



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 81 OF 2018

(FORMERLY MACHAKOS ELC CASE No. 191 OF 2016)

TABITHA KAVENGE MATOLO.....PLAINTIFF/RESPONDENT

VERSUS

RHODA MALULU SENGETE.....1ST DEFENDANT/APPLICANT

DANIEL KASIMU GIBSON.....2ND DEFENDANT/APPLICANT

R U L I N G

1. The application for determination is dated 26th July 2018 and was filed under certificate of urgency. It is brought under Order 40 Rules 1 & 2 and Order 51 of the Civil Procedure Rules 2010, Sections 1A,1B & 3A of the Civil Procedure Act and all other enabling provisions of the Law. It seeks;

a) Spent.

b) THAT this Honorable Court be pleased to grant a temporary injunction restraining the County Surveyor, Makueni County from sub dividing the land in question in which the defendants/applicants are the administrators, pending the hearing and determination of this application

c) THAT this Honourable Court be pleased to stay the orders issued by this honourable Court on 12th April, 2018 directing the County Surveyor, Makueni County to sub-divide the land in question until the hearing and determination of this application inter-parties.

d) THAT costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of the 2nd Applicant sworn on 26th July 2018. He deposes *inter alia* that the orders of 12/04/2018 were given in his Advocate's absence due to an oversight and that they have filed an application in the Court of Appeal (No. 115 of 2005) which is likely to affect the status of the subject matter herein.

3. The Respondent filed a notice of preliminary objection on 12/09/2018 and averred *inter alia* that the application is bad in law because a temporary injunction can only be granted pending disposal of a suit and not when a suit has been determined and judgment delivered. She also averred that injunctive orders were being sought against the County Surveyor who is not a party to the suit. Further, she averred that the applicants were seeking to stay a judgment which was made almost four years ago yet there was no appeal against it.

4. The application was canvassed by way of written submissions. I could not trace the Applicants' submissions in record.

5. The Respondent submits that the law does not act retrospectively or retrogressively and that the applicants are seeking orders of temporary injunction to stop an act that has already happened. She contends that such orders can only be granted pending disposal of a suit and not when the suit has been determined and judgment delivered. She relies on **Kisawuzi –vs- DFCU Bank Ltd (2016)1 EALR** where the Court stated;

“...one can apply for a temporary injunction only when there is a pending suit before the court which has not been disposed off.”

6. She submits that the Court pronounced itself and determined that the suit property belongs to her and she can therefore put it into use or dispose it in any manner that she pleases. She cites the case of **Membley Park Residents Association –vs- The Presbyterian Foundation (2017) eKLR** where the Court stated;

“the purpose of injunction is to injunct or prevent an intended action. Injunctions are not issued when an event has already occurred and cannot be granted once the event intended to be injuncted has been overtaken by events.”

7. She also submits that according to the law, an application for stay should precede an application to appeal. She contends that the applicants have not demonstrated the substantial loss which they will suffer if the judgment delivered on 19/12/2014 is executed. She also contends that no explanation has been offered for the delay in seeking the stay orders.

8. The instant application was canvassed by way of written submissions. The 4th and 5th defendants neither responded to the application nor filed submissions.

9. Having considered the application, the preliminary objection (P.O) and the submissions, the only issue for determination is whether the P.O has merits.

10. Judgment in this matter was delivered on 19/12/2014 and the following orders issued;

a) 20 acres to the family of the plaintiff to be curved where the plaintiff's family has developed.

b) The balance 9.9 acres to the family of Gibson Sengeti Matolo as he has also parcel No. 53.

11. Pursuant to the said judgment, the respondent moved Court and obtained orders on 18/04/2018 allowing the surveyor, Makueni County to sub-divide the suit land in execution of the judgment.

12. Through a letter dated 24/04/2019, the respondent drew the attention of this Court to the ruling delivered by the Court of Appeal (Nrb) in Civil Application No. 115 of 2015. In that ruling, the applicants' application for leave to appeal out of time was declined. Accordingly, there is no appeal against the judgment delivered on 19/12/2014 and the attempt to re-open the matter has been shut.

13. I have noted from the record that the injunction is being sought to stop sub division which has already been done. The letter dated 30/07/2018 from the County surveyor confirms the same. In any case, the import of the Court of Appeal ruling is that the sub-division was done in execution of a valid judgment which has neither been set aside nor varied. Further, I agree with the respondent that it is not tenable to issue injunctive orders against a person who is not a party in the suit.

14. Similarly, there is nothing to stay as the orders issued on 12/04/2018 have been acted upon legally.

15. The upshot is that the application dated 26/07/2018 must fail. The matter involves family members and I am therefore reluctant to award costs. The application is dismissed with no orders as to costs.

Signed, dated and delivered at Makueni this 31st day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. E. K. Mutua for the Applicant Present

Mr. Muthiani holding brief for Mr. Mbindyo for the Plaintiff/Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

31/07/2019.