



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 2 OF 2018

JANE WANGARI NGENE.....APPELLANT

=VERSUS=

PHILIP NJUGUNA WARUTH.....1ST RESPONDENT

JULIUS KANYUGI.....2ND RESPONDENT

R U L I N G

1. This appeal arises from the ruling of the senior principal magistrate court (Hon E K Usui) delivered on 7/12/2017, dismissing the appellant's application for an injunctive order. While dismissing the application, the trial court found that the appellant had failed to satisfy the criteria for grant of an interlocutory injunction. The learned trial magistrate contended that whereas the appellant had produced an agreement for sale for the suit property dated 2013, together with letters from the chief and from Nairobi City County indicating that the appellant was the owner of the suit property, the respondent had produced a lease from the City Council of Nairobi dated 27/6/2012. Aggrieved by that decision, the appellant lodged the present appeal through a memorandum of appeal dated 22/1/2018 and amended on 25/1/2018.

2. The appellant subsequently brought a notice of motion dated 25/1/2018, seeking an interim injunctive order restraining the respondents, their servants, agents and/or employees from carrying on any construction, developments, wasting, alienating, leasing, transferring, disposing and/or from dealing in any other way whatsoever with the suit property pending the hearing and determination of the appeal. The application is supported by an affidavit sworn by the appellant, Jane Wangari Ngene. The 1st respondent through grounds of opposition dated 13/4/2018 opposed the application. That application is the subject of this ruling.

3. The appellant has deponed that she has filed an appeal against the ruling delivered on 7/12/17 in respect of the application dated 23/11/15. She contends that prior to the said ruling, there had been an order of interim injunction in place as from 3/9/15. She further contends that justice dictates that the suit property be preserved through an injunctive order as the appeal filed has high chances of success.

4. The 1st respondent opposes the application. He contends that the application is defective and an abuse of the court process because the applicant is delaying conclusion of the case. He has deponed that the applicant has not satisfied the requirements of Order 40 rule 1 and that from the ruling appealed against, it is clear that the applicant has no title hence she cannot suffer any loss or damage. He has further deponed that he is the lawful owner of the suit property and that he will suffer immense loss because he has invested heavily on the suit property.

5. The application was canvassed orally on 16/5/18. Mr Sumba, counsel for the appellant, submitted that the appellant has filed an appeal hence the *status quo* should be maintained. He further submitted that the application was brought under Order 42 rule 6(6) and if an injunction is not granted, the applicant will suffer substantial loss. He further submitted that on page 2 of the impugned ruling, the trial magistrate confirmed that an agreement had been produced and Nairobi County Government had confirmed that the appellant was the owner of the suit property. He relied on **Nairobi Civil Appeal No 273 of 2014** in which the Court of Appeal held that an agreement for sale constitutes a *prima facie* case. He referred the court to the documents on pages 100 and 107 and submitted that ground 3 of the Grounds of Opposition relates to the trial court and not an appellate court.

6. Mr. Gatitu, counsel for the 1st respondent, submitted that the application was not brought under Order 42 rule 6(6) and that a party seeking an injunction must satisfy the criteria in **Giella vs Cassman**. He added that the temporary injunction that was issued in the lower court was not confirmed. He further submitted that the prayer sought in the in the present application will not preserve the suit property but will lead to the eviction of the respondents from the property suit. He submitted that in Civil Appeal No. 273/2014 the court granted the order simply because the lower court had erred about who was the registered owner but in the present case there is no such error. He urged the court to dismiss the application. In response, Mr Sumba submitted that the court has the duty to do justice.

7. The single issue for determination in this application is whether the appellant has satisfied the criteria for grant of injunction pending appeal. When exercising jurisdiction to grant injunction pending appeal, this court is guided by well settled principles. Firstly, the jurisdiction to grant injunction pending appeal is a discretionary one and the discretion is to be exercised judiciously. The discretion will not

be exercised in favour of an applicant whose appeal is frivolous. Secondly, the injunction will not be granted if it would inflict greater hardship than it seeks to prevent. Thirdly, the applicant must demonstrate that failure to get the injunctive order would render the appeal nugatory. Lastly, the applicant must satisfy the criteria in **Giella v Cassman Brown 1973 EA 358** in that he must demonstrate that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by any award of damages if the injunction is not granted; and if the court were to be in doubt, the application is to be decided on a balance of convenience. Lastly, it should be noted that at this point, the court is required to exercise caution and avoid delving deep into the merits of the appeal because that task is for a subsequent forum.

8. In the present application, none of the parties has evidence of a registered title. The applicant has relied on the same documents which she relied on in the trial court; namely a sale agreement, letter from the chief and letter from the city council. Before the trial court, the 1st respondent relied on an unregistered lease and letter from Nairobi City County Government.

9. The court's view at this point is that none of the rival documents constitute better evidence of ownership than the other. The present application will therefore be disposed on a balance of convenience and on the need to preserve the subject matter of the appeal. The focus of the court will therefore be to preserve the suit property and dispose the appeal expeditiously. Consequently, the appellant's notice of motion dated 25/1/2018 is disposed in the following terms:

(a) Between now and the hearing date of the appeal, the property subject matter of the appeal shall be preserved in the sense that none of the parties herein shall dispose, mortgage or develop the suit property.

(b) The appellant shall file her record of appeal together with her brief written submissions within 30 days from today. In default the preservatory order granted herein shall stand vacated.

(c) The respondents shall file their brief response submission within 30 days from the date they are served with the appellant's written submissions.

(d) The appeal herein will be heard within 90 days on a date to be set by the court at the time of delivering this ruling.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Morara holding brief for Sumba for the Appellant/Applicant

Mr Kairaria holding brief for the 1st Respondent

Ms Halima Abdi - Court Clerk