



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CIVIL APPEAL NO. 17 OF 2018

AGNES WAMBUI NYAMIRU.....APPELLANT

VERSUS

PAUL KAMAU MBUGUA.....1ST RESPONDENT

ELIZABETH WANGUI KAMAU.....2ND RESPONDENT

COUNTY GOVERNMENT OF KAJIADO.....3RD RESPONDENT

RULING

What is before me for determination is the Notice of Motion application dated the 29th October, 2018 brought pursuant to sections 1A, 1B, 3A, 27 (1), 79(G) of the Civil Procedure Act and all other enabling provisions of the law.

The Appellant seeks stay of execution of the Chief Magistrate's decision dated the 27th September, 2018; Stay of proceedings in Kajiado Chief Magistrate Court ELC Case No. 113 of 2018 and for the Respondents to be restrained from interfering with plot No. Noonkopir/147 hereinafter referred to as the 'suit land', pending the outcome of the Appeal.

The Application is based on the grounds that the Appellant's application for injunction in Kajiado CMC ELC No. 113 of 2018 was dismissed on 29th September, 2018. In the ruling the Honourable Court misapplied the principles for granting an injunction and disregarded the Appellant's ownership documents. The court failed to appreciate that both parties had claimed the suit land and exercised its discretion capriciously. The Honourable Court dismissed the application yet the 3rd Respondent had not participated in the suit. Further, the application is meritorious and unless it is granted, the appeal will be rendered nugatory.

The application is supported by the affidavit of the Appellant AGNES WAMBUI NYAMIRU where she reiterates her claim as stated above.

The Application is opposed by the 1st and 2nd Respondents who filed their affidavits where they averred that there are no orders to be stayed since the Ruling only dismissed the Appellant's application. They insist the order of injunction pending Appeal is discretionary and order for stay of proceedings cannot be granted since the Plaintiff/ Appellant would be using the court as a double edged sword. They insist there is no evidence that the trial Magistrate misapplied the law and the Appellant has not demonstrated any loss she will suffer since she never produced any valid documents of ownership. They reiterate that there is no evidence they intend to sell the property. They confirm being the registered allottees of Plot B 613 Business Noonkopir T Centre (Formerly Plot No. 589/ Business – Noonkopir T. Centre) which is a Commercial Plot situated in Kitengela within Kajiado County. They deny knowledge of Plot Number Noonkopir /147/ Res, Kitengela, Kajiado County (Also known as Plot Number B 613) and contends it does not exist. They explain that they purchased their plot from Olmaroroi Women Group in 2011 for Kshs. 700,000/= took possession, commenced developing it and have been paying rates. They state that in 2012 they received threats of encroachment over their plot and lodged a complaint with the County Council of Olkejuado. They contend that the Appellant invaded their plot in 2013 and they decided to report to Ol Kejuado County Council and a letter was written to Samuel Munyambu on 3rd January, 2013. Further, a meeting was convened in January 2014 by the County where the dispute of the plot was deliberated upon and they were declared its owners. They reiterate that the Order of injunction sought lacked merit and Hon. Susan Shitubi arrived at a just decision to dismiss it. They insist the Appellant has never been in occupation of the suit land and her plot is residential while their plot is commercial. Further, she had no Allotment letters and the instant application lacks merit.

The 1st and 2nd Respondents filed their submissions but the Appellant did not.

Analysis and Determination

Upon consideration of the instant application, supporting including replying affidavits and submissions, the following are the issues for consideration:

- Whether a temporary injunction should issue pending the outcome of the Appeal
- Whether there should be a stay of proceedings pending the outcome of the Appeal

As to whether a temporary injunction should issue pending the Appeal. I note the Appellant has lodged an Appeal against a Ruling of the Chief Magistrate Hon. Susan Shitubi dismissing her application for injunction. The principles for granting an injunction are well established in the case of **Giella Vs Cassman Brown & CO. Ltd (1973) EA 358**. The Magistrate had established that the Appellant had not established a prima facie case pending the outcome of the suit. The Appellant claims the Hon. Magistrate erred because the 3rd Respondent that is the County Government had not filed a response to her application.

In the case of **Bilha Mideva Bukulu Vs Everlyine Kanyere (2012) eKLR**, it was held that an order of injunction pending Appeal is discretionary and the Court should be guided by the principles set down in **Giella Vs Cassman Brown & CO. Ltd (1973) EA 358**. I note the Applicant has not annexed the proceedings that culminated in the Ruling she intends to Appeal from. Further, from the Ruling of the Hon. Magistrate it emerged that the Appellant does not reside on the suit land. In line with the principles set down in **Giella Vs Cassman Brown & CO. Ltd (1973) EA 358**, I find that the Appellant has not established a prima facie case to warrant the orders sought.

As to whether there should be a stay of proceedings pending the outcome of the Appeal.

I note the Appellant is the Plaintiff in the lower court matter. I note the Hon. Magistrate only dismissed her application for injunction. She seeks a stay of the lower court proceedings until this Appeal is heard and determined.

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J (as he then was) when dealing with an application for stay of proceedings pending appeal, had this to say:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

From the Application and Memorandum of Appeal, I do not see any positive orders to be stayed since the Court only declined to grant an injunction. Further, I note the stay sought would actually hamper the expeditious disposal of the lower court case. I opine that since the matter has not even been set down for hearing, and have not seen any prima facie merits of the intended Appeal, I will decline to stay the lower court proceedings at this juncture.

It is against the foregoing that I find the instant application is unmerited and will dismiss it with costs.

Dated signed and delivered in open court at Kajjido this 23rd day of May, 2019

CHRISTINE OCHIENG

JUDGE