



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA. NO. 10 OF 2019**

**WASHINGTON MWANGI.....PETITIONER**

**VERSUS**

**1. PAUL SINGH SODI**

**2. WINNIE WAMBUA.....RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> March 2019 brought under Article 159 of the Constitution, Order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act the Appellant/Applicant seeks the following orders:

**1. Spent**

**2. Spent**

**3. That pending the hearing of this Appeal, a temporary injunction order be granted restraining the 2<sup>nd</sup> respondent, her agents, servants and/or employees from interfering in any manner with the appellant's peaceful and quiet occupation of the premises standing on subdivision NO. 97 (Original No. 966/13) Section III Mainland North.**

**4. That in the alternative, an order that the existing status quo relating to the status currently prevailing as between the parties be maintained pending the hearing and determination of this application.**

**5. That the costs of this Application be provided for.**

2. The Application premised on the grounds:

**1. The appellant has at all material times been the tenant of the 1<sup>st</sup> respondent with regard to the premises standing on subdivision No.97 (Original No.966/13) Section III Mainland North pursuant to an agreement dated 24<sup>th</sup> May, 2013 at a ground rent of Kshs.5,000.00 per month, whose agreement is in writing.**

**2. That the appellant acquired the premises then undeveloped and has developed the same through the injection of a lot of resources.**

**3. That sometimes in April, 2018, the 2<sup>nd</sup> respondent demanded that the appellant vacates the premises that the appellant had quiet occupation of for the last 5 years.**

**4. Consequently, the appellant filed a suit in Mombasa CMCC No.2082 of 2018 Washington Mwangi Njeri –v- Paul Singh Sodi & Winnie Wambua Kanyua and applied for an injunction vide notice of motion application dated 4<sup>th</sup> October, 2018.**

**5. During the hearing of the said case, the 2<sup>nd</sup> respondent referred the issue to the police who charged the appellant in criminal case NO.135 of 2018; Republic –v- Washington Mwangi Njeri which is pending.**

**6. The injunction application was dismissed on 25<sup>th</sup> February 2019 and the appellant filed the appeal herein.**

7. That the said appeal has overwhelming chances of success.

8. That from the conduct of the 2<sup>nd</sup> respondent, the said respondent is likely to use the basis of the dismissal as a ground for eviction notwithstanding the respondent not having a positive order in her favour to do so.

9. That in that eventuality, this appeal will be rendered nugatory in that the business would be completely destroyed without the appellant having the chance to even recover his goodwill or the investments he has put thereon.

10. That in the circumstances this application is well merited.

3. The application is further supported by the affidavit of Washington Mwangi Njeri sworn on 7<sup>th</sup> March, 2019 in which he has deposed inter alia, that sometime in April 2018, the 2<sup>nd</sup> respondent approached him with a certificate of title no.25187 claiming to be the owner of the suit property which issue is yet to be determined by the court since it stands disputed. That upon being summoned by the OCS Mtwapa Police Station, the Applicant was given 30 days' notice to vacate the premises which notice, according to him, was improper and irregular prompting him to file Mombasa CMCC No.2082 of 2018 and concurrently filed an application for injunction date 4<sup>th</sup> October, 2018 which application the trial court dismissed vide a ruling dated 25<sup>th</sup> February, 2019. The applicant depones that the effect of the said ruling is likely to render the entire suit nugatory since the issue on the rightful owner is yet to be determined whose basis laid the foundation of the application for injunction.

4. That being dissatisfied with the said ruling, the applicant filed the appeal herein. That during the hearing of the said case, the 2<sup>nd</sup> respondent not only attempted to evict the appellant but also referred the issue to the police who charged the appellant in criminal case no.135 of 2018 which is pending. The applicant states that the conduct of the 2<sup>nd</sup> respondent suggests that she may use the dismissal of the applicant's application for injunction as a basis of harassment to him and his employees. That he has acquired rights a per the lease and such rights constitute a duly protected tenancy, and that a capricious eviction cannot be compensated by an award of damages and therefore orders for an injunction pending appeal are appropriate. He states that this appeal will be rendered nugatory if the injunction orders are not in force in that the applicants business would be completely destroyed without him having the chance to recover his goodwill or the investments he has put thereon. The applicant has annexed copies of the pleadings in CMCC No.2082 of 2018, the memorandum of appeal and charge sheet in criminal case no.135 of 2019.

5. In opposing the application, the 2<sup>nd</sup> respondent filed a replying affidavit sworn on 15<sup>th</sup> March, 2019. The 2<sup>nd</sup> respondent avers that the appeal is predicated on false pretences that her title to LR. NO.MN/III/977 is being challenged by the 1<sup>st</sup> respondent and another mysterious lady. The 2<sup>nd</sup> respondent further avers that she is the registered owner of the suit property and has attached documents showing how she acquired the property as well as the title in her name and a certificate of official search showing that the 2<sup>nd</sup> respondent is the registered owner of the property. She added that both the 1<sup>st</sup> Respondent and the lady alleged to be claiming the property did not participate and have not participated in these proceedings and are not claiming or disputing the 2<sup>nd</sup> respondent's title. That the appellant concedes that he is not the registered owner and therefore does not have prima facie case or arguable appeal to warrant the temporary injunction sought.

6. The application was canvassed by way of written submissions which were duly filed by the Applicant and the 2<sup>nd</sup> Respondent . I have considered the application, the affidavit in support and against as well as the submissions filed and the authorities cited. The only issue for determination is whether this court should grant the order for temporary injunction pending the hearing determination of the appeal herein.

7. Order 42 Rule 6(6) states as follows:

**“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

8. The applicant has lodged an appeal against the decision of the learned magistrate thus complying with the procedure for instituting the appeal to this court. This court is therefore properly seized of this matter and has the necessary jurisdiction to consider the application herein by the applicant.

9. The applicant is seeking a temporary injunction order restraining the 2<sup>nd</sup> respondent, her agents servants and/or employees from interfering in any manner with the applicant's peaceful and quiet occupation of the premises standing on Subdivision No.97 (original No. 966/13) Section III Mainland North pending the hearing of the appeal. In considering a prohibitory injunction, an applicant must establish a prima facie case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant's favour.

10. This court has noted that the applicant did not attach a copy of the order he is appealing against making it difficult for the court to know the exact order that was granted by the learned trial magistrate. Be that as it may, this court noted that in the application herein and the memorandum of appeal filed, the applicant has alluded that the subject of the appeal was an application for injunction, a fact that was confirmed by the 2<sup>nd</sup> respondent herein.

11. This court appreciates that an injunction can be granted pending appeal. Having said so an applicant must demonstrate the criteria set out in the case of **Giella –v- Cassman Brown Ltd (1973)EA 358** in which the principles alluded above had been set out.

12. In this case, the 2<sup>nd</sup> respondent had demonstrated that she is the registered owner of the suit property. The applicant's claim is based on the lease he allegedly entered into with the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent was not a party to the said agreement. Indeed the 1<sup>st</sup>

respondent has not participated in these proceedings to challenge the 2<sup>nd</sup> respondent's title to the suit property. It is clear that the applicant's claim is based on alleged rights from 3<sup>rd</sup> parties who have never participated in these proceedings and who have never challenged the 2<sup>nd</sup> respondent's title.

13. Having looked at the evidence on record, this court finds that the applicant has clearly not made out a prima face case with a probability of success. It is not in dispute that the 2<sup>nd</sup> respondent is the registered owner of the suit property and was not a party to the agreement between the applicant and the third parties who have failed to demonstrate their interest in the land, if at all. The applicant can be adequately compensated in damages in the event his case succeeds. The balance of convenience, if I had doubt, tilts in favour of the 2<sup>nd</sup> respondent who is the registered owner of the property. An order of injunction cannot be issued in favour the applicant. It is the applicant who should give way to the rightful owner pending hearing of the dispute.

14. For the foregoing reasons, this court finds that the appellant's notice of motion dated 6<sup>th</sup> March, 2019 is not merited and the same is hereby dismissed with costs to the 2<sup>nd</sup> respondent. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 11<sup>th</sup> day of November, 2019.**

---

**C. K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Gikandi & Odeng for Appellant

No appearance Respondents

Yumna Court Assistant

**C.K. YANO**

**JUDGE**