



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA NO. 8 OF 2016**

**1. BARTHOLOMEW MWANYUNGU**

**2. CHRISPUS SANGA**

**3. LENNOX SANGA NYAMAWI**

**4. DANSON MAZURI.....APPELLANTS**

**VERSUS**

**FLORENCE DEAN KARIMI.....RESPONDENT**

**RULING**

1. By Notice of Motion dated 8<sup>th</sup> May 2018 and brought under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law and the inherent jurisdiction of the Court, the Respondent/Applicant seeks orders that pending the hearing of the appeal, the appellants, their agents, servants and/or employees be restrained by way of an injunction pending appeal from entering upon, occupying, distributing, alienating, or dealing adversely with **PLOT NO.KILIFI/MTWAPA/774B** to the prejudice of the respondent.

2. The application is based on the grounds:

**1. That by a judgment delivered by Hon. Justice C. Yano dated 18<sup>th</sup> April 2018 the Court set aside the judgment issued by the Court in CMCC NO. 3321 of 2009 and in lieu thereof dismissed the Respondent's suit.**

**2. That the Respondent was dissatisfied with the said judgment and has already lodged a notice of appeal dated 3<sup>rd</sup> May, 2018. Further, the respondents has applied for certified copies of the proceedings and judgment so that the Record of Appeal may be filed upon supply thereof.**

**3. That the intended appeal raises arguable issues of law as follows: -**

**a. Whether it was proper for the Court to dismiss the respondent's suit despite there being evidence that the Respondent has been in open an uninterrupted occupation of the suit property for more than 12 years.**

**b. Whether the respondent's suit is in respect of specific performance as held by the Court.**

**4. That in the circumstances if appropriate protective orders as herein prayed for are not on a most urgent basis, the respondent's developments on the suit property will be destroyed and the appellants will proceed to sale and lease the suit property on the faith of the judgment that is now subject of an intended appeal to the Court of Appeal.**

**5. That in the event the suit property is sold and the respondent's developments thereon are demolished, the following would then be case: the intended appeal would be rendered nugatory and the Respondent would suffer irreparable losses in that his right of appeal will be rendered useless and further, the respondent will not be able to get a similar property in the event the suit property is sold.**

**6. That there has not been any delay in filing this application.**

**7. That this Court is under a duty in law to preserve the subject matter of the intended appeal irrespective of whether in the Court's view that the appeal is devoid of merit. The applicant stand on that right and pleads with the Court to uphold the law.**

**8. That in the circumstances, it is necessary that appropriate protective orders as herein prayed for be granted on a most urgent basis.**

3. The application is supported by the affidavit of Florence Dean Karimi, the Applicant sworn on 8<sup>th</sup> May 2018 in which she reiterates the grounds in support of the application. The applicant has attached a notice of appeal dated 3<sup>rd</sup> May 2018 and a letter dated 30<sup>th</sup> April 2018 in which the Applicant's counsel is requesting to be supplied with certified copies of proceedings and judgment of the Court dated 18<sup>th</sup> April, 2018.

4. The appellants opposed the application and filed a notice of preliminary objection dated 22<sup>nd</sup> May, 2018 on the ground that the injunctive order sought herein is not in the nature of the relief contemplated by order 42 rule 6 and that the Court would have no jurisdiction to grant the same and that the application ought to be struck out with costs.

5. The application was canvassed by way of written submissions which were duly filed by both parties and which counsel also highlighted through brief oral submissions. The applicant submitted that the application has been made without unreasonable delay. In addition, the applicant submitted that she will suffer irreparable and substantial loss if the orders sought are not granted as the respondents are likely to dispose off the suit property or evict the applicant and demolish the applicant's residential house thereon. The applicant's counsel replied on the case of **Kenya Shell Ltd -v- Benjamin Karugu Kibiru & Another (1996)eKLR** where the Court of Appeal observed that substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay thus has to be prevented to avoid defeating the very purpose of an appeal. It is submitted that the applicant has at all material times been in occupation of the suit property and is still in occupation as that is the only home known to the applicant. That respondents have never been in occupation of the same and will not suffer any prejudice if the orders sought herein are granted. The applicant urged the Court to weigh the matter on a balance of convenience and relied on the decision of the Court in the matter of **Antoine Ndiaye -v- African Virtual University (2015) eKLR**. The applicant further submitted that the Court has jurisdiction to grant the orders sought herein as provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, and added that the preliminary objection raised by the respondents is bad in law as it lacks merit and should be dismissed with costs.

6. The respondents submitted that where injunction is concerned, that jurisdiction, whether in the case of an appeal being taken from the lower Court to the High Court or from the High Court to the Court of Appeal, is exercisable by the Court of which the appeal itself is preferred. The Respondents counsel submitted that Order 42 Rule 6 (6) would be inapplicable as this Court would not be clothed with jurisdiction to grant an injunction as sought pending disposal of the appeal. That the order sought remains only within the jurisdiction of the appellate Court under Rule 5(2)(b) of the Court of Appeal Rules and not the Court appealed from. The Respondents therefore urged Court to dismiss the application with costs.

7. I have considered the application and the submissions made. I find that the issue for determination by this Court is whether the applicant herein should be granted an order of injunction to restrain the respondents from entering upon, occupying, distributing, alienating or dealing adversely with **PLOT NO.KILIFI/MTWAPA/774B** to the prejudice of the respondent pending the determination of the intended appeal against the judgment delivered on 18<sup>th</sup> April 2018.

8. The respondents submitted that this Court does not have the jurisdiction to entertain this application and rather that the application for an injunction is a preserve of the appellate Court. It is important to note that the applicant herein is not challenging any orders issued by this Court in its judgment of 18<sup>th</sup> April, 2018 but is praying that this Court issue an injunction against the respondent to restrain them from dealing adversely with the suit property to the prejudice of the applicant until the intended appeal is determined. The applicant is not asking this Court to sit as an appellate Court and review the decision of this Court issued on 18<sup>th</sup> April 2018. Order 40 Rules 1 and 2 provide that this Court may grant an order of injunction while 3A of the Civil Procedure Act provides that nothing in the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends to justice or to prevent abuse of the process of the Court. Therefore it is safe to say that this Court has the jurisdiction to grant an injunction in a suit pending before the Court. However, the question that I need to consider is whether the Court has the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant.

9. The application is brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules which states as follows:

***“6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.***

***(2) No order for stay of execution shall be made under sub-rule (1) unless***

***a) the Court is satisfied that substantial loss may result to the applicant unless the Order is made and that the application has been made without unreasonable delay; and***

***b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant***

*(3) Notwithstanding anything contained in sub-rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) for the purposes of this rule an appeal to the Court of appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) 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 subordinate Court or tribunal has been complied with.* ”

10. It should be noted from the above provision of the law, and in particular Order 42 Rule 6(6) that this Court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the Court has already rendered its decision and the applicant has stated that she intends to appeal to the Court of Appeal against the decision of this Court given on 18<sup>th</sup> April 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present application and grant the order of injunction sought by the applicant. This Court is no longer exercising its appellate jurisdiction. The applicant has already filed a Notice of Appeal in the Court of Appeal. Under 5(2)(b) of the Court of Appeal Rules, the Court of Appeal may grant an injunction in civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 75.

11. In the result, I find that the Notice of Motion dated 8<sup>th</sup> May 2018 is improperly before this Court. The same is dismissed with costs to the Respondents.

**DATED, SIGNED and DELIVERED at MOMBASA this 8<sup>th</sup> day of February 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mwakisha for Appellants/Respondents

Asige holding brief for Gikandi for Respondent/Applicant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**

**8/2/19**