



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC MISC. APPLICATION NO. 22 OF 2019

CHARLES MUTETHIA NGORE APPLICANT

VERSUS

JOSEPH NTONGAI M'ALABWA..... RESPONDENT

RULING

1. The applicant filed a notice of motion dated 10/5/2019 brought under section 79G of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 42 Rule 6 (1) and 6 (6) and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following orders:

a. Spent.

b. That pending the hearing and determination of this application, this honorable court be pleased to stay execution of the lower court's orders issued on 25/3/2019.

c. That pending the hearing and determination of the intended appeal this honorable court be pleased to stay execution of the lower court's orders issued on 25/3/2019.

d. That pending the hearing and determination of the appeal, this honorable court be pleased to issue an order of temporary injunction restraining the respondent, his servants and agents from entering, occupying, harvesting trees and other crops, tilling the land removing the fence or in any other way interfering with the applicant's occupation of parcel number KANGETA/KANGETA/5036.

e. That this honorable court be pleased to grant leave to the applicant to lodge his appeal out of time.

f. That the costs of this application be in the costs in the intended appeal.

2. The application was based on the grounds on the face of it and on the supporting affidavit of Charles Mutethia Ngoré who averred that he bought the suit land in 2018 from its previous owner John Michubu M'Nguthari. The respondent served him with an application dated 14/11/2018 seeking to restrain him from evicting him and interfering with the suit land pending the hearing and determination of the suit. The application was heard inter-parties and the court indicated that it would deliver its ruling on 28/2/2019. However, the ruling was not read on the said date and it was only on 29/4/2019 that he discovered that the same had been read on 25/3/2019. In the said ruling the lower court issued an injunctive order against him and it is on the strength of that ruling that he has lost his land to the respondent.

3. The application was opposed by the replying affidavit of Joseph Ntongai M'alabwa who indicated that on 8/9/1999 he purchased land parcel no. 5036 Kangeta Adjudication Section from John Michubu M'nguthari. At the time, the land was not registered. He was put in possession of the said property by the said John Michubu and has been using the land to date. On 20/2/2016 he moved the court in the Land and Environment case No. 242 of 2016 Meru and obtained orders restraining John Michubu from selling or transferring the suit land to a third party. The orders remained in force and it was on 19/8/2018 when he learnt that Michubu had transferred the suit land to the applicant. This resulted in his being arrested and committed to civil jail for six months or pay Ksh. 200,000 fine. The applicant herein is a neighbor and was aware all along that he was a purchaser of the land despite not having a title deed. The effect of granting the orders sought would be tantamount to evicting him from the suit land.

4. I have carefully perused through the application, affidavits, submissions and the record in its entirety and the issues to be determined are: ***Whether to issue a stay of the orders given on 25.3.2019, whether to grant leave to appeal out of time and whether to issue temporary orders of injunction.***

5. I will deal with all the issues simultaneously. **The injunctive orders granted by the court on 25. 3 2019 were to remain in force for a period of 4 months** unless extended by a further order of the court, which means the orders lapsed on 25.7.2019. There is no evidence to show that the orders were extended. What is there to stay? **NOTHING**. On the same breath, the proposed appeal is anchored on quick sand as the injunctive orders are not in place. In the case of **Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others [2015] eKLR**, the court had this to say on issue of extension of time to appeal.

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis”.

6. This is certainly not a deserving case as there is no basis in the first place to warrant an appeal. The applicant should pursue the route of having an expeditious trial.

7. The applicant prays that this court grants him an injunction pending the appeal. However, I have already pronounced myself on this issue. It is also not lost to this court that the applicant acquired his title to the suit land during the subsistence of an order in Meru ELC. NO. 242 of 2016 where the suit land was not to be alienated. On the face of it the applicants title was procured by violating a court order which means that it was acquired illegally, an issued which the trial magistrate analyzed in depth.

8. All in all, I find that the application is not merited, the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

M. Muriuki holding brief for Nkunja Kaberia for applicant

Nyamokeri for respondent

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE