



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELCA. CASE NO. 34 OF 2020**

**JOHN ONDU.....APPELLANT**

**VERSUS**

**JAMES ZOLLO MOGAKA.....RESPONDENT**

***(Being an appeal from the decision and ruling of Honorable R.K. Ondieki***

***(SPM) delivered on 28/8/2020 in Chief Magistrate Court ELC CASE NO. 18 OF 2020)***

**RULING**

John Ondu, (hereinafter referred to as the Appellant) has come to this court vide a memorandum of Appeal, accompanied with an application for stay of execution pending appeal dated 8/9/2020. In the application, the appellant seeks orders that the Honourable Court be pleased to issue an order of stay pending appeal against the ruling of Honourable R.K. ONDIEKI (SPM) delivered on 28/8/2020 in Chief Magistrate Court ELC CASE NO. 18 FO 2020. Costs of this application be provided for. The application is premised on grounds that the respondent has been granted injunction orders against the applicant. The applicant has been aggrieved by the ruling of Honourable R.K. ONDIEKI (SPM) delivered on 28/8/2020 in Chief Magistrate Court ELC CASE NO. 18 OF 2020 which he has appealed. The applicant states that he has brought this application at the earliest opportune time. He lamented that If orders for stay are not granted, the applicant is likely to suffer irreparable loss and damage and the intended appeal by the appellant shall be rendered nugatory. The intended appeal by the applicant has merit, arguable issues and a high chance of success. It is the interest of justice that the prayers sought herein are granted

In the supporting affidavit, the appellant states that he is aggrieved by the ruling of Honourable R.K. Ondieki (SPM) delivered on 28/8/2020 in Chief Magistrate Court Environment Land Case no. 18 OF 2020. That vide the said ruling, orders of injunction were issued against the applicant. That he is inclined to file an appeal to the High Court against the said ruling. That he has a house in the said parcel of land, he has planted trees, and built a toilet on the said parcel and thus cannot be deprived access to his own home. If stay is not granted, the appellant stands to suffer irreparable loss and damage. Failure to grant him stay will render the appeal nugatory. That no prejudice would be occasioned to the Respondent if this application is allowed. The application has been presented within reasonable time and without undue delay. It is in the interest of justice and fairness that this application be allowed.

The appellant filed a supplementary affidavit stating that he has been in occupation of the land since 1979 and that the respondent is not in possession of the suit land. The respondent has annexed a photograph of his home on the suit land. He has also annexed photograph of trees growing on the land. He has annexed photographs of a gate.

The respondent filed a replying affidavit stating that he legally and procedurally obtained Title Kisumu/Ojola/1189 on 15<sup>th</sup> of January 2018, he was registered as the owner and issued with Title Number Kisumu/Ojola/1189 which he holds todate. That by way of a ruling delivered on 28<sup>th</sup> of August 2020, the Honourable court found merit in his application for an injunction and granted orders that the appellant herein by himself his servant and/or agents or otherwise be restrained by way of injunction from entering, remaining on and trespassing by way of erecting structures or in any manner undertaking any activity on all that parcel of land known as Kisumu/Ojola/1189 manning (0.27) ha which is registered in the name of the respondent herein pending the hearing and determination of the application and that the appellant herein by himself, his servant and or agent or otherwise be restrained by way of injunction from entering or remaining on and or trespassing by way or entering any structures or in any manner undertaking any activity on all that parcel of land known as Kisumu/Ojola/1189 manning (0.27) ha which is registered in the name of the respondent herein pending the hearing and determination of the application. The OCS Maseno Police station and/or the Sub-county police Commander were directed to ensure that the appellant herein abides and complies with the honorable court orders and peace and order prevail.

The respondent states that the assertions by the appellant are untrue and devoid of merit as when he purchased the property in 2016 there was no one on the land. The appellant is a trespasser as he has not produced any documents to support his assertions of ownership and when the applicant purchased the property in 2016 the land was bare and there was no one living on it.

The structures on the photos attached as JO-1 were built recently and the appellant has not been in occupation of the land as claimed since

1979. There is no evidence of the same and that should be disregarded. The appellant has not demonstrated that he is deserving of the orders sought of stay of execution. There is no leave sought to file the Appeal and the Application and the Appeal and Application are therefore incompetent.

According to the respondent, the appellant has not met the threshold provided by law to warrant the granting of the orders for stay of execution and that the appellant has failed to demonstrate substantial loss and is not deserving of the orders of stay of execution. The allegations of fraud are denied and it is the appellant who is illegally in occupation of the Respondent's land without any colour of right and he prays that the court be pleased to dismiss Notice of Motion Application dated 8<sup>th</sup> September 2020 and allow the matter to proceed for hearing on its merit.

**This application is brought under Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010** that 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, the ruling of the trial court was delivered on 28<sup>th</sup> August 2020 whilst the Memorandum of Appeal was filed about ten days later on 8<sup>th</sup> of September 2020. To that end, the Appellant duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the present application. 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 pronounced 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.”***

The determination of whether the Appellant has a prima facie case with chances of success in the present application calls for a consideration of the prospects of success of the pending appeal since the ultimate objective is to safeguard the rights of the Appellant in the appeal by maintaining the status quo, if need be. I have considered the submissions on record and do find that the appellant has demonstrated that he has a home on the parcel of land as shown by the annexures depicting the houses and a gate and therefore he has a prima-facie case with a likelihood of success. Moreover, that he has been denied entry in the said home by virtue of the order of the lower court that restrained him from entering or remaining on the land.

The appellant has also demonstrated substantial loss if the stay is not granted because he can’t enter the home if the orders are enforced and that technically, the orders granted by the lower court amounted to an eviction. On sufficient security, this court finds this to be a peculiar case as the land in dispute is occupied by the appellant and yet there is an injunction against him from entering the home and therefore the land in dispute can be treated as security. The upshot of the above is that the application is allowed and I do grant an order of stay of execution of the orders of the court made by Honourable R.K. ONDIEKI (SPM) on 28<sup>th</sup> August 2020 in Chief Magistrate Court ELC CASE NO. 18 of 2020, pending appeal. For avoidance of doubt, the proceeding in the lower court are not stayed but the appellant is restrained from undertaking any improvements on the suit property and from cutting trees until the determination of appeal. The costs be in the appeal. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> 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 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**