



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO. 15 OF 2019

KEIBUKWO INVESTMENTS LTD.....APPELLANT

VERSUS

DANIEL KIMUTAI CHUMA.....RESPONDENT

RULING

1. By a notice of motion dated 2nd December, 2019 and filed on 3rd December, 2020 brought under **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Order 40 Rule 7, Order 42 Rules 11 & 13 of the Civil Procedure Rule, 2010 (the Rules) and all other enabling provisions of the law**, the Respondent sought the setting aside and vacation of the orders made on 25th June, 2020 before the Hon Justice. M.C. Oundo on the Appellant's application for an interim of injunction pending appeal dated 13th November, 2019.

2. By the said ruling the court made the following orders:

a) A temporary injunction is herein issued restraining the Respondent whether by himself, agent or any person whomsoever from subdividing, offering for sale, selling, charging, leasing, licensing, transferring, or concluding any transfer of all or any part of LR No Rumuruti Township/block 3/140 pending the hearing and determination of appeal.

b) That the Applicant Keibukwo Investments Limited shall deposit in court a sum of Kshs 1,000,000/- (one million shillings) within the next 30 (thirty) days from the date herein and in default order No (i) above shall stand vacated.

c) The Appellant/Applicant's counsel to file and serve his record of appeal within 30 days from the date herein.

d) There shall be no order as to costs.

3. The Respondent's application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent, Daniel Kimutai Chuma, on 2nd December, 2020. It was contended that the Appellant has failed to fully comply with the terms of the orders made on 25th June, 2020 and that he had failed to file the record of appeal as ordered. It was further contended that the appeal had remote chances of success and that, in any event, the Appellant can be compensated in monetary terms should the appeal succeed.

4. The Appellant filed a replying affidavit sworn by its managing director, David Some Barno, on 27th March, 2021 in opposition to the application. The Appellant contended that he had complied with the order directing the deposit of Kshs. One million and that he had notified the Respondent's advocate in writing. The Appellant contended further that it was unable to file the record of appeal because it had not been furnished with copies of the typed proceedings by the trial court to enable it file the record of appeal. It was further contended that the delay in filing the record of appeal was due to factors beyond its control. Consequently, the Appellant urged the court to dismiss the Respondent's application.

5. When the application was listed for *inter partes* hearing on 27th April, 2021, it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their submissions. The record shows that none of the parties had filed submissions by the time of preparation of the ruling.

6. The court has considered the Respondent's said application, the Appellant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether the Respondent has made out a case for setting aside or vacation of the interim injunction and consequential orders made on 26th June, 2020.

7. The Respondent's application was based, *inter alia*, upon **Order 40 Rule 7 of the Rules which stipulates as follows:**

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

8. The Respondent contended that he was aggrieved by the interim injunction because the Appellant had failed to comply with the consequential orders made as to the deposit of kshs one million in court and the filing of the record of appeal. The Respondent was of the view that the Appellant had failed to take steps to prosecute the appeal since obtaining the interim injunction on 25th June, 2020.

9. The power of the court to discharge, vary or set aside an interim injunction was considered in the case of **JSL v JKL [2020] eKLR** as follows:

“ The provision primarily grants the court discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued.

In Mobil Kitale Service Station v Mobil Oil Kenya Ltd & Another [2004] eKLR, Warsame J held *inter alia*:

‘...an interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose- to shield a party against violation of the legal rights a person is seeking. ‘

From the above, although a court has unfettered discretion pursuant to Order 40 Rule 7 of the Civil Procedure Rules, it only exercises it when circumstances so require after considering the position of both parties at that particular instant and as well as when the injunction was given. This is because, before granting an injunction, a Court is usually guided by the principles for granting injunction as stated in *Giella v. Cassman Brown & Co. Ltd. [1973] E.A 358*”.

10. The court has considered the reasons given by the Appellant for the delay in filing the record of appeal. The court finds that the explanation for the delay is not unreasonable. The Appellant could not be expected to file a competent record of appeal without copies of the proceedings. The court is further satisfied that the Appellant duly complied with the order regarding the deposit of kshs one million. There is no evidence on record to demonstrate that the Appellant is using the interim injunction to harass or oppress the Respondent. There is also no evidence on record to demonstrate that there has been a material change in circumstances between 25th June, 2020 when the injunction was granted and 3rd December, 2020 when the instant application was filed.

11. The upshot of the foregoing is that the court finds no merit in the Respondent’s application. Consequently, the notice of motion dated 2nd December, 2019 and filed on 3rd December, 2020 is hereby dismissed with costs.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 21ST DAY OF OCTOBER, 2021.

In the presence of:

Mr. Mukuha Kamau for the Appellant

No appearance for the Respondent

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Y. M. ANGIMA

ELC JUDGE