



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT AT KISII

ELC CIVIL APPEAL NO. 11 OF 2020

VINCENT ORINDA NYAMBAN.....1ST APPELLANT

ALFRED MOFFAD OMUNDI MICHIRA.....2ND APPELLANT

VERSUS

DANIEL NYANGARESI ORINDA.....1ST RESPONDENT

CHARLES ARASA ORINDA.....2ND RESPONDENT

RULING

INTRODUCTION

1. By Notice of Motion dated 5th October 2020, the Applicants seek orders that pending the hearing of their Appeal against the judgment of the learned Hon. E. A. KIMUTAI, Principal Magistrate, Keroka, delivered on 21st day of October, 2020 a temporary injunction do issue against the Respondents herein by themselves, their agents, servants, family members and/or any persons acting for and on their behalf from entering into, cultivating, tilling, cutting down of any trees, erecting any structures or in any manner interfering or dealing with land parcel No. **EAST KITUTU/KEBIRICHI/3155**.

2. The application is based on the grounds stated on the face of the Notice of Motion and Supporting Affidavit of the 1st Applicant sworn on 5th October, 2020 in which they contend that he is the registered owner of the suit property and he and the 2nd Appellant are in occupation thereof.

3. In their response, the Respondents aver that Appellant's assertion that they are the sole proprietors and occupants of parcel NO. EAST KITUTU/KEBIRICHI/3155 is false as the aforesaid registration was fraudulently obtained. This was the finding of the Principal Magistrate's Court at Keroka in its judgment delivered on 2nd October 2020. They contend that the suit land claimed by the Appellants is ancestral land that was originally parcel NO. EAST KITUTU/KEBIRICHI/794 registered in the name of the 1st Appellant's late father one NYAMBANE ORINDO. The deceased was to hold it in trust for himself and the Respondents who are his step brothers. He was also to hold it in trust for the family of his uncle one KEBANDE.

4. It is their further contention that the 1st Appellant fraudulently and unlawfully misled the Nyamira County Land Registrar to register him as the sole proprietor of the suit property without disclosing material facts. They aver that they are already in occupation of their respective share of the family land that was originally known as parcel No. East Kitutu/Kebirichi/794. They deny that they have caused any destruction on the suit land. They state that the photographs attached by the Respondent portray the side of the suit property which ought to be shared between the 1st Appellant and Respondents. They contend that the instant application is an abuse of the court process since it is based on non-disclosure of material facts and is therefore misleading. It is their further contention that the application lacks merit and does not meet the threshold set out in **Giella Vs Casman Brown**.

5. The parties consented to have the application canvassed by way of written submissions. The Appellants filed their written submissions on 15th February 2021 while the Respondent filed his on 16th March, 2021.

ISSUES FOR DETERMINATION

6. Having considered the application and the rival submissions, the only issue for determination is whether the Applicants should be granted an order of injunction.

ANALYSIS AND DETERMINATION

7. 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.”

8. Section 79G of the Civil Procedure Act provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

9. In the instant case, the judgment of the trial court was delivered on 2nd October, 2020 whilst the Memorandum of Appeal was filed about fifteen days later on 7th October, 2020. To that end, the Appellant duly complied with the procedure for instituting an Appeal before this court and thus the court has jurisdiction to entertain the present application.

10. Having established that this court has jurisdiction to hear and determine this application the next question is whether the Applicants have met the requirements for grant of injunction pending Appeal. The principles applicable in considering an Application for an injunction pending appeal were pronounced 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.

11. In the case of **Mrao v First American Bank of Kenya Limited & 2 others, 2003 KLR 125 Bosire JA** stated as follows on the jurisdiction to grant an interim injunction: -

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.”

12. Counsel for the Appellant in his attempt to demonstrate that the Appellants have met the above mentioned requirements submitted that the Appellants had expeditiously filed the Appeal. He also brought to the attention of this court, the fact that prior to the filing the Appeal, the Appellants obtained an order of stay of execution in the lower court in the presence of the Respondents.

13. In demonstrating that the Appeal was arguable and not one that was frivolous, counsel argued that the issues in the Appeal are quite weighty and they involve an interest of the Appellants who should be allowed to ventilate their Appeal while the stay orders continue to subsist.

14. On the issue of hardship and the appeal being rendered nugatory, counsel argued that the Respondents do not stand to suffer any hardship or inconvenience which given that have clearly stated on oath that they currently live in donated shanties in Keroka Township. He contended that conversely the Appellants will suffer hardship or loss if this Application is not granted because they already are in occupation of the suit property and have stay order from the trial court which has not lapsed or been challenged. He also averred that if the orders in the application are not granted pending the hearing and determination of the Appeal, there is a likelihood of there being breach of peace and chaos.

15. I have considered the arguments of counsel for the Appellant hereinabove and I have found them to have met the requirements highlighted in the case of **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR**. Further I have taken judicial notice of the stay orders issued by the trial court in the presence of all parties which have not lapsed and remain unchallenged and thus see no reason to interfere with them.

16. I have also considered the issues raised by the Respondent in their Grounds of Opposition, Replying Affidavit and the submissions and found them weighty. However, the same can only be canvassed at hearing of this Appeal.

17. In the light of the foregoing, I allow the Application in the following terms:

a) A temporary injunction is hereby issued against the Respondents herein by themselves, their agents, servants, family members and/or any persons acting for and on their behalf from entering into, cultivating, tilling, cutting down of any trees, erecting any structures or in any manner interfering or dealing with land parcel No. **EAST KITUTU/KEBIRICHI/3155**.

b) The costs of the application shall abide the Appeal.

Dated, signed and delivered at Kisii this 5th day of May 2021.

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J. M. ONYANGO

JUDGE