



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC.CIVIL APPEAL NO. 31 OF 2014

OSMAN ADAN ABDI IROBE.....APPELLANT

VERSUS

NADHIFA B. ABDISAMAD.....RESPONDENT

RULING

Through the application dated 19th January, 2015, the Appellant seeks orders crafted as follows:

1. **THAT** the matter do be certified urgent, service dispensed with and heard ex-parte in the first instance;
2. **THAT** an interim injunction do be issued to restrain the Respondent from unlawfully encroaching on the Appellant's plot of land, transferring it to a third party or interfering with the Appellant's quiet possession thereof pending the hearing of this application.
3. **THAT** an interim injunction do be issued to restrain the Appellant from unlawfully encroaching on the Plaintiff's plot of land, transferring it to a third party, or interfering with the Appellant's quiet possession thereof pending the hearing and determination of the appeal.
4. **THAT** costs of this application do be provided by the Respondent in any event.

It is necessary to reproduce the prayers sought in the application.

The application is supported by the Appellant's affidavit. Plot Number R 2254 ("the Suit Property") is only mentioned in the grounds set out in support of the application.

The Appellant depones that the Respondent has unlawfully encroached on the Suit Property which is situated next to Wagberi Primary School in Wajir town. The Appellant filed suit Wajir SPMCC No. 2 of 2013 which the court dismissed. His application for review of the dismissal order was also dismissed by Hon B. Rogonjo Resident Magistrate in Wajir on 12th November 2014. This prompted the Appellant to bring this appeal seeking reinstatement of the dismissed suit. The Appellant seeks an order of injunction to prevent the Respondent from encroaching on the Suit Property before the appeal is determined. The Appellant annexed copies of the Memorandum of Appeal together with a copy of the ruling of the magistrate. To demonstrate ownership of the plot, the Appellant attached a copy of a receipt issued by Wajir County Council when he paid Kshs. 5,000/= on 18th August, 1998 on account of plot transfer fees for L.R. No. R2254. He also annexed a copy of a transfer form which is not dated but which bears his signature and that of the person who transferred the Suit Property to him.

The application was opposed. The Respondent filed a replying affidavit in which he depones that he is in occupation of plot number R5928 which he has developed and he is in process of further developing. He maintains that his plot is different from the one the Appellant claims which is R2254. Parties filed written submissions.

The Appellant submits that it has demonstrated a prima facie case with a high probability of success and that the appeal may be rendered nugatory if the injunction is not issued to preserve the subject matter of the suit.

The Respondent's objection is three fold. Firstly, that it is not clear what Suit Property the Appellant seeks an injunction over. Prayers number 2 and 3 of the application do not describe the Suit Property in respect of which the orders are sought. Secondly, the Appellant's claim is in respect of plot number R2254 while the Respondent's plot is R5928. The Respondent submits that these two plots are separate and distinct. Thirdly, the Respondent contends that the application is brought under order 40 of the Civil Procedure Rules yet it ought to be an injunction pending appeal. According to the Respondent, the application ought to have been brought under Order 42 rule 6 of the Civil Procedure Rules and that the Appellant has not demonstrated that he has an arguable appeal which will be rendered nugatory if the orders are not granted. The Respondent argues that the Appellant does not have an arguable appeal. The other issue the Respondent took up is that the jurat of the supporting affidavit is not commissioned as required by section 4 of the Statutory Declarations Act which requires that a Commissioner for Oaths who is an individual and not a law firm is to administer the oath to the person swearing the affidavit. Counsel therefore admits that the affidavit is incompetent. He urged the court to dismiss the application with costs to the Respondent. The Appellant's counsel maintains that they seek an injunction under order 40 of the Civil Procedure Rules and not stay of execution.

The court has considered the application, affidavits and the oral and written submissions made by counsels. The orders sought in the application as reproduced above do not give particulars of the land in respect of which they are sought. The court agrees with the Respondents that issuing orders in such terms would be vague and incapable of enforcement since the land reference number is not given.

The Appellant has not demonstrated that the Suit Property is the same plot on which the Respondent has constructed. The Respondent annexed photographs to his replying affidavit showing the development on plot number R5928. It has not been shown that plot numbers R2254 and R5928 are one and the same plot.

The court is not satisfied that the Appellant has met the criteria for the grant of injunctive relief. The application is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 25th day of July 2017.

K. BOR

JUDGE

In the presence of: -

Nyamweya for the Appellant

Ingutya for the Respondent

Mr. V. Owuor- Court Assistant