



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT AND LAND CASE APPEAL NO. 43 OF 2019

JOHN KISEGU.....APPELLANT/APPLICANT

VERSUS

JOYCE MMBONE.....RESPONDENT

RULING

This ruling is in respect of an application dated 19th December 2019 by the appellant/applicant seeking for the following orders:

- a) That there be temporary orders of injunction restraining the respondent by themselves, their servants and/or agents or any person whatsoever acting on their behalf from threatening to evict, trespassing onto, entering into, ploughing, planting, fencing, constructing, demarcating, developing, cutting trees or in any way dealing or interfering with the plaintiff/applicant land known as Kakamega/Chekalini/20162 pending the hearing and determination of this application inter-partes.
- b) That there be a stay of execution of the order of the subordinate court issued on 17.12.2019 in Eldoret Cmcc E&L case no. 176 of 2019 pending the hearing and determination of the appeal herein.
- c) That there be temporary orders of injunction restraining the defendant/respondent by themselves, their servant their servants and/or agents or any person whatsoever acting on their behalf from threatening to evict, trespassing onto, entering into, ploughing, planting, fencing, constructioing, demarcating, developing , cutting trees or in any way dealing or interfering with the plaintiff/applicant land known as Kakamega/Chekalini/20162 pending the hearing and determination of this appeal herein.
- d) That costs of this appeal be borne by the respondent.

Counsel agreed to canvass the application vide written submissions of which only the applicant filed. The court gave orders of stay pending the hearing and determination of this application inter partes.

Counsel for the applicant submitted that the defendant/respondent filed a preliminary objection at Eldoret CM's court on the territorial jurisdiction of the court which was allowed and thus dismissing the entire suit. He was dissatisfied with the said ruling and lodged an appeal.

Counsel further submitted that the applicant was granted temporary orders of injunction which when served upon the respondent he stopped further threatening with eviction, ploughing and interfering with the suit land. That the upholding of the preliminary objection upset the status quo hence the application for injunction.

Counsel therefore urged the court to grant orders for temporary injunction as the applicant would suffer irreparable loss and damage that cannot be monetarily compensated.

It was counsel's further submission that the balance of convenience tilts in favour of the applicant as he has been in occupation of the land since 2009 hence the appeal will be rendered nugatory if the same is not allowed.

The respondent did not file any submissions but from the replying affidavit dated 6th February 2020, she deponed that she is the owner of the parcel of land known as Kakamega/Chekalini/2062 which is situated in Lugari Kakamega county and she had never sold her land to anyone and the alleged sale agreement was a forgery which matter was reported to the police thus under investigation.

She further deponed that she is ready to defend the suit in the right court in Kakamega where the suit land is situate.

ANALYSIS AND DETERMINATION

This is an application by the applicant for temporary orders of injunction pending the hearing and determination of appeal. When a court is considering an application for injunction pending appeal, it should be guided by the principles as stated by Visram J (as he then was) in the case of **Patricia Njeri & 3 others v National Museum of Kenya** [2004] eKLR namely:-

- a) *an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.*
- b) *The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c) *The applicant must show that to refuse the injunction, would render the appeal nugatory.*
- d) *The court should also be guided by the principles in **Giela v Casman Brown Ltd 1973 EA 358**.*

This means that the applicant must satisfy the court that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience.

The court should also take into consideration that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of both parties.

The court is also guided by the provisions of **Order 42 rule 6(6)** which provides:

“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 the subordinate court or tribunal has been complied with.”

From the application and the attached order of the lower court, it is evident that the said order stated specifically that the parties are advised to file the matter at **KAKAMEGA ENVIRONMENT AND LAND COURT**. This gives the parties an opportunity to file the case again without being locked out on the grounds of res judicata as the matter has not been fully adjudicated and a final judgment rendered by a competent court. The respondent also admitted in her affidavit that she is ready to defend the case in the right court due to her advanced age. This is not to pre-empt the outcome of the appeal but a direction to help the parties come to a consensus.

I have considered the application and the submission of counsel and find that the applicant has met the threshold for grant of a temporary injunction and the same is hereby allowed as prayed.

This is a matter that the parties can agree on the way forward on how to proceed with the suit either fresh in whichever court without the prolonged process of an appeal. The matter to be mentioned on 28th May 2020 for further directions.

DATED and DELIVERED at ELDORET this 14TH DAY OF MAY, 2020

M. A. ODENY

JUDGE