



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

ELC APPEAL NO. 03 OF 2020

MUTUKU MWAMISI.....APPELLANT/APPLICANT

-VS-

KATIKI MUTUKU MWAMISI

***alias* NAOMI KATIKI MUIA.....RESPONDENT**

AND

PAUL KIMUYU MUMO.....1ST THIRD PARTY/RESPONDENT

MUTISYA MAKAU.....2ND THIRD PARTY/RESPONDENT

RULING

1. The application for determination is dated 3rd November, 2020 and was filed under certificate of urgency. It is brought under Sections 1A, 1B, 3, 3A & 63(e) and 78(2) of the Civil Procedure Act, Order 40 Rules (1), (2) & (4), Order 42 Rule 6 (1), (2) & (6), Order 51 Rule (1), 3 & 10 of the Civil Procedure Rules (CPR) and all other enabling provisions of the Law. It seeks;

a) Spent.

b) Spent.

c) THAT a temporary order of injunction do issue against the third parties restraining them from entering, remaining therein, cultivating, ploughing, planting, fencing, grazing or committing acts of wanton destruction or in any way from interfering with defendants Land Parcel Number Mbooni/Kalawani/387 pending the hearing and determination of the appeal.

d) THAT there be a stay of execution of the judgment/decree dated 27th February, 2020 delivered in TAWA SRMCC No. 136 of 2015 and all consequential orders thereto pending the hearing and determination of this appeal.

e) THAT costs of the application be provided for.

2. The application is supported by the grounds on its face, the affidavit of Mutuku Mwamisi sworn on the same date and his further affidavit sworn on 16th December, 2020. The applicant deposed that the suit was instituted in Tawa Senior Resident Magistrate's Court by his brother's wife, the Respondent. He has exhibited an amended plaint as **MM2**. He deposed that he is the registered owner of Mbooni/Kalawani/387 (*suit land*) and has exhibited a copy of official search as **MM1**. Further, he deposed that the Respondent secretly sold her beneficial share to the 1st Third party who in turn sold the portion to the 2nd Third party. The third party notices have been exhibited as **MM3**.

3. He deposed that the trial Court allowed the Respondent's claim which aggrieved him and he filed the current appeal which he deposed, has high chances of success. The Memorandum of Appeal is exhibited as **MM4**. It is also his deposition that the third parties have entered the suit land, caused destruction and vowed not to stop as the judgment was in favour of the Respondent who sold the land to them. Photographs have been exhibited as **MM5**. He deposed that the third parties have threatened to demolish his house and those of his sons as he has refused to transfer the land which they purchased.

4. The application is opposed through the Respondent's Replying Affidavit sworn on 24th November, 2020, the 1st Third Party's Replying Affidavit sworn on 24th November, 2020 and the 2nd Third Party's Replying Affidavit sworn on 24th November, 2020.

5. The Respondent deposed that the Applicant lacks *locus standi* to file the application and has not met the legal threshold for an application of that nature. She deposed that the disputed portion belongs to her and that the third parties have full authority from her to utilize it.
6. The 1st Third party deposed that the Applicant has not stated the substantial loss which he will suffer if stay is not granted, that he has not provided security and that he has not demonstrated that his appeal has high chances of success. He deposed that the Applicant has not satisfied the requirements for granting of a temporary injunction. That the Applicant has not demonstrated the interest he has in the disputed portion and that he should not hide behind Reuben Muia who was not a party in the lower Court and is not a party in this appeal. It is also his deposition that this application has been brought late in the day and no explanation has been given. He has exhibited photographs as **PKM 2** of what he refers to as '*the small structure alleged to have been demolished*'.
7. The Replying Affidavit by 2nd Third party is a replica of the one sworn by the 1st Third party.
8. In rejoinder, the Applicant deposed that after being served with orders from this Court and the current application, the third parties rushed to the trial Court and filed an application seeking to have him evicted. The application and replying affidavit have been exhibited as **MM1 & 2** respectively. He deposed that, seeking his eviction is a clear indication that the Third parties want to implement the lower Court judgment during the pendency of the appeal thus rendering it nugatory. It is also his deposition that the issue of security does not arise as the land will still be there even after the appeal is concluded.
9. Directions were given that the application be canvassed by way of written submissions. The parties complied and filed their respective submissions.
10. The Applicant submissions were that the Respondent did not have a title deed to her portion and as such, she could not transfer any to the third parties. That the Respondent did not obtain the Land Control Board (LCB) consent hence the sale was illegal, null and void. That the Respondent did not obtain consent from him as the registered owner and that she did not inform all her children about the sale.
11. He submitted that the appeal is arguable and raises weighty issues of law and fact such as;
- Did the Respondent have capacity to sell land to the 1st third party when she had no title deed in her name?
 - Could the Respondent sell the land without consent of all her children including Reuben Mutuku?
 - Did the sale of land to the third parties make the Appellant a constructive trustee on behalf of the third parties?
 - Was there forgery of the signature and Identity Card number of Reuben Muia, a son of the Respondent?
 - Is Reuben Mutuku entitled to settle on the beneficial portion of his late father?
 - Was the judgment legally and factually sound?
12. He submitted that demolition of the house by the third parties is likely to cause retaliatory attacks hence breach of peace.
13. On security, he submitted that the lower Court did not award costs to any party and this being a land matter, the land will still be there after conclusion of the appeal.
14. He submitted that the third parties have never used the land since 25th January, 2016 when the lower Court issued an order of *status quo*. Accordingly, he contends that they can wait a little longer for the appeal to be concluded.
15. The Respondents submissions were that the applicant has not demonstrated the interest he has in the disputed portion and that the allegation, about a house constructed therein by Reuben Muia, is neither here nor there.
16. She submitted that the Applicant has not demonstrated that he will suffer any loss which cannot be compensated by way of damages. She contends that no evidence has been presented to show that materials like iron sheets, cement and doors were taken away from the house in the disputed land.
17. It is also her submission that the Applicant has not satisfied any of the legal requirements for stay of execution.
18. The submissions by the third parties are a replica of the Respondent's submissions.
19. In their supplementary submissions, the third parties submitted that it is not correct for the applicant to dwell on stay orders which were issued in 2016 because they lapsed immediately the Court gave its judgment on 27th February, 2020. They contend that there is nothing wrong with the successful litigants wanting to implement the trial Court's judgment.
20. Further they submitted that the present application was filed after an inordinate and unexplained delay.
21. Having looked at the record, it is not in dispute that the Applicant holds Land Parcel Number Mbooni/Kalawani/387 (*suit land*) in trust for the Respondent and other beneficiaries. However, from the trial Court judgment and grounds of appeal, it is my considered view that there are questions of law and fact that need to be interrogated by this Court.
22. Implementing the trial Court judgment may have the effect of transferring ownership all the way to the 2nd third party and from there the suit land may exchange hands further. It is therefore my considered view that the balance of convenience tilts towards maintaining the *status quo*. This being a land matter, furnishing of security is not necessary as the land will still be there after conclusion of the appeal.

23. The upshot of the foregoing is that the application partially succeeds and I hereby proceed to issue the following orders;

a) **THAT** there be a stay of execution of the judgment/decree dated 27th February, 2020 delivered in TAWA SRMCC No. 136 of 2015 and all consequential orders thereto pending the hearing and determination of this appeal.

b) **THAT** costs shall abide the outcome of the appeal.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi