



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA E013 OF 2020

GIDEON MUCHUI ARITHI.....APPELLANT

VERSUS

WILSON MUTAI.....RESPONDENT

RULING

1. Before this court are two applications one dated **10.12.2020** seeking for stay of execution of the orders made by the lower court on 3.12.2020 pending the hearing and determination of this appeal and another dated **7.6.2021** brought under **Order 40** seeking for temporary orders of injunction restraining the respondents from interfering with the suit land, removal and demolition of all developments on the land.
2. The applications are supported by affidavits sworn on **10.12.2020** and **7.6.2021** respectively. The grounds are that the respondent filed for temporary orders in the lower court and refusal for stay in the lower court, and hence there was likelihood of eviction from his land.
3. Regarding the 2nd application the grounds are the respondent is purporting to dispose of the suit land to third parties despite interim stay orders made on 15.12.2020 by this court is trespassing into the land and carrying out acts of destruction or acts of vandalism.
4. The respondent opposes the motion through a replying affidavit sworn on 8.3.2021 stating the suit land is a quarry, the appellant does not live there and hence the application is an abuse of the court process.
5. For an applicant to be granted stay of execution, he must demonstrate substantial loss, that there was no inordinate delay and that he is willing to offer security for due satisfaction of the decree should he lose the appeal.
6. The appeal before this court is on an interlocutory injunction granted by the trial court pending hearing of the suit. In the said ruling the court found the respondent had established a prima facie case on a balance of probability regarding **Parcel No. 1926 Mbwa I Adjudication Section** which he had bought from one **Clement M. Murongo Rukunga** and which was subsequently demarcated in his favour as per Sub-County Land Adjudication & Settlement Officer's, letter dated 9.8.2016 and a sale agreement dated 15.3.2006.
7. Upon service of summons the appellant instructed the firm of Mutunga Mwesigwa LLP Advocates who filed another application on 24.6.2020, together with a replying affidavit to the application dated 25.5.2020, and an application of the same date seeking for the setting aside the ex parte orders of injunction made on 3.6.2020 and stay of the proceedings and or dismissal of the suit dated 25.5.2020. The two applications were based on pendency of petition No. 16 of 2016 which had allegedly had stopped adjudication and issuance of new numbers in Mbwa Adjudication Section.
8. The respondent made a reply to the said application through replying affidavits and supplementary affidavit sworn on 28.9.2020. He avers that by the time the Court of Appeal orders were issued he had been allocated a parcel number and that the appellant was a witness in SRMCC 124/2007 before Tigania Law Courts where he had won over the same land.
9. The appellant relies on written submissions dated 13.4.2021, case law of **HGK –vs- SM [2020] eKLR, Ezekiel Mule Musembi –vs- H. Young Co. Ltd [2019] eKLR, Antoine Ndiaye –vs- African Virtual University [2015] eKLR, Tabro Transporters Ltd. –vs- Absalom Dova Lumbasi [2012] eKLR & Nesco Services Ltd. –vs- CM Construction [EA] Ltd. [2019] eKLR.**
10. It is trite law parties are bound by their pleadings. From the court record above, it is clear the appellant had not filed a defence in the lower court. Though a record of appeal has been filed herein, the lower court file before the court shows no evidence that any defence has been filed and served upon the respondent. The appellant was expected to assert his claim against that of the respondent through pleadings.
11. He has neither filed a defence nor a counterclaim to demonstrate how he acquired the suit land as opposed to the respondent. The

respondent before the trial court as indicated above produced copies of ownership documents and gave a root cause of how he acquired the land prior to the adjudication process. The trial court looked at all those details in establishing whether the application for temporary injunction was meritorious and dismissing the application by the appellant seeking to set aside the interim orders as well as the one for stay or dismissal of the respondent's suit.

12. The appellant did not have any defence at all to the respondent's case and at the moment, I have not seen any. Filing of other documents in a court file without specifically defending the suit as per the Civil Procedure Rules and the Act cannot in my considered view replace known pleadings.

13. Turning to the issue as to whether the application was filed without inordinate delay, this application was filed on 11.12.2020 which was 8 days after the ruling was delivered. By that time the respondent was still in occupation going by the plaint filed and which as I have found above is yet to be challenged through a defence.

14. So in essence, the order which the appellant got after his application was dismissed is a negative order. The lower court allowed the respondent's application for temporary injunction pending hearing and determination of the lower court suit.

15. The appellant has urged this court to issue temporary orders of injunction which in my view is in a nature of seeking eviction through the back door.

16. Given that the appellant's legitimate claim or stake in the suit land has not been defined, it is my finding that the 2nd application lacks merit and is hereby dismissed with costs.

17. As regards security for the due performance of the decree should the appeal fail, there is no demonstration in the application that the appellant is willing to offer security save the ones given for costs.

18. Seeking to have orders of stay in circumstances showing the respondent has a defined claim to the land under the Land Adjudications Act in my considered view would fly against **Sections 1A, 1B and Articles 40 & 159** of the **Constitution**.

19. The overriding objective is to do substantive justice to the parties and in the instant case, the orders granted by the lower court cannot be termed unreasonable given the material before the trial court.

20. The two applications are hereby dismissed with costs. The appellant shall file the record of appeal within 30 days from the date herein and the matter be listed for directions within 45 days.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

Mutungu for appellant

M.G. Kaume for defendant/respondent

Court assistant - Kananu

HON. C.K. NZILI

ELC JUDGE