



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO.38 OF 2019

DANIEL KYUSYA MUTHAMI.....APPELLANT

VERSUS

MOHAMED MUTSONGI.....1ST RESPONDENT

BIBI ZENA KARISA.....2ND RESPONDENT

MARIAM BILALI HASSAN also known as

MARIAM MOHAMED SHOMARI.....3RD RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 26th September, 2019 brought under Order 40 Rule 1 & 2 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The Appellant/Applicant seeks for orders that the respondents, by themselves, their agents, servants and/or assignees be restrained by an order of injunction from trespassing, constructing, selling or in any way from dealing with parcel of land number 830/ORG/155/MN/II measuring 120 ft by 60 ft at Concordia area at Vikwatani area pending the hearing and determination of the appeal herein. The application is premised on the grounds that the appellant is the owner of the suit parcel number 823 on plot 830/ORG/155/MN/II measuring 120 ft by 60 ft and that without any colour of right, the respondents have trespassed upon the said plot and are carrying out construction thereon. That the appellant's suit to restrain the respondents was dismissed hence this appeal. The appellant avers that he has good appeal with overwhelming chances of success and that unless the injunction is granted, the appeal shall be rendered nugatory.

2. The application is supported by the affidavit of Daniel Kyusya Muthami, the appellant sworn on 26th September, 2019. He has deposed that in 2005, he purchased the suit property from one Mbaraka Ali who transferred all the rights over the said plot to the appellant. He has also deposed that he paid survey fees to Concordia Development Group. He has annexed copies of the sale agreement and receipt. He has deposed that on or about 29th and 30th June, 2015, the respondents without any colour of right brought construction material on the said plot and started digging foundation in readiness to commence construction. The appellant states that he immediately sought the intervention of the area chief who stopped the respondents. A letter from the chief has also been annexed. The appellant has deposed that the respondents continued with the construction and the appellant's lawyer served them with a demand letter and they stopped temporarily before continuing with the construction. This prompted the appellant to file Mombasa CMCC No. 2314 of 2015 which was dismissed on 30th July 2019, hence the appeal herein. The appellant has deposed that since the institution of the suit, the respondents stopped their acts of trespass but the appellant is apprehensive that they will resume the construction. It is the appellant's contention that the appeal has overwhelming chances of success and if an injunction is not issued; and in the event the appeal succeeds, the appellant shall be saddled with the task of demolishing permanent structures built by the respondents.

3. In opposing the application, the 1st respondent filed a replying affidavit sworn by Mohamed Mutsongi on 21st February, 2020. He has deposed that the application has been presented to court after undue delay which delay has not been explained by the appellant noting that the application was filed on 27th September, 2019 yet judgment was delivered on 30th July, 2019 and a Memorandum of Appeal filed on 23rd August, 2019. The 1st respondent has deposed that on 25th October, 2014, the respondents jointly purchased a portion of land measuring 64 x 72 x 74 x 50 feet from one Shehi Murisa Kumbi out of the bigger portion of land known as Plot No.830/II/MN commonly known as Concordia land. He has annexed a copy of the sale agreement. He has deposed that after paying the balance of the purchase price, the respondents sent people to clear the plot and that no one claimed the plot until December, 2014 when they commenced construction that the appellant claimed the plot was his and filed Mombasa CMCC No.2314 of 2015 in which he obtained injunctive orders barring the respondents from carrying out any activities on the suit plot. He states that the respondents complied with the said court order. He has deposed that evidence was taken in the case before the subordinate court and the court in its judgment delivered on 30th July, 2019 dismissed the appellant's claim with costs. It is contended that the appellant did not prove ownership of the suit property and that the appeal is only a

ploy to deprive the respondents their right to develop their property. It is further contended that the appeal has no chances of success.

4. The 2nd and 3rd respondents have opposed the application through the replying affidavit of Mohamed Shebe Shomari sworn on 2nd March 2020 in which he supports and reiterates the averments of the 1st respondent. It is deposed that the appellant is bent on stopping the respondents from enjoying the fruit of their judgment, adding that it is the respondents who stand to suffer irreparable loss and not the appellant. The respondents aver that the appellant has not offered any form of security for costs or due performance of the decree and urged the court to dismiss the application.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have taken into account. I have considered the application, the affidavits, annexures and the submissions and authorities relied on. The issues which I find falling for determination are whether or not there was delay in filing the application and whether or not the appellant has demonstrated a prima facie case to be granted an interlocutory injunction pending the hearing and determination of the appeal herein.

6. The respondents have submitted that the application has not been filed timeously. The application herein was filed on 27th September, 2019 while the judgment appealed against was delivered on 30th July, 2019. This is a period of about two months. I have perused the affidavit in support of the application. I find that there has been no attempt by the appellant to explain the reason for taking about two months to file the application. This court has noted that even after the respondents raised the issue of undue and unexplained delay in filing the application, the appellant did not deem it fit to file a further or supplementary affidavit to explain the delay. On that ground alone, this court agrees with the respondents that this application must fail.

7. Turning to the other issue, this court appreciates that an injunction can be granted pending an appeal. Order 42 Rule 6 (6) of the Civil Procedure Rules provides as follows:

“Notwithstanding anything contained in sub-rule (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 a subordinate court or tribunal has been complied with.”

8. The issue before this court therefore is whether or not the appellant has demonstrated a prima facie case for him to be granted an interlocutory injunction pending the hearing and determination of the appeal herein. This court notes that the appellant did not attach a copy of the judgment he is appealing against making it difficult for it to know the exact orders that were granted by the learned trial magistrate. Although it is common ground that the appellant’s suit was dismissed by the trial court, this court cannot tell the reasons that led to the dismissal as a copy of the judgment has not been filed. Indeed this court is completely in the dark as to what orders the appellant had sought in the lower court. From the memorandum of appeal alone, the court cannot be in a position to decide whether the appellant had demonstrated that he has a prima facie case or not.

9. Be that as it may, the appellant has submitted that the application ought to be allowed to prevent the appeal being rendered nugatory in the event the same is successful. The appellant is apprehensive that he shall be saddled with the task of demolishing permanent structures that may be built by the respondents. I am however, not convinced that the appeal shall be rendered nugatory in the event the same is successful as the respondents can still be ordered to demolish the same at their own cost. The appellant’s apprehension that he shall incur a lot of costs in demolishing the structures is not therefore convincing. To be successful, the appellant ought to have established other factors which show that unless the injunction is granted, the respondents actions will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail. In this case, the applicant can recover the costs of demolition, if any, from the respondents in the event the appeal is successful.

10. By reason of the foregoing, it is my finding and I so hold that the notice of motion dated 26th September, 2019 lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 1st day of October 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE