



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC APPEAL NO. 6B OF 2016

ABDI DIRIYE ABDI.....APPELLANT

VERSUS

NASIR MOHAMED OLOW.....RESPONDENT

RULING

On 24th March 2016, **E.C. CHERONO – SENIOR PRINCIPAL MAGISTRATE** - as he then was - delivered a ruling at the **SENIOR PRINCIPAL MAGISTRATE’S COURT WAJIR in CIVIL CASE No. 16 of 2015** dismissing the appellant’s suit against the respondent in a dispute involving some un-registered plot situated at **WAGBERI LOCATION** and measuring 100 x 50 ft. In dismissing that suit, the magistrate found that the respondent was wrongly sued yet he was only an agent of a disclosed principal.

Aggrieved by that ruling, the appellant promptly moved to this Court vide an amended Memorandum of Appeal dated 28th April 2016 in which he raised several grounds which I need not consider at this stage.

Contemporaneously with that appeal, the appellant filed a Notice of Motion under **Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. That application is the subject of this ruling in which the appellant seeks the following remedies:

1. Spent.

2. Spent.

3. That a permanent injunction do, (sic) be issued to restrain the respondent from unlawfully encroaching on the appellant’s plot No. R 4245, transferring it to a third party, or interfering with the applicant’s quiet possession thereof or in any way constructing or alienating it pending the hearing and determination of the appeal.

4. That costs of this application do (sic) be provided for by the respondent in any event.

The application is premised on the grounds set out therein and also supported by the appellant’s affidavit. The gravamen of this application is that the appellant is the owner of plot No. R 4245 situated at Wagaberi Location (the suit plot) on which the respondent is unlawfully encroaching and there is a need to issue an injunction to restrain him pending the hearing of the appeal against the dismissal of his suit in the subordinate Court. That his suit was dismissed without any proof that the respondent was an agent of an alleged principal and further, without giving him an opportunity to enjoin the said principal so that the case could be determined in a just and fair manner. He therefore filed this appeal and in the meantime, he seeks orders to preserve the suit plot.

The respondent filed a replying affidavit in which he deponed, inter alia, that he is an agent of Ambassador **RUKIA SUBOW** and **Dr. A.M. SUBOW** who work in **TEHRAN** and who own the suit plot. That the said principals are the owners of the suit plot and are in actual possession thereof. That the trial Court arrived at the right decision in striking out the suit since he clearly indicated in his pleadings that he was an agent. This application should therefore be dismissed as it is an abuse of the Court process and the appeal has no chances of success.

The application was placed before me during my tour at Embu and counsel agreed that it be canvassed by way of written submissions which have now been filed.

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

Although the application is brought under the provisions of **Order 40 Rules 1 and 2 of the Civil Procedure Rules**, the more appropriate provision is **Order 40 Rule 6 (6)** which provides as follows:

“Notwithstanding anything contained in sub-rule (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 think just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with”

The decision appealed from was delivered on 24th March 2016 and the appeal filed was first filed on 7th April 2016 before being amended on 28th April 2016. Therefore, there is a proper appeal before this Court which grants it the jurisdiction to determine this application for temporary injunction pending appeal. In an application such as this one, however, I must guard against delving into the appeal itself because that may prejudice the Court that will eventually handle the appeal. I must only consider if there is an arguable appeal. The grant or otherwise of an injunction pending appeal involves the exercise of discretion which must be exercised judicially on the basis of law and evidence. The Court should ensure that the appeal, if successful, will not be rendered nugatory. In **CHARTER HOUSE BANK LIMITED VS CENTRAL BANK OF KENYA & OTHERS C.A CIVIL APPLICATION No. 200 of 2006 (2007 e K.L.R)**, the Court of Appeal held that:

“The principle upon which this Court exercises its unfettered discretion to grant a stay of execution, stay of proceedings or an order of injunction are settled. The applicant should satisfy the Court that the appeal or intended appeal is not frivolous, that is to say, that the appeal or intended appeal is arguable and, secondly, that unless the application is granted the results of the appeal, if successful would be rendered nugatory. The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory”.

In **PATRICIA NJERI & OTHERS VS NATIONAL MUSEUM OF KENYA (2004 e K.L.R)**, **VISRAM J.** (as he then was) identified the following principles to guide a Court considering such an application. These are:

- 1. An order of injunction pending appeal is discretionary and will not be granted where the appeal is frivolous.***
- 2. The discretion should be refused where it would inflict greater hardship than it would avoid.***
- 3. The applicant must show that if the injunction is not granted, the appeal will be rendered nugatory.***
- 4. The Court should be guided by the principles set out in the case of GIELLA VS CASSMAN BROWN LTD 1973 E.A 358.***

In considering this application, I have looked at the impugned ruling subject of this appeal and the

memorandum of appeal to see if the appellant has an arguable case even without going into the merits of the appeal itself. I have also considered the guidelines laid down in the GIELLA case (supra). The appellant's case in the subordinate Court was dismissed basically on the ground that the respondent had wrongly been sued yet he was an agent of a disclosed principal. The trial Court cited ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & OTHERS VS KENYA POST OFFICE SAVINGS BANK CIVIL APPLICATION No. 5 and 48 of 2002 NAIROBI for the proposition that the agent cannot be sued where the principal is disclosed. That principle was approved by the Court of Appeal in the case of CITY COUNCIL OF NAIROBI VS WILFRED KAMAU GITHUA T/A GITHUA ASSOCIATES AND ANOTHER C.A CIVIL APPEAL No. 206 of 2008 (2016 e K.L.R) where it stated that:

“The principle of common law is that where the principle is disclosed, the agent is not to be sued”.

The trial magistrate had before him a letter of allotment showing that the suit plot was registered in the name of **RUKIA A. SUBOW**. The respondent had pleaded in paragraph 5 of his defence that he was simply building a perimeter wall on the suit plot ***“as an agent and employee of Ambassador Rukia Subow and her husband Dr. A. Subow who had given him the authority to build a perimeter wall on the premises as they claim to be the owners of the property”***. That relationship between the respondent and the Subows was not really in doubt as there was no reply to that averment. In the circumstances, the appellant cannot be heard to say that he has an arguable appeal to warrant the grant of the orders sought. And even considering the application on the basis of the principles set out in the GIELLA case (supra), I do not see what prima facie case the appellant has established in view of the undisputed fact that he has sued the wrong party. The appellant not having surmounted the first hurdle in the GIELLA case (supra), there will be no need to consider the other two principles as was held in the case of NGURUMAN LIMITED VS JAN BONDE NIELSEN & TWO OTHERS C.A CIVIL APPEAL No. 77 of 2012 where the Court stated that:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”

Ultimately therefore, and having considered all the matters herein, I find no merit in the appellant's Notice of Motion dated 28th April 2016. The same is therefore dismissed with costs.

B.N. OLAO

JUDGE

5TH MAY, 2017

5th May 2017

Coram B.N. Olao - Judge

(In Chambers)

ORDER

Ruling was due today and notices were issued to the counsels. However, none is present

Fresh notices to issue for 19th May 2017.

B.N. OLAO

JUDGE

5TH MAY, 2017

Later at 11.30 a.m.

Coram as before

Mr. Nganga for Mr. Odiya for Respondent now present

Mr. Wanyoike for Appellant absent

COURT: Ruling delivered, dated and signed in open Court this 5th day of May 2017.

B.N. OLAO

JUDGE

5TH MAY, 2017