



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**ELCA CASE NO. 6 OF 2019**

**ELIJAH NJERU MUGO.....1<sup>ST</sup> APPELLANT**

**PATRICK KINYUA SAMWEL.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NJERU SAMWEL M'RWINGO.....RESPONDENT**

*(Being an appeal from the judgement and decree of the Honourable L.K. Mwendwa*

*(Senior Resident Magistrate) dated 14<sup>th</sup> February 2019*

*in Runyenjes SRMCC No. 3 of 2018)*

**RULING**

1. By a notice of motion dated 4<sup>th</sup> March 2019 brought under the provisions of **Order 40 Rule 1(a) & (b), Order 42 Rule 6 (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules (hereinafter Rules) and section 1, 1A, 1B 3 & 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law** the Appellants sought the following orders:

- a. *This application be certified as urgent and be heard ex parte in the first instance.*
- b. *There be a stay of execution of the judgement/decree in Runyenjes SRMCC 3/18 (Elijah Njeru Mugo, Patrick Kinyua Samwel Vs Njeru Samwel M'Rwingo) herein dated the 14<sup>th</sup> day of February 2019 pending the inter partes hearing of this application.*
- c. *That there be a stay of execution of the judgement/decree herein dated 14<sup>th</sup> February 2019 pending the hearing and determination of the Appeal herein.*
- d. *This honourable court be pleased to grant orders of injunction restraining the Respondent, his agents, servants or assigns anybody acting at his behest from interfering in any way with the 1<sup>st</sup> Applicant's or his agents, servants or assigns user and enjoyment of his 3000 tea bushes situate and growing on land parcel No. Kagaari/Kanja/1011 pending the hearing of this application inter partes.*
- e. *This honourable court be pleased to grant order of injunction restraining the Respondent, his agents, servants or assigns from interfering in any way with the 1<sup>st</sup> applicant's or his agents, servants or assigns user and enjoyment of his 3000 tea bushes situate and growing on land parcel No. Kagaari/Kanja/1011 pending the hearing and determination of the appeal herein.*
- f. *This honourable court be pleased to order the Land Registrar, Embu County Lands Office to place orders of inhibition over land parcel No. Kagaari/Kanja/1011 pending the hearing of this application inter partes.*
- g. *This honourable court be pleased to order the Land Registrar, Embu County Lands Office to place orders of inhibition over land parcel No. Kagaari/Kanja/1011 pending the hearing and determination of the appeal herein.*
- h. *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 there was imminent danger of

the Appellants being evicted from the suit property before the pending appeal could be heard; that the Appellants would suffer substantial loss unless the orders sought were granted; and that the Respondent would not suffer any prejudice if the orders sought were granted.

3. The said application was supported by a supporting affidavit sworn by the 1<sup>st</sup> Appellant on 4<sup>th</sup> March 2019 which reiterated and expounded upon the grounds set out in the notice of motion. The Appellants contended that they had occupied part of the suit property since 1999 which they had developed by planting 3000 tea bushes and some trees. It was further contended that since delivery of judgement by the Magistrate's court the Respondent had moved with speed to cut down their trees. The Appellants exhibited photographs of the trees which were allegedly destroyed by the Respondent.

4. The Respondent filed grounds of opposition dated 18<sup>th</sup> March 2019 and a replying affidavit sworn on 4<sup>th</sup> April 2019 in opposition to the said application. It was contended that the instant application was misconceived since the Magistrate's court merely dismissed the Appellant's suit hence there was nothing to be stayed. The Respondent denied that the trees which were cut belonged to the Appellants and contended that, in any event, they had failed to satisfy the conditions for the grant of stay under **Order 42 Rule 6 of the Rules**.

5. When the said application was listed for hearing on 18<sup>th</sup> March 2019 the advocates for the parties agreed to canvass it through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling only the Appellants' submissions were on record.

6. The court has considered the Appellants' said application, the grounds and replying affidavit in opposition thereto as well as the submissions on record. It is common ground that the Appellants are appealing against a dismissal of their suit by the Magistrates' Court at Runyenjes vide a judgement dated 14<sup>th</sup> February 2019. The court has, however, noted that the Appellants are seeking not only orders of stay under **Order 42 Rule 6 of the Rules** but also orders of injunction under **Order 40 Rule 1 of the Rules**.

7. The court agrees with the Respondent's contention that a dismissal order is a negative order which is not capable of being stayed. In the case of **Western College of Arts & Applied Sciences V Oranga & Others [1976 – 80] KLR 78** the Court of Appeal held, *inter alia*, that:

**“But what is there to be executed under the judgement the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs.**

**In Wilson Vs Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgement for this court, in an application of a stay. It is so ordered.”**

8. That holding was followed in other subsequent cases such as **Kilindini Warehouses (K) Ltd & Another V Omar Saleh Said & Another [2014] eKLR and Sonalux Limited & Another V Barclays Bank of Kenya Ltd Nairobi Civil Application No. Nairobi 219 of 2007**. The court is thus satisfied that the Appellants are not entitled to any orders of stay under **Order 42 Rule 6** of the **Rules** since there are really no positive orders to be stayed in the decree appealed from.

9. The court is, however, obliged to consider whether or not the Appellants have made out a case for the grant of an order of interlocutory injunction under **Order 40 Rule 1 of the Rules** and an order of inhibition for preservation of the suit property under **section 68 of the Land Registration Act 2012**. There is some evidence on record that the Appellants have been utilizing part of the suit property for some years. That state of affairs was not expressly controverted by the Respondent.

10. The court is thus of the opinion that the Appellants are entitled to some measure of protection pending the hearing and determination of the appeal. It might cause greater hardship for the Respondents to be evicted during the pendency of the appeal than to grant orders maintaining the *status quo*. Should the Respondent succeed on Appeal, the Appellants may still be evicted and the suit property handed to the Respondent.

11. The court is further of the opinion that it is necessary to preserve the suit property through an order of inhibition to prevent the pending appeal from being rendered nugatory should the Appellants ultimately succeed. There might be a barren result should the suit property be alienated before the conclusion of the pending appeal.

12. In the case of **Shah & Partners Ltd Vs National Social Security Fund Board of Trustees & 3 Others [2018] eKLR** which was cited by the Appellants' the Court of Appeal quoted the meaning of the term “nugatory” as rendered in the case of **Stanley Kangethe Kinyanjui & Tony Ketter & 5 Others [2013] eKLR** as follows:

**“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd V Norlake Investments Ltd [2002] 1 EA 227 at page 232.**

**x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”**

13. Similarly, in the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907** it was held, *inter alia*, that;

**“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”**

14. The upshot of the foregoing is that even though an order of stay is not available in the circumstances of this appeal, the court is satisfied that the Appellants have made out a case for an interim measure of protection pending the hearing and determination of the pending appeal. Consequently, the court makes the following orders for disposal of the notice of motion dated 4<sup>th</sup> March 2019:

- a. An order of temporary injunction be and is hereby issued restraining the Respondent by himself, his agents, servants or assigns from interfering with the 1<sup>st</sup> Appellant's user and enjoyment of tea bushes and trees growing on *Title Kagaari/Kanja/1011* pending the hearing and determination of the appeal.
- b. The Land Registrar Embu shall register an order of inhibition to prevent any dealings with *Title No. Kagaari/Kanja/1011* pending the conclusion of the appeal
- c. Costs of the Application shall be costs in the appeal.
- d. The Appellants shall take steps to file a record of appeal and expeditiously prosecute the appeal within two (2) years from the date whereof in default of which the interim orders herein shall lapse.

15. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **18<sup>TH</sup> DAY** of **JULY, 2019**.

Ms. Kung'u holding brief for Mr. Kiautha for the Appellants and Mr. Gachuba holding brief for Ms. Makori for the Respondent.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**18.07.19**