



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

APPEAL NO. 26 OF 2019

JULIUS LEPERES NGILAS.....APPELLANT/APPLICANT

VERSUS

JONATHAN NKARO MUNERYIA.....RESPONDENT

RULING

Before this Court is a Notice of Motion Application dated 7/5/2020 filed by the Applicant/Appellant Julius Leperes Ngilas together with a Supporting Affidavit of even dated. The Application is brought under Orders 42 Rule 6 (6) and Order 40 Rules 1,2,3 & 4 of the Civil Procedure Rules.

The Application is premised on the grounds on the face of the Application and the Supporting Affidavit thereof. The Applicant avers that he is the registered proprietor of suit land L.R. No. TRANSMARA/ENTONYO/NKOPIT/29 and annexed as PEXH-1. That the trial court did not conclusively determine the issue of ownership between him and the Respondent. That while the Appeal is pending determination, the Respondent has commenced construction of a permanent house and other structures on the suit land. That it is in the interest of justice that the suit land is protected and to mitigate any loss that would arise as a result of construction. That the acts of the Respondent are deliberate and meant to infringe on the Applicant's proprietary interests.

The Application is opposed by the Replying Affidavit of the Respondent, Jonathan Nkaro Muneria sworn on 27/5/2020 in which he gives an account of how he acquired the suit land. That the Appellant entered into an Agreement for sale of Land on 22/11/1995 with his brother Konchellah Ole Muneria. That the Appellant took possession of the suit land measuring 3.4 acres. That his brother granted him possession of the suit land sometime in the year 1995 and 1996 a period spanning 25 years within which the Appellant is fully aware and at no time did the Appellant demand vacant possession.

That the Appellant began demanding more money in the year 2009 whereas the full purchase price had been paid by his brother when they entered into a Sale Agreement. Further, that the Appellant filed Kilgoris PMCC ELC No. 50 of 2018 which judgment was delivered on 3/10/2019. The trial court found that the Appellant was not entitled to vacant possession, eviction or permanent injunction. The Respondent further avers that he has been in actual possession of the suit land having established a homestead. That the grant of injunction as sought by the Appellant herein would be tantamount to hearing and determining the Appeal prematurely, the same being unprocedural. That despite this court bestowed with the jurisdiction to grant injunction the same ought to be based on the circumstances of the case. In addition, the Respondent avers that contrary to what is alleged by the Appellant, it is him who would suffer irreparable loss owing to the fact that he has been in occupation of the suit land for more than 25 years. That in the circumstances, the Appellant's Notice of Motion lacks merit and ought to be dismissed.

I have read and analysed the Application, Relying Affidavit and Submissions filed by both parties. The issue for determination is whether the Applicant is entitled to grant of injunction as sought.

Order 40, rule 1 of the Civil Procedure Rules provides a basis upon which a temporary injunction may issue and states

'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.'

In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an Injunction. The jurisdiction to grant an Injunction may be exercised if it is just and convenient to do so. In the case of ***Giella v Cassman Brown & Co. Ltd***, the court set out the principles for interlocutory injunctions which are:-

- a) The Plaintiff must establish that he has a prima facie case with high chances of success;
- b) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;
- c) If the court is in doubt, it will decide on a balance of convenience.

In addition, an injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, “to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

The Appellant herein avers that the trial court failed to conclusively determine ownership of the suit land in its judgement delivered on 3/10/2019 which has now prompted the filing of the Appeal herein. Having analyzed the evidence in Affidavit of the Appellant and taking into consideration the law as stated above. I find the Application herein filed as premature.

Order 42 rule 6 provides as follows:-

(2) No order for stay of execution shall be made under subrule (1) 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.

(6) Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.

The Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* provides guidance on how a court should exercise discretion and held that:-

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of proceedings.**
- 4. The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount or rent in dispute and the appellant had an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.**

The Respondent has in his Affidavit deponed to the fact that he has been in occupation of the suit land for more than 25 years. This fact is not controverted by the Appellant. On a balance of convenience, it would be unfair for this court to agree with the Appellant that the Respondent should be restrained from further dealing with the land.

The Appellant has also not adduced any evidence to prove that he would suffer substantial loss through any overwhelming hindrance whatsoever.

The upshot of the foregoing is that the Application dated 7/5/2020 lacks merit and the same is hereby dismissed.

DATED, SIGNED and DELIVERED virtually at **KILGORIS** on this 28TH day July, 2021

Mohamed N. Kullow

Judge

28/7/2021

In the presence of:-

CA:Chuma

N/A for the parties and advocates