REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 8 OF 2018

JANE NJERI MURIITHI (Suing as the Administrator of the Estate of MURIITHI

NGARI MBARU Alias TITUS.....APPELLANT

VERSUS

PETER GITHINJI MUTHIGANI.....RESPONDENT

RULING

The application before me is the Notice of Motion dated 26th July 2019 brought under ***Order 1, Order 40 Rule 1, Order 45 Rule 1 and Order 42 Rule 1 CPR and Section 1A, 1B and 3A CPA.*** The Applicant is seeking the following orders:

(1) Spent.

(2) That there be a stay of execution of the judgment delivered on 5th July 2019 by the Honourable Court pending hearing and determination of intended appeal already filed.

(3) That the Appellant/Respondent be restrained by way of temporary injunction as against harassing, evicting and/or anyway disturbing the quiet possession of land parcel No. MWERUA/KANYOKORA/118 by the following:

(i) JAMES MUNENE NDUMBI

(ii) MIRIAM WAMBUI GITARI

(iii) BENSON MAINA KABAU

(iv) MARGARET WANJIKU (DCD)

(v) SIMON MUGO KINYUA

(vi) SUSAN WANJIRU MWANGI

(4) That the Honourable Court be pleased to enjoin the interested parties.

(5) That the Honourable Court be pleased to review the judgment/orders of 5th July 2019.

(6) That the Honourable Court be pleased to order a re-trial of the appeal.

(7) Costs of the application.

The application is premised on the affidavit of the Applicant sworn the same date and grounds shown on the face of the said application. That application is opposed with a replying affidavit sworn by the Respondent on 16th September 2019.

APPLICANT'S CASE

According to the applicant, the judgment of this Honourable Court which was delivered on 5th July 2019 go into conflict with the orders granted by Hon. Lady Justice Ong'udi in Embu HCC No. 35 of 2011 and later transferred and registered as ELC No. 188 of 2013 (Kerugoya). The applicant's contention is that the subject land parcel No. MWERUA/KANYOKORA/118 was long sub-divided and the intended

interested parties have since bought, taken possession and developed their portions of land. He stated that the interested parties were not subject to this proceedings thus they stand condemned unheard. He argues that the orders herein are in complete conflict with the orders granted in High Court Civil Case No. 188 of 2015 (Kerugoya). The applicant further stated that the respondent failed to make a full disclosure of these issues and that to-date, there remains a valid decree given on 12th November 2008 and which decree has remained unchallenged thus still conferring ownership to the initial owner and the interested parties. The applicant also stated that it is the respondent who enjoined the interested parties in ELC No. 188 of 2013 at Kerugoya. The applicant contends that there are pertinent issues that may cause an embarrassment to the justice system as the respondent seems to be on a fishing expedition.

RESPONDENT'S CASE

The respondent contends that no appeal has been preferred against the judgment of this Honourable Court and that this Court is now functus officio save for executing its judgment. The applicant further stated that the application before Court is a back door appeal and that there is no new ground or error apparent on the face of the record or sufficient reason to warrant a review. He stated that the interested parties as well as the applicant are aware and have always been aware of this case and this appeal. The respondent further stated that they had even sought to have ELC No. 188/2013 (Kerugoya) stayed on grounds that it was Res-judicata and the Court made a ruling on the issue. He stated that instead of applying to be enjoined in these proceedings, they went to sleep. The respondent contends that the issues raised in this application were raised in the submissions of the respondent and that this Court was aware of those facts even when making its judgment. The respondent argued that the interested parties have not shown that they were not aware of this case and even the respondent was a party to both this appeal and ELC No. 188/2013 (Kerugoya). He stated that the applicants obtained land through fraudulent and un-procedural transactions that were done by the respondent. He stated that the Court has held that the Tribunal that had given the respondent land had acted ultra vires. He stated that what followed is that the transactions that happened due to the Tribunal's decisions have no legal basis. The respondent further argued that the respondent was not able to pass good title to the interested parties as he had no proper title to the land of Muriithi Ngari. The respondent stated that they have no cause of action against him and that their remedy lies with pursuing a refund from the applicant. The respondent stated that the interested parties have not come to Court with clean hands as they conspired to frustrate this Court proceedings by sub-dividing the land and transferring the same during the pendency of this Appeal.

APPLICANT'S SUBMISSIONS

The applicant did not file his written submissions within the time frame given by the Court or at all.

RESPONDENT'S SUBMISSIONS

The counsel for the respondent M/S Ann Thungu & Co. Advocates filed their submissions and argued that there is no conflict between the judgment of Justice Ong'udi and this Court. She submitted that what had been placed before Justice Ong'udi was an application for temporary injunction and she dismissed the same and stated that she would not make any orders that may likely affect this Appeal. The learned counsel also submitted that Justice Ong'udi expressed her opinion that the parties in that file had not followed correct procedure in filing the suit and held that the plaintiff in that case had abused Court process and found they had not established a prima facie case and had failed to disclose about the pendency of this Appeal and also that there was conflict of interest on the part of their advocate. She submitted that the Court declined to grant them a temporary injunction and that there is nothing in the said ruling that conflicts with this Court's judgment. She cited the following authorities:

(1) TERESA CHEBICHII RUTO VS TALALEI KIPTENAI, MISC. CIVIL APPL. No. 28 of 2015 (ELDORET) (Unreported).

(2) KENYA INDUSTRIAL ESTATES LTD VS ANNE CHEPSIROR & 6 OTHERS, ELC No. 71 of 2013 (ELD) (UR).

ANALYSIS AND DECISIONS

I have considered the arguments by the counsels both in support and in opposition to the Notice of Motion dated 26th July 2019. I have also considered the affidavits of the parties and the submissions by their counsels. The applicant who was the respondent in this Appeal has sought numerous orders. First, the applicant is seeking a stay of execution of the judgment of this Court delivered on 5th July 2019 pending an intended appeal to the Court of Appeal. ***Order 42 Rule 6 (2) CPR*** provides as follows;

"No order for stay of execution shall be made under sub-rule (1) unless:-

(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the Court order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant".

The three main principles an applicant must satisfy the Court for the grant of stay pending appeal from the above proviso are to wit:-

(i) The applicant must satisfy that she will suffer substantial loss unless the stay is granted.

(ii) The application must be brought without unreasonable delay and;

(iii) The applicant must provide security for the due performance of the decree or order as may ultimately be binding on him"

On the first ground whether the applicant will suffer substantial loss unless the stay orders are granted, the applicant has not stated anywhere in his supporting affidavit that he will suffer substantial loss if the stay of execution orders are not granted. The question of substantial loss was aptly discussed in the case of ***SILVERSTEIN VS CHESONI (2002) K.L.R 867*** where it was held as follows:

"…… issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory".

The subject matter of this Appeal is land and the applicant has not stated how the land will be interfered with so as to render the intended Appeal nugatory. There is no iota of evidence by the applicant that the intended appeal will be rendered nugatory unless the orders of stay are granted. Regarding the second ground, this Court delivered the impugned judgment on 5th July 2019. On 26th July 2019, which is almost 21 days, the applicant lodged a Notice of Appeal and also filed the instant application. I find that a period of 21 days Is not unreasonable delay. I find that the applicant has satisfied the Court on the second ground.

The third ground is for the applicant to give security or an undertaking to comply with any order regarding security that the Court may give. The applicant has not given any security or an undertaking to comply with any conditions that may be given by the Court for the due performance of the decree. In order to grant an order for stay pending Appeal, an applicant must satisfy the Court on all the three grounds. I find that the applicant has not satisfied the grant of the orders of stay of the decree/order pending appeal.

The second prayer is for a temporary injunction against harassing, eviction and/or anyway disturbing the quiet possession of land parcel No. MWERUA/KANYOKORA/118 occupied by the interested parties pending the hearing of the intended Appeal. ***Order 42 Rule 6 (6)*** provides as follows:

"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".

From my interpretation of the above provisions of the law, this Court's jurisdiction to consider whether to grant an injunction order is only limited to when it is exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has even lodged a Notice of Appeal to the Court of Appeal. On that basis alone, I find that the Court does not have the jurisdiction to entertain the application and grant the order of injunction sought by the applicant. This Court has ceased exercising its appellate jurisdiction after it rendered its decision on 5th July 2019 and the applicant lodged a Notice of Appeal on 26th July 2019. Under ***Rule 5 (2) (b) of the Court of Appeal Rules***, the Court of Appeal may grant an injunction in Civil proceedings where a Notice of Appeal has been lodged in accordance with ***Rule 75.*** The applicant's remedy therefore lies elsewhere in as far as that prayer is concerned. The third prayer of the applicant's application is to enjoin the interested parties. ***Order 1 Rule 10 (2) CPR*** provides as follows:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

It is trite that an application for joinder either as a plaintiff or a defendant or an interested party can be made any time. However, an application for joinder can be made after judgment only where damages are to be assessed. In this case, judgment was delivered on 5th July 2019. There is no assessment of damages pending and therefore an application for joinder after judgment is untenable. As such, the prayer for joinder in this application is misconceived and superfluous. In the case of ***TANG GAS DISTRIBUTORS LTD VS SAID & OTHERS (2014) E.A. 448,*** the Court held:

"…… the power of the Court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate state".

I agree with the decision in the said case and since the judgment delivered by this Court on 5th July 2019 has finally disposed off all the issues in the Appeal, the issue of joinder at this stage is therefore inapplicable. The fourth prayer in the application is for review of the judgment delivered on 5th July 2019. ***Order 45 Rule 1 (1***) provides as follows:

"Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the

face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay".

The provisions of the law above gives the following grounds for review of a judgment and/or order of a Court:

(a) Discovery of a new and important matter or evidence which after the exercise of due diligence was not within his knowledge.

(b) Was not within his knowledge at the time the decree or order was made.

(c) Could not be produced by him at the time on account of mistake or error apparent on the face of record; or

(d) For any other sufficient reason.

The applicant has made reference to an application made in High Court Civil Case No. 35 of 2011 (Embu) where the proposed interested parties had sought orders of injunction in a matter relating to the same parcel of land being L.R. No. MWERUA/KANYOKORA/1475 (originally land parcels No. MWERUA/KANYOKORA/1361, 1362, 1363 and 1364. In a ruling delivered on 19th June 2012, the leaned Judge Hon. Lady Justice H.I. Ong'udi observed as follows:

"***The plaintiffs are seeking equitable orders and yet have not come to Court with clean hands – material disclosures were not made to the Court as they sought the temporary orders. Even the plaint does not disclose the pendency of an appeal over the same issues. The filing of this suit is an abuse process of the law. I do find that the plaintiffs/applicants have not come to Court with clean hands. A prima facie case has therefore not been established. The plaintiffs say they are in occupation of the lands complained of so they will suffer no loss. Considering the principle of balance of convenience, I find that the same tilts in favour of the 1st defendant since the plaintiffs are seeking order to overturn a decree and an order through a civil suit".***

From the above order of the High Court at Embu, it is clear that the applicant and even the proposed interested parties were aware of this Appeal and the judgment and decree of the Magistrate's Court Baricho LDT No. 3 of 2008 which the proposed interested parties had attempted to overturn through the said civil suit. The applicant cannot therefore benefit from the grounds for Judicial Review set out under ***Order 45 Rule 1 (1) CPR*** since he was all along aware of this Appeal before it was heard and determined. Infact the applicant was a party in this Appeal. The proposed interested parties were also aware of this Appeal and even the impugned decision by the learned Hon. Mwaniki in LDT No. 3 of 2008.

Having evaluated each of the prayers sought by the applicant and held in the negative, I therefore find the Notice of Motion dated 26th July 2019 misconceived and lacking in merit and the same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this ***29th day of May, 2020.***

E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Muriithi holding brief for Ms Ann Thungu for Appellant*
2. *Respondent/Advocate – absent*
3. *Mbogo, Court clerk – present*