



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC APPEAL NO.15 OF 2019

JOSHUA MWILU KIMEU.....APPELLANT/APPLICANT

VERSUS

**JULIAN NDUKU JOSEPH (Suing as the legal Representative of the
estate of MWILU LUMU NGOTHO- deceased) RESPONDENT**

R U L I N G

1. What is before the court is the Appellant's/Applicant's Notice of Motion application dated 20th June, 2019 and filed in court on 25th June, 2019 for orders: -

1) Spent.

2) Spent.

3) Pending final hearing and determination of the Appeal herein, order do issue staying execution, operation and effect of the ruling and order of the lower court dated 9/5/2019 AND a consequential order do issue staying and or suspending all or any further proceedings in the lower court Tawa E.L.C Suit No.54 of 2018.

4) Costs of the suit application be provided for.

2. The application is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of the Appellant/Applicant sworn at Machakos on 20th June, 2019 and 07th October, 2019 respectively.

3. The Respondent has opposed the application vide her replying affidavit sworn at Machakos on 22nd July, 2019 and filed in court on 23rd July, 2019.

4. The Appellant has deposed in his supporting affidavit that the learned Senior Resident Magistrate vide his ruling/order delivered on 09th May, 2019 in Tawa Civil Suit No.54 of 2018 condemned him unheard and before he was validly enjoined in the aforementioned suit, that being in possession of land parcel number Kiteta/Ngiluni/2108 he stands to suffer substantial and irreparable loss as a consequence of the learned Senior Resident Magistrate's aforementioned ruling.

5. On the other hand, the Respondent has deposed in her replying affidavit that she has read the Appellant's application and she has advisedly concluded that it is frivolous, vexatious, scandalous and an abuse of the court process, that the ruling delivered on 09th May, 2019 is legally sound.

6. Directions to dispose off the application by way of written submissions were issued on the 31st July, 2019 and pursuant to the said directions, the Appellant and the Respondent filed their submissions on 07th and 14th October, 2019 respectively.

7. The Counsel for the Appellant/Applicant submitted that all what the Applicant is asking for is preservation of rightful legal status quo on his possession as the bona fide purchaser for value as at 20th April, 2018, being in possession and subsequently lawfully and rightfully being registered as proprietor on due process. The Counsel went on to submit that the Respondent's replying affidavit is not responsive to the Appellant's/Applicant's application and has not addressed these matters and opts to conceal them.

8. The Counsel went on to submit that the power of the court to grant stay of execution or proceedings pending the appeal is discretionary and the Applicant needs only to show that his appeal is arguable and not frivolous and that if stay is not granted, the appeal if successful, shall be rendered nugatory. In support of his submissions, the Counsel cited the cases of **Indar Singh Gill Ltd vs. Njoroje Gichara in Nairobi HCCC No.2411 of 1990** and **Pithon Waweru Maina vs. Thuka Mugiria [1983] eKLR** and **Joseph Mbau Gitau vs. Joveth Ltd & Another [2013] eKLR**.

9. It was further submitted that the Appellant's/Applicant's title is unimpeachable as he acquired it from its first registered proprietor. The Counsel cited the case of **Chacha vs. Manini (2002) eKLR** where the Court stated thus: -

“ it is also not in dispute that during the Land Adjudication process in the year 1974, the land in question was processed into his name.

The defendant is therefore the registered owner by virtue of first registration; and under the provisions of section 143 of the Registered Land Act his rights cannot be defeated.

The section provides: -

143(1) (quotes)

That section expounds the sanctity of first registration of a title that the same cannot be vitiated even on the face of fraud.

That section and its efficacy has been given judicial interpretation and recognition by the court of appeal of Kenya in the case of

And quoting from the referred case on **Section 143(1)** aforesaid

“Quite clearly this section envisages that the title by way of a first registration is undefeasible even if obtained by fraud. This must be of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down.”

10. It was further submitted that the Respondent is totally non suited in respect of the subject title over which neither the deceased nor his estate held any demonstratable legal or other interests and that the confirmed grant does not empower the Respondent to claim any interest in the suitland. The Counsel added that the Respondent's interest is limited to the deceased's title named in the confirmed grant and no more. The Counsel went on to submit that the Respondent's allegations of possession at paragraph 11 of her replying affidavit is false as the land was always in possession of its then registered proprietor who sold and gave possession to the Appellant/Applicant. The Counsel submitted mere allegations of possession or use without title gives no right to claim and at its best is evidence of blatant trespass. The Counsel was of the view that it is clear that the Respondent in the lower court only appeals for sympathy from the court just because the property she desires was sold right before her eyes and wants to stop the legal and valid transactions under her belated suit but has no valid or lawful grounds for that claim. The Counsel went on to submit that a court of law cannot act out of sympathy for a party and in this instance, the Respondent must show entitlement to the property and injunction orders by demonstrating legal rights to the suit property which she has failed to do so. In support of his submissions, the Counsel cited the case of **Mwinyi Hamisi Ali vs. The Attorney General and Philemon Mwaisaka Wawaka in Mbomba Court of Appeal Civil Appeal No.125 of 1997 pages 5, 6 and 7**.

11. On the other hand, the Counsel for the Respondent submitted that the suit land was transferred and registered in the name of the Appellant/Applicant on 12th September, 2018 during the pendency and existence of valid court orders. The Counsel added that the trial court on balancing the interests of the Respondent who was already in occupation and possession and those of the Appellant/Applicant who was purporting to have purchased the land and attempting to enter into the said land and take possession by false, found in favour of the Respondent and issued orders of injunction against the Appellant to prevent a breach of peace as land is a very emotive issue.

12. It was further submitted that the title deed obtained by the Appellant is not a first registration, is not absolute as it was obtained through illegal transfer as there were court orders restraining the original owner from selling and transferring it. The Counsel pointed out that it is a cardinal principle of the law that any act done in breach of the law or court order is a nullity.

13. The Counsel went on to submit that the orders granted in the application dated 12th November, 2018 were threefold that is for Appellant to be enjoined as a party in the suit, for orders of injunction and for amendment of the plaint. That the Appellant has only appealed against the orders of injunction issued against him and not the orders enjoining him as a party or amendment of the plaint and as such, the appeal is selective, malicious and made to delay the fast conclusion of Tawa SPMCC No.54 of 2018.

14. The Respondent's Counsel further submitted that the Appellant has never set foot on the suit land since he purportedly purchased it and that for the injunction to be vacated, the Appellant must prove that they are causing undue hardship on his part or are incapable of being implemented. The Counsel went on to submit that staying of the orders of injunction granted by the Subordinate Court would not be appropriate at this interlocutory stage as it will amount to granting the Appellant permission to interfere with the suit land before the appeal is heard on merit. The Counsel was of the view that since in his memorandum of appeal the Appellant is seeking for the said court ruling delivered on 9th May, 2019 to be set aside, the said ruling cannot be stayed at this stage as it will render the appeal a mere academic exercise and hence a legal futility.

15. I have read the application together with the supporting and supplementary affidavit as well as the replying affidavit by the Respondent. I have also read the submissions filed by the Advocates for the parties on record. From the affidavit evidence, it seems that land parcel

number Kiteta/Ngiluni/2108 was registered on 06th May, 2002 in the name of Ngui Mbuu who is the 1st Defendant in Tawa SPMCC No.54 of 2018. The Respondent herein states that she only became aware of this fact when she went to transfer land parcel number Kiteta/Ngiluni/960 after obtaining letters of administration. She further claims that land parcel number Kiteta/Ngiluni/2108 is part of land parcel number Kiteta/Ngiluni/2108. As earlier on observed, the latter parcel of land was all along registered in the name of the 1st Defendant who together with the Appellant herein have claimed that they entered into a land sale agreement on 20th April, 2018. The Appellant further contends that he obtained consent from the relevant Land Control Board on 05th May, 2018 to transfer the parcel of land to him before the injunctive orders were issued against him.

16. As it were, there is contestation regarding possession of the suit land between the Appellant and the Respondent herein. This issue will have to be interrogated during hearing of the substantive suit. However, I am satisfied that the appeal raises triable issues which include whether or not the Appellant was condemned unheard before he was validly enjoined in the suit before the learned Senior Resident Magistrate. It is only fair that the Appellant be given a chance to prosecute it. It is worth noting that given the circumstances presented in the affidavit evidence before me, it is only fair that both the Appellant and the Respondent be barred from carrying out any further development, cultivation and/or disposing it pending the hearing and determination of the appeal herein. In the circumstances, therefore, I will grant prayer 3 and 4 of the application on condition that neither the Appellant nor the Respondent carries out further development, cultivation or disposes the suit land pending the hearing and determination of the appeal herein.

Signed, dated and delivered at Makeni via email this 29th day of April, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi

MBOGO C.G, JUDGE,

29/04/2020.