REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 6 OF 2021

ALEXANDER M'MIRIANGA M'MAUTA.....APPELLANT/APPLICANT

VERSUS

SEBASTIAN MUYE.....RESPONDENT

RULING

This ruling is in respect of a Notice of Motion dated 15th June 2021 by the Appellant/applicant seeking for the following orders:

a) Spent

b) THAT the orders issued on the 7th day of June 2021 dismissing the Appellant's application for injunction pending the hearing of this application inter-partes be stayed.

c) In the alternative and without prejudice to (b) above an injunction be issued against the Respondent by himself, his servants and agents to restrain them from entering upon, trespassing, construction, leasing and or selling the Plot No. LR NO. 12182 alleged by the Respondent to be plot No. 84 Malindi or thereof or any one pending the hearing of this application inter-partes.

d) Upon inter-partes hearing the orders in (a) and (b) above be confirmed pending the hearing and disposal of the Appeal.

e) Any other or further orders as the honourable court may find fir to grant.

f) Costs be provided.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant submitted that the gist of the application is that the Respondent is constructing on the Plot No. 84 which is the subject of the intended appeal and if the orders sought herein are not granted the appeal will be rendered nugatory. Further that the court declined to issue interim orders reason being that the impugned construction was already advanced.

Counsel relied on the applicant's affidavit whereby the applicant deponed that the trial court delivered a ruling on 7th June 2021 dismissing an application for temporary orders of injunction restraining the Respondent from trespassing, constructing or dealing with the property L.R No. 12182 which was initially known as Plot No.84 (the suit property). He further deponed that the Respondent has no single document of ownership to the suit property yet he has continued to develop the same. It was the Appellant/applicant contention that he purchased the suit property from the previous owner and that the transfer was yet to be completed.

Counsel for the Appellant/applicant relied on the case of **Afyare Enterprises Company Limited v Gideon Kiremah Mugambi & 3 others Nairobi Court of Appeal Civil Application No.163 of 2018**, where the Court of Appeal held as follows:

"The terms of injunction sought embraces restraining the respondents from undertaking development construction and making improvements on the buildings. In the affidavit to support certificate of urgency dated 12th May, 2017 filed in the court below, the applicant stated that the 2nd respondent had embarked on massive demolition and excavation of the suit land with a view to undertaking massive development. The 2nd respondent now deposes that it demolished the building and constructed a new

shopping centre. The applicant disputes that the construction had been completed and stated that it was still going on.

[14] In the absence of certainty that the construction is not completed, it would be inappropriate to grant an injunction stopping construction or use of the suit land. However, in the circumstances of the case, an injunction restraining the 2nd respondent from trespassing, registering any dealings and from dealing in the suit property would be appropriate.

[15] For the forgoing reasons, the notice of motion dated 30th May, 2018 is allowed to the extent that an injunction is issued against the Max Gas and Logistics Limited (2nd respondent herein) and the Chief Land Registrar, Nairobi (3rd respondent herein) from transferring and/or registering any dealings or from dealing whatsoever in respect of Land Parcel No. 36/VII/403, original number 3018, pending the hearing and determination of the intended appeal."

It was counsel's submission that the orders sought herein could be granted as long as construction of the suit premises has not been completed so as to preserve the suit premises and relied on the case of in **Elijah Kipngeno Arap Bii v Samuel Mwehia Gitau & another Court of Appeal Civil Application No.243 of 2004** where the court held that:

"On the second requirement the learned counsel for the applicant submitted that his client would suffer loss if the application is refused. The dispute relates to a house which has been vacant. Neither the applicant nor the 1st respondent is in possession. It is an unfortunate state of affairs in which the 1st respondent has invested. On the other hand, the applicant had also invested in this house and like the 1st respondent is not in a position to reap the fruits of his investment. On the other hand, the applicant has also invested in this house and like the 1st respondent is not in a position to reap the fruits of his investment."

"In view of the foregoing, we are satisfied that the facts of this case, it would be in the interest of the parties if the status quo were to be maintained. Hence, we order that there shall be a stay of the order of the superior court in its ruling delivered on 22nd September, 2004 pending the hearing and final determination of the intended appeal."

Counsel further submitted that the Appellant/applicant has established a prima facie case with chances of success and cited the case of **Hesbon K. Limisi v Delilah Achieng Mathews & 2 others [2015] eKLR** where the Court of Appeal held as follows:

"Based on the facts of the case, the learned judge ought to have considered whether the appellant's documentation was sufficient to establish that he had a claim over the suit apartment, and not whether he held the documents of the suit apartment, to determine whether an order of injunction was warranted."

It was counsel's submission that the court ought to preserve the substratum of the case and cited the case of **Judith M. Njue v Standard Chartered Bank of Kenya & another [2001] eKLR** where the Court of Appeal held that:

"we are equally of the view that if we do not grant the order of stay, the 2nd respondent having already obtained title of the suit land, there is nothing to stop him from dealing with the same in a manner that would be completely detrimental to the applicant's interest.

We therefore grant stay of execution of the orders of the superior court in this matter until the determination of the intended appeal".

Counsel submitted that nothing would stop the respondent from dealing with the property adversely to the applicant's interest and relied on the case of **Nyals (Kenya) Ltd v United Housing Estate Ltd [1995] eKLR** where the court held that

"Where the subject matter is simply the right to possess on a statutory tenancy, it is difficult to see how this can be preserved, unless the status quo is maintained pending the determination of the appeal. Certainly we know of no local case of this nature where a stay pending appeal has been refused."

"If we were to refuse a stay of execution of the decree in the Nairobi High Court civil case no. 2137 of 1983, the applicant's power to possess the suit premises may be removed beyond recall with the result that its intended appeal will, if successful, be rendered nugatory. To avoid such an eventuality, we think that the applicant's application in this motion should be granted."

Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel relied on the respondent's replying affidavit and submitted that the applicant has not established a prima facie case with a probability of success. Counsel cited section 26 (1) of the Land Registration Act on indefeasibility of title and as such the applicant has failed to establish ownership of the suit land.

Counsel submitted that the appellant/applicant's evidence was filled with contradictions on how and from whom he acquired the suit property and that the purpose of injunction is to preserve the status quo of which the respondent has always in occupation. That the construction is already complete hence issuing an injunction would be in vain.

Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant has met the threshold for grant a temporary injunction pending the determination of the 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) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited vs Kerr (1985) KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries vs KCB (1982 – 88) KLR 1088 (also cited in Venture Capital)***
>
> ***(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper supra).***
>
> ***(c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt vs Rent Restriction Tribunal (1982) KLR 417 (cited also in Venture Capital).***
>
> ***(d) The Court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).***

The principles for grant of interlocutory injunctions are as per the in the Giella case (supra) which must be adhered to in order for the court to allow the orders. An applicant must prove that he/she has a prima facie case with a probability of success.

In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR** the court of appeal added that:

> ***"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

The applicant relied on a copy of a grant filed in the lower court indicating that one Mwalimu Kazungu as the grantee of the parcel L.R No. 12182 who was to transfer the same to him at a consideration however the transfer is yet to be effected.

From the record and the application, there is no evidence to show the relation between parcel L.R No. 12182 and Plot No. 84 Malindi Bus Park as the letter from the Commissioner of Lands dated 27th October 2008 instructing the Senior Registrar of Titles to register the grant does not clarify this relation.

The Appellant/applicant also filed a copy of an allotment letter issued to one Anna S. Katana over Sabaki Squatters Upgrading UNS Residential Plot No. 84 which he contends was later transferred to him and registered as L.R. No. 12183. The question is whether Plot No. 84 Malindi Bus Park is the same as parcel L.R No. 12182 or 12183.

Further it should be noted that vide a letter dated 23rd October 2006 from the Malindi Municipal Council which stated that an application by the Appellant/applicant to be allocated Plot No. 84 was still under consideration as at that time but there was no confirmation that it was ever considered

This leaves the court with no evidence to show that the applicant has a prima facie case with a probability of success. Courts do not give orders in vain.

On the issue as to whether the Appellant/applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages, it is evident that the Appellant/applicant has never been in occupation of the suit property. He has admitted that throughout his application and attached photographs of the ongoing construction thereon by the Respondent.

I find that the applicant will not suffer any loss as he has not been in occupation of the suit land which he has admitted and an award of damages would be sufficient when he finally succeeds in the appeal.

The upshot is that the application lacks merit and is therefore dismissed with costs

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF OCTOBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.