



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 465 OF 2013

ANGELINE KINYA NCHEERI & OTHERS..... PLAINTIFF

VERSUS

JOSEPH MUSAU KALUNDE DEFENDANT

RULING

On 28th September 2012 **Hon. Justice Makhandia** as he then was delivered the ruling prepared and signed by the **Hon. Justice Hatari Waweru** on the Plaintiffs chamber summons application dated 3rd March 2010. By the ruling the Plaintiffs application which sought to restrain the Defendants from “**further transferring or carrying out any transaction on land parcel L.R. NO. 12715/42 (grant NO. LR 44336) situated in Machakos District...**” and further to restrain the Defendants from interfering with the Plaintiffs quiet possession of the said suit land was dismissed.

The Plaintiffs being dissatisfied with the ruling filed a Notice of Appeal dated 8th October 2012 signifying their intention to lodge an appeal to the court of Appeal against the said ruling.

On 15th October 2012 the plaintiffs filed the instant Notice of motion the subject of this ruling expressed to be brought under order 22 Rule 22, order 42 Rule 6 of the Civil procedure Rules 2010, section 1A, 3A, 63 (e) & 79 of the Civil Procedure Act Cap 21 laws of Kenya and inter alia seek the following orders:

1. That the enforcement of the order/ruling made by the Hon. **Justice HPG Waweru** on 28th September 2012 be stayed and status quo be maintained pending the hearing and determination of the applicants intended appeal.
2. That the enforcement of the order/Ruling made by the **Hon. Justice HPG Waweru** on 28th September 2012 and the proceedings be stayed and status quo be maintained pending a valuation of the developments in the suit land by the applicants.
3. That a temporary injunction do issue to restrain the defendants, agents and/or servants from further transferring or carrying out any transaction on land Reference **L.NO. 12715/42 (GRANT no. IR.44336)** measuring 2.024 Hectares or thereabouts located in Machakos District pending the hearing of the applicants intended appeal.

The plaintiffs application is grounded on the grounds set out on the face of the application and on the supporting affidavit sworn by Angeline Kinya Ncheeri on behalf the plaintiffs filed in court on 15th October 2012 and further affidavit filed on 25th July 2013.

The 1st Defendant/Respondent filed grounds of opposition to the plaintiffs said application on 29/5/2013 and set out the following grounds of opposition:

- i. The Notice of motion is incompetent, frivolous, vexatious and an abuse of the court process.
- ii. The prayers sought by the applicants amount to reviving of their application dated 3rd March 2010 that was heard and determined and is thus resjudicata.
- iii. The applicants application is incompetent as it seeks to have the court sit on appeal over its orders.

The 2nd Defendant through its Chairman Paul Ogori Nyerere filed a replying affidavit sworn on 11th June 2013 in opposition to the Plaintiffs said application. The parties filed written submissions each articulating their respective positions.

The main basis for the plaintiffs application is that as **Hon. Justice Hatari Waweru** had in his ruling of 28th September 2012 dismissing their application for interlocutory injunction held that the plaintiffs had established a prima facie case against the 1st Respondent and further had found that the 1st Respondent had put and/or allowed the plaintiffs into possession the plaintiffs appeal against the order dismissing the plaintiffs application for injunction would be arguable and not frivolous. However the judge had also held that the plaintiffs had not placed any material for evidence before the court to demonstrate that the 2nd Defendant at the time it entered into the purchase agreement with the 1st Defendant had any notice and/or knowledge of the plaintiffs interest in the suit property. In essence and by all appearances the 2nd Defendant was an innocent purchaser for value who fully paid for the purchase of the portion of the suit property that was transferred to it.

The judge further held that the plaintiffs would be adequately compensated by an award in damages and did not stand to suffer any irreparable damages. Essentially therefore the judge found that the plaintiffs did not satisfy the conditions for the grant of an interlocutory injunction as enuciated in the case of **GIELA VS- CASSMAN BROWN LTD (1973) EA 358**. Even though I am quite aware I cannot sit on appeal against the decision/ruling of my brother Judge I do not find any basis on which the Judge's ruling can be faulted and I am thus unable to discern that the intended appeal has any chances of success.

It is further unclear what the status of the intended appeal is as the plaintiffs appeal have not pleaded that they have indeed filed the record of appeal having already filed the Notice of appeal. The respondents state they have not been served with the record of appeal but I acknowledge that the court of appeal Rules permit for the filing and service of a record of appeal out of time if sufficient cause is demonstrated under the rules. It is thus within the province of the court of Appeal to admit or not to admit a record of appeal lodged out of time.

The Plaintiffs application seeks the enforcement of the order/ruling by **Honourable Justice Waweru** to be stayed and status quo to be maintained pending the hearing and determination of the intended appeal. Is the order given by the **Hon. Justice Waweru** capable of being stayed? I do not think so as the judge merely dismissed the Plaintiffs application for injunction and in my view a dismissal order is not capable of being stayed. The dismissal of the application can only be dealt with by the court of appeal which can set aside the order dismissing the application for injunction and grant the injunction. I am persuaded that the dismissal order was not one capable of being executed so that a stay of the same could be sought. The Respondents referred me to the case of **ROYAL MEDIA SERVICES VS- TELKOM KENYA LTD & 13 OTHERS 9HCCC NO. 15/2000 Milimani Commercial courts**) where **Hon. Justice Ransley** as he then was relying on the holding in the court of appeal case of **ESTATES LIMITED VS. KENYA POST & TELECOMMUNICATIONS COR. & ANOTHER (CA NAL 162 OF 2004)** held that an order dismissing a suit was incapable of being stayed. In the said court of Appeal case the court of Appeal stated thus:-

“ **The stay of execution envisaged by Rule 5 (2) (b) of the Rules of this court is the execution**

of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act.

“Means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.

The order which dismissed the suit was a negative order which is not capable of execution. If the order sought is not granted, the appeal will not be rendered nugatory because if the appeal succeeds the dismissal order will be set aside and the suit will be restored on the register”.

Similarly an application for stay under order 42 Rule 6 of the Civil Procedure Rules would envisage a decree or order capable of execution. The order sought to be stayed by the plaintiffs is not such an order and I therefore decline to grant the orders sought under prayers 2 and 3 of the Notice of motion dated 15th October 2012.

As regards prayer NO.4 for temporary injunction pending the intended appeal it is my view that the plaintiffs are attempting to have a second bite of the cherry having failed to get the injunction before **Hon. Justice Waweru**. The application is grounded on the same facts and the circumstances have not changed. The Hon. Judge duly considered all the facts laid before him in arriving to the decision that he did. To request me to consider the same application based on the same facts is to request me to sit on appeal against the decision of my brother Judge with whom I share concurrent jurisdiction and I will therefore decline the invitation and urge the plaintiffs to pursue their appeal in the court of appeal. Whereas I agree I have jurisdiction to grant an interlocutory injunction even where an initial application for injunction has been heard and dismissed by the court it is my position that the plaintiffs have not satisfied me that they would be deserving of an order of injunction pending the hearing and determination of the appeal having regard to the findings contained in the ruling of **Hon. Justice Waweru** with which I agree.

In the premises and for the reasons set out herein above I find and hold that the plaintiffs application dated 15th October 2012 lacks merit and the same is hereby ordered dismissed with costs to the respondents.

Ruling dated and delivered at Nairobi this 5th day of February 2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... PLAINTIFFS

..... DEFENDANT