



REPUBLIC OF KENYA



**Njimu v Jaswant Singh & Brothers Ltd & 2 others (Civil Appeal
E563 of 2021) [2023] KEHC 21578 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E563 OF 2021

JN NJAGI, J

JULY 25, 2023

BETWEEN

JANE WANGUI NJIMU APPELLANT

AND

ELEGANT DESIGNERS AND PRINTERS LTD 1ST RESPONDENT

JASWANT SINGH & BROTHERS LTD 2ND RESPONDENT

HENRY BETT 3RD RESPONDENT

RULING

1. The 1st Respondent/Applicant has filed an application dated September 28, 2021 seeking for orders that:
 - (1) Spent
 - (2) Spent
 - (3) That pending the hearing and determination of this appeal, the Honourable court do issue orders restraining the respondents by themselves, employees, servants or agents from charging, selling, disposing, trespassing, damaging property, threatening, harassing, remaining in possession and/or in any other way interfering with the Applicant's ownership, possession and occupation of the parcel of land, House No 947, Jambo Estate, LR No Nairobi/Block 72/947.
 - (4) That this Honourable court do issue further orders and directions as it may deem just and fit.
 - (5) That the costs of this Application be provided for.



2. The application was premised on the grounds that the Appellant herein has filed an appeal against the judgment of the lower court wherein judgment was entered against the appellant and the Applicant herein. That the Applicant has equally filed a cross appeal seeking for the said judgment to be set aside.
3. It is the contention of the Applicant that the trial court erroneously found that the Applicant is not the registered proprietor of the suit property, House No 947 Jambo Estate, LR Nairobi/Block 72/947. That the lower court failed to consider that there is a pending case, HCCC 411 of 2018 between the Applicant/1st Respondent and Standard Chartered Bank wherein the Applicant is challenging the bank's exercise of its statutory power of sale. That the lower court irregularly considered and determined issues pending in the High Court case which is a court with supervisory jurisdiction over the lower court, thus the same should be preserved to keep the subordinate court within its prescribed sphere and prevent usurpation. Therefore, that the 2nd and 3rd Respondents herein should be restrained from dealing with the property pending the hearing and determination of the appeal. That unless this court intervenes the Applicant/1st Respondent shall suffer substantial loss.
4. The Application was opposed by the 2nd and 3rd Respondents vide the replying affidavit of the 3rd Respondent, Henry Bett, wherein he deposes that he is a director of the 2nd Respondent. That neither him nor the 2nd Respondent is a party to HCCC No 411 of 2018 which is between the 1st Respondent/Applicant and Standard Chartered Bank Limited. That neither was the bank a party to the suit from which this appeal emanates. Further that the suit from which this appeal emanates was filed in 2019 after the High Court case was filed in 2018. That the issues in the High Court case have no nexus with the suit the subject matter of this appeal. Therefore, that the instant application has no merit and should be dismissed.

Submissions

5. The Applicant through the firm of K Mberia & Co Advocates submitted that it is necessary to preserve the substratum of the appeal case as the respondents are in the process of taking possession of the suit property when the matter is pending appeal and the question of ownership of the suit property is pending determination by this court.
6. It was submitted that the Applicant has established a prima facie case with high chances of success in that the lower court entered judgment for the respondents while ignoring that there was a pending High Court matter where the question of ownership of the suit property is pending determination.
7. The Applicant submitted that he stands to suffer irreparable injury and damage if an order of temporary injunction is not granted as he has constructed permanent buildings on the suit property and the respondents are in the process of destroying and/or evicting the Applicant from the suit property. That the damage that would result from not granting the injunction orders sought is not quantifiable and thus cannot be compensated by way of damages. That it is therefore in the interest of justice that the orders sought are granted.
8. On the issue of balance of convenience, it was submitted that the same tilts in favour of the Applicant. The Applicant cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR* where the concept of balance of convenience was defined as follows:

' The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff's, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show



that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting.'

9. The 2nd and 3rd Respondents through GN Thion'go Advocates submitted that the Appellant was a tenant for the 1st Respondent. That the 1st Respondent had taken a bank loan from Standard Bank and when they failed to pay the bank exercised its statutory right of sale and sold the property in an auction and the 2nd and 3rd Respondents bought the property. That the Appellant filed suit at the lower court which she lost and was ordered to vacate the house. Execution was carried out against her. That by the time execution was effected the Appellant had vacated the premises and the 1st and 2nd Respondents took actual possession of the parcel. That for all purposes, determination of ownership of the suit parcel is finalized and there is no substance for this court to injunct.
10. It was submitted that the current application relies on a preliminary ground that there is a suit pending in the High Court between the 1st Respondent and Standard Bank. It was observed that the 2nd and 3rd Respondents are not parties to the said suit. That neither the Appellant nor the 1st Respondent made any move to stay the lower court proceedings in light of the High Court matter. That the lower court in its judgment observed as such. That it is cheeky for the Applicant/1st Respondent to now try to use this court to get what it is unable to pursue in a court of similar jurisdiction.
11. The 1st and 2nd Respondents submitted that it is trite that an order of injunction pending appeal is discretionary which should not be granted to an applicant whose appeal is frivolous. The case of [*Raphael Mulinge Muthusi & others v Mary Ndila Nyolo, Machakos ELC Appeal No 45 of 2021*](#) was cited where the court cited the case of [*Patricia Njeri & others v National Museum of Kenya \(2004\) eKLR*](#) where it was stated that:

In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be 'exercised judicially and not in whimsical or arbitrary fashion.' This discretion is guided by certain principles some of which are 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 (*JK 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*).
12. It was submitted that the appeal as preferred whereby it is making reliance on a different matter in another court is without any chance of success. That the Applicant is no longer in possession of the premises and proprietorship and title have shifted in favour of the 2nd Respondent and as such there is nothing to injunct.



Analysis and Determination

13. I have considered the application, the response thereof and the rival submissions of the advocates for the parties. The question for determination is whether the application has met the threshold for granting of temporary injunction pending hearing and determination of the appeal herein.
14. The principles for grant of temporary injunction are well settled. These were set out in the case of *Giella v Cassman Brown (1973) EA 358* as follows:
 - a) The Applicant must establish a prima facie case with a probability of success.
 - b) If the injunction is not granted, the Applicant will suffer irreparable injury that may not be compensated by an award of damages.
 - c) Where a court is in doubt, it should decide the application on a balance of convenience.
15. In the first place the applicant has to establish that he has a prima facie case with a probability of success. A prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya & 2 others (2003) eKLR* as follows:

' A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'
16. The Applicant in the instant matter argues that he has established a prima facie case with high chances of success in that the lower court entered judgment for the respondents while ignoring that there was a pending High Court matter where the question of ownership of the suit property is pending determination. That the trial court failed to consider that the issues in the High Court entail the 2nd Respondent's acquisition of the suit property and the alleged sale by the bank involving fraud, misrepresentation and illegality.
17. The Applicant is thus faulting the trial magistrate for proceeding with the matter when there was a High Court case pending over the same matter. However, as pointed out by the 1st and 2nd Respondents, the said Respondents are not parties to the High Court case. Neither did the High Court issue stay orders against the lower court stopping it from proceeding with the matter when the High Court case was pending. The magistrate's court cannot therefore be faulted for proceeding with the matter that was before it. The argument that the trial court should not have dealt with the case has no basis as there were no restraining orders against it. The Applicant has not established that he has an arguable case with a probability of success.
18. On the issue as to whether the Applicant will suffer irreparable loss and damages if the orders of injunction are not granted, the Applicant argued in his submissions that he has constructed permanent buildings on the property and that the Respondents were in the process of evicting the Applicant from the suit property. That the damage that would result is not quantifiable and cannot be compensated by way of damages.
19. The dispute between the parties is ownership of a house on plot No 97 Jambo Estate LR No Nairobi Block 72/947. In my considered view the value of the house and the plot can be quantified. The Applicant can thereby be compensated by way of damages on any loss or damage that it might suffer. The second limb for grant of temporary injunction has not been demonstrated.



20. The other consideration is the balance of convenience. The 1st and 2nd Respondents argued that possession has changed hands and therefore there is nothing to injunct.
21. I have perused the judgment of the trial court. It was indicated in the judgment that possession of the property had changed hands to the 2nd Respondent who has charged it to Equity Bank (K) Ltd. In that case it would serve no purpose to injunct the 1st and 2nd Respondents as sought in the instant application. The balance of convenience tilts against the applicant and is in favour of the 2nd and 3rd Respondents.
22. The upshot is that the Applicant has not adduced sufficient evidence to persuade this court to issue injunctive orders against the 2nd and 3rd Respondents pending the hearing and determination of the appeal herein. The application dated May 28, 2021 is devoid of merit and is dismissed with costs to the 2nd and 3rd Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 25TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Miss Kemunto HB for Mr. Mberia for 1st Respondent/Applicant

No appearance for 2nd and 3rd Respondents

Court Assistant – Jarso

30 days R/A.

