



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA NO. 25 OF 2019**

**DELMONTE KENYA LIMITED.....APPLICANT/APPELLANT**

**VS**

**MISHACK KIBE MUIRURI.....1<sup>ST</sup> RESPONDENT**

**PATRICK KIBE KIGURU.....2<sup>ND</sup> RESPONDENT**

**KEVIN KAMAU WANJIRU.....3<sup>RD</sup> RESPONDENT**

**JOSEPH NJOROGE.....4<sup>TH</sup> RESPONDENT**

(as representatives of Gatanga Quarry owners Sacco)

**COUNTY GOVERNMENT OF MURANGA.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. On the 17/7/19 the 1<sup>st</sup> – 4<sup>th</sup> Respondents filed suit against the 5<sup>th</sup> Respondent vide **MCLE No 26 of 2019 at Kandara Senior Resident Magistrates Court** seeking interalia orders of permanent injunction restraining the 5<sup>th</sup> Respondent, its agents, employees, servants or agents from interfering, restricting or dealing with the suit property contrary to the Plaintiffs interest, loss of income and costs. The gist of their case was that they had been permitted to carry out domestic quarrying activities on the 5<sup>th</sup> Respondent's unsurveyed land by the 5<sup>th</sup> Respondent and National Environmental Management Act whose approvals were given on the 1/3/18 and 30/5/19 respectively. That in an about turn, the 5<sup>th</sup> Respondent wrote to them on the 12/7/19 suspending their activities until further notice. That the letter halted their quarrying activities occasioning them loss and hardship.

2. Simultaneously the 1<sup>st</sup> – 4<sup>th</sup> Respondents sought orders restraining the 5<sup>th</sup> Respondent by way of interim injunction from interfering and restricting their quarrying activities along Kakuzi/Mitubiri/Chania river pending the hearing and determination of the suit.

3. On even date the Court sitting at Kandara granted the said orders pending the interpartes hearing of the application on the 25/7/19. Come the 25/7/19 the orders were confirmed exparte as follows;

“That an order of injunction be and is hereby issued against the Defendant /Respondent by itself, servants, agents or any authority restrained by this Court from interfering restricting of in any way dealing with the quarrying happening along Kakuzi/Mitubiri/Chania river by the Plaintiffs areas pending the hearing and determination of this suit.”

4. These orders were issued on the 29/7/19.

5. On the 29/7/19 the 1<sup>st</sup> -4<sup>th</sup> Respondents filed an amended plaint which interalia included the Applicant herein as the 2<sup>nd</sup> Defendant in the suit. That the Applicant summoned the 1<sup>st</sup> -5<sup>th</sup> Respondents to the County Commissioners Office on the 23/7/19 claiming that it was the registered proprietor of the land on which they had undertaken quarrying activities. The Applicant was therefore enjoined in the prayers sought by the 1<sup>st</sup>-4<sup>th</sup> Respondents.

6. On the 8/8/19 the Applicant filed a defense and counterclaim denying the 1<sup>st</sup> -4<sup>th</sup> Respondents' claim and sought orders of declaration that it is the registered owner of the LR 12157 and entitled to its peaceful enjoyment, the Plaintiffs quarrying activities on the land are illegal and unlawful and a permanent injunction restraining the 1<sup>st</sup> -4<sup>th</sup> Respondents from entering quarrying and interfering with its quiet enjoyment of its property. Additionally, on even date filed a Notice of Motion seeking orders interalia of stay of orders dated the 25/7/19, interim

injunction restraining the 1<sup>st</sup> -4<sup>th</sup> Respondents from entering occupying and carrying out quarrying activities on its Land Reference No 12157 and or interfering with its quiet enjoyment of the said land in Gatanga sub county, setting aside the orders of the Court granted on the 25/7/19 in its entirety.

7. Upon hearing the parties on the Notice of Motion the Court pronounced its ruling on the 24/9/19 disallowing the application.

8. This prompted the Applicant to file an Appeal dated the 23/10/19 against the said Ruling. In it the Applicant/Appellant sought interalia orders that the impugned ruling be set aside, an order allowing the Applicants Notice of Motion dated the 8/8/19 and costs of the Appeal. Subsequently the record of Appeal was filed on the 4/11/19.

9. Together with the record of Appeal the Applicant filed a Notice of Motion seeking the following orders; stay of the orders dated the 24/7/19 and proceedings in the Kandara SRM Court MCLE No 26 of 2019, injunction orders restraining the 1<sup>st</sup> -5<sup>th</sup> Respondents from carrying out quarrying activities and or interfering in any way with the quiet enjoyment of their property namely Land Reference No 12157 situate in Gatanga sub county, the OCS Ithanga Sub County Police Station to enforce the orders and costs of the application.

10. The record shows that on the 17/10/19 the 1<sup>st</sup> -4<sup>th</sup> Respondents filed a notice of motion Gatanga to be committed to civil jail for failing to enforce the orders issued on the 24/7/19 by the Hon Mutunga SRM by putting them back to the suit land to continue quarrying activities.

11. On the 6/11/19 this Court granted interim orders interalia to wit Nos 1-3 pending the hearing and determination of the application which orders have been extended severally and are still in force.

12. The application is based on the grounds adduced and the Supporting Affidavit of Harry Odoni, the Legal officer of the Applicant. That the Applicant is the registered owner of the suit land LR No 12157 and the 1<sup>st</sup> - 4<sup>th</sup> Respondents have without any color of right carried out quarry operations on the land ostensibly pursuant to exparte orders issued by the SRM Court at Kandara on the 17/7/19 and 25/7/19. That the said orders made reference to the "Plaintiffs' areas along Kakuzi/Mitubiri/Chania river" and not the Applicants land yet the Respondents are using the said orders to enter its property. Interalia that the orders were obtained through concealment of facts so much so that the Respondents did not disclose that the Applicant was the registered owner of the property that they are undertaking quarry activities. That the Applicant was enjoined to the suit after the orders were obtained exparte notwithstanding prior meetings held between the Applicant, the 1<sup>st</sup> - 4<sup>th</sup> Respondents and the local administration seeking a resolution to the dispute. That obtaining exparte orders in exclusion of the Applicant is an act of bad faith on the part of the said Respondents.

13. In addition, the Applicant stated that the 1<sup>st</sup> - 4<sup>th</sup> Respondents activities on the ground are occasioning it loss and damage from removal of stone materials and destruction of its land through felling trees, soil erosion, displacement and the expected rock blasting. A number of photographs were adduced to support this averment. It is their plea that these activities have the effect of altering the Applicant's land drastically and irretrievably making it unsuitable for farming as well as causing irreversible environmental degradation given the proximity to the river and its resources. He explained that the quarrying activities were being carried out by about 200 unruly rowdy and violent young men which poses a serious security threat on the land. That the Applicant will suffer loss which is not capable of being compensated in damages.

14. Further that aggrieved by the Ruling dated the 24/9/19 of the Hon Magistrate the Applicant has filed an Appeal. Coupled with the Appeal, the deponent stated that the 1<sup>st</sup> -4<sup>th</sup> Respondents have filed an application in the lower Court seeking orders to enforce the very orders that the Applicant has Appealed against. The Applicant pleaded with the Court to stay the proceedings in the lower Court pending the hearing and determination of its Appeal to avoid parallel proceedings which outcomes may embarrass the Courts. Interalia, the Applicant argued that if the proceedings in the lower Court are allowed to proceed, it will have been condemned unheard given that the orders were obtained exparte.

15. The deponent stated that the application has been brought without any delay. That granting the application will not prejudice the 1<sup>st</sup> - 4<sup>th</sup> Respondents as they are not entitled to carry out quarrying activities on the Applicant's private land.

16. The 1<sup>st</sup> - 4<sup>th</sup> Respondents opposed the application and filed their grounds of opposition on the 20/11/19 as follows;

- a. That the application is bad in law incompetent and is meant to delay the hearing and determination of the suit
- b. The application is frivolous vexatious and abuse of the process of the Court as it is brought a stranger to the suit property who has no certificate of title.
- c. The application is an afterthought and brought in bad faith as it is brought under certificate of urgency one month after the ruling being appealed against what is made
- d. That the entire application and supporting affidavit is good as a piece of literature but is highly misleading
- e. The entire application is an embarrassment to fair trial and brought by the application in clear violation of Section 26 of the Land Registration Act
- f. That the entire application is therefore a perfect candidate for dismissal with costs.

17. The 5<sup>th</sup> Respondent did not oppose the application though duly served.

18. Parties have filed written submissions which I have read and considered.

19. In regards to the principles of granting injunction pending Appeal the Applicant cited the case of **Patricia Njeri & 3 others Vs National Museum of Kenya (2004) EKLK** where the Court set the guidelines as thus; an order of injunction pending Appeal is discretionary; the discretion should be refused where it would inflict greater hardship than it would avoid; the Applicant must show that to refuse the injunction would render the Appeal nugatory; the Court should be guided by the principles in the case of **Giella Vs Cassman Brown Ltd 1973 EA 358**.

20. The Applicant submitted that it has an arguable Appeal going by the grounds of Appeal set out in the memorandum of Appeal and will inter alia show the Court on Appeal that the lower Court failed to determine its prayer for setting aside the orders, for which an Appeal has been proffered. That it is the registered proprietor of the land upon which the 1<sup>st</sup> -4<sup>th</sup> Respondents want to carry out quarrying activities in total disregard to its proprietary rights. That to the contrary the Respondents claim to be on unsurveyed land when in actual sense it is on its land which averments have been supported by the affidavit of a surveyor as to the delineations of the land in question. That it will suffer loss and damage that cannot be compensated with costs if the 1<sup>st</sup> -4<sup>th</sup> Respondents are allowed to continue with the quarrying operations. It went ahead to enumerate the damage on the land which includes felling of indigenous trees, soil erosion and environmental injury among others. It argued that the damage on the land is irreversible so much so that it changes the character of the land which is principally used for growing pineapples. In any event they contend the Respondents have not denied the damage to the land in their pleadings. In closing, it submitted that the balance of convenience tilts in the Court granting the injunction as the same will not prejudice the 1<sup>st</sup> -4<sup>th</sup> Respondents in any way as the stones will always be there but if it turns out that the 1<sup>st</sup> -4<sup>th</sup> Respondents are not entitled to the prayers in the suit, then the prejudice to the Applicant will be high due to the and environmental degradation that would have been meted on the land.

21. In respect to the Appeal, the Applicant argued that if the injunction is not granted, the 1<sup>st</sup> -4<sup>th</sup> Respondents will resume quarrying activities on the property and its Appeal will be rendered nugatory. That the 1<sup>st</sup> -4<sup>th</sup> Respondents have commenced proceedings to facilitate enforcement of the orders issued by the lower Court and if the proceedings are not stayed before the Appeal is heard and determined, the same will be reduced to an academic exercise.

22. The 1<sup>st</sup> -4<sup>th</sup> Respondents in opposition of the application submitted that the conditions for stay of execution/ proceedings under Order 42 rule 1 and 2 have not been satisfied by the Applicant for reason that the Applicant failed to give security for the stay proceedings. Further that since the Applicant has claimed that the 1<sup>st</sup> -4<sup>th</sup> Respondents have stopped quarrying activities, then no substantial loss will be occasioned if the stay of orders is declined.

23. As to whether the Court should grant an injunction pending the hearing and determination of the Appeal, the 1<sup>st</sup> -4<sup>th</sup> Respondents contended that the Applicant failed to show that it is the registered owner of the land by failing to produce a certificate of title. They challenged the copy of the grant on record and contended that the deed plan attached to the said grant is a sketch map which does not conclusively authenticate that the area along the Chania river belongs to the Applicant. That on that ground the Applicant failed to demonstrate a prima facie case with a probability of success.

24. As to whether the Applicant will suffer irreparable loss if the application is not granted, the 1<sup>st</sup> -4<sup>th</sup> Respondents argued that the Applicant failed to show proof of any soil erosion and or soil displacement or any other damages alleged to have been suffered by the Applicant.

25. Having considered the application, the affidavit evidence, the grounds of opposition, the written submissions and all the materials placed before me the issues that commend themselves for determination are; whether the Court should grant stay of the proceedings/orders; whether the Court should grant an injunction pending the hearing and termination of the Appeal; who meets the costs of the application.

26. Before delving into the main issues, I wish to discuss an issue that I have been invited by the parties to determine relating to a notice to produce the original certificate of title for LR No 12157 filed by the 1<sup>st</sup> -4<sup>th</sup> Respondents on the 20/11/19. Both parties have widely submitted on the application which with respect, no foundation has been laid. My perusal of the application shows that this issue is distinctly excluded in the prayers sought in the application. I decline the invite and the parties are best advised to bring the appropriate application during the hearing of the Appeal and or reserve the issue for pretrial at the trial Court.

27. Stay of execution of orders or decrees and proceedings of a Court are discretionary. Order 42 rule 6 (1) and (2) govern these discretionary powers of the Court. Under the said procedural provisions this Court has power to consider the application and make orders as it deems fit. In making such orders the Court must be satisfied that the application has been brought without delay; substantial loss may result to the Applicant if the order is not made and security for the due performance of the decree has been given, where the orders relate to stay of execution.

28. In respect to the stay of proceedings in the lower Court, it has been explained in the preamble of the ruling that the case in the trial Court is yet to commence. Further there is evidence by way of an application for committal proceedings for the enforcement of the orders dated the 25/7/2019. The Applicant has argued that if the said orders are enforced the 1<sup>st</sup> -4<sup>th</sup> Respondents will be free to carry out the quarrying operations on the Applicant's land occasioning damage and loss that cannot be compensated with costs. Moreover, two parallel proceedings in the trial Court and in the Appellate Court will be running at the same time.

29. In the case of **Global Tours & Travels Limited: Winding up Cause No 43 of 2000**, Ringera J (as he then was) held thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order Appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind

such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

30. The 1<sup>st</sup> -4<sup>th</sup> Respondents did not challenge the averment of two parallel proceedings being undertaken and neither have they demonstrated any prejudice that will be suffered by the Respondents if the proceedings in the lower Court are stayed. It is important at this point to state that parallel proceedings must be discouraged as it can lead to outcomes that embarrass the Court and lower its dignity in the administration justice. I find that it is in the best interest of justice to grant the orders.

31. Having stayed the proceedings as in para 30 above, for purposes of clarity, it follows that the orders issued on the 24/9/19 have also been stayed including any enforcement of the same.

32. That said, in this case the decree was made on the 24/9/19 and the application was filed on the 4/11/19 hence without delay. In respect to the substantial loss, the Applicant has adduced photographs which shows the extent of trees felled on the ground and has averred that the quarrying activities are likely to cause soil erosion, soil displacements and environmental degradation thus affecting the suitability of the land for planting pineapples. There is the overarching issue which is the identity of the land on the land on which the 1<sup>st</sup> -4<sup>th</sup> Respondents is carrying out the quarrying activities. If indeed it turns out to be private land then the rights of the Applicant will have been affected by the actions of the 1<sup>st</sup> -4<sup>th</sup> Respondents without the due process of the law having been followed that is to say the consent of the Applicant will not have been sought and obtained to allow the activities to go on. The Court finds that on a balance of probability the Applicant has demonstrated substantial loss.

33. The issue of security for the performance of due performance of the decree in my view does not apply and I need not consider this limb. The reason is because the stay is not for execution of a decree but stay of orders. In the end the Court is satisfied that a stay of the orders issued on the 25/7/19 can be allowed.

34. The principles of granting an order for injunction have been firmly settled in the case **Giella Vs Cassman Brown Ltd 1973 EA 358** which has been ably discussed by both parties in their written submissions.

35. As regards the grant of injunction pending Appeal, I am guided by Order 42 rule 6 (6) provides that

“Notwithstanding anything contained in subrule (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 a subordinate Court or tribunal has been complied with”.

36. Going by the record, there is an Appeal that has been filed in this matter.

37. I have perused the Appeal filed by the Applicant/Appellant in which it has raised inter alia two key grounds which is that its right to be heard on setting aside the orders of 25/7/19 was not given and secondly that it holds proprietary rights over the land that 1<sup>st</sup> -4<sup>th</sup> Respondents are carrying out quarrying operations. These grounds cannot be said to be frivolous in my view but suffices to hold that the Appeal is an arguable one. In order not to allow the Appeal to be rendered nugatory, the Court is of the view that granting the injunction is the lower risk to take in this case. It is to be noted that there is an interlocutory Appeal where the dispute between the parties is still outstanding and therefore, I must exercise care to obviate the risk of trespassing on the jurisdiction of the Appellate Court that will eventually hear the Appeal.

38. Order 40 Rule 1 of the Civil Procedure Rules empowers the Court to grant an injunction in respect to property in dispute in a suit if it is in danger of being wasted, damaged, or alienated by any party to the suit. The order of injunction will act to, restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders. Under section 63 of the Civil Procedure Act the Court is equally mandated to grant an injunction in order to prevent the ends of justice from being defeated. It will not be in the ends of justice to allow the suit land to be wasted so much so that the rights of the parties are abrogated without the due process of the law. It is on record and admitted by both parties that the quarrying operations had been stopped temporarily and therefore I find no prejudice (other than that may be compensated by costs) that will be suffered by the 1<sup>st</sup> -4<sup>th</sup> Respondents if the status quo (not to allow any quarrying activities on the land) is maintained pending the hearing and determination of the Appeal on record.

39. The Applicant has annexed a copy of the grant for LR 12157 which shows that it is the registered owner of the land. The 1<sup>st</sup> -4<sup>th</sup> Respondents have faulted the Applicant for not adducing the original title of the land and further a proper deed plan which shows the delineations of the boundaries of the land which it is claiming to own. The 1<sup>st</sup> -4<sup>th</sup> Respondents quarrying activities are said to be on unsurveyed land. These are arguments and counter arguments that the Court would best leave to the trial Court to hear and determine as to whether or not the quarrying activities are situate on the Applicants land and or whether the unsurveyed land is different from the Applicants land as delineated in the title and the deed plan annexed.

40. It is not lost on the Court that should it turn out that the subject land is indeed unsurveyed land held under the trusteeship or custody of the 5<sup>th</sup> Defendant, the delay in determining the Appeal might trigger damages for loss of income as pleaded by the 1<sup>st</sup> -4<sup>th</sup> Respondents in their suit against the Defendants in the lower Court. Looking at the circumstances of the application and putting into consideration the overriding objectives of expeditious disposal of cases the Court will make appropriate orders.

41. In the end the application is granted in the following terms;

a. Prayers 4, 5 and 6 are granted as prayed.

b. Orders dated the 25/9/19 are hereby stayed.

c. The prayers in a) and b) are granted for a period of 90 days from the date of this ruling within which time the Applicant should have taken expedient steps to prosecute the Appeal to its conclusion. In default the orders shall lapse.

d. The costs of the application shall be borne by the Applicant in favour of the 1<sup>st</sup>-4<sup>th</sup> Respondents.

**42. It is so ordered.**

**DATED, SIGNED & DELIVERED AT MURANGA VIA EMAIL THIS 3<sup>RD</sup> DAY OF JUNE 2020.**

**J. G. KEMEI**

**JUDGE**