



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 2 OF 2019

ALFRED IRERI NDERI.....APPELLANT

VERSUS

STEPHEN NJERU JOEL.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon.

M.N. Gicheru (C.M.) dated 21.12.2018 in Embu CMCC No. 83 of 2013)

RULING

1. By a notice of motion dated 28th February 2020 expressed to be brought under **Sections 1, 1B, 3, 3A and 63** of the **Civil Procedure Act, Order 40 Rule 1 (a)** of the **Civil Procedure Rules and all other enabling provisions of the law** the Respondent sought a temporary injunction restraining the Appellant either by himself, his agents or servants from entering, remaining upon, wasting or destroying the property erected or planted on *Title No. Kagaari/Kanja/2358 (the suit property)* including cutting down trees and harvesting tea bushes pending the hearing and determination of the pending appeal.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent on 28th February 2020. It was contended that it was the Respondent who had planted the 10,000 tea bushes and mature trees on the suit property. It was further contended that the Appellant was abusing the orders of stay of execution he obtained before the Magistrates' court to cause damage and waste to the suit property. The Appellant was said to have cut down and destroyed six (6) mature eucalyptus trees on the suit property on 20th February 2020 and that he had threatened to cause massive damage to the tea bushes before his eventual eviction.
3. The Appellant filed a replying affidavit sworn on 29th June 2020 in opposition to the said application. He stated that he had been in possession of the suit property since 1985 and that he was the one who planted the tea bushes and the trees the Respondent was complaining about. The Appellant accused the Respondent of being the first one to start cutting down trees on the suit property.
4. The Appellant contended that the order of injunction sought was merely intended to defeat the interim orders of stay of execution issued by the Magistrates' court. The Appellant further stated that he cut down the trees complained of in order to avoid them damaging the tea bushes nearby and denied that it was an act of malicious damage to property.
5. When the said application was listed for *inter partes* hearing on 30th June 2020 it was directed that the same shall be canvassed through written submissions. The Respondent was granted 14 days to file a further affidavit and written submissions whereas the Appellant was granted 14 days upon the lapse of the Appellant's period to file his submissions. The record shows, however, that none of the parties had filed their submissions by the time of preparation of the ruling.
6. The court has considered the Respondent's notice of motion dated 28th February 2020, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Respondent has made out a case for the grant of an interim injunction as prayed.
7. The court is satisfied from the material on record that the Appellant is the one currently in possession of the suit property. In those circumstances, he cannot be restrained from *entering* or *remaining* upon the suit property. The court is of the view that an interim injunction would not be an effectual remedy. Only an eviction order may serve the purpose of removing the Appellant from the suit property and he cannot be evicted since there is in force a stay of execution in his favour.
8. The Appellant may, however, be restrained from causing damage to the tea bushes and the trees growing upon the suit property. There is adequate evidence on record to demonstrate that the Appellant has cut down several trees on the suit property after losing his suit before the Magistrates' court. An order of stay of execution cannot authorize one party to cause destruction on the suit property. The court is thus inclined to grant an order against the Appellant restraining him from destroying or cutting down trees and the tea bushes on the suit property.

However, the Appellant should not be restrained from picking tea since he has been in occupation of the suit property all along.

9. The upshot of the foregoing is that the court finds merit in the Respondent's notice of motion dated 28th February 2020 and the same is partially allowed in the following terms:

a) A temporary injunction be and is hereby issued restraining the Appellant from destroying or cutting down the trees and tea bushes or wasting the suit property pending the hearing and determination of the appeal.

b) The Appellant shall take steps to list the appeal for directions within 45 days.

c) Costs of the application shall abide the outcome of the appeal.

10. Orders accordingly.

RULING DATED and SIGNED in Chambers at EMBU this 30TH DAY of JULY 2020 and delivered via Microsoft Teams platform in the presence of Mr. Njiru Mbogo for the Appellant and Miss Kiai holding brief for Mr. Joe Kathungu for the Respondent.

Y.M. ANGIMA

JUDGE

30.07.2020