



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN SIAYA

ENVIRONMENT AND LAND APPEAL CASE NUMBER 1 OF 2021

GLADYS ONG'UDI OKOTH.....APPELLANT

VERSUS

RICHARD OUMA ODIE.....RESPONDENT

(Being an application for temporary injunction pending appeal from the judgement of HON. J.P. Nandi -P.M delivered on 2nd July 2021 in Bondo ELC NO.22 of 2018)

RULING

Introduction

1. By a plaint dated 30/1/2012, the appellant sought orders of eviction against the respondent and for her to be declared the exclusive possessor and occupier of UYOMA/KATWENGA/1381 and UYOMA/KATWENGA/3420 (**the suit properties**). The respondent filed a defence dated 28/02/2012 in which he denied the averments in the plaint and contended that the appellant had fraudulently registered the suit property in her name. Upon hearing the parties, the court by its judgment dated 2/07/2021 dismissed the appellant's suit and ordered each party to bear their own costs.

2. Aggrieved and dissatisfied by the judgement of the court, the appellant filed a memorandum of appeal dated 29/07/2021 and a motion dated 5/08/2021. The motion is the subject of this ruling.

Appellant's case

3. The motion seeks the following verbatim reliefs against the respondent:

a) Spent

b) That a temporary injunction do issue to restrain the respondent, his respective agents, servants, employees, assigns and/or personal representatives from alienating, taking possession, transferring, selling, disposing of either by private treaty or public auction and/or interfering with the applicant's/appellants ownership, possession, use and/or entitlement of parcel number UYOMA/KATWENGA/3251 pending the hearing and determination of this application, suit, further court orders and/or directions.

c) That the costs of this application be in the cause.

4. The motion is grounded on the following grounds: (i) that the appellant is the registered owner of the suit property, (ii) that the appellant has absolute and exclusive rights of use, possession and occupation of the suit property as enshrined in **Article 40** of the **Constitution**, (iii) that the respondent has entered into the appellant's land and has interfered with the appellant's exclusive right of peaceful stay, use and ownership of the suit property, (iv) the respondent has alienated a portion of the appellant's land beyond the portion he had unlawfully occupied previously and, (v) that the appellant shall suffer irreparable loss and damage unless the restraining orders are issued.

Respondent's case

5. The respondent has neither filed a response to the motion nor filed written submissions and in essence the motion is unopposed however, this court is called upon to determine the motion on its own merits.

The Appellant's submissions

6. The appellant's submissions are hinged on the fact that she is the registered owner of the suit property and avers that she has absolute and exclusive rights of use, possession and occupation of the suit property to the exclusion of all others.

7. The appellant contends that in accordance with the principles governing grant of interlocutory injunction, she has a prima facie case and that she will suffer untold loss and damage unless the respondent is restrained.

Analysis and determination

8. Having considered the motion, supporting affidavit, annexures and submissions, this court is of the considered view that the only issue falling for determination is whether the motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

9. This court's jurisdiction to grant a temporary injunction pending hearing and determination of an appeal lies with **Order 42 Rule 6 (6) of the Civil Procedure Rules**. It grants the court with discretionary powers to grant orders on such terms it deems fit so long as the procedure for filing an appeal from a subordinate court has been complied with. It provides thus: -

“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.”

10. **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.”

11. In the instant appeal, the judgement of the trial court was delivered on 2/07/2021 whilst the memorandum of appeal was filed on 30/07/2021 which was within the requisite period. Consequently, the appellant has duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the instant motion.

12. The cases of **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR**, **Giella versus Cassman Brown [1973] EA 358** and **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** have long settled the principles that have guided courts in determining whether or not an applicant has met the threshold to warrant the grant of an injunction pending appeal. The principles are set out as follows: -

- a. An order of injunction pending appeal is 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 applicant must present a prima facie case with probability of success;
- e. The applicant must demonstrate that she will suffer irreparable injury if a temporary injunction is not granted; and
- f. The applicant must show that the balance of convenience tilts in her favour.

13. The essence of an injunction pending appeal is to maintain the *status quo*. The question that then arises is has the appellant met the threshold? This court has had a chance to look at the judgement of the lower court and memorandum of appeal and there is a discrepancy on the suit property mentioned in this motion and those that are mentioned in the memorandum of appeal. The substantive prayer on the face of the motion is on a property known as **UYOMA/KATWENGA/3251** while the suit properties are **UYOMA/KATWENGA/1381** and **UYOMA/KATWENGA/3420**. A closer scrutiny of the judgement demonstrates that **UYOMA/KATWENGA/3251** was long subdivided and **UYOMA/KATWENGA/3420** emanated from it. This court is constrained from granting orders in a property that was neither the substratum of the trial Court nor the subject of this appeal and shall do more than to down its tools.

14. It is trite law costs follow the event. The respondent did not file any response to the instant motion and it is the considered view of this court that they are not entitled to costs.

15. The appellant's motion dated 2/09/2021 is not merited and ultimately, I make the following disposal orders: -

a) The application dated 2/09/2021 is hereby dismissed with no orders as to costs.

b) Matter to mentioned for directions on 26/01/2022

It is so ordered.

RULING DELIVERED IN OPEN COURT.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF DECEMBER 2021.

IN THE PRESENCE OF

MR. JAOKO FOR THE APPELLANT

N/A FOR THE RESPONDENT

COURT ASSISTANT: SARAH OORO

HON. A. Y. KOROSS

JUDGE

6/12/2021