



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 7 /2017

AGNES MUTINDI NDETEI.....APPELLANT

VERSUS

MICHAEL KILUU MUNG'ATA.....RESPONDENT

RULING

1. There is before me a notice of motion application expressed to be brought under **Order 40 Rule 2, Order 51 Rule 1** of the Civil Procedure Rules, Section **1A, 1B** and **3A** of the Civil Procedure Act and other enabling provisions of the law for orders that ;

I. THAT the application herein be heard exparte in the first instance for reasons of urgency.

II. THAT pending the hearing and determination of the application herein interpartes the Respondent be barred from subdividing, selling, transferring, parting with possession, alienating or in any manner whatsoever interfering with and or disposing plot number 1451 Mang'elete Settlement Scheme.

III. THAT pending the hearing and determination of the appeal the Respondent be barred from subdividing , selling , transferring , parting with possession, alienating or in any manner whatsoever interfering with and or disposing plot number 1451 Mang'elete Settlement Scheme.

IV. THAT the costs of this application be in the cause.

2. The application is dated **20/8/2015** and was filed in court on the **28/8/2015**. It is predicated on the grounds on its face as well as the supporting affidavit of **Agnes Mutindi Ndetei**, the appellant herein, the same being dated **20/8/2015** as well as the supplementary affidavit of **Elizabeth Isika** the Appellant's Counsel. The latter affidavit is dated **30/9/2015** and was filed in court on **6/10/2015**.

3. The application is opposed by the Respondent's supporting and replying affidavits sworn on **7/10/2015** and **11/5/2017** respectively. The Respondent's two affidavits were filed in court on **12/10/2015** and **15/5/2017** respectively.

4. The Appellant has deponed that the suit property was the subject of **Makindu PMCC number 84/09** which suit was determined in favour of the Respondent on **30/6/2015**. The Appellant has further deponed that the Respondent is in the process of subdividing the land into plots of **100 feet** by **50 feet** with a view to selling and transferring the same to **3rd Parties**. She contends that if the Respondent proceeds with his intention to completion, the appeal will be heard in vain as there will be nothing for her to get in the event that she succeeds. She says that the Respondent will not be prejudiced in the event she loses the appeal since the land will remain intact.

5. In his supporting affidavit, the Respondent has deponed that the Appellant never sought for stay of execution pending appeal during the delivery of judgement on **30/6/2015**. The Respondent further contends that the Appellant is merely wasting courts time as she should have filed an application to file an appeal out of time. In both the supporting and the replying affidavits, the Respondent has deponed that the Appellant be barred from interfering or and intermeddling or damaging the suit property like she did on the **05/7/2015**.

6. The Appellant's Counsel submitted that the purpose of an application such as this one is to preserve the subject matter in dispute so that the rights of an Appellant who is exercising his/her undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. He went on to refer the court to the case of **Patricia Njeri and 3 others Vs National Museum of Kenya [2004]eKLR** which provides the principles that guide the court when considering an application for injunction pending an appeal. Those principles were held by **Visram J(as he then was)** as:-

a) An order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.

b) The discretion should be refused where it would inflict greater hardship than it would avoid.

c) The applicant must show that to refuse the injunction, would render the appeal nugatory.

d) The court should also be guided by the principles in *Giella Vs Cassman Brown Ltd 1973 EA 358* that the applicant has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be adequately compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellant in the appeal.

7. The counsel also urged to the court to apply the doctrine of lis pendens and referred the court to the case of *Naftali Ruthi Kinyua Vs Patrick Thuila Gachura & Another [2015] eKLR*. The counsel further submitted that the Appellant has satisfied the principles for the grant of injunction.

8. On the other hand, the Respondent's counsel agreed that the principles for the grant of injunction pending appeal are as stated in the *Patrick's case (Supra)* and pointed out that the Appellant has failed to demonstrate what prejudice would be occasioned to her if the orders sought were not granted. He went on to submit that the appellant has also failed to provide evidence that the Respondent is disposing or rather alienating the suit property and, therefore, the appeal does not in any way risk being rendered nugatory. He termed the application as one that is not only frivolous but also vexatious and is meant to frustrate the Respondents who has not disposed or sold any part of the suit property.

9. The counsel went on submit that the Appellant has not satisfied the principles of granting injunction stated in the famous case of *Giella Vs Cassman Brown & Co Ltd [1973]EA 358*. The counsel added that the Appellants has failed to demonstrate to the court how the Respondents intends to dispose or transfer the suit property.

10. Having read the submissions that were filed by the partes herein as well as the application, the supporting and supplementary affidavit, and having read the supporting and the replying affidavits, I wish to point out that the principles to be considered in this application for are as stated by *Visram J(as he thus was)* this *Patricia Njeri & 3 others Vs National Museum of Kenya [2004]eKLR*. The issue is, has the Appellant/Applicant satisfied the four principles set out in the case? The Appellant/Applicant's counsel's submissions were that the applicant has met those principles. The counsel states that the court dismissed joint ownership of the plot number **1451/ Mang'etele Settlement Scheme**. As earlier on observed, the Respondent's Counsel submissions are that the Appellant /Applicant has not satisfied the principles for granting an injunction pending appeal.

11. I have had a chance to look at the impugned judgment which is annexed to the applicant's supplementary affidavit dated **30/9/2015**. On the face of it, the Appellant has an appeal with chances of success taking into account the issue co-ownership of the suit property as the trial court observed or joint ownership as the Appellant/Applicant's Counsel stated. This is an issue that requires to be interrogated. I do note that the Respondent has in **paragraph 7** of his supporting and replying affidavits stated that he has never lodged the title to plot number **1451 Mang'etele Settlement Scheme** by way of sale or mortgage or lien or charges whatsoever save that the land is for his use as a domestic premises only where he resides todate.

12. Grant of prayer 3of the Appellant's notice of motion application will not prejudice him in any way as he will not be estopped from utilizing the suit property in any other gainful manner other than the acts which the Appeallant has stated in prayer three of her application. He will still have the land should the Appellant lose the appeal. I hold that it is the plaintiff who instead stand to be prejudiced if the orders sought are not granted. In the circumstances, I am satisfied that the Appellant has placed sufficient evidence before this court to warrant the grant of injunction pending appeal.

I, therefore, proceed to grant prayers 3 and 4 of the notice of motion application dated 20/08/2015. It is ordered.

Signed, Dated and Delivered this 14th day of February, 2017

C.G MBOGO

JUDGE

In the presence of:

Mr. Tamata for the Appellants

No appearance for the Respondent

Both Appellants present

Respondent present

Mr.Munyao Court Assistant

C.G MBOGO

JUDGE