



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. APPEAL CASE NO. E031 OF 2021

ABDI IBRAHIM.....APPLICANT/INTENDED APPELLANT

VERSUS

FRED OPIYO.....RESPONDENT

RULING

Applicants Case

The applicant Abdi Ibrahim comes to this court on appeal against Fred Opiyo for orders that pending the hearing and determination of the appeal, there be an order of temporary injunction restraining the respondent from doing any further construction on plot number 17B Bondo Town for purposes of preserving the subject matter herein.

The application is premised on grounds that the Applicant sued the respondent vide Bondo principal Magistrate's Court Environment and Land Court E12 of 2021 for injunctive orders against his activities on the Applicant's lease premises on Plot No. 17B Bondo Town. In the said suit, the Applicant applied for orders of injunction pending the hearing of the suit which were declined on the basis of an existing suit between the Applicant and the Respondent's deceased mother. The said suits are not similar and do not fall under the subjudice rule. Upon decline of the orders sought in the Lower Court, the Applicant has promptly lodged an appeal in this Court in a bid to preserve the subject property.

The ruling by the Magistrate has triggered massive activities on the suit property which will have irredeemable damage to the Applicant's claim. The Appeal lodged by the Applicant has high chances of success and it's only fair that the Applicant's suit property be preserved to await the determination of the Appeal.

The Respondent will suffer no prejudice if the application is allowed as he has neither demonstrated his legal capacity nor link in dealing with the subsisting lease between the Applicant and his deceased mother. Its only proper that the Applicant be allowed to pursue his claim by allowing the orders sought herein.

In the supporting affidavit, the Appellant/Applicant states that he sued the Defendant vide Bondo Principal Magistrate's Court Environment and Land Court E12 of 2021 for injunctive orders on plot No. 17B Bondo Town to which he has a subsisting lease with the Respondent's deceased mother for the construction of a permanent commercial building. That the Learned Magistrate declined to confirm the order sought in his application on the basis that here was a pending suit between him and the Respondent's deceased mother, which parties and orders therein are different from the prayers he was seeking from the instant suit. That being aggrieved with the said ruling, he has promptly instituted an Appeal challenging it and which appeal; he strongly feels has very high chances of success.

That in his pleadings, he clearly indicated that there was no privity of any contract between himself and the Respondent to warrant his illegal actions on the suit property and that the Respondent had no locus standi as an administrator to his deceased mother's estate to invade the suit property and start construction thereon.

That immediately the ruling was delivered the Respondent instructed workers who are currently continuing with construction at rocket speed to defeat his claim over the suit property. That he is advised by his counsel on record that the Magistrate did not consider his application on merit and whether his case was arguable from the pleadings presented. That he is further informed by his counsel on record and which information he verily believes to be true that, this court has jurisdiction in its appellate exercise to grant him an injunction against the Respondent to protect his claim in this suit property and or to preserve it pending the hearing of his Appeal. That he is aware that the Respondent stands to suffer no prejudice if the orders sought are granted since he was not privy to the lease and has not demonstrated his legal interest in the property.

Respondents Case

The Respondent filed a replying affidavit stating that the respondent has failed to attach a certified copy of both the ruling and the order of the lower court upon which he was aggrieved and now intends to appeal against in order to enable the court appreciate the gist of his grievance and the exact orders he is dissatisfied with pending the filing of the intended appeal and now the request for the injunction, and as such leaving the present court in the dark as to what orders he was aggrieved with. That the applicant's application is premised mainly on Order 42 rule 6 of the Civil Procedure Rules 2010, upon which he has failed to demonstrate sufficiently the requisite elements to warrant the grant of orders he seeks and most importantly, as to what substantial loss he shall suffer if the prayers on the face of the application are not granted. That there is no substantial loss that the applicant will suffer if the present application is not granted on the grounds that he had initiated Civil Case No. 70 of 2020 that touches on the subject matter being the leased property as between him and the respondent's deceased mother in which suit he is seeking for damages.

That having quantified and or stated the damages he is seeking in Civil Suit No. 70 of 2020, it is evident that the can be adequately compensated by way of damages if his intended appeal is successful and or the other suits. The applicant is not in occupation of plot 17B Bondo Town that he claims to have subsisting lease with the respondent's deceased mother. That the said deceased estate is now subject to succession and administration.

The respondent contends that the applicant is misleading the court at paragraph (a) of the grounds in support of his application to believe that Plot No. 17B Bondo, is developed and as such there are premises the applicant occupies therein whence he has never been in occupation of the said plot at any time, he has not laid any materials that therein that would be wasted and further, he has never done any construction on the said plot.

The respondent contends that the applicant at paragraph (b) of the grounds in support of his application indicates that the lower court dismissed his suit on the ground of sub judice but has failed to avail the said proceedings before the honourable court in order for the court to appreciate his grievance. That the applicant has not exhibited any evidence before court to demonstrate his claim that the respondent is currently engaged in massive activities on the said plot.

The respondent argues that there is no appeal lodged by the applicant to warrant the grant of the injunctive orders he seeks and as such the injunctive orders would serve no purpose in the interest of justice in this matter. That in the foregoing and in the circumstances of the present case the balance of convenience as rightfully found by the trial court tilts in favour of the respondent herein. The Respondent's mother Mary Alice Nyasenda (deceased) estate is yet to undergo succession and as such the respondent is not the legal representative to the said deceased estate capable of being enjoined in these proceedings.

That the Respondent is not privy to the lease agreement as between the applicant and his deceased mother one Mary Alice Nyasenda.

That the respondent has however perused the impugned lease agreement relied upon by the applicant/plaintiff and he states that the deceased one Mary Alice Nyasenda terminated the said lease on the 13th day of June, 2020 and upon the same, issued a termination notice to the plaintiff.

Upon terminating the said lease, the applicant was granted 90 days as per the termination notice but to this date has refused to acknowledge the said termination. The deceased thereafter proceeded to refund the applicant all the sums of money he paid, precisely being a sum of Ksh. 70,000.00/= and an additional Ksh. 14,000.00/= thus a total of Ksh. 84,000.00/= the sums were refunded and paid to the applicant vide Mpesa and as such the Mpesa refunds attached and marked as "FOS' VIDE Mpesa statements.

I have considered the rival submissions of the parties and do begin by referring to **order 42 Rule 6 (6)** of the **Civil Procedure Rules, 2010** which empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus: -

"(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with."

Section 79G of the **Civil Procedure Act** provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -

"Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

In the instant case, this provision has been complied with. However, the power to grant an injunction is discretionary and such discretion must be exercised judiciously on the basis of law and evidence. The principles applicable in considering an application for an injunction pending appeal were reiterated by Visram J. (as he then was) in **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR** as follows:

"a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.

b. The discretion should be refused where it would inflict greater hardship than it would avoid.

c. The applicant must show that to refuse the injunction would render the appeal nugatory.

d. The court should also be guided by the principles in Giella v Cassman Brown [1973] EA 358.

In the locus classicus case of Giella v Cassman Brown [supra], the court set out the conditions necessary for the grant of interlocutory injunctions as follows:

“The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt it will decide an application on the balance of convenience.”

Whether the Applicant has a prima facie case with chances of success

The question of what constitutes a prima facie case was determined by the Court of Appeal in the case of Mrao Limited V First American Bank of Kenya and 2 Others [supra] as follows;

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

While adopting the same position the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR 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..... 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.”

In this matter, it is evident that there was a lease between the appellant and the respondent’s deceased mother however, the respondent has stated that the same was terminated and monies refunded to the appellant which allegation the appellant has not controverted. On the basis that the Appellant has not controverted the allegation of termination of the lease and refund, I doubt that the appellant has a prima facie case with a likelihood of success unless he gives further evidence. On the issue of irreparable injury that can’t be compensated with damages, I do find that the appellant has not satisfied this test as the loss he is likely to suffer if any, is quantifiable and can be paid in damages. Moreover, the applicant has not demonstrated that he is in possession of the property. There is no evidence that he has developed the property. Lastly, the balance of convenience tilts in not granting an injunction as prayed because it amounts to evicting the respondent. The upshot of the above is that the application for injunction is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19th DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE