



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A CASE NO. 3 OF 2018

MUNGANIA TEA FACTORY CO. LTD

*(In trust for Kirwiro Tea Buying Centre).....***APPELLANT**

VERSUS

KIRIAMBURI NJAMIU.....RESPONDENT

RULING

1. By a notice of motion dated 25th September 2018 brought under **Order 50 Rule 1 of the Civil Procedure Rules and the Court of Appeal Rules 2010**, the Respondent in the appeal sought the following orders;

- a. That the Appellant herein, its assigns, agents and or servants be restrained from utilizing Kirwiro Tea Buying Centre – MU060 constructed on the Applicant’s parcel of land number Ngandori/Kiriari/353 pending the hearing and determination of the intended appeal.*
- b. That the Respondent be allowed to utilize the area surrounding Kirwiro Tea Buying Centre – MU060 after prayer 1 is granted.*
- c. That costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Appellant had prevented the Respondent from selling his tea leaves at Kirwiro Tea Buying Centre (hereinafter *Centre*); that the said Centre stood on the Respondent’s parcel of land; and that the Appellant had the financial means to build an alternative tea buying facility on its own land.

3. The said application was supported by the Respondent’s own supporting affidavit in which he reiterated and expounded upon the grounds set out in the notice of motion. It was contended that the Appellant had wrongfully constructed the Center on the Respondent’s *Title No. Ngandori/Kiriari/353* (hereinafter *parcel 353*) instead of the Appellant’s *Title No. Ngandori/Kiriari/3818* (hereinafter *parcel 3818*). It was further contended that although the Respondent had succeeded in the suit before the Magistrate’s court (i.e. *Embu CM’s Award No. 68 of 2001*), the Appellant has failed to prosecute the instant appeal thus frustrating the Respondent from enjoying the fruits of his judgement.

4. The Appellant filed a lengthy replying affidavit in opposition to the said application. It was sworn by Angelica Njoka who described herself as the chairlady of the Centre committee. She stated that the Centre in issue is located on parcel 3818 and not the parcel 353 as claimed by the Respondent. It was stated that sometime in 2014 the Respondent forcibly closed down the Centre and threatened violence upon anyone who attempted to access it with the consequence that the tea producers using the Centre had to ferry their produce to another tea buying facility which was about 2 kilometres away. It was also contended that the Respondent was expelled from the membership of the Centre due to his unbecoming conduct and failure to adhere to the prescribed rules.

5. The Appellant also explained that it was unable to prosecute its pending appeal because its advocates had not been supplied with copies of the proceedings and ruling of the magistrate’s court despite request. The Appellant contended that the orders sought were drastic and would adversely affect the tea farmers who deliver their produce to the Centre. It was further contended that should the orders sought herein be granted, they would cause irreparable harm and render the pending appeal nugatory if successful.

6. When the said application was listed for hearing on 18th October 2018, the Respondent’s advocate prosecuted the same on the basis of the grounds set out in the notice of motion, the supporting affidavit and annexures thereto. The Appellant was not represented at the hearing. However, the Respondent filed its replying affidavit about one month later, that is, on 17th November 2018.

7. The court has considered the Respondent’s said application, the Appellant’s replying affidavit in opposition thereto as well as the Respondent’s oral submissions on record.

8. The court is not inclined to grant the orders sought for at least three reasons. First, it would appear to the court that the said application is based upon the matters which are in controversy in the pending appeal. The question of whether the Centre is situated on parcel 353 or 3818 and whether the Appellant should be evicted from the area they occupy are matters in issue in the appeal. It would not be in order for the Respondent to seek final orders in his favour before the pending appeal is heard and concluded.

9. Second reason is that the pending appeal might be rendered nugatory should the orders sought be granted at the interlocutory stage. If the Appellant were to be removed from the land they occupy and the Respondent allowed to take possession thereof and utilize it, the purpose of the appeal might be defeated. There is no valid reason why the Appellant should be compelled to construct an alternative tea buying facility whilst the instant appeal is pending. There is no justification for causing hardship to the tea producers who utilize the Centre just to make the Respondent comfortable whilst the appeal is pending. The court is of the view that it would cause greater hardship to the tea farmers by granting the orders sought than the Respondent would suffer if the orders were denied.

10. The third reason is that a person who seeks discretionary, equitable orders from the court must conduct himself in an orderly and equitable manner. See **Thomson Smith Aikman Vs Muchoki & Others [1984] KLR 353**. It would appear from the material on record that the Respondent has been violent and unreasonable in his actions towards the Appellant and the farmers who deliver their produce to the Centre. There is some documentary evidence on record to the effect that the Respondent was involved in malicious damage to property in consequence of which he and his sons were arrested and prosecuted. The policy of the law is that it does not assist law breakers in furtherance of their illegal activities.

11. For the foregoing reasons, the court finds no merit in the Respondent's notice of motion dated 25th September 2018 and the same is consequently dismissed with costs to the Appellant. The Appellant is hereby directed to file a record of appeal and set down the appeal for directions within the next six (6) months in default of which the Respondent shall be at liberty to seek its dismissal for want of prosecution.

12. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 21st day of MARCH, 2019.

In the presence of the Ms Rose Njeru for the Appellant and Ms Maina holding brief for Mr A.P. Kariithi for the Respondent.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

21.03.19