



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 18 OF 2018

TAHIR SHEIKH SAID INVESTMENTS LTD.....PLAINTIFF

VERSUS

ADMINISTRATOR, TSS GRAIN MILLERS LTD.....1ST DEFENDANT

BAKHRESA GRAIN MILLING (K) LTD..... 2ND DEFENDANT

KCB BANK LTD.....3RD DEFENDANT

RULING

1. The plaintiff/applicant filed the notices of motion dated 13th December 2018 and 15th January 2019 both brought under the provisions of Section 68 of the Land Registration Act and Sections 1A, 1B & 3A & 3B of the Civil Procedure Act. In the motion of 13th December 2018, the following orders sought;

(a) Spent;

(b) Spent;

(c) There be a temporary prohibitory injunction restraining the 2nd and 3rd defendants, by themselves, their agents, servants or employees from selling, transferring, alienating, presenting any instrument for registration at any registry or body, or in any other way disposing all the parcel of land known as MOMBASA/BLOCK 1/316 pending the lodging, hearing and determination of the intended appeal to the Court of Appeal.

(d) In the alternative to (c) above, there be a temporary prohibitory injunction restraining the 2nd and 3rd defendants, by themselves, their against, servants or employees from selling, transferring, alienating, presenting any instrument for registration, at any registry or body, or in any other way disposing all that parcel of land known as MOMBASA/BLOCK 1/316 pending the lodging, hearing and determination of an application for injunction before the Court of Appeal, or for such other period as the court may deem fit.

(e) The costs of this application be costs in the intended appeal.

In the application dated 15th January 2019 the following 3 orders were sought;

(a) Spent;

(b) There be an interim injunction in terms of prayer 2 of the Notice of Motion dated 13th December 2018 pending the inter-partes hearing of the Notice of Motion.

(c) Alternatively, there be a temporary injunction restraining the 2nd and 3rd defendants, by themselves, their agents, servants or employees from selling, transferring, alienating, presenting any instrument for registration at any registry or body, or in any other way disposing all that parcel of land know as MOMBASA/BLOCK 1/316 pending the inter-partes hearing and determination of this application.

(d) The costs of this application be costs in the cause.

2. The grounds listed in support of the two motions were kind of similar. The grounds are inter alia;

(i) The plaintiff is the registered owner of parcel of land MOMBASA/BLOCK 1/316 holding a lease of 99 years with effect from 1st October 1948.

(ii) The plaintiff is apprehensive that in the absence of an injunction, the 2nd and 3rd defendants will purport to perfect a transfer to themselves or other unsuspecting members of the public.

(iii) The plaintiff believes his intended appeal against the ruling of this court is meritorious based on the reasons set out at paragraph 6(a) – (f) of the grounds which forms his grounds of appeal.

(iv) That if the sale or transfer is perfected, the plaintiff will be greatly and substantially injured.

(v) The grant of the injunction will not harm either of the defendants since the 2nd defendant is operating a milling plant on the suit property and such operations will not be affected and that the suit property will not be dissipated.

3. The application is further supported by the affidavit of Mr Tauhida Tahir S. S sworn on the 13th December 2018. The affidavit reiterated the facts as set out in the grounds on the face of the motion. The applicant annexed a copy of the notice of appeal as annex “TS-4”.

4. The applications are opposed by the 3rd Respondent, Mr Francis Kiranga swore a replying affidavit on behalf of the 3rd respondent on 10th January 2019. Mr. Kiranga deposed that the applicant has not adduced any substantive evidence to entitle her to the orders sought. Secondly that the issue in the intended appeal shall be whether or not the suit filed by the applicant was struck out with justification and has nothing to do with ownership of the suit property. Thus there would be no question that the substratum of the appeal will be lost unless the orders of injunction are granted. Mr. Kiranga further deposed that this court is *functus officio* unless the court is being asked to review or set aside its decision.

5. The 3rd Defendant deposes further that it will be absurd for this court to consider the question of prima facie case in respect of a suit that has already been struck out, which may result in this court sitting on appeal over its own decision. That the applicant is seeking orders of injunction both in this suit and in Mombasa HCC No. 3 of 2016 against the 3rd Defendant from exercising its statutory power of sale.

6. The 3rd Defendant/Respondent annexed an orders issued in HCC No 3 of 2016 on 27th March 2017 discharging the orders of injunction previously issued by that court on 13th January 2016. That this suit was filed to circumvent the discharge order which act therefore disentitles the applicant from enjoying the exercise of discretion by the court. That the orders sought herein if granted will also circumvent and or set aside the orders that were issued on 27th March 2017 in Mombasa HCC No. 3 of 2016. Lastly that by 2017 the 3rd Respondent had already sold and transferred the suit property to the 2nd Respondent in exercise of its statutory power of sale as shown in the annexed agreement of sale dated 5th May 2017 and transfer document dated 12th July 2017 produced as **KCB-2**. The 3rd Defendant thus urged the court to disallow the motion dated 13th December 2018 with costs to them.

7. The parties advocates agreed to dispose off the two applications by filing of written submissions. The applicant filed her submissions together with her list of authorities on 7th March 2019. The 3rd Respondent filed his submissions and list of authorities on 18th March 2019. The plaintiff submitted that the facts are largely agreed. She raises 3 issues for this court’s determination;

(a) Is there jurisdiction to hear the application?

(b) If yes, what are the principles applicable in an application for injunction pending appeal?

(c) Should the injunction sought be granted?

8. In response to the 3rd Respondent’s contention that this court became *functus officio*, the plaintiff referred this court to the Court of Appeal decision of **Eustance Kagau –versus- Wiyathi Embu Service Station & Another (1966) eKLR** which case made reference to the case of Madhupaper International that held that the High Court had power to grant a temporary injunction after dismissing an application or suit for injunction pending appeal to this court. The plaintiff submitted that the holding in the case of **Western College** in so far as it relates to the question of the High Court having power to issue injunction after it has given Judgment was overruled by the case of **James Juma Muchemi & Partners Ltd –versus- Barclays Bank of Kenya Ltd (2011) eKLR**.

9. On the 2nd issue framed, the applicant cited the case of **Kingorani Investments Ltd –versus- KCB & Another (2008) eKLR** which set the guiding principles for granting an order of injunction as; the need to preserve the suit property and that the court should not frustrate an applicant’s right to appeal even where the Judge felt no doubt in dismissing an application for interlocutory injunction. That the Judge must not revisit his own decision in considering an application for injunction pending appeal. He must not just think about the winning candidate before him but the winning candidate before the Court of Appeal.

10. Should the injunction be granted? The applicant relies on the finding of Muriithi J in the case of **D. J Lowe & Company Ltd –versus- Credit Agricole Indosueux & 2 Others (2014) eKLR** i.e in case the appeal succeeds, the suit will be restored to hearing. That of what value will such victory be if the defendants have transferred the parcel of land in the purported exercise of power of sale? The applicant urged the court to grant the orders sought.

11. The 3rd Defendant submitted that the court is *functus officio* putting reliance on the case of **Chembe Katana Changi –versus- Ministry for Lands & Settlement & 4 Others (2014) eKLR** – where Angote J stated that once a court determines a suit on merit, it cannot revisit the issues that were before it in the subsequent application unless the court is moved by way of review application or stay of execution.

12. The 3rd Respondent also submits that the plaintiff has not made out a case for the grant of an injunction. The 3rd Respondent while referring to the Chembe Katana case stated that the Madhupaper International case was in respect of an application filed before the Court of Appeal. The 3rd Respondent referred to the holding in the case of Krone (U) Ltd –versus- Kerilee Investments Ltd & 2 Others, High Court Civ. Application No. 118 of 2018 that she submits set issues to be considered in granting injunction as;

(a) **It is a discretionary matter to be exercised against an appellant whose appeal is frivolous.**

(b) **It would be refused if it would inflict greater hardship than it would avoid.**

(c) **It would be granted where an appeal will be rendered nugatory.**

(d) **The Principles in Giella –versus- Cassman Brown.**

13. That in the case before court, the subject matter of the appeal is whether or not the suit was struck out with justification see decision in **Ephraim Mbae Thurairira & 2 Others –versus- Gilbert Kabeere Mbijiwe & 2 Others (2008) eKLR**. Consequently that rejecting this application for injunction will not render the intended appeal nugatory. The 3rd Respondent argues that the doctrine of *lis pendens* is not applicable to this case – **Al Jalal Enterprises Ltd –versus- Gulf African Bank Ltd (2014) eKLR**.

14. The 3rd Respondent has submitted that the plaintiff has not made out a case why the court should invoke its jurisdiction under Section 68 of the Land Registration Act to issue an inhibition pursuant to Section 68. That the Section is only available to a party filing suit and not on appeal. Furthermore that this Section presupposes that there is a suit existing which is not the position herein. The 3rd Respondent urged the Court to dismiss the motion of 13th December 2018 with costs to them.

15. The parties have made it easy for me by framing the issues for determination. On jurisdiction, they hold opposite positions. The 3rd Respondent argues that this court can only sit on this matter if the court was moved by way of review under Order 45 or stay of execution pending appeal. While the plaintiff/applicant has made arguments that I do indeed have jurisdiction to grant an injunction pending appeal.

16. In the case of Eustace Kagau Kangarwe Supra, the Court of Appeal discussed the question whether the High Court had powers to grant an injunction pending appeal. The Court of Appeal held this **“it is correct to say that the holding in Western College Case in so far as it relates to the question of the High Court having no power to issue a temporary injunction after it has given a judgment in a suit stands overruled in Madhupaper International Case but the principle that the High Court has no power to issue an injunction still stand good.”** The decision thus found that the High Court lacks jurisdiction where it is exercising its appellate jurisdiction. The contrary circumstances are obtaining in the application before the court.

17. The 3rd Respondent put reliance in the decision of the Chembe Katana Changi Case Supra. Which I take note of the fact that it is persuasive on me. Justice Angote held that there was no provision in the Civil Procedure Rules which allowed a party against whom a judgment has been entered to file an application for injunction pending appeal. The judge went further to state that **“the often quoted case of Madhupaper International Ltd dealt with a pending appeal before the Court of Appeal in respect to an application and not a suit i.e where an application for interlocutory injunction has been dismissed and the dissatisfied party decides to appeal. That it is the Court of Appeal to grant an injunction under Order 5(2) (b) of the Court of Appeal Rules”**.

18. In the High Court case of **Kingorani Ltd –versus- KCB Ltd & Another (2008) eKLR**, the court noted that there was agreement between counsels that the High Court had jurisdiction to grant a temporary injunction and or stay. All the trial judge was left to do in the exercise of the discretionary powers i.e preserve the status quo so as not frustrate an appellant’s right to appeal. The question of whether the court had jurisdiction to grant an order for injunction thus did not arise for determination. Therefore the case does not help this court much in resolving the question jurisdiction. In any event it is settled law that jurisdiction cannot be conferred by consent of parties where none exists.

19. Similarly the facts in the James Mwachemi case Supra are distinguishable as they referred to issuance of an injunction pending hearing and determination of the case on its merits. The same applies to the **Isolux Ingeniera S. A –versus- Kenya Electricity Transfusion Ltd & 5 Others (2018) eKLR** case where what was dismissed was an interlocutory application and not an application which determined the entire suit as in this case. Lastly the Butt case discussed the issue of stay of execution pending and appeal not an application for injunction pending appeal. It is also distinguishable to this case.

20. I have taken the liberty to analyse all these cases because it seems to me to be a grey area where the High Court (and ELC) have not determined the question because if there is no provision for the same in the Civil Procedure Rules just as Angote J pointed in the Chembe Katana case Supra. In the Madhupaper case referred to by the Court of Appeal in the Eustace Kagau case was in relation to the powers of the High Court to entertain an injunction application pending appeal by an unsuccessful applicant whose application for interlocutory injunction had been dismissed. The essence of this is that when an application for injunction is dismissed, the main suit is still alive before the High Court. So what happens where the suit is struck out as in the case before me and the court is moved for an order of temporary injunction pending appeal?

21. I am persuaded to take the same position that was taken by Angote J that an application such as this does not lie to this court. I take this position because an order of injunction can only be given where there is an existing suit. In this instance, until the Court of Appeal finds that I was wrong in striking out the plaintiff’s suit, I am unable to find that I have jurisdiction to entertain an application for temporary injunction pending appeal i.e I am *functus officio* to deal with the presence application. The applicant sought orders of injunction in prayer (3) of the

motion pending determination of her application before the court of Appeal, however no such copies of the application before the Court of Appeal were annexed to either of her applications. The court of Appeal has powers to grant orders to preserve the status quo as it deems fit and does to need the help of this court in determining matters that are filed before it. The cases referred to by the applicant are all distinguishable to this application.

22. Further on whether this court would grant an order of inhibition under Section 68 of the Land Registration Act, I opine and hold that I lack powers to make such an order at this stage of these proceedings purely because the inhibition has no suit to hang on.

23. In conclusion, I hold that I am *functus officio* thus have no jurisdiction to issue any orders prayed for in the application of 13th December 2018 and or 15th January 2019. The result is that both applications are dismissed for want of jurisdiction. Each party to meet their costs of the applications.

Dated, Signed and Delivered at Mombasa this 4th day of July 2019.

A. OMOLLO

JUDGE.