



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 10 OF 2017

STEPHEN MUTUGI MWENJE.....APPELLANT/APPLICANT

VERSUS

MUNICIPAL COUNCIL OF KERUGOYA/KUTUS (Now known as COUNTY

GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

ROSE WANJIKU WARUI.....2ND RESPONDENT

RULING

Order 42 Rule 6(6) of the Civil Procedure Rules provides that:

“Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in 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”

Citing that provision, the Applicant filed a Notice of Motion dated 16th October 2017 and sought the following orders:

- 1. Spent.**
- 2. Spent.**
- 3. That this Honourable Court be pleased to grant a temporary injunction against the 2nd Respondent restraining her from selling, transferring, disposing, alienating, wasting, developing and/or in any other way dealing with plot No. 316A KUTUS (referred to by the 2nd Respondent as Plot No. 201A KUTUS) pending the hearing and determination of this appeal.**
- 4. That the costs of the application be provided for.**

The application is premised on the grounds set out therein and is supported by the affidavit of the Applicant. The gravamen of the application is that since 13th May 1978, he has been in possession of plot No. 316A KUTUS (also known as plot No. 234A) and indeed the 1st Respondent had admitted the Applicant's claim as the lawful allottee of plot No. 316A KUTUS and a consent to that effect had been admitted as a judgment of the Court on 17th June 2014 and the Applicant has been paying rent and rates as per the receipts attached. However, on or about February 2011 when the Applicant decided to develop

the said plot, the 2nd Respondent claimed it as hers. Investigations by the D.C.I.O Officer in **KERUGOYA** surprisingly determined that plot No. 316A KUTUS (previously plot No. 234A) does not exist and that what is on the ground is plot No. 201A belonging to the 2nd Respondent. That the 2nd Respondent on 27th July 2011 issued the Applicant with a 21 days notice stopping him from developing his plot but despite all the evidence, the lower Court held that the Appellant had not proved his claim thus necessitating this appeal which has good chances of success and if the injunction is not granted, the Applicant will suffer irreparably as his plot may be sold.

The application is opposed by the 2nd Respondent who has deponed, inter alia, that she was allocated plot No. 201A KUTUS which the Applicant claims to be his plot No. 316A KUTUS and so the matter was reported to the 1st Respondent and later to the Police as the Applicant had commenced putting up a building on the plot. Investigations however revealed that the plot belonged to the 2nd Respondent who was then issued with a letter dated 27th July 2011 by the 1st Respondent and so the Applicant's case in the lower Court was dismissed with costs. That the Applicant has not demonstrated that he has an arguable appeal nor shown any evidence that the 2nd Respondent is in the process of selling the plot in dispute and further, no memorandum of appeal has been annexed. That the 2nd Respondent's plot is No. 201A and she has never claimed plot No. 316A and if an injunction is granted, she will suffer injustice and prejudice.

In a supplementary affidavit however, the Applicant deponed that the letter dated 27th July 2011 was overruled by another letter dated 7th October 2013 which indicated that his plot No. 316A (previously No. 234A) was next to plot No. 315A (previously 235A) and further that the Applicant's plot No. 316A had been pointed to him on the ground by one **SAMUEL MUCHIRA MAGU** a surveyor with the **URBAN COUNCIL OF KERUGOYA/KUTUS**. That the said letter also indicated that the physical development plan forwarded to the 2nd Respondent was circumspect and under investigations.

The 1st Respondent did not file any reply to the application which has been canvassed by way of written submissions filed both by **MS MUNENE ADVOCATE** for the Applicant and **MS THUNGU ADVOCATE** for the 2nd Respondent.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

The judgment sought to be appealed was delivered by **HON. Y.M. BARASA – RESIDENT MAGISTRATE** on 25th August 2017 and a memorandum of appeal was filed on 25th September 2017 and therefore there is compliance with the provisions of **Section 79G of the Civil Procedure Act**. This application is properly before this Court.

In considering an application such as this one, the Court will be guided by the following principles:

- 1. An order for injunction pending appeal is a discretion one which will be exercised against an Applicant whose appeal is frivolous.***
- 2. Such discretion should be refused where it would inflict greater hardship than it would avoid.***
- 3. The Applicant must show that a refusal to grant the injunction would render the appeal nugatory.***
- 4. The Court should also be guided by the principles set out in GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.***

The above principles were laid down in the case of **PATRICIA NJERI VS NATIONAL MUSEUM OF KENYA 2014 e K.L.R.** Similarly, in **MUKUMA VS ABUOGA 1988 K.L.R 645**, the Court of Appeal held that where a party is exercising his right of appeal, the Court ought to see that the appeal is not

rendered nugatory. See also **BUTT VS RENT RESTRICTION TRIBUNAL 1982 K.L.R 417.**

It is interesting, but not entirely strange, that the 1st Respondent, and which should be the main party in these proceedings, has not filed any response to the application. The Appellate Court will no doubt be keen to know where the 1st Respondent stands in this dispute considering that among the documents annexed to the Applicant's Notice of Motion is a consent order issued by the trial Court on 17th June 2014 that reads:

- 1. "That the consent dated 7th February 2014 is endorsed.***
- 2. That the plaintiff's suit against the 1st defendant is allowed with no order as to costs".***

That order was issued in **KERUGOYA PMCC No. 192 of 2011** in which the Applicant had filed a suit against the 1st and 2nd Respondents seeking, inter alia, a declaration that he is the lawful allottee of plot No. 316A (previously 234A KUTUS). Whereas the Applicant claims ownership of plot No. 316A KUTUS (previously plot No. 234A KUTUS), the 2nd Respondent's case is that her plot is No. 201 KUTUS and that she has never claimed plot No. 316A. Given those two divergent claims, it is not clear why the Applicant and the 2nd Respondent would appear to be litigating over the same property. Could there be a double allotment or simply failure by the 1st Respondent to identify the two different plots on the ground or outright mischief? The Applicant's letter of allotment dated 13th May 1987 describes his plot as No. 234A KUTUS (annexture **SMM 1**) and yet the letter requesting him to pay rate refers to his plot as KUTUS A/316A (annexture **SMM 2**). Plot No. 201A on the other hand had been allocated to one **NAFTALY MWAI** in 1987 who then transferred it to the 2nd Respondent in 2008 (see annexture **RWW 2 (a)**). I am not determining the appeal itself at this stage and therefore I must avoid comments that may prejudice the appeal. From the evidence before me however, I take the view that the appeal is clearly not frivolous. Ultimately it will be crucial to determine whether or not plot No. 316A KUTUS and 201 KUTUS are one and the same plot and pending that decision, a refusal to grant the injunction sought would render the appeal nugatory. The Applicant would suffer great hardship and injustice should it emerge that the plot which the 2nd Respondent claims as her plot No. 201A KUTUS is in fact his plot No. 316A KUTUS. The converse is also true considering that the Applicant is in fact desirous of developing what he believes to be his plot No. 316A KUTUS.

Guided by the above principles and also the test in **GIELLA's** case (supra), and bearing in mind that in a situation such as the one obtaining in this case, the Court should aim at preserving the status quo so that the appeal is not rendered nugatory. I am persuaded that this is a proper case in which to grant the order of temporary injunction pending the hearing and determination of the appeal.

In the circumstances, therefore, I allow the Notice of Motion dated 16th October 2017 in the following terms:

- 1. A temporary injunction is hereby granted restraining the 2nd Respondent from selling, disposing, alienating, wasting, developing and/or in any other way dealing with plot No. 316A KUTUS (referred to by the 2nd Respondent as plot No. 201A KUTUS) pending the hearing and determination of this appeal.***
- 2. The Applicant do file a record of appeal within forty five (45) days from the date of this ruling and thereafter, the appeal be fixed for directions within thirty (30) days from the date of filing the record of appeal.***
- 3. Either party at liberty to apply.***
- 4. Costs of this application shall abide by the results of the appeal.***

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February 2018 at Kerugoya

Mr. Ngigi for Ms Munene for Applicant present

2nd Respondent present

Ms Thungu for 2nd Respondent absent

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018