



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 9 OF 2014

JAMES M. KIMONYE.....APPELLANT

VERSUS

WILSON KINOTI KIREA.....1ST RESPONDENT

PHILIP GUANTI M'ITUARUCHU.....2ND RESPONDENT

JOSEPH GATOBU KARAMA.....3RD RESPONDENT

R U L I N G

This ruling concerns 2 applications. The first one filed by the Appellant is dated 10th April, 2014 and seeks orders:

1. *That the Learned trial Magistrate erred in Law and in fact in finding that the appellant had not made out a prima facie case against the weight of the evidence on record.*
2. *That the Learned trial Magistrate erred in law and in fact by failing to make a determination on the evidence adduced proving fraud on the part of the Respondents which would have led to the conclusion that the appellant had an arguable case with a high probability of success and thus had established in a prima facie case.*
3. *That the Learned trial magistrate erred in law and fact by going against the holdings in the Court of Appeal decision in MACHARIA MWANGI MAINA & 87 OTHERS VS DAVIDSON MWANGI KAGIRI Civil Appeal No.6 of 2011 consolidated with Civil Appeal No. 26 & 27 of 2011 in finding that there being no consent of the Land Control Board the same transaction between the Appellant and 1st Respondent was void and hence the Appellant's only remedy was seeking a refund of the sum paid.*
4. *That the Learned Trial Magistrate erred in law and fact in failing to find that the Appellant's case was not for a refund of the paid consideration price and the Appellant could not be compensated by way of an award of damages the appellant having taken possession and extensively developed the suit lands.*
5. *That the Learned trial Magistrate erred in law and fact in failing to recognize that the orders of injunction and inhibition sought are equitable remedies and only took in consideration a statutory provision of the law in denying the appellant's the orders justifiably prayed for.*
6. *That the Learned trial Magistrate erred in law and fact in failing to find that the orders of temporary injunction and inhibition were called for to preserve the suit parcels to wit LR Nos. ABOTHUGUCHI/KATHERI/3734 and 3735 and the developments of the appellant's pending*

the hearing and determination of the suit.

7. *That the Learned trial Magistrate order/ruling was against the weight of the evidence on record.*

The second application is dated 28th April, 2014 and seeks the following orders:

1. *That this application is certified urgent.*
2. *That there be a stay of the exparte orders issued on 23.4.2014 pending interpartes hearing of this application.*
3. *That the exparte orders issued on 23.4.2014 be set aside/discharged/varied.*
4. *That costs of this application be in the cause.*

I have considered the 2 applications. I have also considered the submissions by the parties. It is quite clear to me that whichever way the rulings in the two applications go, the hearing of the Civil Appeal herein will remain to be done. This Court must take care not to rule on issues which will have to be handled during the hearing of the appeal.

It is also clear that the suit in the lower court remains to be heard and determined. This court must be sensitive to the fact that it should avoid anything that will tie the hands of the lower court.

I opine that the most important thing at this point in time is to hear and determine this Civil Appeal. This court must avoid, at all costs, pronouncing itself on any issue that can only be determined after the appeal is heard. The Court should also be careful not to make any pronouncements which will tie the lower court when it hears and determines the case before it. The submissions by both parties regarding their two applications touch on matters and issues which can only be heard and determined in the hearing and determination of this appeal and of the suit in the lower court. I, therefore, despite the extensive submissions by the parties refuse to grant the orders sought in both applications.

It is my opinion that for the purposes of this appeal an order of inhibition, will suffice.

I grant the following orders:

1. *An order of Inhibition is granted prohibiting any dealings regarding parcel Nos. ABOTHUGUCHI/KATHERI/3734 and ABOTHUGUCH/KATHERI/3735.*
2. *Interim orders granted by the court, except the order of inhibition, are vacated.*
3. *The appellant should set down the case for hearing of the appeal within 45 days.*
4. *Costs of both applications shall be in the cause.*

It is so ordered.

Delivered in Open Court at Meru this 7th day of May, 2015 in the presence of:

Cc Lilian/Daniel

Dickson Kimathi for Appellant/Applicant

Murithi for 2nd and 3rd Respondents

Kariuki for 2nd and 3rd Respondents

P. M. NJORGE

JUDGE