



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**CIVIL APPEAL NO. 9 OF 2014**

**JAMES M.KIMONYE .....APPEALANT**

**VERSUS**

**WILSON KINOTI KIRERA.....1STRESPONDENT**

**PHILIP GUANTAI M'ITUARUCHIU.....2ND RESPONDENT**

**JOSEPH GATOBU RARAMA.....3RD RESPONDENT**

**J U D G M E N T**

The Appellant filed a Memorandum of Appeal on 10: 04:14 as he was aggrieved by the ruling delivered on 14:03:14 in Meru CMCC No. 265 of 2013. The grounds set out in the Memorandum of Appeal are that:-

1. That the Learned Trial Magistrate erred in Law and in fact in finding that the Appellant had not made out a prima facie case against the weight of the evidence on record.
2. That the Learned Trial Magistrate erred in Law and in fact by failing to make a determination on the evidence adduced proving fraud on the part of the Respondent which would have led to the conclusion that the Appellant had an arguable case with a high probability of success and thus had established in a prima facie case.
3. That the Learned Magistrate erred in law and fact by going against the holdings in the Court of Appeal decision in MACHARIA MWANGI MAINA & 87 OTHERS VS DAVIDSON MWANGI KAGIRI Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 & 27 of 2011 in finding that there being no consent of the Land Control Board the same transaction between the Appellant and 1st Respondent was void and hence the Appellant's only remedy was seeking a refund of the sum paid.
4. That the Learned Trial Magistrate erred in law and fact in failing to find that the Appellant's case was not for a refund of the paid consideration price and the Appellant could not be compensated by way of an award of damages the Appellant having taken possession and extensively developed the suitlands.
5. That the Learned Trial Magistrate erred in Law and fact in failing to recognize that the orders of injunction and inhibition sought are equitable remedies and only took in consideration a statutory provision of the law in denying the Appellant's the orders justifiably prayed for.
6. That the Learned Trial Magistrate erred in law and fact in failing to find that the orders of

temporary injunction and inhibition were called for to preserve the suit parcels to wit. L.R NOS. ABOTHUGUCHI/KATHERI/3734 and 3735 and the developments of the Appellant's pending the hearing and determination of the suit.

7. That the Learned trial Magistrate's order /ruling was against the weight of evidence on record.

Way back on 23:07:15 directions were given that the matter be heard by way of Written Submission Appellant's Submission were filed on 30:03:16, those of 2nd and 3rd Respondents (combined) were filed on 09 :11:15.

The 1st Respondent did not file any Submissions. The Court was informed on 10:11:16 that 1st Respondent had died. His Counsel, Mr. Kithero had Written to the Court on 03:03:16 stating that no submissions would be filed in respect of 1st Respondent.

### **ANALYSIS AND DETERMINATION**

The Appellant herein had filed a Notice of Motion dated 23:08:13 seeking for an order of Interlocutory Injunction and inhibition against the Defendants to restrain them from entering or trespassing into L.R NO. ABOTHUGUCHI/KATHERI/ 3734 and 3735 (the suit lands). The application was opposed and the ruling was delivered whereby appellants application was dismissed.

The background to this matter is that 1st the Respondent had apparently sold the suit land to Appellant but then sold the land to 2rd and 3rd Respondents.

After analysing the material evidence presented before the trial Court, a ruling was delivered on 14:03:14. The appellant was aggrieved by this ruling hence the appeal.

From the onset , I must point out that at the interlocutory stage, a Court is not seized of the full facts and evidence that would determine and pronounce the rights of the parties in *Nguruman Limited -versus Jan Bonde Nielsen & 2 others* Court of Appeal Civil Appeal No. 77 of 2012 (NBI) Ouko J , Kiagu J and M' Inoti J the Court was dealing with the issue as to whether the lower Court. (High Court) in granting a prayer of temporary injunction had properly exercised its discretion, on whether it misdirected itself in same manner and arrived at a wrong decision. The Court stated thus.

***"In conclusion, we stress that it must be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where the facts are not shown to bring the case within these conditions, the relief of injunction is not available".***

When an application for an interlocutory Injunction to restrain a defendant from doing something as was the case in the instant matter, such an application is made on contested facts, hence the trial. The decision whether or not to grant an Interlocutory Injunction has to be taken at a time when the existence of the rights and interest of the applicants are uncertain and remains so until the suit is heard and determined.

When the trial Magistrate was dealing with the matter, the appellants rights of proprietorship to the suitland had not crystalized in view of the fact that the transaction was never finalized. The trial Magistrate analysed the position of the parties at length pointing out that the transaction between the Appellant and the then 1st defendant was a controlled transaction as per the provisions of section 6 of the land control board. The application failed to succeed in view of the fact that a *prima facie* case was not made by the Appellant.

Now where in the life history of the application of 23:08:13 or in the suit did the appellant demonstrate to the trial court that he stood to suffer irreparable damage if the injunction was not granted. It was therefore quite in order for the trial Court to state that damages would be an adequate compensation.

On the balance of convenience Principle, the trial Court stated that there were no doubts regarding the first two principles. I find no justification to rule otherwise.

From the way the appellant is proceeding with this matter, it appears his basis for litigating the issue is anchored on the sale agreement and the alleged take over of the suit property. However these are issues that ought to be canvassed in a full trial **Charter house investment Ltd vs Simon K. Sang & 3 Others (2010) eKLR** the court of appeal had observed that;

***“Injunction is an equitable and discretionary remedy.....the award of temporary injunction by a court of equity has never been guaranteed as a matter of right”.***

A prayer for an Injunction is a discretionary remedy.

I also find that on 11:04:14 ( few days) from the date of delivery of the ruling in Lower Court), Appellant filed an application before this Court. The orders sought from are more or less similar to the prayers in the Lower Court (in the application of 23:08:13). He did obtain the prayer for inhibition on 16:04:14 (Ex-parte). When the application was eventually canvassed interpartes before Hon Njoroge J the Judge stated that:-

***"It is clear that the suit in Lower Court remains to be heard and determined. This Court must be sensitive to the fact that it should avoid anything that will tie the hands of the Lower Court" ...."***

I hold the same opinion that this Court is not seized of the full facts. Its only the Court seized of the matter that will have an opportunity of hearing the merits of the case in a full trial.

I note that the Lower Court case was filed in 2013. This is the fourth year down the line. I am obliged to emphasize the mandate of the Court as is provided for Under Article 159 of the Constitution, Judicial Authority should be exercised in a manner that ensures **JUSTICE IS NOT DELAYED**". It is the view of this Court that the numerous applications brought forth by the appellant in the lower and High Court have hindered the Court's mandate in terms of expeditious delivery of justice. The appellant opted the path of filing a similar application in the High Court. Sadly the very nature of the interlocutory application for temporary injunction have tended to divert the the path of the resolution of disputes such that the quest for substantive justice is relegated to the bottom of the barrel.

The overriding objective set out in Section. 1A and 1B of the Civil Procedure Act is to ensure the just and fair disposal of cases. In reference to this overriding objective , *Judge Odunga in John Maina Mburu & Co. -Vs- Samuel Gitau Manene & 3 others H.C.C.C NO 265 of 11 (NBI)* stated that:-

***"If the often talked of backlog of cases is littered with similar matters, the challenge to the Courts is to use the new " broom"of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the Principle issues in full hearing".***

My conclusion is that this appeal is unmerited.

The same is dismissed with costs to Respondents. Any orders of Inhibition issued herein are hereby vacated. The suit is to proceed before the trial Court to its logical conclusion.

**DELIVERED, DATED AND SIGNED AT MERU THIS 26TH DAY OF JULY, 2017 IN THE PRESENCE OF:**

C:A Janet

No appearance for appellant

No Appearance for 1st Respondent

Miss Nyaga for 2nd & 3rd Respondent Present

**HON. L. N. MBUGUA**

**JUDGE**