



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KISII

ELC CIVIL APPEAL NO. 17 OF 2020

NEHEMIAH CHARLES OMWOYO.....APPELLANT/APPLICANT

-VERSUS-

HON. ATTORNEY GENERAL.....1ST RESPONDENT

MICRO AND SMALL ENTERPRISES AUTHORITY.....2ND RESPONDENT

SKYVIL ENTERPRISES LTD.....3RD RESPONDENT

RULING

INTRODUCTION

1. The Appellant herein filed an Appeal vide a Memorandum of Appeal dated 18th December, 2020 on 22nd December, 2020 having been aggrieved by the decision of Hon. Lutta dismissing his application for injunction dated 25th November 2020.

2. The Appellant has also filed a Notice of Motion application dated 11th February 2021 seeking a temporary injunction restraining the Respondents, their servants, or their agents from entering, or in any manner whatsoever interfering with **PLOT NO. 6 KIOMOKAMA MARKET**.

3. The application is based on the grounds on the face of the application and on the Applicant's Supporting Affidavit wherein he deponed inter alia that he was the legal Administrator of the estate of the late Omwoyo Getange, the owner of **PLOT NO. 6 KIOMOKAMA MARKET**. It is his contention that the Appeal is arguable and has overwhelming chances of success. He depones that sometime in the month of June 2020, the 2nd and 3rd Respondents, through their agents, workers, and/or employees started constructing a permanent structure on **PLOT NO. 6 KIOMOKAMA MARKET** without his consent or knowledge or official communication to compulsorily acquire the said plot. This prompted him to file a suit in the lower court vide KISII CM ELC CASE NO. 73 OF 2020 against the Respondents seeking a permanent injunction and an eviction order evicting them from the suit property. He further avers that he filed an application seeking a temporary injunction pending the hearing and determination of the suit which application was dismissed on 25th November, 2020. It was also his averment that being aggrieved by the decision of the lower court he filed an Appeal. He further avers that he thereafter filed this application seeking an injunction pending the hearing and determination of the said Appeal.

4. The said application is opposed. The 1st and 2nd Respondents have filed a Replying Affidavit sworn by Evans Mogeni on 1st March, 2021. In the said affidavit, he avers that Appellant's lacks *locus standi* to file this application. He further avers that the 2nd Respondent is currently constructing a cooling plant for bananas at Kiomokama Market and it is in public interest that the project continues because it is meant to benefit the community. He contends that the project is 90% complete. It is his averment that the project is located on parcel No. NYARIBARI MASABA/KIOMOKAMA/2913 measuring 0.42 HA which was issued to the 2nd Respondent by the County Government of Kisii on 17th June 2020, after conducting due diligence. It is the 2nd Respondent's contention that at the time of the allocation of the land, the land was unoccupied. The Respondents argue that the Applicant did not present to the court any document to prove occupation of the suit property and the said property has never been known as **PLOT NO. 6 KIOMOKAMA MARKET** as alleged by the Applicant.

5. The 1st and 2nd Respondents thus contend that they will suffer tremendous loss if the orders sought in the application are allowed. They urge the court to dismiss the application.

6. The court directed that the application be canvassed by way of written submissions and both parties filed their written submissions which I have considered.

ISSUES FOR DETERMINATION

7. The singular issue for determination is whether the Applicant is entitled to an order of injunction pending the hearing and determination of his Appeal.

ANALYSIS AND DETERMINATION

8. **Order 42 Rule 6 (6)** of the **Civil Procedure Rules, 2010** empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus:

“(6) Notwithstanding anything contained in sub rule (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 subordinate Court or tribunal has been complied with.”

9. The principles applicable in an application for an injunction pending appeal were elucidated by Visram J. (as he then was) in **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR** as follows:

“a. An order of injunction pending appeal is a discretion 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.”

10. In the case of **Giella v Cassman Brown [1973] EA 358**, it was held that in order to qualify for an injunction:-

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

11. Furthermore, in the case of in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** the Court of Appeal elaborated the meaning of a prima facie case and stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. Turning to the instant application, learned Counsel for the 1st and 2nd Respondents in his bid to persuade the court that the Plaintiff had not established a prima facie case urged me to take judicial notice that the parcel land known as "**PLOT NO. 6 KIAMOKAMA MARKET**" which the Appellant lays claim to is non-existent and no title documents have been adduced. He submitted therefore that an order of injunction can only be issued in respect of an existing parcel of land which is likely to be wasted if an injunction is not granted.

13. In order to establish the veracity of such observation, I have looked at the documents filed by the Appellant in the lower court to establish if indeed "**PLOT NO. 6 KIAMOKAMA MARKET**" exists. I have also considered the finding of the learned Trial Magistrate on the same. The only documents that were presented before the lower court in order to show ownership of the suit property were receipts of payment of rent between 2008 and 2013 and a letter from the County Government of Kisii. The said letter referred to a copy of a plot card, which plot card was not attached. It is therefore evident that there are no ownership documents presented before this court and therefore the Appellant has not established a prima facie case with probability of success.

14. It is trite law that parties are bound by their pleadings and evidence adduced. It is clear from my observation hereinabove and as correctly submitted by counsel for the 1st and 2nd Respondents that the Appellant has not demonstrated the existence of the alleged parcel of land known as "**PLOT NO. 6 KIAMOKAMA MARKET**". Section 26(1) of the Land Registration Act states that;

"A certificate of title issued by the land registrar upon registration..... Shall be taken by all courts as prima facie evidence of that the person named as proprietor of the land is the absolute and indefeasible owner..."

15. In the instant case, the Appellant has failed to prove that he owns the suit property.

16. On the issue as to whether the Appellant will suffer irreparable loss which cannot be adequately compensated by an award of damages, it is evident that the Appellant has never been in occupation of the suit property. This is because before me and before the lower court the Appellant never presented photographic evidence to demonstrate his occupation. It therefore goes without saying that there would be no injury or damages that would be occasioned to him if injunctive orders are not granted.

17. On the other hand, the 2nd Respondent has adequately demonstrated through evidence that it has a valid title over the suit property. The 2nd Respondent has urged that it will suffer great harm if the orders sought are granted. This is due to the fact that it has invested a lot of

resources in the construction of the Kisii cooling storage facility, which is a public interest project meant to serve the residents of Kiamokama. The 2nd Respondent through photographic evidence has demonstrated that the construction of the said project is 90% complete. Thus the balance of convenience tilts in favor of refusing to grant the orders sought, as granting the injunction would cause irreparable damage to the 2nd Respondent whose project is meant to benefit the residents of Kiamokama and the general public.

CONCLUSION

18. In the final result, it is my finding that the application by the Appellant has not met the conditions for grant of injunctive orders pending the hearing and determination of his Appeal and the same is dismissed with costs to the 1st and 2nd Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF MAY, 2021.

J.M ONYANGO

JUDGE