



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 13 OF 2014**

**(Appeal arising from the judgment of D.K. Mikoyan, Ag. SPM dated 22nd January, 2014 in the Principal's Magistrates Court at Nyahururu, Civil Case No. 34 of 2006)**

**TABITHA WAMBUI MUNYAO**

**GEOFFREY KANIA MUNYAO**

**ISAAC NJENGA MUNYAO**

**PETER GITHINJI MUNYAO**

**JOHN MURUGA MUNYAO**

**NGOTHO MUNYAO**

**CHARLES KINUTHIA MUNYAO**

**SAMUEL NDUNU ..... APPLICANTS**

**VERSUS**

**PETER NGUGI KAINAMIA..... 1ST RESPONDENT**

**JOHN MURAYA KAINAMIA ..... 2ND RESPONDENT**

**RULING**

1. On **17th February, 2014** the Applicants moved this Court by way of Notice of Motion. The said application was filed under Certificate of Urgency and was so certified by this court. By this application the applicants seek the following two prayers:

a) ... (spent)

b) ... (spent)

c) **That this Honorable Court do order a stay of execution of the ruling and orders made by this Honorable Court on the 22nd day of January, 2014 pending the hearing and final determination of the Applicants' appeal;**

**d) That the Costs of this application be provided for.**

2. The application is supported by the grounds on the face of it and the affidavits of **Isaac Njenga Munyao** sworn on **17th February, 2014** and a further affidavit of **Tabitha Wambui Munyao** sworn on **16th April, 2014**. The Respondent filed a replying affidavit sworn by **Peter Ngugi Kainamia** and **John Muraya Kainamia** on **29th March, 2014**.

3. The grounds in support of the application were elaborated by the affidavit of **Isaac Njenga Munyao**. He deposes that on 22nd January, 2014 a ruling was entered against the applicants in which the court ordered that pending the hearing and determination of the suit before it, there be a temporary injunction against the applicants from any dealings with the suit land (**LR. Nyandarua/Ol Kalou South/1698**). The applicants being aggrieved by the ruling preferred this appeal on the grounds that they are in occupation of the suit land and are apprehensive that the Respondents shall execute the ruling against them and as a result they will suffer substantial loss.

4. The deponent further avers that they have been in occupation of the suit land since 1966 enjoying quiet and uninterrupted possession. That they sought similar prayers for stay of execution in the Principal's Magistrate Court at Nyahururu but the orders were not granted in the first instance. He avers that if the stay of execution is not granted by this court, this application shall be rendered nugatory.

5. In reply, the Respondents vehemently opposed the facts as elaborated by Isaac Njenga Munyao. They contend that the said deponent is not conversant with the facts of the case and is a stranger to this matter.

6. The genesis of this case is a dispute over ownership of **Nyandarua/Ol Kalou South/174** between the Respondents and one Munyao Kakunia (now deceased) in **Nairobi HCCC 1994 of 1979**. The matter was heard and determined by **Mboghli J** where he stated that Munyao Kakunia held the suit property in trust for the Respondents herein and that he must facilitate transfer of the suit property to the Respondents; The property was proclaimed vide Kenya Gazette Notice No. 6371 dated **21st September, 2001** and subsequently subdivided and the resultant parcels were **Nyandarua/Ol Kalou South/1627** and **Nyandarua/Ol Kalou South/1628**; **Nyandarua/Ol Kalou South/1627** was further subdivided into **Nyandarua/Ol Kalou South/1698** and **1699**. That the suit land (Nyandarua/Ol Kalou South/1698) is now registered in the names of the Respondents and that they are in possession of the said land.

7. On **29th June, 2009** the Applicants filed Succession **Cause No. 330 of 2009** in respect to the estate of Munyao Kakunia where they listed Nyandarua/Ol Kalou South/174 as the only asset of the deceased; that the certificate of search filed in the cause indicated that the file had been closed upon subdivision; In spite of this the Applicants obtained a grant and threatened to subdivide the suit land;

8. Again, the Respondents moved the court for revocation and/or annulment of the said grant and pending the determination of the matter they obtained interim injunctive orders dated **5th March 2012** against the applicants; The status quo was maintained by both parties until sometime in 2013 when the applicants in total disregard of the court orders ploughed the land, planted and denied the Respondents access to their houses and homesteads. They further filed an application in the trial court seeking stay of execution of the ruling aforesaid. The Respondents opposed the application and whilst the application was pending before the lower court, the Applicants moved to this court seeking similar prayers. The Respondent avers that the application is vexatious, bad in law, frivolous and an abuse of the court process.

9. On the advice of their counsel, the respondents aver that orders of stay cannot be issued in respect of restraining orders as opposed to mandatory injunctions or orders of eviction and the only recourse to the applicants would have been to seek to set aside or discharge the injunctive orders. They also denied threatening to evict the applicants as there are no eviction orders to that effect.

10. When the motion came up for hearing on **16th April, 2014** Mr. Waiganjo, the learned counsel for the Applicants reiterated the prayers in the motion and depositions in the affidavits of Isaac and Tabitha Munyao. He submitted that the order is couched in broad terms and can be used to evict the applicants from the suit land. Counsel further submitted that the Respondents were in possession of a judgment of

the court and had used it to evict the applicants despite a lapse of time.

11. Mr. Sigilai, learned counsel for the Respondent opposed the application. He submitted that the applicants had filed a similar application before the lower court. That the said application had not been discharged in the lower court proceedings prior to coming to this court. According to counsel, the applicants are shopping for justice and thus an abuse of the court process.

12. Further, counsel submitted that Order 22 Rule 52 does not donate powers to stay a ruling. He contends that an order was extracted and served upon the applicants prior to the filing of this application. As such the prayers sought were already overtaken by events.

13. Counsel also submitted that under **Order 40 Rule 7** of the **Civil Procedure Rules**, an injunction may be discharged, or varied or set aside by the court on application. According to counsel, Order 42 contemplates that one can only appeal against a judgment or a decree. He further stated that Section 75 of the Civil Procedure Act provides on what appeal can be made. It was his submission that the appeal as filed has no chance of success and should be dismissed.

14. I have considered the application, the grounds in support thereof, the replying affidavit filed by the Respondents, able submissions by the counsels and the law. The decisive issue in this application is whether this court can stay execution of an interlocutory injunction granted by the subordinate court pending the hearing and determination of the suit before it.

15. The object of an interlocutory injunction is to preserve matters pending the trial. Such an injunction is usually framed as to endure until the hearing of the case or until further orders of the court. It cannot be considered as affecting the final determination in the case. The learned counsel for the applicants submitted that the order is framed in broad terms and could be used to evict the Applicants. He however did not substantiate this argument and I agree with counsel for the Respondent that the order is framed to the effect of maintaining status quo.

16. In **Halsbury's Laws of England**, (4th Edition) para. 853 sets out the principles upon which the court acts in granting interlocutory injunction. In part it provides that:

**“On application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances...”**

17. It is settled law that the conditions for the grant of injunction were well laid down in the case of **Giella vs Cassman Brown & Co. Limited (1973) EA**. The applicant must demonstrate that he has a prima facie case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages. If the court is in doubt it will decide the application on a balance of convenience. A further regard that the court also considers is the conduct of the parties before application was made since the jurisdiction to interfere being purely equitable, is governed by the equitable principles.

18. I wish to evaluate the conduct of the applicants vis a vis the purpose of an injunction. The respondents submitted to court that there were orders of the court which were issued on **5th March, 2012**. They were interlocutory injunctions with effect of restraining the applicants from any further dealings in the suit land pending the hearing and determination of the suit. It is further sworn that the status quo was maintained by parties until 2013 when the applicants in total disregard of the court orders ploughed, planted and illegally grazed their cattle in the suit land. These allegations were not denied and the Applicants instead attempted to justify their actions by saying that they were harvesting farm produce which if they failed to do, would have been prejudicial to them as they rely on farming as their source of livelihood. It is my view, that the alleged justification does not warrant the applicants to disregard court orders as the loss if any, could be compensated by way of damages. Moreover the applicants had refuge **under Order 40 Rule 7** of the **Civil Procedure Rules** to apply to the court for discharge or variance of the terms of

injunction. To my mind, the conduct of the applicants is unjustifiable and they cannot now seek protection of the same court which they approach with unclean hands.

19. As I have herein above elaborated the object of an interlocutory injunction, it is my considered view that the same cannot be executed. It only acts to preserve the status quo of the property in dispute pending the final determination. As such **Order 40 Rule 7** provides that if a party is dissatisfied with an order of injunction he/she can apply for such order to be discharged, varied or set aside by the court.

20. For these reasons I dismiss the applicants notice of motion dated **17th February, 2014** with costs to the Respondents.

**Dated, signed and delivered in open Court at Nakuru this 11<sup>th</sup> day of July 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

Mr Waiganjo for the Applicant

N/A for the Respondent

Emmanuel Maelo: Court Clerk

**L N WAITHAKA**

**JUDGE**