



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L APPEAL NO. 6 OF 2014

EDWIN K. TOO.....APPELLANT

VERSUS

PAUL K. SITIENI.....RESPONDENT

RULING

On the 25.6.2014, the Principal Magistrate's Court in Kapsabet dismissed the plaintiff's suit for specific performance of the contract for sale of land on grounds that the same was void as the plaintiff and defendant had failed to obtain the consent of the Land Control Board contrary to the provision of section 6(1) of the Land Control Act Cap. 302 Laws of Kenya. On 1.7.2014, the plaintiff lodged an appeal in the Environment and Land Court at Eldoret being the appeal herein.

The grounds of appeal are that the learned trial Magistrate erred in law and fact in failing to order that the Appellant be refunded the purchase price of Kshs.480,000 which was paid in full. Moreover that the learned trial Magistrate erred in law and fact in not broadly framing the issues before her thereby resulting in the offending judgment. Furthermore, that the learned trial Magistrate erred in law and fact in not finding that the evidence raised by the appellant were merited and that the learned trial Magistrate erred in law and fact in dismissing the appellant's case without considering the fact that it was the respondent who had refused to appear before the Land Control Board to have the consent obtained. Lastly, that the learned trial Magistrate erred in law and fact by failing to appreciate and consider the submission made by the counsel for the appellant.

The appellant who was the plaintiff in the Lower Court prays for orders that the appeal herein be allowed and the judgment delivered in Kapsabet PMCC No. 22 of 2010 be set aside and that the Honourable Court be pleased to order the respondent to pay the appellant a sum of Kshs.480,000 being a refund of the purchase price paid together with interest. Costs of the appeal be provided for.

On the 19.2.2015, the appellant filed an application for stay of execution of judgment and the decree of the court in Kapsabet PMCC No. 222 of 2010 pending interparte hearing of the application which is the subject for determination herein.

On the 5.5.2014, it was agreed that the appeal be fast-tracked for hearing and therefore the application dated 19.2.2015 was compromised in the appeal. The appellant was required to prepare a record of appeal within 30 days and the Lower Court file was to be availed within the 30 days. The matter was set for mention on 26.6.2015. It appears that after this direction by the court the respondent put a spanner in the works and deposited some building materials on the disputed land.

On the 9.6.2015, the appellant filed an application under Order 40 Rule 1(2) .of the Civil Procedure Rules 2010, section 1A, 3, 3a and 63 (e) of the Civil Procedure Act praying for Orders that

this honorable court be pleased to issue an order of temporary injunction restraining the respondent, his agents or representatives from erecting any structure, building or digging in land parcel no Nandi/Arwos/1062 pending the hearing of the appeal herein.

Mr. Melly submits that the appellant is entitled to the order of injunction as the respondent has done foundation in the suit land and yet the appeal has not been heard.

Mr. Choge argues that an injunction cannot be granted now as the applicant was seeking specific performance that was declined by the Lower Court. They were given a stay of 30 days that lapsed. They filed an appeal but failed to apply for extension of the order of stay.

The court having heard both parties finds that the following issues are to be determined:

1. **Whether a temporary injunction can be granted pending appeal.**
2. **What would be the principles to be applied if such an order can be granted?**

WHETHER A TEMPORARY INJUNCTION CAN BE GRANTED PENDING APPEAL

Order 40, Rule 2 provides as follows:-

“Where in any suit it is proved by affidavit or otherwise-

(a) that 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.

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.*

Properly constructed, this Rule gives the court the power to grant an injunction pending appeal because it allows an injunction either before or after judgment.

WHAT PRINCIPLES SHOULD BE APPLIED?

This court finds that the principles for grant of temporary injunction should be applied. Thus, the appellant should satisfy the court that he has an arguable appeal or that he had a *prima facie* case that

could have succeeded in the Lower Court. Secondly, that if the injunction is not granted, the appellant is likely to suffer irreparable loss and lastly, that if the court is in doubt, then it can determine the matter on a balance of a convenience. This was the holding in the locus classicus case of **Giella Vs Cassman Brown & Co. Ltd.**

On the first issue, I do find that the fact that the respondent gave possession of the disputed land to the appellant after receiving the consideration on *prima facie* basis created a contract between the appellant and the defendant.

Moreover, it is arguable that a constructive trust was created in favour of the appellant who paid the purchase price and took possession of the property. In **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) EKLv**, Judges of Appeal, Koome, Mwilu and Odek held that:

“The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural

land. We do find that the possession and occupation by the appellants of the suit property is an overriding interest attached to the said property. Based on the reasons given, we find that this appeal has merit and we hereby set it aside in its entirety the judgment and decree of the High Court (Kasango, J.) delivered at Meru dated 11 th November, 2010. We substitute in its place judgment dismissing the respondent’s Complaint dated 16 th August, 1993, and enter judgment in favour of the appellants as per the Counterclaim in the Statement of Defence dated 1st September, 1993. The plan to be used to identify and allocate the individual plots is the one prepared by Kamwere and Associates in 1983. We further order and direct that each of the appellants shall pay the costs of surveying his/her respective plot and the requisite stamp duty and any fees necessary to secure and obtain individual title deeds. A total of 16 acres of land

situate at the site and locale where the respondent had his house shall remain the property of the respondent and shall be registered in his name. For avoidance of doubt, we reiterate that this Judgment and all and any orders made by this Court shall and are hereby declared to be in respect to the property now known as LR No. 6324/10 in the name of the respondent. Having received the purchase price from the appellants, put them in possession of the suit property and reneged and/or refused to transfer the individual plots to the appellants, the respondent shall bear the costs of the suit before the High Court and the costs of this appeal. The upshot is that this appeal is allowed with costs.
”

From the above, this court finds that the appellant/applicant has an arguable appeal. Whether the appellant shall suffer irreparable loss, if the temporary injunction is not granted, is an issue that should be considered in view of the consequences of the action by the respondent in depositing the building materials on the suit land.

It is alleged that the respondent has delivered building material on the suit land and is ready to build a permanent structure. I do find that if the respondent is allowed to construct on the premises and the appellant succeeds on appeal, the appeal would be rendered nugatory and that there is likely to occur irreparable loss as the land would have been excavated and soil deposited elsewhere.

Even if the court was to determine the application on a balance of convenience it would tilt towards granting a temporary injunction in view of the fact that the appellant is in possession of the property and has not been refunded the purchase price.

Ultimately, this court finds the application dated 9.6.2015 merited and grants a temporary injunction restraining the respondent, his agents or representatives from erecting any structure, building or digging in land parcel no Nandi/Arwos/1062 pending the hearing of the appeal herein. Costs in the

appeal.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF SEPTEMBER, 2015.

ANTONY OMBWAYO

JUDGE