



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 2 OF 2013

GRACE MUGURE.....APPELLANT

V E R S U S

1. THE MANAGER MWEA IRRIGATION SETTLEMENT.....1ST RESPONDENT

2. DANIEL GIKARU NJENGA2ND RESPONDENT

3. HEZRON GITERI MURIMI.....3RD RESPONDENT

RULING

The appellant, Grace Mugure in an application dated 15/1/13 under Section 10 of the Judicature Act, Cap 8 of the Laws of Kenya, rules 2,3 & 4 of the High Court (Practice and Procedure) Vacation Rules, Section 3A Civil Procedure Act, Order 42 Rule 6 Civil Procedure Rules seeking orders that the Court be pleased to grant a temporary injunction against the 2nd Res^ondent Daniel Gikaru Njenga, his servants, agents and/or anyone acting through him, from transferring, surrendering rice holding No. 1733 Mwea Section and/or in anyway interfering with the appellants possession, use and enjoyment of 2 acres of the rice holding pending hearing and determination of this application and the appeal. That the Court be pleased to order stay of proceedings in S.R.M CC No. 191/2012 Daniel Gikaru Njenga & 3 Others –vs- Grace Mugure pending the hearing and determination of this application and the appeal. She also prays that costs be provided for.

The application is based on the following grounds:-

- a) The lower court in Wanguru dismissed the appellants application dated 30/6/2012 that sought for review, varying and/or setting aside of orders given on 17/5/200. The court orders of 17/5/2000 declared the 2nd respondent herein as successor of Hezron Gateri Murimi (deceased).
- b) The effect of the said dismissal is that the respondent herein may evict the appellant from the rice holding. She has been utilizing 2 acres of the rice holding since 1991 while the appellant has been utilizing remaining 2 acres.
- c) The respondent may also transfer the rice holding to third parties and/or other beneficiaries. The applicant herein has already preferred an appeal against the ruling delivered on 19/7/2012.
- d) The appeal has very high chances of success and if the orders herein are not granted the appeal may be rendered nugatory.
- e) It is also in the interest of justice for the orders to be granted to avoid the respondent being rendered destitute or losing her interests in the holding incase it is transferred to third parties or other beneficiaries.
- f) The respondent has also filed SRMCC No. 191/2012 Daniel Gikaru a & 3 others –v- Grace Mugure whereby he is seeking for injunction orders against the appellant which suit if allowed may render the appeal nugatory.

The application is supported by the affidavit of Grace Mugure sworn on 15/11/2013.

The appellant's case is that the 2nd respondent Daniel Gikaru Njenga is her cousin as they are Grand Children of Hezron Gateri Murimi (deceased). The deceased, Hezron Murimi had three wives and the appellant is the child of Rhoda Wanjiku (deceased) who is the daughter of Rhoda Wanjiku a child of the deceased Hezron Gateri while 2nd Respondent is the son of Noah Njenga who is the son of the deceased.

The deceased Hezron Gateri Murimi was the original owner of Rice Holding No. 1733 Mwea Section. The appellant avers that she has been utilizing two acres out of the rice holding while the respondent has been utilizing the remaining two acres.

The second respondent filed succession cause No. 14/2000 after the death of the deceased and the respondent inherited the entire Rice Holding to hold in trust for her mother Hannah Gathoni and her siblings Zackary Muthee, Festus Muhoro and Joseph Muhoro.

The appellant avers that she was not aware of the said Misc. Succession Cause No. 14/2000 which was between the Manager Mwea Irrigation Settlement –versus- Hezron Gateri until sometime in 2011 when the respondent started interfering with her occupation of the Rice Holding. She took steps to file succession and in process discovered that the 2nd respondent had filed the Misc. Succession 14/2000. She then filed an application for review of the orders granted in Miscellaneous Succession Cause No. 14/2000 but the application was dismissed.

The applicant then filed this appeal and the application. She contends that the appeal has high chances of success and if the application is not granted she risks being evicted from the rice holding or it be transferred to 3rd parties. That she is likely to suffer substantial loss as a suit to evict her has been filed by the 2nd respondent and others.

She had filed a similar application in the lower court but it was dismissed. The delay is due to the fact that she filed the application in Embu but it was transferred to High Court Kerugoya and it took time to have the file brought to this court.

The appellant seeks stay of proceedings in Senior Resident Magistrate CC 191/2012 where the 2nd Respondent has sought for injunction orders against her which suit if allowed may render the appeal nugatory.

The 2nd Respondent file grounds of objection to the application on the following grounds:

1. **THAT** the Application is incurably defective as it does not comply with the Provision of Law that are mandatory.
2. **THAT** the application is misconceived, frivolous, vexatious and an abuse of the process of the Court.
3. **THAT** the application is resjudicata there having been previously decided application between the same parties litigating under them over the same subject matter.
4. **THAT** the application before this Honourable Court has been brought in bad faith and blatant breach of law.

He seeks the dismissal of the application with costs.

The 2nd respondent, Daniel Gikaru Njenga filed a replying affidavit. He avers that the provisions of **Order 42 Rule 6 Civil Procedure Rules** do not provide for staying of proceedings in a suit whose proceedings are not subject matter of appeal. That the applicant has failed to disclose that there are already temporary orders of injunction restraining her from interfering with the Rice Holding which orders have not been vacated or stayed. He contends that he is the registered owner and an order of injunction cannot be issued against him. That the appeal arose from orders in Wanguru P.M. CC 14/2000 of 19/7/2012 and the orders are res judicata. That the applicant has not taken steps to prosecute the appeal and it is fair that her application be dismissed.

In reply the appellant filed a supplementary affidavit and avers that they had informed the court at Nyeri of the injunction orders and hence the court granted stay of proceedings to avoid conflict of its orders and that of the lower court. That the subject matter of the proceedings in P.M.CC 19 of 2012 and the appeal herein are the same and it is only fair that they be stayed to avoid multiple appeals.

I have considered the application. On 16/1/13 before Justice Wakiaga at Nyeri an order was issued to stay the proceedings in Wanguru S.R.M CC 191/2012. The order was extended on 4/2/2013 and has not been varied or set aside.

The parties agreed to proceed by way of written submissions. I have considered the application and the submissions. The issue for determination is whether the court should grant the applicant an order for a temporary injunction.

The procedure for seeking a temporary injunction is as provided under **Order 40 Civil Procedure Rules**. A party seeking an order for a temporary injunction must establish three principles which are:-

- 1) That he has a prima facie case with chances of success.
- 2) That he is likely to suffer irreparable loss which cannot be compensated by an award of damages.
- 3) That the balance of convenience tilts in his favour.

These principles were laid down in the celebrated case of **Giella –v- Cassman Brown**. The second respondent that has deponed that he has already obtained a temporary injunction in respect of the same rice holding against the appellant. The order, annexure DGN-1- issued in Civil Case No. 191/2012 restrains the applicant who is the defendant in that case from entering, remaining on or in any way interfering with the plaintiff's rice holding No. 1733 Unit M4 Mwea Section until further orders of the court. There is no evidence that this order has been varied or set aside. There has been no appeal. The proceedings are not the subject of this appeal. In any case the 2nd respondent is the registered owner and/or tenant as shown by the tenant Card Annexure DGN -3-. A registered owner enjoys the rights of a proprietor and cannot be restrained from exercising such rights. The fact that the 2nd respondent is the registered owner shows that the applicant has no

prima facie case with chances of success.

The appeal arose from Succession Cause No. 14/00 Principal Magistrate's Court Wang'uru. It is not denied that a similar application was made before the court and was dismissed. The applicant has not come to seek the order by way of appeal. The application is therefore resjudicata and filing a similar application in this court is an abuse of court process.

The appellant cannot seek an injunction when there is an injunction issued in the lower court without seeking orders to vacate those earlier orders first. The applicant has not come to court with clean hands as she failed to disclose that there was a temporary injunction which was issued by the lower court restraining her from interfering with the Rice Holding. The applicant has also been indolent as she has not taken steps to prosecute the appeal. The application flies against the provisions of **Section 7 of the Civil Procedure Act** which provides:-

“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.”

The option open to her was to file an appeal. The appellant has not shown that she is likely to suffer irreparable loss. The balance of convenience does not tilt in her favour. This ground is considered where the court is in doubt and in this case it is clear that she has no prima facie as she does not own the Rice Holding. The National Irrigation Board held that the Rice Holding shall be utilized by the siblings.

Stay or Proceedings:-

The appellant has also sought for stay of proceedings in Wang'uru PMCC No. 191 of 2012 pending hearing and determination of the appeal.

Order 42 Rule 6 of the Civil Procedure Code provides:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

As per the wording of the above, stay of proceedings can only be granted against a decree or order appealed from. In this case, the appellant is appealing against the orders granted under **Wang'uru PMCC No. 14 of 2000** therefore stay of proceedings can only be granted against **Wang'uru PMCC No. 14 of 2000**.

The prayer lacks merits as the proceedings she seeks are not the ones appealed against. In any case, Civil Case No. 191/2012 has other parties who have sought to restrain her from interfering with the Rice Holding No. 1733 and are not parties in this appeal. The suit has nothing to do with this appeal. The appeal herein is against a succession cause and dismissal of an application for review it has nothing to do with the suit she seeks to stay and there is no explanation why she wants the proceedings to be stayed. The prayer is without merits.

In Conclusion:-

I find that this application is without merits. I order as follows:

1. The application be dismissed.
2. Costs to the respondent.

Dated at Kerugoya this 11th Day of October 2018.

L. W. GITARI

JUDGE