the grant of a temporary injunction pending appeal.

It is against the foregoing that I find the Notice of Motion application dated the 11th May, 2021 merited and will allow it.

Costs will abide outcome of the Appeal.

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

CHRISTINE OCHIENG

JUDGE

