



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1019 OF 2013

VIRGINIA NJERI MURIMAH..... PLAINTIFF

VERSUS

MBO-I KAMITI FARMERS CO. LTD.....DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff in a Notice of Motion dated 29th January 2014 is seeking orders for a temporary injunction restraining the Defendant from interfering with her quiet possession of Plot No. L.R 96/1 Loresho & Kiora Plaintiation (hereinafter referred to as the suit property), or in anyway selling or transferring the said property pending the hearing and determination of this suit. Further, that the OCS Kiambu Police Station assist in enforcing this orders. The Notice of Motion is supported by an affidavit and further affidavit sworn by the Plaintiff on 29th January 2014 and 15th May 2014 respectively, as well as submissions filed by her counsel dated 13th May 2014.

This is the second such application the Plaintiff is making to this Court, having made a similar application in a Notice of Motion dated 22nd August 2013 which was denied by this court in a ruling delivered on 27th January 2014. The Plaintiff in the instant application states that she is dissatisfied with the said decision of this Court and has already filed a Notice of Appeal, and that in order not to render the appeal nugatory it is fair and just that the Defendant be restrained from interfering with the suit property. Further, that if the orders sought are not granted the suit will be overtaken by events as the Defendant will possess the suit property and demolish the developments thereon.

The Plaintiff also stated that she is willing to finance the balance of the purchase price and deposit the said balance of Kshs 4,500,000/= in court. She claims that the Defendant cannot compensate her by an award of damages because it is unable to settle cases filed against it in court as it has no traceable assets. She attached evidence of her ability to pay the said deposit, and of pleadings evidencing the Defendant's inability to pay some of its debts.

The Plaintiff's counsel in his submissions argued that the Plaintiff had demonstrated that she has a *prima facie* appeal with a high chance of success, and gave examples of how this court erred in law in its ruling delivered on 27th January 2014. Further, that the Plaintiff had also demonstrated that she would suffer irreparable loss which cannot be compensated in damages as the Defendant is likely to demolish the house on the suit property. The counsel relied on the decision in **Madhupaper International Limited vs Kerr (1985) KLR 840** that the High Court had jurisdiction to grant an injunction pending the hearing of an appeal.

The Defendant's Response

The Defendants opposed the said Notice of Motion in a replying affidavit sworn on 3rd March 2014 by Stephen Kimani Mihiu, a director and secretary of the Defendant. The Defendant's counsel also filed submissions dated 15th May 2014. The Defendant stated that the Plaintiff's application is an abuse of the process of court, in light of the ruling delivered by this court on 27th January 2014 dismissing her earlier application. Further, that the application herein does not meet the conditions for awarding temporary injunctions and is prejudicial to the Defendant who is the *bona fide* owner of the suit property and has transferred the property.

The Defendant's counsel in his submissions argued that the Plaintiff has not disputed the fact that there is a default in payment as stipulated in the contract for the sale of the suit property, and has no right to continue claiming the suit property which has been transferred to a third party, and that her only claim is in damages. Further, that the only forum left for the Plaintiff to ventilate her case is before the Court of Appeal. The Defendant also argued that the Plaintiff has not met the conditions for the grant of an injunction pending appeal.

The Issues and Determination

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The Plaintiff has brought this application pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules on the grant of injunctions. Before I can determine the application on its merits, I must first deal with the issue of whether this Court has the jurisdiction to deal with this application at all.

In my understanding, the jurisdiction of this Court to grant an injunction pending appeal is limited to two instances. The first is under Order 42 Rule 6(6) whereby this Court can grant an injunction pending an appeal from a subordinate court, in the exercise of its appellate jurisdiction. The second is the circumstances described by the Court of Appeal in **Madhupaper International Limited vs Kerr (1985) KLR 840**, where it was held that where a judge of this court dismisses an application for interlocutory injunction, the said judge has jurisdiction to grant to an unsuccessful applicant an injunction pending appeal against the dismissal.

The purpose of granting an injunction pending appeal is to preserve the *status quo* and to prevent the appeal, if successful from being rendered nugatory as held in **Madhupaper International Limited vs Kerr (1985) KLR 840** and in **Charterhouse Bank Ltd vs Central Bank of Kenya & Another, Civil Application No. 200 of 2006**. In this regard, the principles that apply are that, that the Applicant must show that he or she has an arguable appeal or an appeal that is not frivolous and secondly, that if the order of injunction sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See also **Republic vs Kenya Anti-Corruption Commission & 2 Others, [2009] KLR 31, and Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd (2002) 1 EA 227**.

If this Court was to proceed and determine if these grounds exist as argued by the Plaintiff, it will essentially be sitting on appeal of its own decision. In my view the appropriate forum to ventilate an application for injunction pending appeal in circumstances such as those in the present application is the appellate court. In addition, the other grounds relied upon by the Plaintiff on the payment of the balance of the purchase price and irreparable damage she will incur were the subject of the ruling of this court delivered on 27th January 2014 and are therefore *res judicata*. The said ruling was on an application for the same order as that sought herein, based on the same facts and between the same parties. This Court in this regard rendered itself as follows on the issue whether the Plaintiff had met the requirements for the grant of a temporary injunction:

“The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of the sale agreement entered into between the Deceased and the Defendant dated 1st November 2010 for the purchase of the suit property

for Kshs 5,500,000/=. The agreement states that the Defendant had received Kshs 1,000,000/= as deposit, and the balance of Kshs 4,500,000/= was to be paid within 90 days. In addition clause 6 of the said agreement provided for the consequences of default and states as follows :

“In default of payment of the entire consideration on or before the 30th day of January 2011, the Vendor shall immediately cancel the transaction with no notice and the Purchaser to forfeit the amount paid.”

Unfortunately the Deceased died on 5th January 2011 before the completion date, and it is apparent that the balance of the purchase price remains unpaid. The Plaintiff has not brought any evidence of the further agreements with the Defendant on the alternative plot that she was to be given, or that the balance of the purchase price would be paid out of the Deceased's dues. As these agreements were transactions affecting land, and varying an earlier agreement already entered into with respect to the suit property, they required to be in writing.

I also note from the Plaint filed herein dated 22nd August 2013 that the Plaintiff is seeking a permanent injunction against the Defendant and that the said Defendant issues her with a title to the suit property. In light of the lack of evidence of the non-payment of the balance of the purchase price, and the provisions of the default clause in the sale agreement entered into between the Deceased and Defendant, I find that the Plaintiff has not established a *prima facie* case.”

This Court will therefore be rehashing and relitigating issues it has already decided on if it proceeds to hear and determine the instant application. The proper forum for the Plaintiff to seek an injunction pending appeal is therefore in the Court of Appeal, where she has already filed her appeal. The Plaintiff's Notice of Motion dated 29th January 2014 is accordingly denied, for the foregoing reasons and the costs of the said motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____July____, 2014.

P. NYAMWEYA

JUDGE