



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 670 OF 2015

IN THE MATTER OF ORDER 37 RULE (1) (2) & (3) OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF; SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF CERTIFICATE OF TITLE NUMBER 209/2378 PUMWANI, NAIROBI REGISTERED UNDER THE REGISTRATION OF TITLES ACT, CAP 281 (NOW REPEALED)

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED TITLE OVER PART OF THE SAID LAND MEASURING 100 FT BY 100FT BY ADVERSE POSSESSION (IN WHICH LAND THEY PUT UP AN 8 ROOMED HOUSE ABOUT 80 YEARS AGO)

BETWEEN

HASSAN SWALEH MOHSIN.....1ST PLAINTIFF/APPLICANT

SAID SWALEH MOHSIN.....2ND PLAINTIFF/APPLICANT

GHALIB SWALEH MOHSIN.....3RD PLAINTIFF/APPLICANT

-VERSUS-

ABDUL KARURI.....1ST DEFENDANT/RESPONDENT

ABDALLAH IDDI2ND DEFENDANT/RESPONDENT

ISSA MOHAMED KILUME (Mosque committee by virtue of being its officials)

(sued on their individual capacities).....3RD DEFENDANT/RESPONDENT

PUMWANI RIYADHA MOSQUE COMMITTEE.....4TH DEFENDANT

RULING

INTRODUCTION

1. Vide Application dated the 15th of November 2021, the Plaintiffs/Applicants have sought for the following Reliefs:

i(spent).

ii. *The Honorable Court be pleased to grant an order of Injunction for the Maintenance of status quo in respect to 100ft by 100ft portion of land where the Plaintiffs/applicants 8-roomed house was initially erected within L.R.NO.209/2378, Pumwani, Nairobi and/or the Defendants/Respondents be restrained from trespassing, selling, transferring, fencing, building, constructing or dealing with the same, in any other way, whatsoever pending the hearing and determination of this Application.*

iii. *The Honorable Court be pleased to grant an order of Injunction for the Maintenance of Status quo in respect to 100ft by 100ft portion of land where the Plaintiffs/Applicants 8-roomed house was initially erected within L.R.NO.209/2378, Pumwani, Nairobi and/or the Defendants/Respondents be restrained from trespassing, selling, transferring, fencing, building, constructing or dealing with the same, in any other way, whatsoever pending the hearing and determination of this Appeal.*

iv. *The Defendants/Respondents be ordered to pay for costs of this Application.*

2. The subject Application is based and/or grounded on the grounds enumerated at the foot of the Application and same is similarly Supported by an Affidavit sworn by, Ghalib Swalleh Mohsin, who is the 3rd Plaintiff herein and to which, the third Plaintiff/Applicant has annexed a copy of the Notice Appeal.

3. On the other hand, the Third Plaintiff/Applicant has also filed a Further Affidavit, sworn on the 6th of December, 2021, and to which same has annexed one annexure, namely, the Proposed Memorandum of Appeal to the Court Of Appeal.

4. The Defendants/Respondents herein, did not participate during the plenary hearing and neither did same file any written submissions, in opposition to the Plaintiffs claim.

5. Be that as it may, this Court proceeded to and rendered a Judgment, which was delivered on the 28th of October 2021, whereby this Court found and held that the Plaintiffs' had not proved their case for Adverse possession. Consequently, the Court proceeded to and Dismissed the Plaintiffs case, albeit, with no Orders as to costs.

6. Following the Dismissal of the Plaintiffs' case, it is evident that the Plaintiffs' herein, felt aggrieved and/or dissatisfied and therefore same filed a Notice of Appeal to the Court Of Appeal. For clarity the Notice of Appeal is dated the 29th of October 2021 and same was similarly, lodged on even Date.

7. Premised on the Notice of Appeal, the Plaintiffs herein, have now approached this Court with an Application for the Grant of Orders of Temporary Injunction, pending the hearing and determination of the intended Appeal to the Court Of Appeal.

DEPOSITIONS BY THE PARTIES

DEPOSITION BY AND/OR ON BEHALF OF THE PLAINTIFFS

8. The 3rd Plaintiff/Applicant has sworn the Supporting Affidavit whereby same has stated as hereunder;

9. The rest of the Plaintiffs and the 3rd Plaintiff filed and/or lodged the subject claim pertaining to and/or concerning the portion of the suit property measuring 100ft by 100ft, wherein the Plaintiffs had (sic) constructed an 8-roomed house.

10. It was the deponent's further averment that the Plaintiffs herein had been in occupation of the designated portion of the suit property, ever since the year 1955 and that same occupied the property while paying Rents to the Defendants.

11. Nevertheless, the Deponent has further averred that on or about 1982, same stopped paying rents to and/or in favor of the Defendants and in any event, the Defendants also stopped demanding for payment of Rents.

12. The Deponent further averred that on or about the year 2015, fire broke out in Gikomba market and same spread to the Plaintiffs' house, whereupon the Plaintiffs' house, namely, the 8 Roomed House, was burnt down and as a result of the fire, the Plaintiffs were forced to look for alternative accommodation for themselves and family.

13. It was further averred that same also made necessary efforts to repair the destroyed houses, but the Defendants herein proceeded to and demolished the remnants of the houses. Besides, the Deponent has averred that the Defendants further stole and/or took away the Building materials which were at the *Locus in quo*.

14. On the other hand, the Deponent has further averred that the Defendants herein have also commenced to fence the portion of land wherein the 8-roomed house was burnt down and that same are now keen to commence putting up a new structure and/ or Building, with a view to letting same to Third parties.

15. It is the Deponents further averment, that as a result of the actions by and/or at the instance of the Defendants, same were constrained to and indeed filed the subject suit. However, the Deponent affirms that the suit has since been dismissed.

16. It is the Deponent's further averment that upon the dismissal of the suit, same have proceeded to and indeed filed a Notice of Appeal.

17. On the other hand, the Deponent has further averred that as a result of the Dismissal of the suit, the Defendants herein, are now exposed to deal with the suit property, in any manner that same deem fit. In this regard, the Deponent has averred that the sale, Disposal and/or

alienation of the suit property, will thus affect the substratum of the Appeal.

18. Owing to the foregoing, the Deponent has therefore implored the Court to grant the Orders of Temporary Injunction sought at the foot of the subject Application.

19. Other than the foregoing, the Deponent has also contended that the intended appeal to the Court Of Appeal, raises Substantial issues and therefore the Appeal has overwhelming chances of success. In this regard, the Deponent has attached a copy of the Memorandum of Appeal.

THE RESPONDENTS' CASE

20. The Respondents herein did not file any Response to the subject Application, either by way of a Replying Affidavit or Grounds of Opposition.

21. In the premises, it is evident that the subject Application is factually not opposed.

SUBMISSIONS

22. The Subject Application came up for hearing on the 6th of December 2021, when the Advocate for the Plaintiffs' argued the Application vide Oral Submissions and impressed upon the Court to grant the Orders sought thereunder.

23. It was the submission of the Advocate for the Plaintiffs' that even though the Court had Dismissed the suit for Adverse Possession and Permanent injunction, the Court was still seized of jurisdiction to entertain and grant the Orders sought at the foot of the subject Application.

24. It was the Advocates' further submission that the Grant of the Order sought, would similarly, preserve the substratum of the Appeal. In this regard, Counsel for the Plaintiffs contended that it is not only appropriate, but just and expedient to allow the Application.

25. Suffice it to say, that Counsel for the Plaintiffs quoted and relied on various Decisions as hereunder:

i. MADHUPAPER INTERNATIONAL LIMITED VERSUS KERR AND ANOTHER [1985] Eklr.

ii. EUSTACE KAGAU KANGERWE VERSUS WIYATHI EMBU SERVICES STATION (K) LIMITED AND ANOTHER [1996]eKLR.

iii. KIBIWOTT ARAP TARUS VERSUS JOHN KIPKEMBOI RONO AND TWO OTHERS [2021]eKLR.

26. Finally, the Advocate for the Plaintiff contended that unless the subject Orders are granted, the Appeal before the Court Of Appeal would be negated and/or otherwise rendered nugatory.

ISSUES FOR DETERMINATION

27. Having reviewed the Application filed by the Plaintiffs, the Supporting Affidavit and the Further Supporting Affidavit thereto and having listened to the oral submissions made by the Plaintiffs' Advocates, as well as having perused the Case Law relied on by the Plaintiffs, I come to the conclusion that the following issues are germane for determination;

i. Whether this Honorable Court is seized of jurisdiction to grant the Orders of injunction sought after dismissing the Plaintiffs case for inter alia, Permanent injunction.

ii. If the answer to (i) above, is in the affirmative, then what conditions must be established and/or fulfilled.

iii. Whether the Plaintiffs herein have fulfilled the said conditions.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

Whether this Honorable Court is seized of Jurisdiction to grant the Orders of Injunction sought after dismissing the Plaintiffs case for inter alia, Permanent injunction.

28. The Plaintiffs herein had filed and lodged before the Court a claim for Declaration of Adverse Possession and also for an Order of Permanent Injunction, to restrain the Defendants, from dealing with, alienating and/or disposing of the designated portion of **LR.NO.209/2378**, situated within the city of Nairobi.

29. Following the filing of the claim by and/or at the instance of the Plaintiffs, the Defendants herein dully entered Appearance and thereafter filed various Replying Affidavits.

30. Subsequently, the subject suit was listed for hearing and same was indeed heard and disposed of by way of Judgment delivered on the

28th of October 2021, whereby the Court dismissed the Plaintiffs' suit in its entirety.

31. Having dismissed the Plaintiffs suit, the Plaintiffs herein proceeded to and filed a Notice of Appeal, whereby same expressed their intention to progress the dispute to the Honourable Court Of Appeal for determination. For clarity, the filing of the Notice of Appeal and the expression of the intention to Appeal, are well within the Plaintiffs' Constitutional Rights. ***See Article 48 of the Constitution, 2010.***

32. Be that as it may, having filed the Notice of Appeal, the Plaintiffs herein have thus reverted to this Court Vide the subject Application and same are now seeking for an order of Temporary Injunction pending the hearing and determination of the Appeal before the Honourable Court of Appeal.

33. In view of the foregoing, the critical question to be addressed and/or answered; is whether this Court is seized of Jurisdiction to grant such an Order, shortly after Dismissal of the substantive Suit, where there was a claim for, inter alia, Permanent Injunction.

34. To answer the foregoing question, It is imperative to take cognizance of the provisions of **Order 42 Rule 6(6) of the Civil Procedure Rules** which provides as hereunder:

“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 a subordinate court or tribunal has been complied with.”

35. From the foregoing provisions of the law, it is evident and/or apparent that this Honorable court has jurisdiction to grant an order of Injunction, pending the hearing and determination of an Intended Appeal or better still, an Appeal to the Honorable Court Of Appeal.

36. Suffice it to say, that the provisions of **Order 42 rule 6 of Civil Procedures Rules, 2010**, were a direct consequence of the decision of the Court Of Appeal in the case of **Eustace Kagau Kangerwe Versus Wiyathi Embu Services Station (K) Limited & Another [1996]eKLR** where the Court Of Appeal held as hereunder;

“ The Madhu paper International case decided (inter alia) that the High Court had power to grant a temporary injunction after dismissing an application or suit for injunction pending appeal to this court. The learned judge correctly directed herself and said:

"To my mind the principle does not confer jurisdiction as such to the High Court in its appellate jurisdiction."

Having properly held that she had no jurisdiction to grant such orders as sought in the appeal the learned judge proceeded to apply the principles which this court applies in granting or not granting a stay or an injunction under the court's jurisdiction conferred by rule 5(2) (b) of the Rules of the Court. The learned judge did so by applying the principles enunciated by this court in the case of Stanley Munga Githunguri vs. Jimba Credit Corporation Civil Appeal No. 161 of 1988, unreported, that is to say, that the appeal should not be frivolous and that if successful, that success would not be rendered nugatory.

The learned judge, after referring to the Githunguri case said:

"Considering the peculiar circumstances of this case and which I have gone into in a certain amount of details, I am of the view that the subject matter ought to be preserved pending the determination of the appeal....."

With respect the learned judge misdirected herself when she applied principles akin to those applied by this court under Rule 5(2)(b) of the rules of this court to the matter before her. In our view when she concluded that the superior court had no power to grant an injunction in its appellate jurisdiction she should have stopped there and dismissed the application.

The orders the learned judge made amounted to an injunction and not stay of execution and the learned judge was clearly wrong in making such orders.

Mr. Kamau Kuria for the respondent valiantly supported the ruling of the learned judge. After conceding that the word 'injunction' does not appear in Order 41 rule 4 of the Civil Procedure Rules, Mr. Kuria argued that in view of the acceptance in Kenya of the ratio decidendi of Erinford Properties case there was no distinction between 'stay' and 'injunction', and that therefore the learned judge had jurisdiction to make the orders she did make. Mr. Kuria argued that the acceptance of Erinford Properties principle in Madhu paper International case amounted to an over-ruling of the decision in the Western College case.

*It is correct to say that the holding in Western College case insofar as it relates to the question of the High Court having no power to issue a temporary injunction after it has given judgment in a suit stands overruled in Madhu paper International case **but the principle that the High Court has no power to issue an injunction in its appellate jurisdiction still stand good. Order 41 would have to be amended if the High Court was to have such powers.***

37. At any rate, the scope of the jurisdiction of this court to entertain and/or deal with an Application for the grant of an Injunction, after dismissing a claim for Permanent Injunction, was underscored and well delineated in the case of **Madhu paper International limited versus Kerr[1985]eKLR** where the Honourable Court stated as hereunder;

“ It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have

and exercise theirs”

38. Based on the foregoing legal position, I find and hold that this Honorable Court is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject Application or such other Application of a like nature.

ISSUE NUMBER TWO

If the answer to (i) above, is in the affirmative, then what conditions must be established and/or fulfilled.

39. Having found and held that this Court is seized of Jurisdiction to entertain and/or adjudicate upon the subject Application, the next issue that arises and thus begs to be addressed is; whether the Grant of such an Order is automatic or whether there are certain legal conditions to be satisfied, established and/ or proved beforehand.

40. Though the provisions of **Order 42 Rule 6(6) of the Civil Procedure Rules, 2010**, grants Jurisdiction and mandate to this Honorable Court to grant and/or allow an order for injunction, pending hearing and determination of an Appeal, however, no pre-requisite conditions have been enumerated and/or provided for.

41. On the face of it, it thus looks like the Grant of such an order accrues and/or arises automatically, provided that a Notice of Appeal or better still, an Appeal has since been lodged.

42. On the other hand, though the decision in the case of **Madhu paper International Limited [1985]eKLR** delineated and/or underscored the fact that this Court has Jurisdiction to deal with an Application for Injunction after dismissing an Application or a suit for Injunction, however, the Court did not proceed to define the circumstances and/or conditions, if any, that must be fulfilled and/or established, by the Claimant.

43. Be that as it may, the same Court in **Madhu paper International Limited(Supra)** had occasion to state and observe as hereunder;

“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”

44. My reading of the foregoing holding by the Court Of Appeal, drives me to the conclusion that the issuance of an Order of Temporary Injunction, pending the hearing of an intended Appeal or better still, Appeal to the Court Of Appeal, is therefore not automatic.

45. Put another way, the Grant of an Order for Temporary Injunction pending the hearing of an intended Appeal or an Appeal, to the Court of Appeal, does not issue as a matter of Right.

46. Suffice it to say, that the Grant of such an Order is therefore left to the discretion of the concerned Court, to be exercised in a judicial manner, depending on various circumstances, inter alia, the chances of success of the Appeal, disclosure of a prima facie case, existence of sufficient cause and apprehension of Irreparable Loss. For coherence, I do not seek to exhaust the circumstances, which need to be established.

47. As pertains to the subject matter, it is not lost on the Court that the Plaintiffs themselves conceded both in the Affidavit Evidence, as well as the Oral evidence tendered before this Court, that the suit premises, wherein same were residing and/or living in and which were the subjects of the claim for Adverse Possession, were destroyed and/or burnt down by fire, which rendered same inhabitable.

48. On the other hand, the Plaintiffs similarly, informed the Court by way of Affidavit Evidence and which was repeated vide oral evidence in Court, that upon the burning down of the suit houses, as a result of fire, same vacated and/or moved out of the suit property. For clarity, the 3rd Plaintiff who testified before the Court, pointed out that none of them was residing in the suit premises as at the time of filing of the subject suit.

49. Notwithstanding the foregoing, the 3rd Plaintiff similarly testified that after the fire, which burnt down the suit premises in 2015, the Defendants moved in and demolished the remnants of the houses that remained after the fire and took away (*read stole*), the Debris and Boulders, that remained at the *Locus in quo*.

50. Consequently, and in the Plaintiffs’ own words, same had been forced out of the suit premises and by extension, the Defendants had moved in and asserted their Rights to and in respect of the Suit Property.

51. In the premises, can it be said that the Plaintiffs herein have espoused a sufficient cause and/or disclosed a Prima facie case, that should attract the grant of the Orders of temporary injunction, pending the hearing and determination of the Intended Appeal to the Court Of Appeal?

52. In my humble view, the answer to the question herein, is the subject of the third issue for determination and I must therefore defer the deliberation thereto, to await the discourse, while dealing with the third issue.

53. Nevertheless, I wind up the Second issue by stating that an Application for Grant of an Order of Temporary injunction, pending the hearing and determination of an Appeal, is discretionary in nature and therefore an Applicant, must establish and/or comply with certain pre-requisite conditions, before same can partake of such an Order.

ISSUE NUMBER THREE

Whether the Plaintiffs herein have fulfilled the said conditions

54. In applying for the Grant of Orders of Temporary Injunction, pending the hearing and determination of the Intended Appeal, the Plaintiffs herein, are thus aware that same cannot just walk into Court and obtain such an Order, without meeting certain legal conditions.

55. Nevertheless, the Plaintiff herein filed the subject Application and same did not allude to and/or espouse any tenable ground(s) upon which the Orders for Temporary injunction was being sought.

56. Suffice it to say, that it was still incumbent upon the Plaintiffs herein to marry the provisions of **Order 42 Rule 6(6) of the Civil Procedure Rules 2010** and the provisions of **Order 40 Rule 1 of the Civil Procedure Rules 2010** and thereby, establish, inter alia, sufficient cause and/or basis, including proof that indeed same have a prima facie Appeal.

57. It is imperative to note that the Honorable Court Of Appeal in the case of **Madhu paper International Limited (supra)**, indicated and underscored that such an order, cannot issue where the intended Appeal, *is ex Facie, frivolous and/ or vexatious*.

58. On the other hand, the Plaintiffs herein have also sought for an order of Temporary Injunction to restrain the Defendants herein, from inter alia, trespassing, fencing, building, constructing and/or dealing with the suit property, in any other manner whatsoever, pending the hearing and determination of the Appeal.

59. Suffice it to say, that the suit property belongs to and is registered in the name of the Defendants. Consequently, the question which thus arises, is whether the owner of the suit property can indeed trespass on own property?

60. Nevertheless, the other aspect to the Application by the Plaintiffs, which also merits to be addressed is whether the registered owner of the suit property can be enjoined or be restrained, by an Order of injunction, to prohibit same from developing, constructing on and/or otherwise fencing own property, and if so, whether the Plaintiffs, have laid a basis for such an Order.

61. In my humble view, whereas the registered owner can be restrained from carrying out and/or undertaking certain activities on own property, however, before such an Order can issue it behooves the claimant to place before the Court special, peculiar and/or exceptional circumstances, underlining such a request.

62. In support of the foregoing pronouncement, I can do no better than to restate the observation of the Court of Appeal in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Honorable Court of Appeal stated as hereunder;

“It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1st respondent’s 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US \$ 1,917,333 alleged advanced to the 2nd and 3rd respondents, and US \$ 14 million allegedly used in the management and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial.”

63. In short, though the Plaintiffs are seeking to restrain the Defendants from constructing and or developing the suit property, which is undeniably theirs (Defendants), same have not endeavored to avail any credible basis to warrant such an order.

FINAL DISPOSITION

64. In conclusion, though the Plaintiffs’ Application was not opposed, but the fact that there was no such opposition, does not relieve the Plaintiffs’ herein from meeting and/or establishing the requisite conditions to warrant the Grant of the Orders of Temporary Injunction sought.

65. At any rate, it must be remembered that the Burden of proving and/or establishing the peculiar circumstances that underlines the subject matter, that is, grant of an Application for Temporary Injunction, remained on the shoulders of the Plaintiffs, even if the Defendants did not file any Opposition.

66. In the premises, the Plaintiffs Application dated the **15th of November 2021**, is Devoid of Merit. Consequently, same be and is hereby **Dismissed**.

67. There shall be no Orders as to costs.

68. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

IN THE PRESENCE OF:

June Nafula - Court Assistant.

Mr. Sumba Advocate for the Plaintiffs

N/A for the Defendants.