



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 230 OF 2018**

**HENRY WAITHAKA WACHIRA** (Suing as the legal representative of

**JOSEPH WACHIRA WAITHAKA ( Deceased).....PLAINTIFF**

**VERSUS**

**CONSOLATA NJERI MAINGI** (sued as the legal representative of

**CHARLES MAINGI MACHARIA (Deceased).....1<sup>ST</sup> DEFENDANT**

**SAMUEL KIMANI MUCHIRI.....2<sup>ND</sup> DEFENDANT**

**JEREMIAH MAINA MWANGI .....3<sup>RD</sup> DEFENDANT**

**FRANCIS MACHARIA MWNAGI.....4<sup>TH</sup> DEFENDANT**

**FR. JOHN MUNJI.....5<sup>TH</sup> DEFENDANT**

**NAKURU KIAMUNYEKI CO. LTD.....INTENDED 6<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR NAKURU..... INTENDED 7<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL .....INTENDED 8<sup>TH</sup> DEFENDANT**

**GEORGE KARANJA MAINA.....INTENDED 9<sup>TH</sup> DEFENDANT**

**DAVID WAINAINA.....INTENDED 10<sup>TH</sup> DEFENDANT**

**STEPHEN NJENGA GICHURU.....INTENDED 11<sup>TH</sup> DEFENDANT**

**RICHARD ONCHWERI ATUKE.....INTENDED 12<sup>TH</sup> DEFENDANT**

**FAITH NJERI WAMBUGU.....INTENDED 13<sup>TH</sup> DEFENDANT**

**JEREMIAH MAINA MWANGI.....INTENDED 14<sup>TH</sup> DEFENDANT**

**RULING**

1.The plaintiff’s application dated 18<sup>th</sup> February 2019 which interalia sought the substitution of the plaintiff by the applicant; the substitution of the 1<sup>st</sup> defendant; the revival of the suit that the Court had declared as having abated vide an order made on 30<sup>th</sup> January 2015; the joinder of several other parties and an order restraining any further subdivision of land parcel **Dundori/Lanet Block5/257 and 261** by the 1<sup>st</sup> defendant and further orders restraining any dealings in respect of several resultant subdivisions was dismissed by the Court on 30<sup>th</sup> September 2019.

2. The Applicant aggrieved and dissatisfied by the ruling of the Court on 8<sup>th</sup> October 2019 filed a Notice of Appeal signifying his intention to appeal against the ruling of the Court. The Notice of appeal was served on the Attorney General and the 1<sup>st</sup> defendant on the same date and on the other Respondents subsequently as detailed on the affidavit of service sworn by Kenneth Maingi on 29<sup>th</sup> October 2019 and filed in Court on 12<sup>th</sup> November 2019. The applicant was granted leave to appeal against the ruling on the same date the ruling was granted. In regard to the oral application by the applicant for an injunction pending appeal, the Court directed that a formal application be filed for consideration by the Court.

3. The Plaintiff/Applicant filed the Notice of Motion dated 15<sup>th</sup> October 2015 which is the subject of this ruling. The application was brought under Order 24 Rule 3, Order 40 Rules 1(a), 10 (1) (a), Order 42 Rule 6 and Order 51 Rules 1 to 3 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. By the application the applicant principally sought the following orders:-

(i) *That this Honourable Court be pleased to restrain the 1<sup>st</sup> defendant/respondent whether by herself or servants or agents from subdividing or further subdividing Dundori/Lanet Block 5/257 and Dundori/Lanet Block 5/261 into plots, registering purported subdivision of the same, selling charging of the said parcels or subdivision of the same or otherwise dealing with the same pending the lodging, hearing and determination of the plaintiff's intended appeal.*

(ii) *That the 1<sup>st</sup> to 5<sup>th</sup> defendants and the intended 9<sup>th</sup> to 14<sup>th</sup> Defendants/ Respondents be restrained by themselves, servants or agents from selling and charging of:-*

*Dundori Lanet Block 5/2304, 2305, 2302, 2303, 2306, 2307, 2308, 2460; and 2461 respectively, pending the lodging, hearing and determination of the plaintiff's intended appeal.*

(iii) *That the Honourable Court be pleased to restrain the 6<sup>th</sup> defendant from registering transfers and/or charges in respect of Dundori Lanet block 5/257 and Dundori Lanet Block 5/261 and of :-*

*Dundori Lanet Block 5/2304, 2305, 2302, 2303, 2306, 2307, 2308, 2460, and 2461 respectively is pending the lodging, hearing and determination of the plaintiff's intended appeal.*

4. Although under prayer (3) of the application the applicant sought leave to appeal against the decision made on 30<sup>th</sup> September 2019 such leave was granted upon the request of the applicant's counsel following the delivery of the ruling.

5. The plaintiff's application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the plaintiff applicant. The applicant basically faults the Court's exercise of its discretion in disallowing the application. The applicant contends the Court failed to consider that the applicant's counsel had made a mistake in his handling of the proceedings which was excusable and that the applicant had demonstrated sufficient cause to warrant being granted extension of time to substitute the plaintiff. The plaintiff further contended that the Court had jurisdiction to grant an injunction notwithstanding it had dismissed an earlier application for injunction if the interest of justice stood to be served by preserving the subject matter of the appeal and in support of this assertion placed reliance on the Court of Appeal decision in *Madhupaper International Ltd -vs- Kern (1985) KLR 840*. The plaintiff/Applicant asserted that notwithstanding his application for injunction was dismissed by the Court, the Court had jurisdiction to order the maintenance of the status quo pending the hearing and determination of the intended appeal to ensure the subject matter of the appeal was not fundamentally altered in the intervening period before the appeal is heard. He argued that unless the subject matter of the appeal was preserved the appeal may be an exercise in futility if the property the subject of the appeal is dissipated, disposed or dealt with in such a manner as would render the appeal nugatory.

6. The 1<sup>st</sup> defendant Consolata Njeri Maingi, swore a replying affidavit on 12<sup>th</sup> November 2019 in opposition to the plaintiff/applicant's application. The 1<sup>st</sup> defendant's detailed replying affidavit in the main faults the plaintiff/applicant for being dilatory in regularising his participation in the proceedings in this suit commenced by his late father. The 1<sup>st</sup> defendant particularly faulted the applicants for not timeously applying for substitution following his father's death and/or timeously applying for the revival of the suit following its abatement. Going through the 1<sup>st</sup> defendant's replying affidavit, it reads like grounds upon which the decision/ruling of the Court rendered on 30<sup>th</sup> January 2019 ought to be affirmed. I am not sitting as an appellate Court and I cannot sit on appeal on my brother Judge's decision as that is the province of the Court of Appeal.

7. The application was canvassed by way of written submissions. The applicant essentially at the time of filing the application was seeking two main prayers; firstly leave to appeal; and secondly injunctive orders with the object of having the subject matter preserved until the appeal is heard and determined. As observed earlier in this ruling leave to appeal was granted on the same date the ruling was delivered on 30<sup>th</sup> September 2019. The applicant in the supplementary submissions filed on 23<sup>rd</sup> July 2020 properly abandoned the prayer for leave to appeal. Thus what is contested in this application is whether or not the Court should grant the injunction orders sought by the applicant pending the hearing and determination of the intended appeal. Had the application dated 18<sup>th</sup> February 2019 upon which the ruling dated 30<sup>th</sup> September 2019 sought to be appealed from been successful, the abated plaintiff's suit would have been reinstated and/or revived and the substitution of the plaintiff and the 1<sup>st</sup> defendant ordered.

8. This Court has granted the Applicant leave to appeal against the ruling of the Court delivered on 30<sup>th</sup> September 2019. The appellate Court may or may not agree with this Court's decision. It is on this account the applicant prays that the prevailing status quo in regard to the affected suit properties be preserved so that the appeal, if successful, is not rendered nugatory.

9. The parties have presented rivalling arguments as to whether this Court has jurisdiction to grant an injunction where it has made a decision dismissing a prayer for injunction. The 1<sup>st</sup> defendant has submitted that the Court can only entertain an application for injunction when exercising its appellate jurisdiction as provided under Order 42 Rule 6 (6) of the Civil Procedure Rules. Order 42 Rule 6 provides as

follows:-

(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 subordinate Court or tribunal has been complied with.*

10. The 1<sup>st</sup> defendant in support of her submissions placed reliance on the persuasive authority of my brother Justice C K Yano in the case of **Bartholomew Mwanyungu & 3 others -vs- Florence Dean Karimi (2019)** where in holding the Court lacked jurisdiction to grant injunction where it had rendered its decision the learned Judge stated as follows:-

*“It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court had the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated she intended to appeal to the Court of Appeal against the decision of this Court given on 18<sup>th</sup> April 2018. On this basis alone, I find that the Court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This Court is no longer exercising its appellate jurisdiction. The applicant has already filed a Notice of Appeal in the Court of Appeal under Rule 5 (2) of the Court of Appeal Rules, the Court of Appeal may grant an injunction in Civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 75.”*

11. The 1<sup>st</sup> defendant thus urged the Court to down its tools on account of lack of jurisdiction no doubt in sync with the holding in the case of **The Owner of the Motor Vessel “LillianS” –vs- Caltex Oil (Kenya) Ltd (1989) KLR** where Nyarangi JA famously stated:-

*“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.*

12. Further the 1<sup>st</sup> defendant has submitted that even if the Court was to hold it had the jurisdiction to entertain the instant application the applicant has not met and/or satisfied the conditions upon which an injunction pending appeal may be granted. The 1<sup>st</sup> defendant has submitted that the applicant has not demonstrated that he has an arguable appeal and/or that the appeal would be rendered nugatory if the orders sought are not granted. Further the 1<sup>st</sup> defendant has argued the Applicant has not demonstrated he would suffer irreparable loss if the injunction sought is not granted. The 1<sup>st</sup> defendant in support of this submissions relied on the case of **Bilha Mideva Buhuku -vs- Evelyne Kanyere (2016) eKLR and Joseph Macharia Nderitu -vs- NIC Bank (Kenya) Ltd & another** Nakuru HCCA No.6 of 2020. In the latter case Hon. Justice Prof Joel Ngugi in considering the conditions an applicant for injunction pending appeal required to meet stated thus at paragraph 17 of his ruling:-

17. *“it seems to me that, therefore, to succeed in an application such as the present one, an Applicant must demonstrate three points:-*

*(a) First, an applicant must demonstrate that the status quo they intend to preserve prevails. As the Court of Appeal stated in the Daniel Lomagul Kande Case, where circumstances have already changed, as for example where titles to land have already passed and new ones issued, an injunction pending appeal cannot issue as it will serve no purpose. Differently put, an injunction pending appeal cannot be used to un-do acts already done. It cannot be mandatory in nature; it can only be preservatory.*

*(b) Second, an applicant must show that they have an arguable appeal. Contrary to what Mr. Omullo argued before the Court, the Applicant is not obligated to demonstrate that they have an appeal with overwhelming chances of success. A single arguable point of appeal would be sufficient.*

*(c) Third, an applicant must demonstrate that he would suffer irreparable loss or that the appeal would be rendered nugatory if the injunction sought is not granted.*

13. I am however mindful that my brother Hon. Justice Prof. Ngugi was in making the ruling exercising his appellate jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules unlike in the instant matter where the Court of Appeal is the appellate Court and consequently the considerations may be different.

14. The plaintiff/applicant in contrast to the position taken by the 1<sup>st</sup> defendant maintains the Court has jurisdiction to grant an injunction pending the hearing and determination of the appeal. The applicant argues, he has a right to appeal the decision of this Court and as indicated, the Court did grant him leave to do so. He argues that if the defendants/ respondents are permitted to deal with the properties the subject of the intended appeal, they could dispose, sell or otherwise deal with the properties during the pendency of the intended appeal which would render the appeal nugatory and it is on that basis he seeks that the properties be preserved in the status they are in until the intended appeal is heard and determined. The Applicant has submitted that notwithstanding that the Court dismissed the earlier application, it has jurisdiction, if the interest of justice will be served by the preservation of the subject matter, to grant an injunction pending the hearing of the appeal. The Applicant for this proposition places reliance on the Court of Appeal case of **Madhupaper International Ltd –vs- Kerr (1985) KLR 840** where the Court relied on the ruling by Megarry, J in the English case of **Eringford Properties Ltd –vs- Chesire County Council (1974) 2 14ll ER 442** in affirming that the Court appealed from has jurisdiction to issue an injunction in a case where it has dismissed an application for injunction. In the case of **Eringford Properties Ltd -vs- Chesire County Council (supra)** the learned judge stated thus:-

*“I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite*

*different. Putting it shortly, on a motion the question is whether the Applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course is the possibility that the judgment may be reversed or varied; Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A Judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision may be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending an appeal against the decision not to grant an injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.”*

15. In the case of **Anthony Raymond Cordeiro & 2 others -vs- Adriam Noel Carvillo & 5 others (2014) eKLR** in an application similar to the one before me seeking injunctive orders pending the determination of an intended appeal the Court referred to the cases of **Madhur paper International Ltd -vs- Kerr (supra)** and **Emma Muthoni Wambaa & Another -vs- Joseph Kibaara Kariuki** (Mombasa HCCC No.274 of 2009) which had applied the principles as propounded in the **Erinford Properties Ltd -vs- Chesire County Homes** (supra). In the **Madhurpaper International case -vs- Kerr** (supra) it was held :-

*“ Where a judge dismissed an application for an interlocutory injunction, he has jurisdiction to grant the unsuccessful litigant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate Court from being nugatory should the appeal succeed.”*

16. In the **Emma Muthoni Wambaa -vs- Joseph Kibaara** (supra), Okwengu, J ( as she then was) inter alia held:-

*“Therefore it is clear that this Court has jurisdiction to hear the present application and if persuaded grant orders sought.*

*It is evident that the purpose of the plaintiff's intended appeal is to preserve the subject matter of the suit which is the suit properties now in possession of the 3<sup>rd</sup> – 7<sup>th</sup> Defendants. The 3<sup>rd</sup> – 7<sup>th</sup> Defendants claim they are bonafide purchasers for value without notice. That is a defence that the Defendants would have the opportunity to fully ventilate when the suit is heard. The main consideration herein is whether the plaintiff's intended appeal would be rendered nugatory if the orders sought are not granted. In my considered view, the Defendants would not in any way be prejudiced by the issue of an order of injunction restraining them alienating or transferring, or charging the suit property. On the other hand, if the order of injunction is not given the defendants who are in possession of the title to the suit properties may dispose of the suit property or deal with it in a manner that may render the plaintiff's appeal nugatory if successful. I think in the circumstances of this case, it is fair and just that indeed, in the interest of justice that the subject of the suit be preserved.”*

17. On the question whether or not this Court would have the jurisdiction to issue an injunction where it has already made an order dismissing an injunction in the instance where the unsuccessful party seeks to appeal against the dismissal order, I would say that the Court has jurisdiction as illustrated in the judicial decisions referred to above . However, the grant of an injunction pending an appeal would depend on the peculiar circumstances and facts of each case. In the present case, it is evident the suit was never heard on its merits. The suit by the plaintiff abated as did the counterclaim by the 1<sup>st</sup> defendant as the original plaintiff and the original 1<sup>st</sup> defendant died and were not substituted within the stipulated time. The application by the plaintiff/applicant seeking revival of the suit and for him to be substituted in place of his deceased father and the enjoinder of several other defendants who had acquired some interest in the suit property and for the preservation of the suit property pending the determination of the suit is what was dismissed by the Court on 30<sup>th</sup> September 2019.

18. The applicant has faulted the Judge, (Munyao, J) in his appreciation of the law in regard to substitution of parties and the role of a personal representative in Court proceedings. In particular he contends lady Justice Waithaka erred when she made an order striking out a suit against a dead person who had not been substituted. In support of his submissions in this regard the applicant relied on the case of **Tronistik Union International & Another -vs- Jane Mbeyu & Another (1993) eKLR**. The applicant has argued that the misapprehension by the Learned Judge in the application of the law mired the Court's exercise of discretion in determining the application dated 18<sup>th</sup> February 2019. On the material on record I cannot hold that the applicant's intended appeal would be frivolous. The appellate court will determine whether in the exercise of his discretion the Learned Judge acted and/or properly applied the appropriate principles. As I am not sitting on appeal on my brother judge's decision I cannot take that role and I would be out of order if I purported to exercise that mandate.

19. Having held this Court has jurisdiction to grant an injunction pending the determination of the intended appeal notwithstanding the dismissal of an earlier application for injunction, I have to determine whether in the circumstances of this case an injunction is merited. The essence of granting an injunction was aptly put in the case of **Assanad -vs- Petit (1989) KLR 241** where the court held thus:-

*“ The object of a temporary injunction is to keep things in status quo that if at the hearing the plaintiffs obtain judgment in their favour the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual”*

20. In the present matter it is the defendants and the intended defendants (should joinder be allowed) who hold title and are in possession of the suit property. The plaintiff as per the plaint filed herein claims ownership of the suit property. The defendants likewise claim ownership of the suit property through the 1<sup>st</sup> defendant. The plaintiff alleges fraudulent dealing by the 1<sup>st</sup> defendant in offering to the defendants for sale properties which the 1<sup>st</sup> defendant knew he did not own and that the same were owned by the plaintiff. The main suit as explained herein above has never been heard on its merits. Were the plaintiff /Applicant's appeal to succeed, that would result in the applicant being substituted in place of his deceased father and the suit being revived to be heard on merits. The suit in other words would recommence and possibly the pleadings would be re-opened.

21. In the eventuality of the plaintiff/Applicant's appeal being successful, it is in my view necessary to have the properties the subject of the suit preserved in the condition they are in at the moment to forestall the appeal being rendered nugatory. I take the position that the hardship visited on the defendants would be far much less than for the plaintiff/Applicant to be successful on the appeal only to find the suit properties have been disposed, alienated and/or charged to persons and/or parties who are not parties to the present suit.

22. In the result I allow the plaintiff/applicant's Notice of Motion dated 15<sup>th</sup> October 2019 in terms of prayers (5), (7) and (8) of the Notice of Motion subject to the condition that the Plaintiff/Applicant shall file the record of Appeal and serve the same on the Respondents within a period of Ninety (90) days from the date of this ruling failing which the orders of injunction granted herein will automatically lapse and will stand vacated. The costs of the application will abide the outcome of the intended appeal.

23. Orders accordingly.

**Ruling dated signed and delivered virtually at Nakuru this 24<sup>th</sup> day of September 2020.**

**J M MUTUNGI**

**JUDGE**