



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL CASE NO. 608 OF 2007

STELLA WAMBUI MUTHONI..... PLAINTIFF

VERSUS

NJERI W/O WANGARURO

WANGARURO MBUGUA

WANGANYA KUNGU

GACHAMBI w/o GICHUI

KAMAU NDERU

WILLIAM WANGARURO MBUA

MWAURA KUNGU

RURIE w/o KIARIE

WANGARURO MBUA

CHEGE KUNGU

SAMUEL MWICHARO

NJERI w/o NGANGA

MUMBI w/o GATHURI

WANGECHI w/o MBUA

GACHEHI w/o MAKENA

PAUL KUNGU WANYOIKE

(All trading under the firm name and style

of Wangaruro's Family Trading & Farming).....**DEFENDANTS**

RULING

1. This suit was instituted by Gladwell Muthoni Njoroge (deceased) through an originating summons taken out on 12/7/2002 under Section 37 of the Limitation of Actions Act and Order XXXVI rule 3D of the repealed Civil Procedure Rules. The originating summons was subsequently amended twice. Through the further amended originating summons dated 11/2/2011, the deceased invited the court to make determinations on two issues and grant orders as set out hereunder verbatim:

i. Whether the defendants' right to recover Land Reference Number 1036 Section III, Eastleigh, Nairobi, is barred under the

Limitation of Actions Act (Chapter 22 Section 7, Laws of Kenya) and Title extinguished on the grounds that since 5/10/1988 the plaintiff has openly, peacefully and as of right been in occupation of the above suit premises of land that is to say for a period of over twelve (12) years preceding the presentation of this summons.

ii. Whether the plaintiff has become entitled to Land Reference Number 1036, Eastleigh, Section III, Nairobi by adverse possession;

iii. That there be an order the plaintiff is entitled to be registered as the owner/proprietor of the said Land Reference Number 1036, Eastleigh, Section III, Nairobi absolutely in place of the Defendants under Section of Limitation of Actions Act Cap 22. (sic)

iv. The costs of this suit be awarded to the plaintiff.

2. Upon death of the deceased, Stella Wambui Muthoni was substituted in her place. She prosecuted this suit on behalf of the estate of the late Gladwell Muthoni Njoroge. The originating summons was heard by Honourable Lady Justice Gitumbi who subsequently rendered her decision through her Judgment dated 17/10/2018. Owing to Justice Gitumbi's transfer to the Judiciary Training Institute (JTI) in early 2018, the Learned Judge requested me to read the Judgment on her behalf on 23/10/2018.

3. I have deliberately set out this factual background because I have noted that the notice of appeal lodged by the plaintiff in this suit erroneously refers to the impugned decision as my decision. The factual position is that the judgment and the decision therein were rendered by Gitumbi J. I merely read the judgment on her behalf. It is to be understood that a judge reading a judgment on behalf of a colleague judge does not have the mandate to make any changes to the judgment; not even to change a punctuation mark.

Application

4. Following delivery of the said judgment, the appellant brought to this same court a notice of motion dated 14/12/2018 under Order 40 rules 1 (a) and 10 (1) (a); Order 42 rule 6; Order 1 rules 1, 2 and 3 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act, seeking the following restraining orders against the respondents, pending the hearing and determination of the applicant's intended appeal against the Judgment of Gitumbi J:

i. Spent

ii. Spent

iii. That the defendants/respondents be restrained by themselves, servants or agents from alienating, transferring, charging or otherwise dealing with the suit property known as Land Reference Number 1036 Section III Eastleigh, Nairobi, until further orders of this Honourable Court.

iv. That the defendants/respondents be restrained by themselves, servants or agents from alienating, transferring, charging or otherwise dealing with the suit property known as Land Reference Number 1036 Section III Eastleigh, Nairobi, until the plaintiff's/applicant's intended appeal is heard and determined.

v. That the defendants/respondents be restrained by themselves, servants or agents from evicting the plaintiff and/or interfering with the Plaintiffs' enjoyment of Land Reference Number 1036 Section III Eastleigh, Nairobi, until further orders of this Honourable Court.

vi. That the defendant/respondents be restrained by themselves, servants or agents from evicting the plaintiff and/or interfering with the plaintiff's enjoyment of Land Reference Number 1036 Section III Eastleigh, Nairobi, until the plaintiff's/applicant's intended appeal is heard and determined.

vii. That the costs of this application be borne by the respondents.

The said application is the subject of this ruling.

5. The application was supported by the plaintiff's affidavit sworn on 14/12/2018 in which she deposed that she was the administratrix of the estate of the late Gladwell Muthoni Njoroge who brought this suit seeking an order of adverse possession in respect of the suit property. She added that there were tenants occupying portions of the suit property and she was in possession of the property. She further deposed that she had lodged a notice of appeal against the judgment herein.

6. The applicant further deposed that Order 4 rule 10, Order 42 rule 6 and Order 51 rules 1 to 3 gave this court jurisdiction to issue preservative orders. She referred to the following cases and urged the court to be guided by the decisions and principles spelt out in the cases: (i) *Madhupaper International Ltd v Kerr [1985] KLR 840*; (ii) *African Safari Club v Safe Rentals Ltd, Court of Appeal at Nairobi Civil Application Number Nai 53 of 2010*; (iii) *Mombasa High Court Civil Suit No 274 of 2009: Emma Muthoni Wambaa and Another v Joseph Kibaara Kariuki*; (iv) *Bankruptcy Cause No 25 and 26 of 2009: Purity Gathoni Githae v Ocean Freight Transport Company*; and (v) *Ernie Campbell & Co. Limited v Githunguri Dairy Plant Company Ltd and another [2009]eKLR*.

7. She urged the court to grant the injunctive orders on the basis that the Court of Appeal might arrive at a different conclusion from the one Gitumbi J reached. She added that there was nothing to stop the respondents from selling the suit property during the pendency of the appeal. She deposed that if the injunctions sought were not granted, the respondents would deal with the suit property in a manner

detrimental to her.

8. The defendants opposed the application through a replying affidavit sworn on 17/1/2019. The case of the defendants was that they purchased the suit property at a consideration of Kshs 30,000 in 1976. Upon purchase of the suit property, they inherited the plaintiff's deceased mother as their tenant. The deceased continued to pay rent. The deceased never came to terms with the fact that the property had changed hands. The defendants further contended that there had been previous litigations between the deceased and the defendants and the courts had severally determined that the deceased had not acquired any adverse title to the suit property. They added and that the courts had stated severally that the deceased was a tenant. They urged the court not to grant the injunctive orders.

Applicant's Submissions

9. The application was canvassed through written submissions. Dr Kamau Kuria, SC, counsel for the applicant, submitted that under Section 19(2) of the Environment and Land Court Act, this court was bound by the procedure laid down by the Civil Procedure Rules. He added that under Section 13(7) (a) of the Act, this court had powers to issue any relief as the court deemed fit, including injunctions. Counsel added that the present application was brought under Order 40 rules 1 and 10(1) (a) of the Civil Procedure Rules which provided for the preservation of suit property by way of injunctions. He argued that the object of an injunction is to preserve the subject matter. Dr Kuria further submitted that Order 42 rule 6 of the Civil Procedure Rules conferred jurisdiction to this court to hear the present application.

10. Counsel for the applicant added that the Court of Appeal will review the evidence presented to this court and may come to a contrary decision and therefore it was in the interest of justice that in the meantime, the plaintiff be granted injunctions to protect the suit property from dealings that may render the appeal nugatory. Counsel relied on Article 48 of the Constitution and contended that anything which renders an appeal nugatory impinges on the right of appeal. Counsel further relied on the English case of **Erinford Properties v Chesire County Council (1974) 2 All LR 448** and **Madhupaper International Ltd v Kerr (1985) KLR 840** where it was held that where a court dismisses an application for interlocutory injunction, the same court has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal and there is no inconsistency in doing so because the purpose of granting the injunction would be to prevent the decision of the appellate court from being rendered nugatory should the appeal succeed.

11. Dr Kuria further argued that the applicant stood to suffer substantial loss if the injunctions were not issued because she had leased portions of the suit properties to various tenants and the said tenants stood to be evicted. Counsel added that the present application was brought without undue delay and the applicant was ready to provide security for the due performance of the decree of the court. He further submitted that the law governing temporary injunctions and stay of execution pending hearing and determination of appeals had been fundamentally altered by the amendments made to the Civil Procedure Act and Rules which introduced the doctrine of overriding objective which require the courts to take a much broader view of justice. Counsel urged the court to grant the orders.

Respondent's Submissions

12. Counsel for the defendants submitted that the plaintiff's claim for adverse possession had been rejected and therefore she had no proprietary interest in the suit property capable of being protected by way of injunctive orders. Counsel contended that the only issue for determination in the application was the question whether the applicant had satisfied the conditions for grant of an injunction as spelt out in **Giella v Cassman Brown (1973) EA 358**. It was argued that the cause of action upon which the applicant's claim was premised had been adjudicated upon and dismissed on several occasions. It was further submitted that the deceased occupied the suit property as a tenant. Counsel urged the court to dismiss the application.

Analysis & Determination

13. I have considered the application together with the rival affidavits and submissions. I have also considered the authorities cited by counsel and the legal framework relevant to the key issues in this application. The present application seeks restraining orders (injunctions) against the defendants, pending the hearing and determination of an intended appeal. Secondly, the application was brought after Gitumbi J fully heard the suit herein and rendered a final judgment. Thirdly, the impugned judgment was rendered on an originating summons which sought this court's determination of two questions relating to the deceased's claim of title under the doctrine of adverse possession. The originating summons did not seek any permanent restraining orders against the defendants. Fourthly, this court (Gitumbi J) made a determination that the deceased had not acquired an adverse title over the suit property. The Learned Judge did not issue any orders directed at any party. It is noted from Dr Kuria's submissions that, he focused on both the reliefs of temporary injunctions and the relief of stay of execution.

14. Having considered the application and the rival submissions, in my view, three key issues fall for determination in the present application. The first issue is whether this court has jurisdiction to issue post-judgment restraining orders under Order 40 rule 1 of the Civil Procedure Rules. And if so, has the applicant made out a case for such restraining orders? The second issue is whether the post-judgment restraining orders sought by the applicant would lie under Order 42 rule 6 of the Civil Procedure Rules. The third issue is whether the applicant has made out a case for grant of the orders sought in the application under the doctrines of overriding objective and inherent power of the court. I will make brief pronouncements on the three issues sequentially in that order.

15. The first issue is whether this court has jurisdiction to issue post-judgment restraining orders under Order 40 rule 1 of the Civil Procedure Rules. The applicant has invited this court to exercise jurisdiction and issue post-judgment restraining orders under Order 40 rules 1(a) and 10(1) (a) of the Civil Procedure Rules. The whole of Order 40 is titled "TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS". Order 40 rule 1 provides thus:

1. Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise-

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders

16. On the other hand, Order 40 rule 10(1) (a) of the Civil Procedure Rules provides as follows:

10. (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit –

a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

17. My interpretation of Order 40 of the Civil Procedure Rules is that it provides a legal framework through which a party to a suit can access the trial court and obtain temporary injunctions and other interlocutory reliefs pending the hearing and determination of the suit. Once the suit is heard and determined through a judgment of the trial court, the trial court ceases to exercise jurisdiction under Order 40. A party seeking post-judgment temporary injunctive orders during the pendency of an appeal in the Court of Appeal has a forum of redress within the framework of Rule 5 (2) (b) of the Court of Appeal Rules. Rule 5(2) (b) grants the Court of Appeal jurisdiction to grant injunctive orders after the High Court or court of equal status has rendered a final judgment. Order 40 does not confer similar jurisdiction to the trial court. Significantly, the criteria upon which jurisdiction under Rule 5(2) (b) is exercised is different from the **Giella v Cassman Brown** criteria upon which jurisdiction under Order 40 is exercised.

18. Dr Kuria SC, counsel for the applicant, cited various authorities and contended that this court has jurisdiction to issue post-judgment injunctive orders under Order 40 rules 1(a) and 10 (1) (a). Among the authorities cited by counsel were the Chancery Division decision of Megarry J in **Erinford Properties Ltd v Cheshire County Council (1974) All ER 448** and Kenya's Court of Appeal decision in **Madhupaper International Ltd v Kerr (1985) KLR 840**. I have considered both authorities together with all the other decisions cited. They all relate to the trial court's jurisdiction to grant an interim injunction pending the hearing of an interlocutory appeal on the trial court's refusal to grant an interlocutory injunction pending the hearing and determination of the suit. That jurisdiction is exercisable when the trial court is still seized of the substantive dispute. The cited authorities do not relate to the trial court's jurisdiction to grant an interim injunction after it has fully heard and determined a suit through a final judgment. The circumstances of the present application are therefore clearly distinguishable from the circumstances of all the authorities cited by Dr Kuria. Put differently, in the cited authorities, the trial courts were still seized of the substantive disputes while in the present application, this court (Gitumbi J) has fully determined the substantive dispute. It is therefore my finding that this court has no jurisdiction to issue a post-judgment injunction under Order 40 rule 1(a) and 10(a) of the Civil Procedure Rules. The injunctive reliefs contemplated under Order 40 are available only as long as the trial court is still seized of the substantive dispute. The second limb of the first issue is therefore moot.

19. The second issue is whether the restraining orders sought by the applicant would lie under Order 42 rule 6 of the Civil Procedure Rules. The applicant similarly invited the court to exercise jurisdiction under Order 42 rule 6 of the Civil Procedure Rules and issue the injunctive orders. The legal framework in the whole of Order 42 relates to appeals. Order 42 rule 6 of the Civil Procedure Rules has two significant jurisdictional features. Firstly, it grants the trial court jurisdiction to issue stay orders, staying its orders and decrees, pending the hearing and determination of appeals to the appellate court. Secondly, it grants this court jurisdiction to issue temporary injunctions when exercising its appellate jurisdiction. It does not grant this court jurisdiction to issue temporary post-judgment injunctions when exercising jurisdiction as a trial court. It is therefore my finding that this court does not have jurisdiction to issue post-judgment injunctions under Order 42 rule 6 of the Civil Procedure Rules as sought by the applicant.

20. Even if this court were to treat the application under consideration as a plea for stay orders, the relief of stay orders would not be available to the applicant because the impugned judgment did not contain any positive order amenable to stay. Put differently, there is nothing to stay. The applicant sought determination of two questions and a declaration under Section 7 of the Limitation of Actions Act. No orders capable of staying were issued by the court.

21. The last issue is whether the applicant has made out a case for grant of the orders sought in the application under the doctrines of overriding objective and inherent powers of the court. The doctrine of overriding principle is contained in Section 1A of the Civil Procedure Act and was legislated into the Act in 2009. It provides that the overriding objective of the Act and the rules made thereunder is to facilitate the **just, expeditious, proportionate and affordable resolution** of civil disputes. The Act enjoins the courts, litigants, and advocates to give effect to the overriding objective. Lastly, the Act sets out a framework on the actualization of the overriding objective. My understanding of the above framework is that it sets out the principles upon which the courts exercise civil jurisdiction under the Act. It is not a jurisdictional framework in itself. Jurisdiction is donated under separate legal frameworks within the Act and Rules.

22. The doctrine of inherent power of the court is contained in Section 3A of the Act. The statute gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The doctrine is invoked whenever the statutes and the rules do not provide a clear framework or mechanism on an issue. Where the statute and the rules provide a clear mechanism or framework, the doctrine cannot be invoked.

23. In the application under consideration, it is clear that the Rules Committee has provided a mechanism for seeking temporary injunctions pending the hearing and determination of appeals in the Court of Appeal. That mechanism is contained in rule 5 (2) (b) of the Court of Appeal Rules. No evidence has been placed before this court to suggest that the Court of Appeal is unavailable to exercise the jurisdiction

conferred upon it under rule 5 (2) (b) to warrant invocation of the doctrine of inherent powers of the court in this suit. There is no gainsaying that the legislature and framers of our civil procedure rules appreciated the dangers of conferring jurisdiction upon the same trial court to issue post-judgment injunctions after it has fully pronounced itself on the substantive issues in the suit through a final judgment. In my view, there is no proper justification in the circumstances of this case to warrant my invocation of the doctrine of inherent powers of the court.

24. Lastly, it is not lost to this court that the applicant carefully crafted the orders sought in the application. She did not seek preservative orders preserving the suit property. She did not pray for stay orders because she knew there was nothing to stay. She sought injunctive orders seeking to restrain parties who hold title and who have been substantively adjudged to be entitled to the suit property. She made the application against a background where there are numerous judicial determinations relating to the same dispute, to the effect that the respondents are the lawful owners of the suit property and the deceased was a tenant of the respondents. In my view, it would be an abuse of the powers of this court if, in the circumstances of this case, this court were to hand the applicant the post-judgment injunctive orders prayed for. It is therefore the finding of this court that the applicant has not made out a case for grant of the restraining orders sought under the doctrines of overriding objective and inherent power of the court.

25. In light of the foregoing, it is the finding of this court that the notice of motion dated 14/12/2018 lacks merit and the same is declined. The defendants shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26 TH DAY OF SEPTEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Chege - Advocate for the plaintiff

Court Clerk - June Nafula