



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 238 OF 2014

JOSEPH MWANGI THEURI & 37 OTHERS.....PLAINTIFFS

VERSUS

DAVID GITONGA GITHINJIDEFENDANT

RULING

(Application for injunction pending appeal; Suit for adverse possession by the plaintiffs having been heard and dismissed; argument that principles in Erinford Properties case apply; proper application should be for stay pending appeal; principles in Erinford Properties case only applying in an appeal on an application for injunction; application considered as one for stay pending appeal; stay orders issued on conditions)

1. The application before me is that dated 17 February 2016 filed by the unsuccessful plaintiffs. It is an application said to be brought under the provisions of Section 68(1) and (2) of the Land Registration Act, 2012; Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, Cap 21, Laws of Kenya; and Order 51 Rules 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following substantive orders which are prayers 3 and 4 of the application :-

(a) That pending hearing and determination by the Court of Appeal of the plaintiffs' appeal against the judgment delivered herein on 21 January 2016, there be an order of inhibition inhibiting all dealings with L.R No. Nyandarua/Ol Joro Orok/Salient/ 26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206 by the defendant.

(b) That pending hearing and determination of the plaintiffs' appeal against the judgment delivered herein on 21 January 2016, there be a temporary injunction restraining the defendant by himself, servant, agents and/or any other person claiming through him from entering, remaining, selling, transferring, charging or in any manner interfering with the plaintiffs' possession of L.R No. Nyandarua/Ol Joro Orok/Salient/ 26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206.

2. The application is supported by the affidavit of the 1st applicant, Joseph Mwangi Theuri, who has sworn the affidavit on behalf of all the 37 applicants. The motion is opposed but before I go to this, I think it is prudent that I set out the background leading to this application.

3. This suit was commenced on 14 August 2014 by way of an Originating Summons seeking two principal orders. The first was a prayer for an order that the defendant is not entitled to execute the decree/judgment given on 13 December 2000 in Nyahuru PMCC Land Dispute Case No. 21 of 2000 for the reason that it is statute barred. The second principal prayer was for an order that the applicants be

declared to have acquired title by way of adverse possession to the land parcel Nyandarua/Ol Joro Orok Salient/1635 (land parcel No. 1635) which was land measuring 1.8 Hectares (Ha). While the suit was still pending, the said land parcel No. 1635 was subdivided into 8 portions registered as Nyandarua/Ol Joro Orok Salient/26199 - 26206 (hereinafter the suit properties) and these subdivided portions transferred to David Gitonga Githinji. Following this development, the Originating Summons was amended, to enable the applicants now claim adverse possession of all the 8 subdivisions and to have the registered owner, David Gitonga Githinji, be the respondent in the suit. Their case was that they had purchased plots measuring about 50 X 100 feet of the whole of the land covered by these 8 properties and that owing to their long occupation, they are entitled to their said plots by way of adverse possession. The respondent entered appearance and filed a Replying Affidavit. Directions were taken for the matter to be heard by way of affidavit evidence and written submissions, and I delivered a judgment on 21 January 2016.

4. In my judgment, I found first, that the 3rd plaintiff had disowned the suit and the judgment did not therefore apply to her. I considered her case as withdrawn. I also found for a fact that the applicants have been in possession of various portions of the suit properties since they purchased the same sometimes between the years 1998 and 2001 but I was of the view that their suit must fail for the reason that I was not convinced that their occupation was one that was quiet and peaceful, given the proceedings in Nyahururu Land Dispute Case No. 21 of 2000, and they had therefore failed in proving one of the key elements required to sustain a case for adverse possession.

5. Aggrieved by my decision, the applicants filed a Notice of Appeal within time and thereafter made the present application. In the supporting affidavit to this application, it has been deposed that there should be an order of inhibition issued so as to avoid adverse dealings on the suit properties pending hearing of the appeal. It has further been deposed that unless the orders sought in this application are granted, the applicants risk eviction by the respondent which will render their appeal nugatory. It has also been averred that the applicants stand to suffer irreparable loss and damage as they have no other place to call home.

6. The respondent filed Grounds of Opposition to oppose the motion. Four grounds were raised as follows :-

(i) That after dismissal of the plaintiffs' suit through the judgment delivered on 21st January 2016, this honourable court is now functus officio as far as the orders sought by the plaintiffs in the notice of motion application dated 17th February 2016 are concerned.

(ii) That the orders sought by the plaintiffs in the said notice of motion application dated 17th February 2016 cannot be granted by this Honourable Court because the plaintiffs' suit has already been heard and determined.

(iii) That this Honourable Court having heard the plaintiffs' suit and determined the same by dismissing the same with costs, this Honourable Court, being the trial court, has no powers to grant to the plaintiffs the orders sought in the notice of motion application dated 17th February 2016.

(iv) That the notice of motion application dated 17th February 2016 is totally misconceived, the same is an abuse of the court process and the same has no merits and it should be dismissed with costs.

7. In his submissions, Mr. Gakuhi Chege for the applicants, submitted inter alia that the application is based on the principles enunciated in the case of ***Erinford Properties Ltd vs Cheshire County Council (1974) 2 All ER 248***. He also pointed out that an appeal against the judgment has already been filed, being Nakuru Civil Appeal No. 5 of 2016. He submitted that the applicants were in possession during the pendency of the suit and it will be in the interests of justice to maintain the status quo. He did not agree with the respondent, that this court is functus officio.

8. On the other hand, Mr. Kinyua Njogu for the respondent, submitted inter alia that the *Erinford* case

does not apply, for it only deals with interlocutory applications. He submitted that in our case, the main suit has already been heard and dismissed and for that reason, this court is functus officio. He submitted that the principles for the grant of an injunction were set out in the case of **Giella vs Cassman Brown (1973) EA 358** and argued that where the suit has been dismissed, it cannot be that the applicant can be said to have a prima facie case.

9. In reply, Mr. Chege submitted that there had been an earlier application for injunction upon which orders of status quo were issued pending hearing of the suit. He submitted that the court that has dismissed a suit has jurisdiction to entertain an application for stay pending appeal.

10. I have considered the matter and the rival arguments. The application as drawn is said to be brought pursuant to the provisions of Sections 68 (1) and (2) of the Land Registration Act, 2012, Sections 1A, 1B, 3A, and 63 (c) of the Civil Procedure Act, and Order 51 Rules 1 and 3 of the Civil Procedure Rules. Also as drawn, it inter alia seeks to have orders of "temporary injunction" pending hearing of the intended appeal. Section 68 of the Land Registration Act, gives power to the courts to make orders of inhibition, inhibiting the registration of any dealings on any land, for a particular time or until the occurrence of a particular event, or generally until a further order. This aspect certainly deals with the first prayer substantive prayer sought, and I think in order to preserve the subject matter of the suit pending appeal, it is only proper to have this order.

11. I however have a problem with construing this application, in so far as the occupation of the land by the applicants is concerned, as one for a "temporary injunction", and I do not think that the case of **Erinford Properties** applies as argued by Mr. Chege counsel for the applicants. The **Erinford Properties** principles touch on a situation where an applicant has been denied an injunction and now wishes to appeal that decision. The question in the said case, was whether the court which denied or granted an injunction, can proceed to hear an application for a further injunction pending appeal. The scenario here is different because we are not dealing with an appeal on an application for injunction, but an appeal after a full hearing of the suit. The applicants having lost the suit, are of course facing a risk of eviction, and I think it is that which they want stopped pending hearing of the appeal in the Court of Appeal. Neither do I think that the case of **Giella vs Cassman Brown** applies, as argued by Mr. Njogu for the respondent. That case deals with the principles to be applied when assessing an application for interlocutory injunction, which is an application for injunction pending hearing and determination of the suit.

12. My view is that it is Order 42 Rule 6 which applies and that the application is actually one for stay pending appeal. The said provision is drawn as follows :-

6. Stay in case of appeal [Order 42, rule 6.]

(1) 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.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal

application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) 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.

13. I am on my part ready to construe this application as one for stay of execution pending appeal, and I will proceed to determine it on the principles set out in Order 42 rule 6(2). Neither can it be argued that this court is *functus officio* for order 42 allows such application to be heard by the court appealed from, which is the trial court.

14. As may be discerned from a reading of Order 42 rule 6(2) three elements are critical in an application for stay pending appeal. First, the applicant must demonstrate that he/she stands to suffer substantial loss; secondly, the application must have been made without unreasonable delay; and finally, there needs to be given security.

15. Starting with the element of delay, I think the applicants moved the court promptly and are not guilty of any laches. On substantial loss, I think they stand to suffer substantial loss since they have been on the land for a considerable duration of time. Some of them have homes in the suit properties. The only issue is security and in my view, I think the applicants need to furnish security in the form of a monetary deposit which will compensate the respondent for the duration of time that he will be unable to use his land while the appeal is pending, assuming that he succeeds on appeal. I must confess that I have no scientific way of calculating this for neither party tabled what exact monetary loss they stand to suffer if the stay is granted or denied. Doing the best that I can, I think each applicant needs to deposit Kshs. 30,000/= as a condition for stay, within 60 days from the date hereof. In the event that the applicants lose the appeal, this sum will be forfeited to the respondent. In the event that they succeed, this sum will be returned to them. I am also of the view that the case Nyahururu PMCC Land Dispute Case No. 21 of 2000 needs to be stayed as any further proceedings thereof may have an impact on the appeal.

16. I therefore make the following orders :-

(i) There is hereby issued an order of inhibition, inhibiting the registration of any dispositions in the land parcels Nyandarua/ Ol Joro Orok Salient/ 26199 - 26206 (all inclusive) pending hearing and determination of the Civil Appeal No. 5 of 2016 in the Court of Appeal at Nakuru.

(ii) There is hereby stayed any further proceedings in Nyahururu PMCC Land Dispute Case No. 21 of 2000 pending hearing and determination of Civil Appeal No. 5 of 2016 in the Court of Appeal at Nakuru.

(iii) The respondent is barred from evicting the applicants, subject to each depositing the sum of Kshs. 30,000/= within 60 days from today, and any applicant not depositing the said sum will have to vacate the suit properties pending appeal or be forcefully evicted.

(iv) The costs of this application shall be costs in the appeal.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Gakuhi Chege for applicants

Mr. Morintat holding brief for Mr. Kinyua Njoroge for respondent

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU