



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 15 OF 2019

KEIBUKWO INVESTMENTS LTD.....APPELLANT

VERSUS

DANIEL KIMUTAI CHUMA.....RESPONDENT

RULING

1. The Applicant in the present matter vide their application under Certificate of Urgency dated the 13th November 2019 brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(a) of the Civil Procedure Act and all other enabling provisions of the law seeks for orders of injunction against the Respondent restraining him whether by himself, agent or any person whomsoever from sub dividing, offering for sale, selling, charging, leasing, licensing, transferring, or concluding any transfer of all or any part of LR No. Rumuruti Township/block 3/140 pending the hearing and determination of Appeal.
2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of David Some Barno the Managing Director of the Appellant, herein dated the 13th November 2019.
3. The Application was opposed vide the 1st Respondent's Replying Affidavit dated the 15th January 2020 in which the 1st Respondent sought that the said application be dismissed with costs for being devoid of merit.
4. On the 21st January 2020, by consent parties agreed to have the Application canvassed by way of written submissions wherein the Applicant was also granted leave to file their supplementary affidavit.
5. Thereafter, parties failed to file their submissions to which effect thereof, the Court shall rely on the averments in the sworn affidavits in support thereof and in opposition of the application herein.
6. The Applicant's application dated the 13th November 2019 seeking an injunction against the Respondents herein from dealing in any way with land parcel LR No. Rumuruti Township/block 3/140 pending the hearing and determination of the Appeal, is premised on the supporting affidavit sworn by the Managing Director of the Appellant, to the effect that after the Judgment in the Magistrate's Court had been delivered on the 9th October 2019, they had filed their Memorandum of Appeal which disclosed serious issues of merit of their Appeal. That the Application sought to preserve the subject suit being LR No. Rumuruti Township/block 3/140 pending the hearing of the Appeal otherwise they would suffer serious irreparable prejudice and the Appeal would be rendered nugatory.
7. That in recognition of the importance of preserving the subject suit, where the Respondent had subdivided it in readiness to dispose it, the Magistrate's Court, pending the determination of the case and dismissal thereafter had previously issued injunctive orders against the Respondents.
8. The Appellant deponed that they were willing to abide by any conditions the Court would issue in the preservation of the suit property.
9. In opposition of the Application, the Respondent through his Replying affidavit of the 15th January 2020 deponed that although the judgment had been delivered in the trial Magistrate's Court in his favour on the 9th October 2019, the Appellant/Applicant had not demonstrated his willingness to abide by any conditions set by the Court for the grant of orders and therefore should be ordered to deposit the sum of Ksh 1,500,000/- before this application and the intended Appeal could be heard by the Court.
10. That the trial Court's judgment was not appealed against within the prescribed period in contravention of the provisions of Section 75 G of the Civil Procedure Act and therefore there was no Appeal in existence.

11. That the Appellant/Applicant neither annexed a draft Memorandum of Appeal nor explained why the Appeal had been filed out of time or why there had been delay in filing the Appeal and therefore the application did not deserve a day in Court.

12. That the Applicant's prayer for issuance of temporal injunction was intended to deny him the fruits of his judgment in Nyahururu Chief Magistrates ELC No. 332 of 2018 and therefore the Application should be dismissed with costs.

13. That the Applicant had not demonstrated what irreparable loss he would suffer if the execution of the Decree proceeded and the mere filing of the application did not warrant a stay of execution and issuance of injunction being sought.

14. That further, the Applicant was guilty of laches and had approached the Court in inordinate delay having filed the present application 1 (one) month after judgment had been delivered. That the application was an abuse of the Court process the same lacked merit, was an afterthought, and did not meet the test for grant of temporary injunction. Further that it had no chances of success hence should be dismissed with costs.

Determination.

15. I have considered the averments in both the supporting affidavit and the replying affidavit for and against the Application by way of a Notice of Motion dated the 13th November 2019 wherein the Applicant seeks for orders of injunction against the Respondent restraining him whether by himself, agent or any person whomsoever from subdividing, offering for sale, selling, charging, leasing, licensing, transferring, or concluding any transfer of all or any part of LR No. Rumuruti Township/block 3/140 pending the hearing and determination of Appeal.

16. I find two issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the interlocutory injunction pending the hearing and determination of the Appeal.

ii. What orders this Court should make.

17. On the issue of whether the Applicant is deserving of the orders of interlocutory injunction pending the hearing and determination of the Appeal herein, the law applicable is Order 42 Rule 6(6) of the Civil Procedure Rules which stipulates as follows:

Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in exercise of its Appellate jurisdiction to grant a temporary injunction on such terms as it thinks just and provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with.

18. Section 79G of the Civil Procedure Act provides that Appeals from subordinate Courts must be filed within 30 days from the date of the decision to the effect that:

Every Appeal from a subordinate Courts to the high Court shall filed within 30 days from the date of the Decree or order Appealed against excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the Decree or order.

19. The decision in the present case was decided on the 9th October 2019 wherein a Memorandum of Appeal was filed on the 6th November 2019 which was within the time frame and therefore the Applicant complied with the law where the Court is now seized with jurisdiction to determine whether or not to grant the injunction so sought, while exercising its appellate jurisdiction.

20. In considering an application for injunction pending Appeal, the Court is guided by the principles set in the case of **Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR** namely:

i. An order for injunction pending Appeal is a discretionary one and the discretion shall not be exercised against an Appellant whose Appeal is frivolous.

ii. Discretion should be refused where it would inflict greater hardship than it would avoid.

iii. The application must show that to refuse the injunction would render the Appeal nugatory.

iv. The Court should also be guided by the principles in **Giella vs Cassman Brown Limited 1973 EA 358**

21. In so stating the Court must first establish whether the Appellant has demonstrated that they have a prima facie case with a probability of success, secondly whether they would suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts keeping in mind that there exists an Appeal which should not be rendered nugatory.

22. In the case of **Charter House Bank limited vs Central Bank of Kenya & Others [2007] eKLR** the Court held as follows:

The purpose of granting an injunction pending Appeal is to preserve the status quo and to prevent the Appeal, if successful from being rendered nugatory (see also **Madhu Paper International Limited vs Merr [1985] KLR 840**).

23. In deciding whether the Appeal is arguable I shall warn myself not to go deep into the merits of Appeal itself but to consider the grounds raised in the Memorandum vis a vis the impugned decision, so as to form an opinion as to whether there is an arguable Appeal to grant the order of status quo/ injunction or not.

24. The Applicant herein has argued that if stay of execution was not granted, the Respondent would proceed with the execution thus rendering the outcome of the Appeal nugatory.

25. The Applicant in the present application had deponed that it would be in the best interest of justice to reserve the suit property so that the same is not taken out of the Courts reach/jurisdiction. That in deed the Magistrate in the trial Court had seen the importance of preservation of the same when she granted an injunction pending the hearing and determination of the matter when it had been evidenced that the Respondent had already subdivided the same in readiness for disposal to third parties.

26. The Applicant's Memorandum of Appeal is to the effect that he was entitled to half the suit property pursuant to an agreement they had entered into with the Respondent where there had been part performance, issues which cannot be determined at this stage but on Appeal.

27. The Respondent on the other hand has opposed the granting of the order of injunction pending Appeal for reason that the Applicant had not demonstrated the kind of irreparable loss he would suffer if the execution of the Decree proceeded. Further that the filing of the application was so as to deny him the fruits of his judgment.

28. In a matter as the present one where property is concerned and ownership might be difficult to reverse should an injunction not be granted and the Appeal succeeds, I ought to exercise my best discretion so as not to render the Appeal, if successful, nugatory.

29. Consequently I allow the Application dated the 13th November 2019 upon the following orders.

i. A temporary injunction is herein issued restraining the Respondent whether by himself, agent or any person whomsoever from subdividing, offering for sale, selling, charging, leasing, licensing, transferring, or concluding any transfer of all or any part of LR No. Rumuruti Township/block 3/140 pending the hearing and determination of Appeal.

ii. That the Applicant Keibukwo Investments Limited shall deposit in Court a sum of Ksh 1,000,000/- (one million shillings) within the next 30 (thirty) days from the date herein and in default order No. (i) above shall stand vacated.

iii. The Appellant/Applicant's Counsel to file and serve his record of Appeal with 30 days from the date herein.

iv. There shall be no orders as to costs.

It is so ordered.

Dated and delivered at Nyahururu this 25th day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE