



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 386 OF 2017 (OS)

NASSOR SALIM MBARUK.....PLAINTIFF/APPLICANT

-VERSUS-

1. FAUZ GADIM

2. NAGIB GADIM.....DEFENDANTS/RESPONDENTS

RULING

1. By a notice of Motion dated 31ST July 2018 the Plaintiff/Applicant seeks orders that the Defendants/Respondents, their servants and/or agents be restrained from alienating, transferring, leasing, subdividing, selling, or in any other manner disposing off the parcel of land known as PLOT NO.KILIFI/MTWAPA/229 registered in the names of Fauz Gadim and Nagib Gadim pending the determination of the intended Appeal. The Application is supported by the affidavit and supplementary affidavit of Nassor Salim Mbaruk and is premised on the following grounds:

- a. **The Applicant is very apprehensive and have reasons to believe that unless the orders sought herein are granted, the Respondents will proceed with the intended sub-division and sale of the suit premises and therefore negate and/or render nugatory the Applicant's claim, interest and/or title to the suit property as well as the purposes of this Application, the original suit and the Appeal intended to be filed herein.**
- b. **It is in the interest of fairness and justice that the suit property by preserved pending the hearing of the Appeal.**
- c. **The Appeal is likely to be rendered nugatory if the orders sought are not granted.**
- d. **The Applicant has filed a Notice of Appeal against the aforesaid ruling.**
- e. **That in any event the Applicant has a very good Appeal with high chances of success and stands to suffer irreparable damage unless the orders sought herein are granted and the balance of convenience tilts in favour of the Applicant.**
- f. **The Honourable Court may in its sole discretion limit the time for the injunction pending Appeal.**

2. The Applicant has exhibited a Notice of Appeal and a letter to the Deputy Registrar requesting for copies of proceedings and states that no prejudice would be occasioned to the defendants if the orders sought are granted and that he is prepared to abide by such orders or undertaking as the court may deem fit to order.

3. The Application is opposed and both parties filed written submissions which I have read and considered. The only issue to consider is whether to grant the orders of injunction sought pending the hearing and determination of the intended Appeal. It is important to note that the Applicant herein is not challenging any orders issued by this court in its ruling of 18th July 2018 but is praying that this court issue an injunction against the Respondents to restrain them from alienating, transferring, leasing, sub-dividing, selling or in any other manner disposing off the suit property pending the hearing and determination of the intended Appeal. The Applicant is not asking this court to sit as an appellate court and review the decision of this court issued on 18th July 2018 which declined to grant injunction orders pending the hearing and determination of the suit herein. Order 40 Rules 1 and 2 provide that this court may grant an order of injunction. Therefore it is safe to say that this court has the jurisdiction to grant an injunction in a suit pending before the court. Indeed the court has considered such an Application in its ruling made on 18th July 2018. However, the question that I need to consider is whether the court has jurisdiction to entertain the present Application and grant the order of injunction sought by the Applicant.

4. The Application is brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules among others. Order 42 Rule 6(6)

provides as follows:

“6 (6) Notwithstanding anything contained in sub rule (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 subordinate court or tribunal has been complied with.”

5. It should be noted from the provision of Order 42 Rule (6)(6) that this court has the power to grant injunction only when exercising its appellate jurisdiction. In the instant case, the court has already rendered its decision and the Applicant has stated that he intends to Appeal to the Court of Appeal against the decision of this court given on 18th July 2018. On that basis alone, I find that the court does not have the jurisdiction to entertain the present Application and issue the order of injunction sought by the Applicant, more so having rendered a decision on the same issue on 18th July 2018. This court is not exercising its appellate jurisdiction. The Applicant has already filed a Notice of Appeal in the Court of Appeal. Under Rule 5 (2)(b) of the Court of Appeal Rules, the Court of Appeal may grant an injunction in civil proceedings where a Notice of Appeal has been lodged in accordance with Rule 75. In my view, the present Application is improperly before this court and the court has no jurisdiction to entertain it.

6. In the result, I find that the Notice of Motion dated 31st July 2018 is improperly before this court. The same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF DECEMBER 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Siminyu for Applicant

Ms. Siema holding brief for Mulwa for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE