



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C APPEAL NO. 17 OF 2016

INOI FARMERS CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

KAITHERI HOUSING CO-OPERATIVE SOCIETY LTD.....RESPONDENT

RULING

This is in respect to the Appellant's Notice of Motion dated 1st December 2016 in which they seek the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to issue a temporary injunction order restraining the Respondent, whether by itself, its servants and/or agents from selling, transferring, disposing, alienating, leasing, charging and/or sub-dividing land parcels No. INOI/KERUGOYA/3095, 3096, 3097, 3098, 3099, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160 and land parcels No. INOI/KERUGOYA/688 and 698 pending the hearing and determination of the appeal.

4. That the costs of this application be provide for.

The application is founded on the grounds set out in there and supported by the affidavit of **ISAAC KARIU KAMUNDIA** the Appellant's Chairman. The gravamen of the application is that land parcels No. INOI/KERUGOYA/252, 688 and 689 were originally registered in the names of the Appellant on which it built rental houses on land parcel No. INOI/KERUGOYA/252 while land parcel No. INOI/KERUGOYA/688 and 689 were bought with development thereon. Land parcel No. INOI/KERUGOYA/252 also houses **KAITHERI COFFEE FACTORY** owned by the Appellant and in 1991, the Appellant formed another Society with the sole purpose of managing its houses on land parcel No. INOI/KERUGOYA/252, 688 and 689 and collecting rent therefrom. Over the years, the Respondent tried to have land parcel No. INOI/KERUGOYA/252 split into two so as to acquire the ownership of the rental houses and meetings were also held for purposes of transferring the land parcel No. INOI/KERUGOYA/688 and 689 to the Respondent but nothing was resolved and no General Meeting was ever held to approve that transfer. The Appellant later discovered that the said parcels were transferred to the Respondent without its knowledge or the consent of the Land Control Board yet the Tribunal dismissed the Appellant's counter-claim hence necessitating the appeal. Annexed to the application are minutes of the Appellant's Executive Committee meeting held on 24th January 2011 as well as copies of the Green Cards and Certificate of Search in respect of the suit properties which are

registered in the names of the Respondent.

The application is opposed and in a replying affidavit by **ANTHONY NJIRAINI KIMBO** the Respondent's Chairman, it is deponed that the suit properties INOI/KERUGOYA/3126-3160 are registered in the names of **KAITHERI HOUSING INVESTMENT COMPANY LTD** and not in the Respondent's names. That the Respondent has already taken a bank loan which is secured with the title to land parcel No. INOI/KERUGOYA/688 and 689 and have also leased and rented some of the properties on those parcels of land which the Applicant does not utilize. That if the orders sought are granted, they will interfere with the operation and management of the Respondent and cripple it since the properties were transferred to the Respondent more than 30 years ago. Annexed to that affidavit are copies of certificate of search showing that land parcels No. INOI/KERUGOYA/3126-3161 are registered in the names of **KAITHERI HOUSING INVESTMENT COMPANY LTD** while parcels No. INOI/KERUGOYA/688 and 689 are registered in the names of the Respondent. There is also a copy of a lease agreement dated 23rd December 2016 showing that land parcel No. INOI/KERUGOYA/252 registered in the names of the Respondent is leased to **LAKE INSTITUTE OF TROPICAL MEDICINE KERUGOYA** for a term of five (5) years at rent of Ksh. 90,000 per month.

In a supplementary affidavit however, **ISAAC KARIU KAMUNDIA** has annexed certificates of search showing that land parcels No. INOI/KERUGOYA/3126-3160, INOI/KERUGOYA/3096-3099 and INOI/KERUGOYA/688 and 689 are registered in the names of the Respondent. He has also annexed a copy of letter dated 18th May 2017 from **MUTHEE J.K.** the District Land Registrar Kirinyaga and addressed to **WANGECHI MUNENE** advocate for the plaintiff. The letter is short and due to its importance in this matter, I find it prudent to reproduce it. The letter reads:

“RE: LAND PARCEL NO. INOI/KERUGOYA/254, 3096, 3098, 3100, 3126-3160

Your letter Ref WM/GEN/KRG/2017 dated 17TH MAY 2017 on the above subject matter refers.

Land parcel No. INOI/KAITHERI/254 in the names of KAITHERI HOUSING CO-OPERATIVE SOCIETY LIMITED was the original of the above parcels. When it was subdivided, the resultant numbers ought to have carried forward the same name as the original parcel .i.e. KAITHERI HOUSING CO-OPERATIVE SOCIETY LIMITED. However, a mistake occurred whereby the resultant parcels were registered with name KAITHERI INVESTMENT COMPANY LIMITED.

We have since discovered the error and rectified our registers (Green Card) to reflect the correct position and we are in the process of recalling back the Title Deeds issued with the name KAITHERI INVESTMENT COMPANY LIMITED for rectification.

Inconveniences caused highly regretted.

MUTHEE J.K

DISTRICT LAND REGISTRAR

KIRINYAGA”.

The application was canvassed by way of written submissions which have been filed by **WANGECHI MUNENE** advocate for the Appellant and **J. NDANA** advocate for the Respondent.

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

This is an application for injunction pending appeal and the relevant provision is ***Order 42 Rule 6 (6) of***

the Civil Procedure Rules which reads:

“Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in 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”.

It is common ground that the Appellant, being aggrieved by the decision of the **CO-OPERATIVE TRIBUNAL NAIROBI** in its **TRIBUNAL CASE No. 10 of 2011** dated 18th October 2016, filed an appeal to this Court on 17th November 2016. Appeals from subordinate Courts should be filed within 30 days from the date of the decision and there is therefore compliance with the law as regards the filing of appeals as provided under **Section 79G of the Civil Procedure Act**.

When a Court is considering an application for injunction pending appeal, it is guided by the principles set out in **PATRICIA NJERI VS NATIONAL MUSEUM OF KENYA 2014 e K.L.R** which are:

- 1. An order of injunction pending appeal is a discretionary one which will be exercised against an Applicant whose 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 to refuse the injunction would render the appeal nugatory.***
- 4. The Court should also be guided by the principles set out in GIELLA VS CASSMAN BROWN LTD 1973 E.A 358.***

As there is a pending appeal, this Court must bear in mind that where a party is exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory. In **MUKUMA VS ABUOGA 1988 K.L.R 645**, the Court of Appeal held that where a party, is exercising his right of appeal, the Court should see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. Similarly, in **BUTT VS RENT RESTRICTION TRIBUNAL 1982 K.L.R 417**, the Court, though dealing with an application for stay of execution made the following remarks with regard to the Court’s discretion which I think are applicable even in a case such as this where what is sought is an injunction pending appeal.

“It has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory”.

In a situation such as this where the appeal involves property whose ownership may be difficult to reverse should the appeal be successful, it would be preferable that the status quo is maintained by preserving the property until the appeal is canvassed.

It is clear from the documents herein that the property in dispute is registered in the names of the Respondent. The Land Registrar has confirmed that the registration of the properties in the names of **KAITHERI HOUSING INVESTMENT COMPANY** was an **“error”** which has been rectified and the Titles issued to the said Company have been recalled to be re-issued in the names of the Respondent. As the Registered owner of the suit properties, the Respondent enjoys the right protected by **Section 26 of the Land Registration Act** which provides that a certificate of Title issued by the Registrar shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. However, the same provision states that such registration can nonetheless be challenged on the following grounds:

- “(a) On the ground of fraud or misrepresentation to which the party is proved to be a party; or***
- (b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.***

At this point, I am only considering the merits of an application for injunction pending appeal. I must therefore bear in mind that the appeal itself is yet to be heard and I must avoid comments that may prejudice the appeal and only consider the grounds raised in the memorandum of appeal vis-a-viz the impugned decision and make a ruling whether the appeal is frivolous or is arguable and what hardship, if any, will be occasioned to the Respondent if the application is allowed. I must also consider whether failure to grant the application will render the appeal nugatory. Looking at the memorandum of appeal, I do not consider it to raise frivolous issues. The issues raised include the claim that the Tribunal did not appreciate the provisions of **Section 27 and 28 of the Co-operative Society Act** and also that there was fraud in transferring the suit properties to the Respondent. There is also a claim that the consent of the Land Control Board was not granted and neither was the transfer approved in a General Meeting. Whether the appeal will succeed or not is not for my determination at this stage but the appeal is not frivolous.

It is also important to note that the Appellant does not seek to restrain the Respondent from accessing or utilizing the suit properties some of which have been charged. The Appellant only seeks an injunction to restrain the Respondent from **“selling, transferring, disposing, alienating, leasing, charging and/or sub-dividing”** the suit properties. The only hardship that the Respondent will suffer is that it will not be able to transfer or dispose of the suit properties pending the hearing and determination of the appeal. The balance of convenience tilts in favour of granting the orders sought so that the Appellant’s appeal, if successful, is not rendered nugatory. It will therefore serve the interest of justice if the subject matter is preserved. It cannot be correct, as submitted by counsel for the Respondent **MR. NDANA**, that if the orders sought are granted, it would **“paralyze the operations of the Respondent”**. As I have already indicated above, the Respondents are in possession of the suit properties and there is no intention at this stage to deprive them of the same. What is sought is to ensure that pending the appeal, the said properties are not alienated to 3rd parties as that would create more hardship to the Appellants should their appeal succeed.

Having considered all the above, I am inclined to allow the Appellant’s Notice of Motion dated 1st December 2016 in the following terms:

- 1. A temporary injunction is issued restraining the Respondent, whether by itself, its servants and/or agents from selling, leasing, transferring, disposing, alienating, charging or sub-dividing land parcels No. INOI/KERUGOYA/3095, 3096, 3097, 3098, 3099, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160 and land parcels No. INOI/KERUGOYA/688 and 698 pending the hearing and determination of the appeal.**
- 2. The order does not affect any leases/charges that the Respondent may have already entered into with respect to the suit properties.**
- 3. Costs shall be in the appeal.**
- 4. This appeal was filed on 17th November 2016. The Deputy Registrar should call for the record so that it is expedited.**

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Ruling dated, delivered and signed at Kerugoya this 6th day of October 2017

Mr. Muchira for Mr. Ndana for the Respondents present

Mr. Macharia for Ms Munene for the Appellants present.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017