



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELCA E006 OF 2021

FLESIA WANJA CHERU...APPELLANT/APPLICANT

VERSUS

JAMLECK KAMAU MWANIKIRESPONDENT

RULING

The Applicant filed a motion under certificate of urgency dated 19th November, 2019 seeking the following orders:

1. Spent.

2. That there be a stay of execution of the ruling/orders of Hon. P.M. Mugure S.R.M) delivered on the 14th October, 2019 in Wanguru SRM Civil Suit No. 42 of 2019 mistakenly referred by the learned SRM as E.L.C Case No. 42 of 2019 in her ruling pending the hearing and determination of this application and appeal.

3. That pending the hearing and determination of this application this Honourable court do issue an injunction restraining the respondent whether by himself, members of his family, agents, servants or any other person from repossessing rice holding No. 2461 A Thiba Section of Mwea Irrigation Scheme, harvesting the appellant's rice due for harvesting in about one week's time, interfering in any other way whatsoever with the appellant's quiet possession and use of the said rice holding.

4. That pending the hearing and determination of this application there be a stay of proceedings in Wanguru SPMCC No. 42 of 2019 erroneously referred to as E.L.C Case No. 42 of 2019 in the ruling appealed against.

Summary of Facts

The Notice of Motion is supported by an affidavit of FLESIA WANJA CHERU dated 19th November, 2019 where she deponed thus:

That she sued the respondent in Wanguru SPMCC NO. 42 of 2019 seeking for an order to restrain him from breaching lease agreement under which he leased her 2 acres out of his rice holding 2461 A for several seasons upto 2024/2025 season and she paid Kshs 180,000 in advance. That the lease agreement is enforceable as she had performed all her obligations under the lease. That she seeks an interim order of injunction to restrain the respondent from executing his unlawful commission of breach of contract by repossessing the leased 2 acres of his rice holding under the provisions of *Order 40 Rule 2(1) of CPC* pending the hearing and determination of the suit. That the learned Senior Resident Magistrate ordered the maintenance of the status quo. That the SRM Court misapprehended the nature of the dispute as one of ownership of the 2 acres leased instead of the respondent being restrained from breaching the lease agreement. That she paid the respondent Ksh. 180, 000 as per the lease agreement, spent Ksh. 202, 000 during the 2019/2020 season in ploughing and was expecting to harvest in one week's time rice worth Ksh. 480,000. That the respondent admitted to having breached the terms of the lease and refused to refund the monies expended by the applicant. That on 16th November, 2019 the respondent threatened to harvest the applicant's rice which will be due in 1 week's time. That her appeal upon which the application is based has high chances of success.

The respondent filed his responded to the Notice of Motion through replying affidavit dated 30th December, 2019 where he deponed thus:

That he is the licensee holder of rice holding No. 2461A Thiba Section of Mwea Irrigation Scheme measuring 2 acres. That upon execution of a lease agreement dated 12th October, 2009 the applicant took possession of the land for a period of seven years commencing from the year 2012 to 2019. That he entered into a lease agreement dated 18th June, 2015 where both rental price was enhanced from Ksh. 15000 to Ksh. 30,000 and the lease period extended to 2023/2024 season and not upto 2024/2025 as alleged. That after leasing the said rice holding

No. 2461A to the applicant, his family objected to the said lease and opted to refund the lease consideration hence resulting to his letter dated 25th June, 2019 sent to the applicant. That the applicant as at 25th June, 2019 has not started to prepare the rice holding but was prompted to prepare rice holding after receiving the letter. That the respondent is willing to reimburse the applicant the lease consideration for the unutilized lease consideration. That the applicant in obtaining the ex-parte interim orders failed to disclose that he had also filed a counterclaim at the SPM Court at Wanguru Civil Suit No. 42 of 2019 which suit is pending determination. That granting the applicant stay of proceeding and injunction pending the hearing of the appeal will determine the case at lower court at interlocutory stage. Finally, he prays for the application by the applicant to be dismissed as the applicant has not made out a prima facie case and the suit in Wanguru Civil Suit No. 42 of 2019 be set down for hearing on priority basis.

The applicant filed a Supplementary affidavit to the Notice of Motion dated 4th August, 2020 where she deponed thus:

The applicant contends that the allegations by the respondent that his intention to breach the lease agreement was prompted by alleged objections of un-named family members is both untrue and untenable in law as they were not privy to the contract. That it is not true that the lease agreement was to end in the year 2024 but in the year 2025. Further, the fact that the respondent wishes to reimburse the lease's consideration for the unutilized period is not a proper ground to terminate the contract for the applicant has invested monies to make the rice holding productive. That the respondent's claim that the applicant failed to disclose to this court that he had filed a counter-claim in the lower court pending determination is untrue and to no avail to him but provides further justification for allowing this application pending the hearing and determination of the appeal.

Applicant's Submissions

The applicant adopted the averments contained in her supporting and supplementary affidavits dated 19th November, 2019 and 4th August, 2020 respectively.

The applicant submitted that the suit before the Senior Resident Magistrate in which injunctive orders were sought was for restraining the defendant from committing breach of contract the existence and validity of which were adverted by the respondent who also confessed his intention to unilaterally rescind or terminate the same allegedly at the instigation of third parties who were not privy to the same. The applicant submitted that she had a good case for the grant of the injunctive orders as set out in *Giella Vs Cassman Brown (1973)* contrary to her holding.

She relied on the decision in *Aikman Vs Muchoki [1984] KLR, 353* where the Court of Appeal held that the High Court had correctly spelt out, understood and considered the conditions for the grant of an interlocutory injunction but it wrongly applied them.

Respondent's Submissions

The respondent adopted the averments in his replying affidavit dated 30th December, 2019. Further, he framed three issues and submitted on the same.

i. Whether stay of execution of the ruling should be granted.

The respondent submitted that the applicant had not fulfilled the requirements under *Order 42 Rule 6 (2) of CPC* to be granted stay of execution of the ruling since the applicant has not demonstrated the substantial loss that she will suffer if stay is not granted and she has not stated her willingness to provide security of costs in her application and submissions.

ii. Whether the Applicant has met the threshold to be granted the temporary injunction.

The respondent submits that the applicant has no justifiable grounds to restrain the respondent who is the registered proprietor of the rice holding from exercising his rights as the owner. Hence, should not be granted temporary injunction.

iii. Whether the Applicant should be granted order for stay of proceedings of Wanguru SPMCC No. 42 of 2019.

The respondent submitted on the threshold for granting stay of proceedings as elaborated in the case of *Kenya Wildlife Service Vs James Mutembei (2019) e K.L.R, High Court Appeal 40 of 2018*.

He submitted that the matter was initiated by the applicant and the respondent had already filed his counter-claim in the matter. The proceedings are not frivolous and therefore the stay of the Wanguru SPMCC No. 42 of 2019 will only act as unnecessary delay to the matter.

In conclusion, he urges the court to dismiss the application with costs to the respondent.

Issues for determination

- i. Whether stay of execution of the ruling should be granted.
- ii. Whether the applicant has met the threshold to be granted the temporary injunction.
- iii. Whether the applicant should be granted order for stay of proceedings of **Wanguru SPMCC No. 42 of 2019**.

Analysis

i. Whether stay of execution of the ruling should be granted.

Order 42 Rule 6 (2) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless:

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The applicant deponed in her affidavit and submitted in her submissions that the Senior Resident Magistrate Court misapprehended the nature of the dispute as one of ownership of the 2 acres leased instead of the respondent being restrained from breaching the lease agreement.

The respondent submitted that the applicant had not fulfilled the requirements under *Order 42 Rule 6 (2) of CPC* to be granted stay of execution of the ruling since the applicant has not demonstrated the substantial loss that she will suffer if stay is not granted and she has not stated her willingness to provide security of costs in her application and submissions.

The applicant in her supporting affidavit made averments to the effect that she would suffer substantial loss unless stay of execution is granted. She was expecting to harvest in one week's time rice worth Ksh. 480,000 in the rice holding in dispute. Further, the respondent admitted to having breached the terms of the lease and refused to refund the monies expended by the applicant. Moreover, the respondent threatened to harvest the applicant's rice which would be due in one week's time. The respondent had been paid the entire agreed amount in the lease agreement and would not incur any loss in the event of terminating the lease in accordance with the lower court's decision.

On the issue of security for costs, the issue was moot as it had not been raised in court. Hence, the applicant had not demonstrated incapacity to furnish the court with security for costs.

ii. Whether the Applicant has met the threshold to be granted the temporary injunction

The principle in granting temporary injunction was set out in the case of *Giella Vs Cassman Brown [1973] EA 358*. The wording of *Spry VP* in that case is reproduced hereunder:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”

The *Civil Procedure Rules 2010*, legislate this position.

“[**Order 40. Rule 1**] *Cases in which temporary injunction may be granted.*

1. Where in any suit it is proved by affidavit or otherwise -

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

On whether the applicant has satisfied the principles for a temporary injunction per the decision in *Giella Vs Cassman Brown [1973] EA 358*. On the first limb, the applicant has an arguable appeal with high probability of success based on unlawful unilateral rescission of the contract and the repossession of the rice holding by the respondent.

On the second limb, the applicant would suffer irreparable injury in the event the respondent repossessed the rice holding with rice pending harvesting in one week's time. Further, the monies spent in developing the leased land will not be fully compensated by the respondent who has not deponed that he was in a position to refund the same.

On the third limb, it would be fair and just to grant the temporary injunction to preserve the substance of the suit being the rice holding which is under threat of being repossessed by the respondent. The respondent submits that the applicant has no justifiable grounds to restrain the respondent who is the registered proprietor of the rice holding from exercising his rights as the owner. Hence, should not be granted temporary injunction.

The applicant relies on the decision in *Aikman Vs Muchoki [1984] KLR, 353* where Court of Appeal held that the High Court had correctly

spelt out, understood and considered the conditions for the grant of an interlocutory injunction but it wrongly applied them. In this case, the respondents had unlawfully seized possession of the appellant's estates and ought to have been restrained by an injunction as equity does not assist law breakers.

iii. Whether the Applicant should be granted order for stay of proceedings of Wanguru SPMCC No. 42 of 2019.

The respondent deponed in his replying affidavit that the applicant in obtaining the ex-parte interim orders failed to disclose that he had also filed a counterclaim at the SPM court at Wanguru civil suit No. 42 of 2019 which suit is pending determination. That granting the applicant stay of proceeding and injunction pending the hearing of the appeal will determine the case at lower court at interlocutory stage.

The applicant in her supplementary affidavit deponed that the respondent's claim that the applicant failed to disclose to this court that he had filed a counter-claim in the lower court pending determination is untrue and to no avail to him but provides further justification for allowing this application pending the hearing and determination of the appeal.

The respondent submitted on the threshold for granting stay of proceedings as elaborated in the case of: **Kenya Wildlife Service Vs James Mutembei (2019) e K.L.R, High Court Appeal 40 of 2018** that: The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

From the foregoing preceding it is clear that the applicant will suffer substantial loss if stay of execution is not granted. She will lose her rice holding and rice awaiting harvesting, lease, monies spent in developing the same. This is buttressed in the following decision:

John Gachanja Mundia Vs Francis Muriira Alias Francis Muthika & Another [2016] e KLR that:

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

Disposition

The applicant's motion dated 19th November, 2019 is merited and the same is hereby allowed as prayed. The costs of the application to abide the outcome of the appeal.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF MAY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Wanjiru Waweru holding brief for Muchiri for Applicant
2. Ms Wambui holding brief for Makworo for Respondent
3. Kabuta – Court clerk.