



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C.A NO. 16 OF 2020 (ELCA E5/2020)

EFURIETH IRIMA MUGO.....APPELLANT

VERSUS

PETER NJIRU MUGEKI.....RESPONDENT

RULING

1. This is an appeal against interlocutory orders of the lower court (Hon. W. Ngumi, Principal Magistrate, Siakago) issued on 9.11.2020 in MCL & E No. 90 of 2020. The suit in the lower court involved two parties: The appellant herein – **EFUREITH IRIMA MUGO**. – as the defendant and the respondent – **PETER NJIRU MUGEKI** – as the plaintiff. In the application, the lower court extended interim restraining orders it had already issued and the appellant herein felt aggrieved, hence this appeal.

2. In the application, the appellant sought to restrain the respondent from entering, trespassing, encroaching, cultivating, invading, obstructing or in any manner interfering with the appellant's parcel of land L.R No. MBEERE/KIRIMA 6604, 6605, 6606, 6596, 6597 and 6598 pending determination of the application and suit. The appellant further sought orders to have the area police ensure compliance of the orders sought.

3. The application was supported by grounds inter alia, that the Plaintiff was the registered owner of the suit parcels of land and had been in occupation until 20.10.2020 when the Respondent trespassed on his land and engaged in clearing bushes and cultivating the land without the plaintiff's consent. He pleaded that he would suffer irreparably if the Respondent is not restrained from engaging in such acts of trespass. The Plaintiff filed a supporting affidavit dated 22.10.2020 in which he reiterated the grounds in his application and annexed photographs in support of his case.

4. The application was filed under certificate of urgency and the court certified it urgent and issued ex parte interim orders on 26.10.2020 pending interparties hearing. The Respondent filed a response on 6th November 2020. She averred inter alia, that the suit parcels of land were resultant subdivisions of land originally known as parcel number MBEERE/KIRIMA/733; that the land was her ancestral home since 1960; that it was subject to an appeal to the minister during adjudication process and the appeal was determined in her late father's favour and she was registered as proprietor on transmission.

5. It was said that the minister's decision was quashed in EMBU ELC JR NO. 32 OF 2015 (formerly KERUGOYA ELC JR NO. 3 OF 2013) on 19.12.2019. The respondent as a result filed for stay of execution of the Judgment but the order for stay was not registered at the land's office as the titles she held were cancelled and new titles issued in tandem with the Judgment. The Respondent has appealed against the Judgment in Nyeri C.A No. 67 of 2020 which is pending determination however in an application for stay of execution of the Judgment the court declined to grant stay of execution as the Judgment had already been executed. Instead it directed that the respondent should not be evicted from the portion of land she occupies and cultivates.

6. It is the respondent's case that the larger portion of Mbeere/Kirima/733 which she occupies falls on Mbeere/Kirima/6403. The respondent complained that the Applicant, upon delivery of the court's ruling filed a suit in Siakago MCELC No. 81 of 2020, and before determination of that suit, he filed this suit seeking to evict her from the land and obtained ex parte orders restraining her from utilizing the land despite being aware of the orders issued by the ELC court. The respondent contends that the ex parte orders issued contradict the orders already issued by the ELC Court directing that she should not be evicted from the land.

7. The court record indicates that the matter proceeded for interpartes hearing on 6.11.2020. However, the appellant has sought to correct this position and has indicated that the interpartes hearing was on 9.11.2020 as opposed to 6.11.2020. During the interparties hearing the court sought to extend the interim orders and scheduled the application for ruling on 2.12.2020. However, counsel for the defendant opposed the extension of the orders contending that the defendant resides on the property and that the orders of the superior court were to the effect that she should not be evicted from the property. The court noted the orders in ELC JR 32 OF 2015 and was of the opinion that the orders sought did not touch on eviction and subsequently extended the interim orders on condition that the Respondent should not be evicted.

8. The appellant was aggrieved by the extension of the interim orders and therefore filed the present appeal before this court. With the appeal was filed an application for stay of execution which the Respondent opposed by filing grounds of opposition. However the application was withdrawn by the appellant before it could be determined on merit.

The grounds outlined in the appeal as follows:

- 1) *The learned Principal Magistrate erred in law and in fact by misinterpreting the orders issued in EMBU ELC JR NO. 32 OF 2015 on 24th September 2020.*
- 2) *The learned Principal Magistrate erred in law and fact in issuing orders that directly contradicted the orders of the superior court the ELC JR NO. 32 OF 2015.*
- 3) *That the Learned Principal Magistrate erred in law and fact in issuing an order that in effect evicted the Appellant from the suit properties before she was heard on merit.*
- 4) *The Learned Principal Magistrate erred in law and order in ignoring the contents of the Appellant's replying affidavit in respect of the application dated 22nd October 2020.*
- 5) *That the Learned Principal Magistrate erred in law and fact in denying the Appellant a chance to be heard.*

The Appellant prayed for the court to set aside the interim orders granted on 26th October, 2020 be set aside and further sought for costs of the Appeal.

Submissions

9. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 14.6.2021. The trial magistrate was faulted for granting interim orders which were similar to the orders requested for in the main suit. Prior to the interpartes hearing she had filed a replying affidavit which highlighted that the superior court had already issued orders directing that she should not be evicted pending determination of the appeal in Nyeri which was appeal case no. 67 of 2020. Further, the trial magistrate was blamed for extending the exparte orders despite being aware of the superior court orders and the protest by the Appellants counsel against issuance of the orders. The ruling of the court appealed against is said to be contradictory as it was not possible for the court to direct the Appellant not to be evicted and still restrain her from entering, trespassing or interfering with the suit property.

10. The Appeal in Nyeri CA No. 67 of 2020 is said to have been struck out and the Appellant was evicted from the suit properties by the Respondent. She is said to have now filed an application in Nyeri civil application No. E045 of 2021 where she is seeking for leave to file the appeal out of time. The Appellant concedes that the appeal has been overtaken by events and calls upon the court not to order any costs against her as she has already suffered substantive loss.

11. The respondents' submissions were filed on 4.5.2021. According to the respondent, the Honourable magistrate did not in any way misinterpret the orders issued in EMBU ELC JR NO. 32 of 2015 and the orders issued by the court affirmed the orders. The Respondent submitted that the court only gave directions regarding their application and set a ruling date on 2.12.2021 but the appellant did not wait for the outcome of the ruling. She rushed to file the present appeal.

12. The respondent relied on Order 40 rule 7 to emphasize that the Appellant ought to have applied for discharge, varying or setting aside of the order by the lower court. The Respondent pointed out that the Court of Appeal ruling delivered on 23.4.2021 struck out the Appellant's Notice and Record of Appeal and hence the orders for stay in the court of Appeal are non-existent. He prayed for the Appeal to be dismissed with costs as the same had been overtaken by events.

Analysis

13. I have considered the appeal as filed, rival submissions, and the lower court record. There are three issues that are in my opinion suitable for consideration to dispose of the appeal. They are as follows:-

- 1) ***Whether the trial Magistrate exercised her discretion judicially in extending the interim injunctive orders.***
- 2) ***Whether the interim orders issued were contradictory to the superior court orders in ELC JR NO. 32 OF 2015.***
- 3) ***Whether the appeal has been overtaken by events.***

14. Before determining any of the issues I seek to address my mind to the fact that this is an interlocutory appeal, one filed pending the full determination of the case. That being the case I will refrain from making conclusions on issues to be determined by the trial court. This approach is manifest in the case of **David Kamau Gakuru v National Industrial Credit Bank Ltd [2002] eKLR** where the court stated

“At the outset we must point out that this being an interlocutory appeal and the suit is yet to be tried in the superior court, we will refrain from expressing our concluded views on any issue which we think may arise in the intended trial.”

15. **The first issue for my determination is whether the trial Magistrate exercised her discretion judicially in extending the interim**

injunctive orders.

In granting or refusing to grant interim injunctive orders a court exercises its discretion. However, such discretion ought to be exercised judiciously.

In the case of **Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR** the court stated that:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

16. It is worth noting that an appellate court will ordinarily not interfere with the trial court’s discretion. The circumstances under which an appellate court can interfere with the discretion of a lower court were laid out by **Madan, JA (as he then was) in UNITED INDIA INSURANCE CO. LTD V. EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] E.A 898**, as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

Further in the case of **Mbogo v Shah [1968] E.A 93**, it was held that:

“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice.”

17. The circumstances before the lower court were that the Respondent filed an application to seek orders to restrain the Appellant from dealing with the suit parcels of land. To be specific, the orders sought were to restrain the Appellant from entering, trespassing, encroaching, cultivating, invading, obstructing or in any manner interfering with the properties. The court had granted the orders *ex parte* and during the *inter partes* hearing it extended the said orders. The Appellant counsel opposed the extension of the orders arguing that the Appellant resided on the land. Nonetheless, the court extended the said orders. The question that arises then is whether the trial magistrate exercised her discretion judiciously in extending such interim orders in the circumstances. I think she didn’t.

18. I am persuaded that the trial magistrate failed to address her mind to the nature of the orders sought. It is not disputed by either parties that the Appellant resided on a portion of the Respondent’s land at the time the orders were sought. Granting an order requiring the Appellant not to enter or trespass on a land that she resided on, and still order that the Appellant ought not to be evicted from the same land is contradictory. Such an order is ambiguous and cannot be enforced. What was the ultimate result expected where one is restrained from entering or trespassing in a land where they reside and still also order that one should not be evicted? Is it not plainly contradictory? It certainly is in my view.

19. I am persuaded that this is one instance where the superior court ought to interfere with the discretion of the lower court. I am convinced that the lower court failed to take into consideration the fact that the Appellant resided on the property. This then would have informed the court of the need not to restrain the Appellant from entering or trespassing on the suit parcel of land. The order that the court would have issued then would be for maintenance of status quo pending determination of the application for injunction.

20. The Respondent has cited the provisions of Order 40 rule 1 of the Civil Procedure Rules. However the court notes that the trial court is yet to make a ruling on the application and evaluating this appeal based on the grounds of Order 40 Rule 1 will amount to determination of the application which the trial court is yet to determine. The appeal before this court does not seek to comment on issues that are yet to be determined by the trial court. For the reasons given above I am persuaded that the lower court exercised its discretion erroneously. It ended up issuing an ambiguous and contradictory order that was not possible to enforce.

21. Whether the interim orders issued were contradictory to the superior court orders in ELC JR NO. 32 OF 2015?

The appellant has submitted that the orders issued by the court were contradictory to the superior court orders in ELC JR No. 32 of 2015. A perusal of the court record shows that the Appellant had filed an application for stay of execution at the superior court (this court, if you like). However the application for stay was declined but the court made orders that the Appellant should not be evicted from the portion of property she is occupying and cultivating pending hearing and determination of her appeal. The order issued therefore, quite apart from being contradictory in and of itself, also contradicted the order of the superior court that expressly prohibited eviction of the appellant herein from the disputed land.

22. Whether the appeal has been overtaken by events.

The Appellant in this appeal has urged the court to set aside the interim injunctive orders. The court notes however that both the Appellant and Respondent have conceded that the appeal has been overtaken by events to the extent that the appellant has pleaded with the court not to condemn her to pay for cost of the appeal. The court orders in EMBU JR NO. 32 OF 2019 were to the effect that the appellant was not to be evicted on the parcel of land she occupies and cultivates pending hearing and determination of the appeal. The facts before the court from

both parties are that the appeal at the court of appeal in Nyeri was dismissed and subsequently the appellant was evicted from the land.

23. In the case of **Muyumba Watita & 51 others v Joannes Satia & 4 others [2020] eKLR** the court declined to grant an injunction where parties had been evicted. The court stated

“An injunctive order is essentially a restraining order aimed at preventing the happening of a certain event. If that event has already occurred then an order of injunction cannot issue.”

24. Further in the Court of Appeal decision in **Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR)** it was stated that:

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

25. With the change in the circumstances this court would wish to state that as much as it would be inclined to allow the appeal as prayed it also cannot issue orders in vain or orders which are not capable of being enforced or executed. The appeal has merits and is allowed but the orders sought in it can not and will not be granted as the *raison d’entre* for which the orders were sought has ceased to exist. In other words, the orders have been overtaken by events. I also make no order as to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4TH DAY** of **NOVEMBER 2021**.

In the presence of M/s Ndorongo for Rose Njeru for appellant and in the absence of Ombachi for respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

04.11.2021