



**REPUBLIC OF KENYA**

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

**ELC APPEAL CASE NO. 40 OF 2019**

**NORMAN MWANGI WAMBUGU**

**T/A KEJA INN BAR & RESTAURANT.....1<sup>ST</sup> APPELLANT**

**ANN WAMBOI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GROUP POWER COMPANY LTD.....RESPONDENT**

**RULING**

This ruling is in respect of an application by the appellant dated 4<sup>th</sup> November 2019 seeking for the following orders:

- a) **THAT** an injunction do issue against the respondent restraining it whether by itself, its servants and/or agents from evicting, denying access or interfering with the user and occupation by the appellants of the land parcel known as UASIN GISHU/KIMUMU SETTLEMENT SCHEME/ 7042 pending the hearing and determination of the appeal herein.
- b) **THAT** the costs of the application be provided for.

This matter was filed under certificate of urgency on 4<sup>th</sup> November 2019 when the Court ordered that the application be served for inter partes hearing. The same was served and parties agreed to canvass the application vide written submissions which were duly filed.

**Applicant's Submissions**

Counsel submitted that the court has jurisdiction to hear and determine the application as provided for under Order 42 rule 6 (6) of the Civil Procedure Rules, 2010 which states as follows;

**"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 a subordinate court or tribunal has been complied with.**

Counsel further submitted that the application is not res —judicata as submitted by the respondent that the initial application for interlocutory injunction had been dismissed by the lower court. That the court has jurisdiction to entertain an application for injunction. He also submitted that the applicant has demonstrated that the appeal will be rendered nugatory if the orders are not granted, Counsel cited the case of **Stanley Kangethe vs Ton Keter & 5 Others, [2013] eKLR**, in which it was held by the Court of Appeal that;

**"(vi) On whether the appeal is arguable it is sufficient if a single bona-fide ground of appeal is raised. (Damji Pragji Mandavia vs Sarah Lee Household & Body Care (K) Limited C.A. No. Nai. 345 of 2004).**

**(vii) An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court; one which is not frivolous (Joseph Gitahi Gachiu & Another vs Pioneer Holdings (A) Limited & 2 others C.A. No. 124 of 2008)."**

Counsel further urged the court to order that status quo be maintained in which the status quo is that the applicant is in occupation of the land based on the valuation reports. He relied on the case of **Suleiman v Amboseli Resort limited, (2004) eKLR** in which it was observed;

"In responding to prayers for interlocutory injunctive relief, the

court should always opt for the lower rather than the higher risk of injustice. "

Mr Mogambi also cited the case of Zainab Ayub Mohamed & Another v Rafiki Micro Finance Limited Eldoret HCCC. No. 67 of 2018—in which it was held that:

' I do find that in granting the stay in this matter would have a lower risk of injustice and I do grant the orders sought. "

Further in Kisumu Court of Appeal Civil Application no. 2 of 2017 — Moses Kibiego Yator v Eco Bank Kenya Limited & 2 Others, in which the Hon. Justices Kihara, Gatembu and Murgor; J.J.A; while granting an injunction pending the determination of the appeal observed;

**"We appreciate that an injunction is granted in cases in which monetary compensation does not afford an adequate remedy to an injured party. However, in this case it is highly likely that the applicant will be evicted from the suit property unless the order of injunction is granted. Eviction of the applicant and his family would render the substratum of the intended appeal nugatory. Moreover, taking into consideration that the applicant is still in possession of the suit property as conceded by the 3<sup>rd</sup>. respondent, the balance of convenience calls for the preservation of the status quo pending the determination of the intended appeal. "**

Counsel therefore urged the court to grant the application as prayed.

### **Respondents' Submissions**

Counsel filed submissions and stated that the issues for determination are whether the

Appellants' application is res judicata and whether the appellants' have met the required threshold required to grant stay of execution.

Counsel relied on Section 7 of the Civil Procedure Act of res judicata and submitted that the Appellants had made a similar application dated 19<sup>th</sup> June, 2019 in which the appellants had sought for similar prayers with the current application inter alia that:-

i) An interlocutory injunction do issue against the Defendant restraining it whether by itself, its servants and/or agents from evicting, denying access or interfering with the user and occupation by the Plaintiffs of the land parcel known as UASIN GISHU/KIMUMU SETTLEMENT SCHEME/7042 pending the hearing of this application in the first instance and thereafter pending the hearing and determination of the suit.

ii) The Defendant by itself, its servants and/or agents do remove the iron sheets placed around the land parcel known as UASIN GISHU/KIMUMU SETTLEMENT SCHEME/7042 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.

iii) The officer in charge of Kapsoya Police Station do assist in enforcing the order.

iv) That the costs of the application be sourced by the Defendant.

That the Chief Magistrate Hon. Charles Obulutsa on the 11<sup>th</sup> October, 2019 delivered his ruling whereby he dismissed that application dated 19<sup>th</sup> June, 2019 with costs.

Counsel cited the case of HENDERSON -VS- HENDERSON (1843 - 60) ALLER 378, where the court served thus;

*"Where a given matter becomes the subject of litigation and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances permit the same parties to open the same subject of litigation in respect a mater which might have been brought forward as part of the subject in context but which was not brought forward on/y because they have from negligence inadvertence even accident omitted pam of their case. The plea of resjudicata applies except in special case not only to points upon which the court was actually required by the rites to form an opinion and pronounce judgment, but to every point which proper/y longed to the subject of litigation and which the parties exercising reasonable 7igence might have brought forward at the time".*

Counsel therefore urged the court to find that the application is res judicata as the application had been heard by a competent court and was dismissed. It was Counsel's submission that the applicant has also not met the threshold for grant of stay of execution as no substantial loss has been demonstrated.

### **Analysis and Determination**

The issue for determination is whether this application is res judicata, The principle of res judicata is as provided for under section 7 of the Civil Procedure Act.

Section 7 provides s follows:

*7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

From the record it is clear that a similar application for injunction was filed in the lower court and the same was heard and determined on 19th June 2019 of which the application was dismissed.

There is no appeal against that ruling. The court rendered its decision and therefore this court cannot grant orders for injunction which had already been declined. If there was an appeal against that ruling then the court would have considered the application and preserved the substratum of the suit. This is not the case in this matter. Procedures must be followed for certainty and to avoid abuse of court process. I find that the application is resjudicata and is therefore dismissed with costs to the respondent.

**DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF JANUARY, 2020**

**M. A. ODENY**

**JUDGE**

**RULING** read in open court in the presence of Mr.Mogambi for Applicant and Mr.Kipkurui holding brief for Mr.Mathai for Respondent .

Mr. Yator – Court Clerk