



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CIVIL APPEAL NO. 5 OF 2013

LUCAS OGOLA OIMBA.....APPELLANT

VERSUS

ROSE AOKO.....1ST RESPONDENT

JARED OTIENO OUMA..... 2nd Respondent

RULING

1. This is an appeal from the ruling and decision of the Principal Magistrate, Hon. Benard Omwanza made on 28th December, 2012 in which he dismissed the Appellant's application for a temporary injunction. The Appellant has preferred an appeal against the said decision and has also brought an application for a temporary injunction pending the hearing and determination of the said appeal. This is the application which is the subject of this ruling. The Appellant's application dated

E&LC.CA.NO.5 OF 2013

NO.75

24th January, 2013 has been brought under Order 40 rules 1 and 2 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act, Cap.21 Laws of Kenya. The application is seeking an order of injunction to restrain the Respondents and their agents and/or servants from trespassing onto land parcel known as **LR. No. Kabuoch/Kachieng/1704** (hereinafter referred to as **"the suit property"** where the context so admits) pending the hearing and determination of this appeal. The application which is supported by the affidavit of the Appellant sworn on 24th January, 2013 is brought on the grounds that the Appellant is the registered proprietor of the suit property and that the Respondents have trespassed thereon and are without any right or lawful excuse ploughing the same. The Appellant claims that unless the orders sought are granted, the Appellant will suffer irreparable harm. The Applicant has annexed to the affidavit in support of the application a copy of the title deed for the suit property in his name.

E&LC.CA.NO.5 OF 2013

NO.75

2. The Appellant's application is opposed by the Respondent. Through grounds of opposition dated 6th ^March, 2013, the Respondent opposed the Appellant's application on the grounds that the orders sought if granted will dispose of the pending appeal by the Applicant and that the title to the suit property was obtained by the Appellant through acts of fraud and that the Appellant has

never been on the suit property. The application was argued before me on 7th March, 2013 when Miss. Kusa appeared for the Appellant and Mr. Sagwe appeared for the Respondents. Miss. Kusa in her submission adopted the contents of the Appellant's affidavit in support of the application and the grounds set out in the body of the said application. The said counsel for the Appellant submitted that unless the orders sought are granted, the Appellant would suffer irreparable loss. In response to the Respondent's grounds of opposition, counsel submitted that the issues raised therein are for determination in the pending suit and not in this

E&LC.CA.NO.5 OF 2013

NO.75

application. On behalf of the Respondent, Mr. Sagwe, advocate submitted that if the orders sought are granted, the Appellant would have achieved what he is seeking in the pending appeal and as such there would be no need of proceeding with the appeal. Counsel submitted further that the Appellant obtained the title to the suit property by fraud and that it is the Respondents who are in occupation of the suit property which they occupy as of right the Respondent's being the heirs of the original proprietor of the same who is now deceased. Counsel submitted that in the proceedings before the lower court they had dealt extensively with the issue of fraud and that the Appellant should have annexed the said proceedings to the present application. Counsel submitted that if the application herein is allowed, it will result in the eviction of the Respondent's from the suit property which they have occupied over the years before they have had their day in court.

3. I have considered the Appellant's application and the affidavit

E&LC.CA.NO.5 OF 2013

NO.75

in support thereof. I have also considered the notice of grounds of opposition filed by the Respondent in opposition to the same and the submissions of learned counsels for both parties. The Appellant's application was presented and argued before me as if it was an application for a temporary injunction pending the hearing and determination of a suit. In fact, the actual prayer in the application sought, injunction "**pending the hearing and determination of this suit**" while the application itself was made under order 40 rules 1 and 2 which applies only to temporary injunctions pending the hearing and determination of suits. Both counsels appearing in the matter did not address their minds at all to the fact that this was an application for injunction pending appeal. The Appellant's application ought to

have been brought under Order 42 rule 6 (6) of the Civil Procedure Rules which provides for temporary injunctions pending appeal. The jurisdiction of this court to grant an injunction pending appeal has not therefore been properly

E&LC.CA.NO.5 OF 2013

NO.75

invoked both in the form of the application and in the submissions made before the court. There is no mention at all in the application about the decision of the lower court which is appealed against and the merit of the appeal lodged before this court. The principles which this court applies in applications for temporary injunction pending the hearing and determination of a suit under Order 40 of the Civil Procedure Rules are different from those applicable to applications for temporary injunction pending the hearing and determination of appeal under Order 42 rule 6 (6). Under order 40 of the Civil Procedure Rules, an applicant for a temporary injunction needs only to satisfy the principles that were pronounced in the case of **Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358** by showing a prima facie case with a probability of success and that unless, the

orders sought are granted, he will suffer irreparable loss that cannot be compensated in damages. If the court is in doubt as to the above, the court will determine the matter on a

E&LC.CA.NO.5 OF 2013

NO.75

balance of convenience. Under Order 42 rule 6 (6) of the Civil Procedure Rules, an applicant for injunction pending appeal must in addition to meeting the said conditions in the **Giella** case also show that he has an arguable appeal and that unless the injunction is granted, the appeal would be rendered nugatory. It is for this reason that the court can only exercise the power once an applicant has complied with the procedure of instituting an appeal. In the present appeal, what the appellant has filed is only a memorandum of appeal. The Appellant has not furnished the court with the pleadings and proceedings in the lower court. The court was not furnished even with a certified copy of the ruling of the learned senior resident magistrate which is being appealed. I have had sight of a purported ruling in the file which I believe may be the one being appealed herein. I don't know how the purported ruling found its way to the court file as it is not referred to anywhere in the Appellant's affidavit in support of the application herein.

E&LC.CA.NO.5 OF 2013

NO.75

If that is not enough, the purported ruling though typed partly, bears no case number to which it relates or names of the parties. It does not also bear the name of the magistrate who delivered it neither is it certified. The upshot of the foregoing is that, this court does not have sufficient material before it on the basis of which it can exercise its discretion under Order 42 rule 6 (6) of the Civil Procedure Rules. On an application of this nature the court needs to peruse the pleadings that were filed in the lower court, the application that was made in the lower court for injunction that was rejected, the replying affidavit that

was put forward in opposition thereto, the arguments that were put forward by the parties before that court and the court's decision on the same. It is upon perusal of the foregoing that the court would be able to gauge the merit or otherwise of the appeal before it and whether or not the same may be rendered nugatory unless the orders sought are granted.

4. Due to the foregoing, the Appellant's application must fail.

E&LC.CA.NO.5 OF 2013

NO.75

5. There is no basis upon which this court can exercise its discretion in favour of the Appellant. The application dated 24th January, 2013 lacks merit and the same is hereby dismissed with costs to the Respondents.

Signed, dated and delivered at Kisii this 7th day of June, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Appellant

Mr. Abobo holding brief for Sagwe for the Respondents

Mobisa the Court Clerk

S. OKONG'O,

JUDGE.

E&LC.CA.NO.5 OF 2013