



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. E046 OF 2021

LYDIA MUNYATTA M'ARUYARUAPPELLANT

VERSUS

RAPHAEL MUKILAM'ITARU ALIAS RAPHAEL ITARURESPONDENT

RULING

1. By a notice of motion brought under **Order 40 Rule 2 Order 51 Rule 1 Section 68 of Land Registration Act and Sections 2, 13, 18 and 19 of the Environment and Land Court Act**, the applicant prays for temporary injunction and inhibition over **Parcel No. Tigania West Uringu II/1059** pending hearing and determination of the appeal.
2. The application is based on ground that the lower court case was struck out with costs for want of jurisdiction and that the respondent is about to dispose the land to a third party which will prejudice the applicant.
3. The applicant complains in the supporting affidavit there was a title deed hence the lower court erred in law by basing the claim over **Land Adjudication Act cap 284**; the land initially belonged to her father; she has been in occupation with full knowledge of the respondent, though now registered fraudulently in the respondent's name.
4. Through written submissions dated **14th June 2021** it is alleged by the applicant there was **Meru HCC J.R. 59 of 2021** settled in favour of the applicant, and that the case in the lower court was for cancellation of the title and or rectification of the register and that there is threatened eviction and or disposal of the suit land to a third party so as to defeat this appeal.
5. With leave of court the applicant filed a further supporting affidavit sworn on **14th June 2021**.
6. On the other hand the respondent opposes the motion through a replying affidavit sworn on **15th April, 2021** maintaining the land was gathered **w.e.f 1966**, later on it demarcated and eventually registered in his name with objections being dismissed, and that the outcome of the judicial review proceedings came long after a title deed had been issued. The respondent submits the lower court was right in upholding the preliminary objection since the applicant had not enjoined the government among other reasons. Lastly the respondent submits there is no pending eviction or intention to dispose the suit land as alleged or at all.
7. Further the respondent relies on written submissions dated **24th May 2021**, relying on ***Giella –vs- Casman Brown (1973) EA 358 principles; and Mrao Ltd. –vs- First American Bank of Kenya Ltd*** on the proposition that a prima facie case is made only where there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter, and ***Philip Mwangi Githinji –vs- Grace Makarima Gichinji (2004) eKLR*** on the proposition that an inhibition is akin to a prohibitory injunction.
8. Additionally the respondent relies on ***Hannah Wangui Mathenge & 2 Others –vs- Rose Muthoni Mathenge (2017) eKLR, Panari Enterprises Ltd., Dorcas Muthoni & 2 Others –vs- Michael Ireri Ngari (2016) eKLR.***
9. What turns out from the pleadings, rival affidavits and submissions is whether or not this court has jurisdiction to grant the orders sought pending hearing and determination of the appeal and if so which are the principles applicable.
10. Whereas the application is premised under **Order 40 of the Civil Procedure Rules**, this section only allows for issuance of injunction pending hearing and determination of a suit.
11. It is only under **Order 42 Rule 6 (6)** that the High Court is allowed to grant temporary injunction while exercising its appellate jurisdiction.

12. Assuming the applicant intended to invoke **Order 42 Rule (6) (6)** the principles applicable are (:) if the appeal is not frivolous (2) it is a discretionary order and should be refused where it would inflict greater hardship than it would avoid (3) the applicant must show that to refuse the injunction would render the appeal nugatory (4) ***Geilla –vs- Cassman Brown (1973) E.A 358 principles must also apply. See Patricia Njeri & 3 Others –vs- National Museum of Kenya (2004) eKLR.***

13. In the instant case the applicant has no title deed as opposed to the respondent. The pleadings in the lower court have not been attached so as to enable this court ascertain the nature of the claim. Be that as it may, it has been stated in the lower court ruling that there was non-joinder of a crucial party if the applicant was seeking for the cancellation and or rectification of the register.

14. Further it is alleged there is a decision from the High Court quashing the Land Adjudication Officer's decision. This decision has not been attached to, at the very least to show the rights or interests of the applicant over the suit land were pronounced and or are about to crystallize.

15. Consequently I find the applicant has not met the principles alluded above as to issuance of an injunction pending appeal and by extension orders of inhibition.

16. Be that as it may and in the interests of justice, I hereby order maintenance of status quo as at the filing of this appeal. The applicant shall file and serve the Record of Appeal within 30 days from the date hereof and the appeal to be listed for hearing within 60 days upon filing of the record of appeal failure of which the orders of status quo shall stand vacated.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 27TH DAY OF OCTOBER, 2021

In presence of:

Miss Nyaga for appellant

Wambua for respondent

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE