REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 28 OF 2015

TERESA CHEBICHII RUTO..................................APPLICANT

VERSUS

TALALEI KIPTENAI...RESPONDENT

RULING

Talalei Kiptenai, ***(hereinafter referred to as the applicant)*** has come to this court for a temporary injunction pending appeal. The application is based on grounds that the court issued an order that the Land Surveyor, Uasin Gishu County do demarcate 36.0 acres from L.R. No. Eldoret Municipality Block 21 (King'ong'o) 2382 – 2466 for purposes of utilization by the applicant/respondent pending the hearing of the appeal filed by the respondent to the Court of Appeal. The applicant has a prima facie case with probability of success. Damages shall not be an adequate remedy. The balance of convenience tilts in favour of the applicant.

The application is supported by the affidavit of ***Talalei Kiptenai*** himself who states that this Honourable court made a ruling on the 27th May, 2016, that 36.0 acres of land be released to the applicant/respondent herein for utilization. That upon the ruling delivered, the applicant/respondent made an application dated 28th May, 2016 seeking orders that the Land Surveyor, Uasin Gishu County do demarcate the 36.0 acres for utilization as per the ruling. That this Honourable court on the 2nd of December allowed the application to the effect that Land Surveyor, Uasin Gishu County do demarcate the 36.0 acres for utilization. That on the 15th December, 2016, the applicant received a letter dated 8th December, 2016 that the surveyor will be visiting for purposes of demarcating the suit land. That the applicant/respondent is in the process of fencing the suit land against the orders of the court issued on the 27th Mary, 2016. That the acts of applicant/respondent demonstrate high level of impunity "untouchable".

The applicant believes that he has a prima facie case with probability of success. That he shall suffer irreparable loss should the applicant/respondent continue fencing as it will mean they have ownership of the land and that balance of convenience tilts in his favour. That the acts of the applicant/respondent are made in bad faith to defeat the appeal.

The application is opposed by Teresa Chebichii Ruto who states that the said application is orchestrated at delaying her siblings and her from enjoying the fruits of a just judgment and that the said application amounts to an abuse of the due process of the court hence the same should be dismissed forthwith with costs to her. That further to the above, the said application is spent in so far as fencing is concerned for the reason that the fencing work had been completed as at 19th December, 2016 long before she was served with the orders issued by the court on 21st December, 2016. That the annextures of the

respondent/applicant are a clear indication that the parcel had indeed been fenced. That paragraph 6 of the applicant's supporting affidavit clearly confirms that as at the time the instant application was filed, the fencing was in progress. That after she was served with the order, the applicant's children took advantage of the said order by destroying the already erected fence forcing her to report the matter at the Eldoret Central Police Station vide OB No. 36/22/12/2016. That she informed her counsel on record about the destruction of the fence after which she promised to call Mr. Mathai for clarifications by his client. That she is further informed by her counsel on record that after calling Mr. Mathai, he confirmed that he had not authorized his client to bring down the fence as was being alleged by the applicant's children. That in the above light, therefore the only issue pending determination by this honourable court is the issue of utilization. That contrary to the allegations by the applicant under paragraph 7 of his supporting affidavit, she has never disrespected any orders of this honourable court. That there were no orders preventing her siblings and her from fencing the suit parcel of land. That the main reason they opted to fence was for purposes of identification of the demarcated boundary in order to prevent eminent disagreements during utilization.

She states that she has been ably advised by her counsel on record on the limits for utilization pending the conclusion of the appeal and as such it is not true to allege that fencing amounts to ownership and that from the pleadings on record, particularly his application dated 9th December, 2016 where the applicant stated that he had tenants on the ground meaning leasing is part of utilization. That it is unfair for the applicant to purport to supervise how her siblings and she should utilize their portion yet the appeal has not even been determined. That even if they are to lease out their portion, they shall consider the term of such leasing with the pending appeal in mind. That the applicant has not demonstrated the prejudice he will suffer if they utilize their portion as ordered by the court pending the appeal. That the instant application is a gimmick by the applicant to supervise the utilization of their portion which position they are strongly opposed to. The applicant has utilized her late father's land for over forty years including sale and leasing and the application now before court is only meant to delay justice further to her detriment and that of her siblings. That litigation must come to an end. That she has been informed by her advocate on record which information she verily believe to be true that this honourable court has the unfettered discretion to disallow the instant application in the best interest of justice which discretion she hereby urge it to so to exercise.

I have considered the application and all affidavits on record and do find that the application is brought under order 40 of the civil procedure rules that provides for temporary injunctions and interlocutory orders

1. ***Cases in which temporary injunction may be granted [Order 40, rule 1.]***

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. ***Injunction to restrain breach of contract or other injury [Order 40, rule 2.]***

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court

for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

A **"suit" means all civil proceedings commenced in any manner prescribed. Appeals Are Not Suits Envisaged by The Civil Procedure Act** and Rules but are based on ***Order 42 of the Civil Procedure Rules*** and the Court of Appeal Rules and therefore an injunction does not lie under ***Order 40 Of the Civil Procedure Rules*** where the court has already made judgment and the matter is on appeal. The proper court to file this application is the court of appeal. This court can only grant a temporary injunction under 0rder 42 rule 6 of the civil procedure rules in respect of an appeal from the subordinate court but not an appeal from this court to Court of Appeal. An injunction in an appeal from this court to Court of Appeal lies in the Court of Appeal whilst an application for injunction from the Lower Court to this court lies in this court. In other words, this court is functus officio.

6.

Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

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

(b) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.

The main issue is the fencing of the parcel of land ordered by the court to be utilized by the plaintiff. This court has already ordered that the plaintiff utilizes 36 acres pending appeal but has stayed the execution of

its orders issued on in the judgment delivered on 28th OCTOBER 2015. Mr. Mathai learned counsel for the applicant argues that fencing means ownership and not possession. With due respect, he has misapprehended the law. Fencing a portion of land leads to possession and not ownership and therefore the respondent did not breach any order by fencing the portion she was given to utilize. Moreover, the issue of granting injunction pending appeal is *resjudicata* as the court has already granted a conditional stay on the cancellation of title pending appeal. Order 40 is not applicable where judgment has been made. The relevant provision is Order 42 which only gives jurisdiction to the court to grant an injunction in respect of appeals from the Lower Court. The application lacks merit. The same is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 2nd day of February, 2017.

ANTONY OMBWAYO

JUDGE