



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL NO. 26 OF 2019

JOSEPH AGUNGA OKUTHE.....APPELLANT

VERSUS

GEOFFREY OKUMU.....RESPONDENT

(Being an appeal arising from the ruling of Honourable M.M. Wachira in CMCC ELC Case No. 100 of 2019 delivered in the Senior Resident Magistrate's court at Migori on 17th day of October 2019)

RULING

1. This ruling is in respect of an application by way of a notice motion dated 18th October, 2019 brought by the appellant, Joseph Agunga Okuthe (the applicant herein) pursuant to Order 42 Rule 6 (1) and (2) orders 51 of the Civil Procedure Rules, 2010, sections 1A,1B and 3A of the Civil Procedure Act (Cap 21). The applicant who is represented by learned counsel, Mr. Singei of Abisai and Company Advocates is seeking the following orders;-

(i) spent

(ii) (iii) The status quo prevailing on LR NO. Suna East/Wasweta 1/8623 (the suit land) be maintained pending the hearing and determination of the appeal herein lodged

(iii) (iv) Cost of this application be in the cause.

2. The application is premised on the applicant's supporting affidavit of 17 paragraphs sworn on even date and the copies of annexed documents stated below;

(a) A ruling rendered by the Honourable trial court (Honourable M.M. Wachira, Senior Resident Magistrate) on 16th October, 2019 in Migori CMCC No. 100 of 2019 and marked as "JAO-1"

(b) A memorandum of appeal dated 18th October 2019 and marked as "JAO-2"

(c) Photographs showing the applicant's occupation and structures on the suit land, LR No. Suna East/wasweta1/8623 and marked as "JAO-3"

(d) A title and a certificate of official search dated 21st September, 1991 and 18th August, 2000 covering the suit land and marked as "JAO-4" (a) and 4(b) respectively.

(e) An interim order of temporary injunction against the defendant, Geoffrey Okumu issued on 2nd August, 2019 and marked as "JAO-5"

3. Briefly, the applicant deponed inter alia, that the dispute between the respondent and himself is not merely a boundary controversy as the respondent is keen on taking over the whole of the suit land from him. That the trial court delivered the ruling marked as "JAO-1" prompting him to file an appeal as per the memorandum of appeal marked as "JAO-2" which has overwhelmingly chances of success. That no party shall suffer any prejudice should the status quo be maintained in the prevailing circumstances.

4. The application is further anchored on grounds (a) to (l) set out on its face. The grounds include;

I. That the applicant is the registered owner of LR. NO. Suna East/Wasweta1//8623.

II. That the applicant is in occupation of land parcel Suna East/Wasweta 1/8623.

III. That the court delivered a ruling on 17/10/2019 and struck out the plaintiff's suit citing lack of jurisdiction.

IV. That the applicant was riding on interim orders that kept the respondent from demolishing his structures on LR. NO. Suna East/Wasweta 1/8623.

V. That without orders of maintenances of status quo, the applicant is vulnerable and the pending appeal would merely be in futility.

5. In a 20-paragraphed replying affidavit sworn on 31st October, 2019, the respondent, who is represented by learned counsel, Mr. Omonde Kisera, opposed, the application. The respondent averred, inter alia, that the suit before the trial court was purely a boundary dispute as shown in copies of an amended plaint and a statement of defence filed therein and marked as "Co-1 and Co-2" respectively. That at paragraph 10 of his supporting affidavit, the applicant admits that the respondent who is his neighbor, has trespassed into the suit land owned by the applicant.

6. The respondent also averred that he has mobilized and assembled materials on site at a colossal sum of money to develop the suit land hence likely to suffer substantial loss as the money is a loan facility. He annexed copies of a bundle of documents including title deed as well as mutation form in respect of the suit land and photographs in support of the same and marked as "CO-3" herein.

7. The respondent further deponed that the trial court confirmed that it lacked jurisdiction to deal with the dispute until the law is complied with accordingly. He did refer to sections 18 and 19 of the Land Registration Act, 2016 (2012) that the ouster of jurisdiction of the courts is encompassing all courts.

8. On 4th November, 2019, the court directed that the application be argued by written submissions; see **Order 51, Rule 16 of the Civil Procedure Rules, 2010 and practice Directions number 33 (a) and (b) of the Environment and Land Court Practice Directions 2014**. Counsel for the respective parties herein complied accordingly.

9. By his submissions dated 11th November, 2019 and filed in court on 13th November, 2019, learned counsel for the applicant urged this court to find in favour of the applicant in the interest of the case and narrowed down issues for determination as follows;

a) Whether the applicant shall suffer irreparable harm and/or substantial injury and/or loss should be application be denied.

b) Whether the application has been made without unreasonable delay.

c) Whether the application merits the orders prayed.

10. Counsel analyzed the said three (3) issues, relied on **section 26(1) of the Land Registration Act 2016(2012) and Order 42 Rule 6 (supra)**. He also relied on authorities including **Kenya Shell Ltd -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-88) IKAR 1015** that substantial loss be substantiated, **Robert Sharpe**, in "injunctions and specific performance, looseleaf. Aura, on **Canada Law Book 1992. Page 2-27** regarding irreparable harm, **Giella-vs-Cassman Brown and Company Ltd (1973) EA 385 on the principles governing injunctions, Registered Trustees of Child Welfare Society of Kenya -vs- Warp Drive Limited (2017) eKLR** which relied on the case of **Niaz Mohammed Jan Mohamed -vs- the Commissioner of Lands (1996) eKLR** that an award of damages does not cure an infringement of a right.

11. Counsel further cited the case of **Nguruman Limited -vs-Jan Bonde Nelson (2014) eKLR** that the inconvenience to the applicant if interlocutory injunction is refused, would be balanced and compared with that of the respondent if it is granted and **Focin Motor Cycle Co. Limited -vs Ann Wambui Wangui & another (2018) eKLR** on reasonable chances of success of an appeal.

12. On the other hand, counsel for the respondent in his submissions dated 22nd November 2019 and filed in court on 27th November 2019, referred to the orders sought in the suit before the trial court, the preliminary objection raised in the suit and the orders sought in the instant application following the ruling of the trial court. He submitted that the suit before the trial court concerned trespass and that in the applicant owns the suit land.

13. Counsel submitted that the application is unmerited, unlawful and without basis hence urged the court to dismiss the instant application. He relied on seven (7) authorities namely;-

i. Mukisa Biscuits Manufacturing Company Ltd -vs- West end Distributors (1969) EA 696.

ii. John Musakati -vs- Speaker County of Bungoma (2015) eKLR.

iii. Oraro -vs- Mbaja (2005) KLR 141.

iv. Supreme Court of Kenya Civil Application No. 11 of 2016 (Hon) Lady Justice Kalpana Rawal -vs- Judicial Service Commission.

v. Court of Appeal Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko and 2 others (2013) eKLR.

vi. Supreme Court of Kenya in case of Samwel Kamau Macharia and another –v- KCB Ltd and other (2012) eKLR.

vii. George Kamau Macharia –vs- Dexka Ltd (2019) eKLR.

14. I have anxiously studied the entire application, the replying affidavit and the rival submissions in the entirety. The issues that fall for determination are as set out under **section 42 (6) (2) (supra)**.

15. Thus, the threshold for the grant of the orders sought in the application is anchored under **Order 42 Rule 6(1) and (2) (supra)** which reads;

“ (i) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been without unreasonable delay;

(ii) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant” (emphasis of issues)

16. In the case of **Trust Bank Limited -vs- Ajay Shah 7 3 others (2012) eKLR at 22**, it was held that;

“The conditions set out in Order 42 Rule 2(a) and (b) are cumulative. All the three must be satisfied before a stay can be granted---“

17. On the first issue namely whether the instant application was brought with undue delay, I note that the trial court rendered its ruling (JOA-1) on 16th October, 2019. The instant application was filed only two (2) days later, on 18th October, 2019.

18. **Article 10(2)(b) of the Constitution of Kenya, 2010** provides for the national values and principles of governance which include equity. I am aware that delay defeats equity and that equity aids the vigilant and not the indolent.

19. It is trite law that this is a court of law and a court of equity; see the Court of Appeal decision in the **case of Macharia Mwangi Maina & 8 others –vs- Davidson Mwangi Kagiri (2014) eKLR at page 87, paragraph 26**.

20. Quite plainly, the instant application was generated by the applicant without delay. He was not indolent in the obtaining scenario.

21. In respect of substantial loss, I take into account the applicant’s contention at paragraphs 6,10,11,13,14 and 16 of his supporting affidavit and grounds (h)(i) and (k) on the face of the application. He deponed in part that the respondent is on the verge of demolishing his structures on the suit land hence he is vulnerable to the intended unlawful acts of the respondent. He reinforced his claim by documents marked as “JAO3”, “JAO5”.

22. The respondent denied the applicant’s claim and deponed in his replying affidavit that the trial court was right in arriving at its finding marked as “JOA1” as the dispute between the parties falls outside the jurisdiction of all courts including the trial court and even this one. He further averred that he is the one who is likely to suffer loss as discerned at paragraph 15 of his replying affidavit.

23. All in all, in view of paragraph 21 herein above, the applicant has established that he is bound to suffer substantial loss; **see Trust Bank case (supra)**.

24. On the issue of security, I take into account ground (h) on the face of the application and paragraph 11 of the supporting affidavit. The respondent asserted that the stay of execution sought is superfluous, non excusable and an abuse of the court process.

25. The principal order sought in this application is the maintenance of the “**status quo**” which term is defined by the **Black’s Law Dictionary 10th Edition** as:-

“ The situation that currently exists.”

26. Practice Direction number 32 of the Environment and Land Court Practice Directions, 2014 provides;

“During interpartes hearing of any interlocutory application, where appropriate, parties are encouraged to maintain status quo----- after considering the nature of the case or hearing both sides the judge shall exercise discretion to order for status quo pending the hearing and determination of the suit keeping in mind the overriding interests of justice.”
(Emphasis laid).

27. In the case **Ogada-vs-Mollin (2009) KLR 620 at page 635 paragraph 35**, the Court of Appeal held thus:-

“ The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in any other manner terminated.”

28. The court including this one has the authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see the

decision of the Supreme Court of Kenya in **Board of Governors Moi High School, Kabarak and another -vs-Malcolm Bell (2013) eKLR.**

29. **Section 13(7) (a) of the Environment and Land Court Act, 2015 (2011)** abundantly provides for this court's mandate to grant interim preservation orders including the orders sought therein. In the premises, I find the instant application full of merits.

30. Accordingly, I allow the application dated and filed in court on 18th October 2019 in favour of the applicant in terms of orders (iii) and (iv) for status quo and costs be in the cause respectively as sought therein.

31. Orders accordingly.

DELIVERED, SIGNED and DATED in open court at **Migori** this **4th** day of **December 2019.**

G.MA. ONG'ONDO

JUDGE

In presence of :-

Ms. Okota L. learned counsel for the applicant/appellant

Mr. Omonde Kisera learned counsel for the respondent

Court Assistant – Tom Maurice.