



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA CASE NO. 55 OF 2019

JOHN J. MCHALU.....APPELLANT

VERSUS

TERESIA WARWARE NGUU

MWANDEBE MWALIMU

MIRIAM M. MWALUGHA

HALIMA MALISO

DEDAY MWANDEMBE MWAVISWA

JONATHAN KAPLO MWAVISWA

LAND ADJUDICATION & SETTLEMENT OFFICER VOI.....RESPONDENTS

RULING

1. This ruling is in respect of the Notice of Motion dated 18th February, 2020 brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and other relevant provisions of the law. The appellant seeks the following orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to grant an injunction order restraining the respondents, whether by themselves, their servants or agents or any person acting on their behalf, from dealing with PLOTS NOS. 2879, 2881, 2886, 2880, 4057 and 4058 NDARA "A" ADJ/SECTION by selling, transferring, disposing off, trespassing into, erecting structures and buildings thereon pending hearing and determination of this Appeal.

4. That this Honourable Court be pleased to grant an order staying proceedings in Voi Environment and Land Court Principal Magistrate's Court case No. 7 of 2019 between the Appellant and the Respondents herein pending hearing and determination of this appeal.

5. That the Officer Commanding Station, Voi Police Station to ensure that any orders to be granted are complied with.

6. That this Honourable Court be pleased to grant any other relief it may deem just to grant in the circumstances.

7. That the costs of this application be provided for.

2. The application is supported by the affidavit of John J. Mghalu, the applicant sworn on 18.2.2020 and is premised on the grounds that the appellant filed Voi ELC PMCC No. 7 of 2019 between the Appellant and the Respondents. Simultaneously, the appellant filed an application seeking orders of injunction restraining the respondents from dealing with PLOT NOS. 2891, 2881, 2886, 2880, 4057 and 4058 NDARA "A" ADJ/SECTION VOI (hereinafter the disputed plots) pending hearing and determination of appeals filed by the Appellant with the

Minister for Lands and Settlement against the decision of the Land Adjudication Officer over the disputed plots. That the appellant's application and suit were dismissed by D. Wangeci, Senior Principal Magistrate by ruling delivered on 2nd December, 2019 on the grounds that the court lacked jurisdiction in the matter, hence this appeal. The appellant states that he has requested for copies of the proceedings and ruling from the subordinate court but is yet to be supplied with the same. The appellant avers that the appeal filed herein is arguable and meritorious with high chances of success and that the same will be rendered nugatory and the appellant bound to suffer irreparable loss and damage unless the court grants the orders sought herein. That the respondents shall suffer no prejudice if the application is allowed.

The appellant however has abandoned prayer 4 of the motion.

3. In opposing the application, the 1st to 6th Respondents filed grounds of opposition dated 2nd March, 2020 on the following grounds:

- 1. That the appellant had filed a similar application in Voi ELC PMCC No. 7 of 2019 and the same was dismissed on 2nd December, 2019 with costs to the respondents.**
- 2. That the courts cannot issue orders in vain as there are no proceedings to be stayed before the trial court and therefore this Honourable Court becomes functus officio.**
- 3. That the application is frivolous, vexatious and meritless.**
- 4. That the application is incompetent, misconceived and fatally defective.**
- 5. That the application is therefore bad in law, an abuse of the court process and ought to be dismissed with costs.**

4. The application was canvassed by way of written submissions. I have considered the application and the submissions made. I have also taken into account the authorities cited. The issue which I find falling for determination is whether or not the appellant has demonstrated a prima facie case to be granted the order of interlocutory injunction pending the hearing and determination of the appeal herein.

5. The applicant has moved this Court principally under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6 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 the subordinate court or tribunal has been complied with.”

6. It is therefore clear that the above sub-rule gives this court discretionary power to grant an injunction on terms that it thinks just so long as the procedure for filing an appeal from the subordinate court has been complied with. Appeals from subordinate courts have to be filed within 30 days from the date of the decision of the lower court and such appeal is filed when a memorandum of appeal has been filed. Section 79G of the Civil Procedure Act provides:

“S 79G. Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

7. In this case, the decision of the lower court was made on 2nd December, 2019 and a memorandum of appeal filed on 11th December, 2019. That the applicant has complied with the procedure for filing of an appeal before this court is not in doubt, and the court is therefore seized of the matter and has the requisite jurisdiction and power to determine whether or not to grant the injunction sought while exercising its appellate jurisdiction.

8. Whether or not to grant an injunction pending appeal involves exercise of discretion and that discretion has to be exercised judicially. Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of **Giella –v- Cassman Brown (1973)EA 358**; that is, that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt, the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safeguard rights of the appellant in the appeal so that the appeal is not rendered nugatory.

9. In the case of **Patricia Njeri & 3 Others –v- National Museum of Kenya (2004)eKLR Visram J** (as he then was) stated that:

“a) An order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.

b) The discretion should be refused where it would inflict greater hardship than it would avoid.

c) The applicant must show that to refuse the injunction, would render the appeal nugatory.

d) the court should be guided by the principles in Giella –v- Cassman Brown Ltd (1973)EA 358.”

10. Further, in considering whether or not to grant an injunction pending appeal, the court while trying to ascertain if the appeal is arguable, or put differently whether the appeal raises serious questions for determination, the court does not have to go deeply into the appeal itself. It must bear in mind that the appeal is yet to be heard and avoid making comments that may prejudice the trial of the appeal itself. The court should only consider the grounds raised in the memorandum of appeal vis a vis the impugned decision and form its own opinion whether there is an arguable appeal to warrant the orders of injunction.

11. In the application before me, the applicant has stated that the dispute over ownership of the suit plots is still pending before the Minister for Lands and Settlement following an appeal filed by the applicant against the decision of the Land Adjudication Officer. Indeed in the application, the applicant has described the suit plots as unsurveyed and unregistered. In this case, I am not persuaded that the applicant has demonstrated that the appeal is arguable. He has also failed to demonstrate that the appeal would be rendered nugatory if the injunction orders sought are denied. I say so because the subject of the suit is land which will still be there post the appeal. I am not convinced that the appeal shall be rendered nugatory in the event the same is successful. Moreover, the dispute over the suit properties is still pending appeal before the Minister for Lands and Settlement.

12. By reason of the foregoing, it is my finding and I so hold that the notice of motion dated 18th February, 2020 lacks merit and the same is hereby dismissed with costs to the respondents.

13. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 2nd day of November 2020

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE