Sugut v Yatich & another; Jepkorir (Interested Party) (Civil Appeal E2 of 2022) [2022] KEELC 13313 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13313 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CIVIL APPEAL E2 OF 2022

LA OMOLLO, J

OCTOBER 6, 2022

BETWEEN

SUSAN KIMELI SUGUT ..... APPELLANT

AND

DAVID YATICH ..... 1ST RESPONDENT

AHMED KIPROTICH KIRUI ..... 2ND RESPONDENT

AND

EVALINE JEPKORIR ..... INTERESTED PARTY

(Being an appeal against the Judgement of the Honorable magistrate Hon. R. Yator (PM) delivered on 3rd February 2022 in Molo CMCC ELC 18 of 2020)

RULING

1. This ruling is in respect of the appellants notice of motion application dated February 22, 2022. The said application is brought under order 42 rule 6(6), order 51 rule 1 of the *Civil Procedure Rules* and section 1A, 1B, 3 and 3Z of the *Civil Procedure Act*.

2. The application seeks the following orders:

    1. ...Spent

    2. ...Spent

    3. Thatpending the hearing and determination of this appeal inter parties herein this honorable court be pleased to grant a temporary order of injunction restraining the respondents and the interested party either by themselves or authorized agents even interfering with appellants use,

occupation, cultivation of parcel of land No Nakuru/ Ngongogeri/ 258 or dealing with the same in a manner inconsistent with quiet possession of the appellant.

4. In the alternative an order for status quo to preserve the suit piece of land pending hearing and determination of this appeal herein.

5. That costs of this application be provided.

3. The application is based on the grounds on its face and supported by the affidavit sworn by Susan Kimeli Sugut sworn on February 24, 2022.

Factual Background.

4. This appeal was commenced by the memorandum of appeal dated February 21, 2022 where the appellant/appellant set out the grounds of appeal as follows:

a. Thatthe learned magistrate erred in law and in fact in making a finding that the interested party had obtained letters of administration in Eldoret High court.

b. Thatthe learned magistrate erred in law and in fact in failing to appreciate the difference between limited grant of letters of administration ad litem and issuance of confirmation of grant to party in relation to a contested ownership; confirmation of grant to date since 2010, has not been issued by the concerned court.

c. Thatthe learned magistrate erred in fact and in law is failing to judiciously exercise her discretions in dispassionate manner and uphold the principles of fairness in light of the fact that the government had caveated the section and had not taken any steps to remove the caveat.

d. Thatthe learned magistrate erred in law and in fact in failing to correctly relate the facts/law on issuance of limited grant of letters of administration ad lite*m* to the interested party from July 1, 2010.

5. The matter first came up in court on February 24, 2022 when the court declined to certify the application as urgent and gave a hearing date for the application for March 14, 2022.

6. On March 14, 2022, parties were absent and the court gave a mention date for April 28, 2022.

7. On the April 28, 2022, again, parties were absent and, on that date, the court gave a further mention for May 17, 2022.

8. On May 17, 2022 the parties agreed to dispose the application by way of written submissions.

The Appellant/ Applicant's Contention.

9. The appellant/applicant contends that the appeal and application arise from the ruling/judgement of Hon R Yator PM that was delivered on February 3, 2022 in Molo CMCC ELC No 18 of 2020 whose decision is the subject matter of this Appeal.

10. It is her contention that the suit property is located at the caveated section of the Mau Forest and that she has been farming on the suit property; land parcel No Nakuru/Ngongongeri/258.

11. The appellant/applicant contends further that she is informed by her advocates on record that the court found that she had failed to prove her case to the required standard therefore dismissing the case with costs to the defendants and the interested party.

12. The appellant/applicant also contends that she is aggrieved by the whole decision of the court and has preferred an appeal seeking that the said judgement be set aside/varied/substituted and/or reviewed.

13. It is her contention that the respondents claim to have authority from the Interested Party to occupy the said property and yet no such authority was availed or shown to court.

14. The appellant/applicant contends that to date the interested party has not obtained confirmed letters of administration for the estate of her late husband and yet the court claimed she had such letters.

15. The appellant/applicant ends her deposition by stating that she is aggrieved by the said judgement from the Molo Law Courts and prays that it be set aside.

The Respondents' Response.

16. In response to the application the respondents filed a replying affidavit sworn on February 28, 2022.

17. He deposes that he together with his co-respondents have been in exclusive possession, quiet use and enjoyment of land parcel Number Nakuru/Ngongogeri/663 and 686 with the authority of the widow of the late Fred R Barsiron the registered owner of the land.

18. He further deposes that the respondents are not interfering with land parcel Number Nakuru/Ngongogeri/258 and that the suit parcel No Nakuru/Ngongogeri/258 belongs to Jackson Tanui and not the appellant/applicant.

19. He deposes that the appellant/applicant trespassed on land parcel No Nakuru/Ngongogeri/663 and 686, fenced and planted maize on it without the authority of the respondents.

20. He deposes that the widow of the registered owner of land parcel Numbers Nakuru/Ngongogeri/663 and 686, Evaline Jepkorir Rono had been granted Limited Grant of Letters of Administration ad litem by the High Court of Kenya at Eldoret in succession cause No 13 of 2010.

21. He further deposes that if the injunction is granted the appellant/applicant shall continue trespassing and wasting land parcel Numbers Nakuru/Ngongogeri/663 and 686.

22. He deposes that the appellant/applicant has not made full disclosure of all the relevant facts for a just determination of the instant application.

23. He ends his disposition by stating that he swears the affidavit to oppose the notice of motion and prays that the same be dismissed with costs.

Issues For Determination.

24. The appellant/applicant filed her submissions on May 23, 2022 while the respondents filed their submissions on May 25, 2022.

25. The appellant/applicant gave a background of the appeal and submits that the interested party obtained limited grant of letters of administration but did not obtain confirmed grant of letters of administration and therefore she cannot be legally entitled to ownership of the suit land or appoint third parties.

26. The appellant/applicant further submits that the government has placed a caveat over the Mau Forest Complex and that she is therefore seeking to stay the lower court findings as she argues her appeal. She relied on the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358.

26. The appellant/applicant also submits that the respondents are not legally connected to the estate of the late Fred R Barsiron. She contends that the lower court failed to determine whether proper letters of administration of the estate of the late Basiron had been granted.

27. The appellant/applicant submits that the 1st and 2nd respondents are not beneficiaries of the estate and are therefore not entitled to participate as respondents.

28. She also submits that the only contested party herein is the Interested Party Evaline Jepkorir and prayed that her notice of motion application dated February 22, 2022 be allowed.

29. The respondents submits that the trial court had ordered the District Surveyor to visit the suit property and file a Report.

30. The respondents further submits that the District Surveyor filed a report on July 3, 2020 and stated that the site the appellant was claiming was for land parcel numbers Nakuru/ Ngongogeri 663 and 668 and not land parcel No Nakuru/Ngongogeri/ 258 and that the appellant/applicant had fenced the wrong parcels of land and planted maize.

31. The respondents also submits that when the District Land Registrar gave evidence, he testified that land parcel number Nakuru/Ngongogeri/258 is registered in the name of Jackson Tanui and not the appellant/applicant herein.

32. They reiterate that land parcel numbers Nakuru/ Ngongogeri 663 and 668 are registered in the name of the deceased and they are farming them with the permission of the deceased's personal representative.

33. The respondents submits that the appeal and application are devoid of any merit as the appellant/ applicant does not have a title and will not suffer if the injunction is not granted.

34. The respondents relied on the cases of *Esther Muthoni Mwangi v Samuel Maina Njaria* [2021]eKLR and *Joyce Mutindi Ndili v Mulu Ndili* [2022] eKLR.

Analysis And Determination.

35. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions of the parties herein. It is my considered view, that the issues that arises for determination are:

    a. Whether the appellant/applicant has met the threshold for grant of temporary injunction pending hearing and determination of the appeal herein.

    b. Who bears the cost of the application?

36. Order 42 Rule 6(6) provides 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."

37. The principles for grant of temporary injunction pending appeal are well settled. In the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the learned judge held that the principles applicable in considering an application for grant of orders of temporary injunction pending appeal are 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 great 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."

38. . In the case of *Giella v Cassman Brown* (1973) EA 358 the court stated that the conditions for grant interlocutory injunction as follows:

> " The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience."

39. The principles as set out in the case of *Giella v Cassman Brown* (Supra) are well known and I shall not discuss them more than is necessary.

40. I also note that that the appellant/applicant has gone into the merits of her appeal rather than make arguments for grant of an order of temporary injunction pending appeal.

41. The appellant/applicant seeks an order of temporary injunction restraining the respondents and interested party from interfering with the appellant's use and occupation of the suit parcel.

42. She further in the alternative prays for an order of status quo to preserve the suit property pending the hearing and determination of the appeal.

43. The respondents on the other hand contend that the appeal and the instant application is with no merit as the appellant/applicant did not possess a title to the suit property.

44. The appellant/applicant has faulted the finding of the lower court which failed to determine whether proper letters of Administration of the Estate of Barsiron was done or whether the confirmed grant was issued.

45. I further note that both parties have completely failed to address themselves on the legal principles that should be canvassed either in support of and/or in opposition to the application. All have, instead, gone into the merits or otherwise of the appeal.

46. In my view, as stated earlier, the sole duty of this court at this point is to establish whether the appellant/applicant has met the threshold for grant of a temporary injunction pending hearing and determination of the appeal.

47. Having said that, I reiterate that the power to issue orders of temporary injunction pending hearing and determination of the appeal is discretionary; and that this discretion should not be exercised where the appeal is frivolous.

48. The decision in *Patricia Njeri* (Supra) also calls upon this court to bear in mind the general principles for the grant of orders of temporary injunction as expressed in *Giella v Casman Brown*.

49. The appellant/applicant has also not explicitly submitted on the question of irreparable injury that she is likely to suffer should the temporary injunction not be granted. She, however, argues that she is

likely to be exposed to execution and eviction from the suit property. I note that the judgment in Molo ELC No 18 of 2020 did not make and order for eviction. It only declared the applicant/appellant as a trespasser.

50. I am not able to determine what injury will be occasioned to the applicant/appellant if the injunction is not granted. The applicant/appellant has also not demonstrated that there is no other remedy open to her by which she will protect herself from the consequences of the apprehended injury.

51. Another principle for grant of orders of temporary injunction pending appeal is that the applicant/appellant has to demonstrate that the balance of convenience tilts in their favour. It ties in with the principle in *Patricia Njeri* (Supra) that discretion should be refused where it would inflict great hardship than it would avoid.

52. It is not clear who between the appellant/applicant and the respondent is in current possession of the suit property.

53. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the concept of balance of convenience as:

> 'The meaning of balance of convenience will favour of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the defendants. Inconvenience be equal, it is the plaintiff who will suffer.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

54. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

> " Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

55. Bearing this in mind, I am not convinced that the risk which is likely to arise from withholding the injunction from the applicant will be greater than that which is likely to arise from granting it.

56. The other principle as set out in the decision of *Patricia Njeri* (Supra) is that applicant/appellant must show that to refuse the injunction would render the appeal nugatory. Regrettably, there in no averment

in the affidavit in support of the application or the submissions to explain this point. I am unable to make a finding on it.

57. The appellant/applicant seeks an alternative prayer for an order of status quo in respect of the suit property. It is, she explains, for purposes of preserving it pending the hearing and determination of the appeal.

58. I am unable to issue an order of *status quo* as I am not clear of the current status of the suit property or the party in actual possession of it.

59. In *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, Odunga J. stated:

> "When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining *status quo* is meant to preserve existing state of affairs...*status quo* must therefore be interpreted with respect to existing factual scenario..."

B. Which party bears the cost of the application?

60. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287.

Disposition

61. The Upshot of the foregoing is that the notice of motion application dated February 22, 2022 lacks merit and is dismissed. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6TH DAY OF OCTOBER 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Applicant

Mr. Machafu for the Respondent

Court Assistant; Monica Wanjohi.