Board of Management Bukati Primary School v Oduori (Environment and Land Appeal E008 of 2021) [2023] KEELC 18663 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18663 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E008 OF 2021

BN OLAO, J

JULY 13, 2023

BETWEEN

BOARD OF MANAGEMENT BUKATI PRIMARY SCHOOL ..... APPELLANT

AND

LODWINA OBAGO ODUORI ..... RESPONDENT

(Arising from the ruling of Hon. Lucy Ambasi (Chief Magistrate) delivered on 27th May 2021 in Busia Chief Magistrate's Court Civil Case No. 139 of 2021)

JUDGMENT

1. This is an appeal arising from an interlocutory order by Hon Lucy Ambasi Chief Magistrate dated May 27, 2021 in which she declined to grant the Appellant an order of inhibition inhibiting any dealings on the land parcel No Marachi/elukongo/752 – it is actually Marachi/Elukhari/752 – (the suit land) pending the hearing and determination of Busia Chief Magistrate's Court Civil Case No 139 of 2021.

2. The Appellant moved to the subordinate court vide it's plaint dated January 11, 2021 seeking the remedy that the Respondent be compelled to transfer to it the suit land and also pay damages for breach of contract as well as punitive damages and costs for having breached a land sale agreement between the parties dated June 19, 2009.

3. The Respondent filed a defence and counter-claim in which she denied having breached the agreement adding that infact it was the Appellant who defaulted in paying the full purchase price despite several reminders to do so.

4. In the counter-claim, the Respondent pleaded that the parties had by another agreement dated August 19, 2009 agreed that the Appellant would compensate her in the sum of Kshs 1.05 million being the value of the sugar cane that was to remain on the suit land for the next five (5) years. The said sum was to be paid in three (3) instalments the last one being due on December 31, 2015. That the Appellant defaulted in paying the instalments due despite demand being made and instead fraudulently filed

Succession Cause no 157 of 2009 without the knowledge of the Respondent and proceeded to transfer the suit land into the name of the Catholic Diocese of Bungoma. The Respondent reported the matter to the Police and the fraudulent title was cancelled. The Respondent therefore counter-claimed for damages for breach of contract as well as a declaration of breach of contract and other remedies which are not relevant for purposes of this judgment.

5. Simultaneously with the plaint, the Appellant filed a Notice of Motion also dated January 11, 2021 seeking an order of inhibition restraining the Respondent from registering any dealing such as charge, transfer or lease on the suit land.

6. That application was first placed before the trial Court on January 28, 2021 and although there is no record to show that any *ex-parte* orders were granted pending inter-parte hearing of the application, it would appear from the ruling subject of this appeal that infact those ex-parte orders were issued. This is because, in her ruling on that application and which is the subject of this appeal the trial magistrate in dismissing the application stated in the last paragraph as follows:

> " Consequently, the interim orders are hereby vacated, the Notice of Motion dismissed with costs".

7. That ruling provoked this appeal in which the Appellant has raised the following four (4) grounds in seeking to have it set aside:

   1) That the Trial Magistrate erred in law and fact when she ignored the Appellant's evidence that it had purchased the suit land from the Respondent and what was remaining between the parties was transfer of land parcel No Marachi/Elukhari/752.

   2) That the Trial Magistrate erred in law and in fact when she found that the Appellant had concealed material facts at the interlocutory level without having sufficient evidence from both parties.

   3) That the Trial Magistrate erred in law and in fact when she agreed with the Respondent who had already received the purchase price from the Appellant for the land parcel No Marachi/ Elukhari/752 hence reaching a wrong conclusion.

   4) That the Trial Magistrate erred in law and in fact in denying the Appellant a temporary order of inhibition whereas the evidence was clear on the side of the Appellant hence reaching a wrong conclusion.

8. The appeal has been canvassed by way of written submissions. These have been filed both by Mr Nyegenye instructed by the firm of Calistus Nyegenye And Company Advocates for the Appellant and by Ms Lidoro instructed by the firm of Mukele Moni & Company Advocates for the Respondent.

9. I have considered the record of appeal and the submissions by counsel.

10. This being an interlocutory appeal, I must caution myself that the main dispute between the parties is still outstanding. I should therefore stay clear of expressing any conclusive views on factual issues. The grant or denial of an interlocutory injunction is an exercise of judicial discretion. And as was stated in the case of *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* 1984 KLR I, an Appellate Court may only interfere with the exercise of judicial discretion if satisfied that:

    a) The trial court misdirected itself on the law; or

    b) It misapprehended the facts; or

c) It took into account consideration which it should not have; or

d) It failed to take into account consideration which it should have taken into account;

e) The decision, albeit a discretionary one, was plainly wrong.

11. I have looked at the impugned ruling of the trial magistrate delivered on May 19, 2021. It is a short five (5) paragraph ruling which I find necessary to set out in extenso, it reads:

> " In a Notice of Motion filed on January 12, 2021, the plaintiff seeks an inhibition order on Marachi/Elukongo/752 (sic) pending the hearing and determination of this suit.
>
> The school relies on an affidavit by School Board Chair and depones the defendant and the school had a sale agreement which the defendant had breached.
>
> By her replying affidavit, the defendant swears that it is the plaintiff who is in breach of the further sale agreement of clearance of sugarcane dated August 19, 2009, and accuses the plaintiff's headmaster of transferring the land to the Catholic Diocese of Bungoma without her consent or knowledge in 2016 and that the Busia Land Registrar had placed a restriction in 2017 as the title was fraudulently obtained.
>
> I have considered at length the pleadings and submissions made by both parties and hold and find that there was material non-disclosure by the applicant to file facts i.e. transfer to Catholic Diocese and the subsequent agreement on sugarcane.
>
> It is trite law that the orders sought are discretionary in nature and court ought not benefit (sic) from such discretion when an applicant fails to approach court with clean hands.
>
> Consequently, the interim orders are hereby vacated, the Notice of Motion dismissed with costs." Emphasis mine.

12. The application which was before the trial magistrate sought an order of inhibition on the suit land parcel pending trial of the suit. The principles governing an order of inhibition which is provided for under Section 68 of the *Land Registration Act* are not too dissimilar to those governing orders of temporary injunction. Such orders are all meant to preserve the property in dispute pending the determination of the dispute concerning it's ownership. The well trodden path in considering an application for temporary injunction is the locus classicus case of *Giela v Cassman Brown & Company Ltd* 1973 EA 358 where the Court of Appeal for East Africa observed that:

> " The condition for the grant of an interlocutory injunction are well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide the application on the balance of probability."

The above has been reiterated in many cases including in the case of *Nguruman Ltd v Jan Bonde Nielsen & Others* Ca Civil Appeal No 77 of 2012 [2014 eKLR] where the Court of Appeal codified those principles as follows:

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a) Establish his case only at a *prima facie* level,

b) Demonstrate irreparable injury if a temporary injunction is not granted, and

c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour."

As is clear from the ruling of the trial magistrate above, there was not even a fleeting reference to the above principles which ought to have guided the Court in determining the application before it. The trial magistrate only confined her ruling on the fact that there was material non-disclosure on the part of the Appellant. That notwithstanding, I am satisfied that at the end, the trial magistrate arrived at the correct decision in declining the order of inhibition for the following reasons.

13. On the ground of *prima facie* case, it is common ground that the suit land is registered in the name of the Respondent who holds a title thereto. As per Section 26(1) of the *Land Registration Act*, that title is "prima facie evidence" that the Respondent is "the absolute and indefeasible owner" of the suit land. In grounds no 1 and 3 of the memorandum of appeal, the trial magistrate is assailed for ignoring the Appellant's evidence that it had purchased the suit land and what was remaining between the parties was the transfer. The record shows however that infact the Appellant had an outstanding balance on the purchase price as well as compensation for sugar cane on the suit land. That was not denied. Clearly, no *prima facie* case had been established. Grounds no 1 and 3 of the appeal are for dismissal.

14. In ground no 2, it is claimed that the trial magistrate erred in law and fact when she found that the Appellant conceded material facts. There can be no merit in that ground because indeed the Appellant did not disclose that it had not fully paid the whole of the purchase price. As the Appellant was seeking an equitable remedy, it was obliged to approach the Court with clean hands including making a full disclosure. It did not. That ground also collapses.

15. In ground no 4, the Appellant's case is that the trial magistrate erred in law and in fact by declining to grant a temporary order of inhibition in the face of clear evidence. The un-controverted evidence was that infact the Appellant had defaulted in paying the balance of the purchase price on or before August 30, 2009 as per the parties agreement dated June 19, 2009. Being the party in breach, the Appellant could not be heard to seek any interlocutory reliefs. As was held in the case of *Kenya Breweries Ltd & Another v Washington O Okeyo* 2002 eKLR:

> " It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party."

16. Since the Appellant had failed to establish a prima facie case, then there was no need to consider irreparable injury and balance of convenience – *Nguruman Ltd v Jan Bonde Nielsen* (*supra*).

17. Even if irreparable injury and balance of convenience were to be considered, the Appellant had averred in paragraph 19 of the supporting affidavit by it's chairman Peter Silvanus Namatsi as follows:

> " That the Respondent is aware that the applicant is a public school donated to the children of Bukati In Butula Sub-county By Norval United Church in Canada in 2009. Annexed hereto and marked as PSN-5 is a copy of photo when money was being received."

18. The Respondent's response to that is found in paragraphs 17 and 18 of her replying affidavit wherein she deposed as follows:

17: "That the parcel of land in question is located approximately 600 metres from the parcel of land where Bukati Primary School currently sits at hence untrue to state that the school going children will be inconvenienced if the parcel of land is sold to a different party."

18: "That the parcel of land in question is in no way being utilized by the school since no classroom nor playground exists in the suit property and in any event, the land belongs to Respondent absolutely and at no point has the Respondent surrendered possession to the Applicant for it's utilization considering the fact there was and there is still default of contract."

In the further affidavit of Peter Silvanus Namatsi dated March 23, 2021, he alludes in paragraph 13 of the presence of "a foundation of five classrooms" having been constructed on the suit land. One would have thought that in such circumstances, photographs of the classrooms would have been availed. None were annexed. The only photograph was that of Dr Cate Dewey receiving a cheque for $20,000 from Rev Paul Ivany Of Norval United Church in 2009 and another photograph of land next to the school. However, the sale agreement between the parties over the suit land was never in dispute. The Respondent's case is that the Appellant defaulted on the payment of the purchase price. The presence of a public school on the suit land may perhaps have tilted the balance of convenience in favour of the Appellant. In the absence of any such building, it was always going to be an up-hill task for the Appellant to warrant the grant of the orders sought.

19. The up-shot of the above is that although the trial magistrate made no reference to relevant principles that should have guided her in determining the application before her, I see no reason to fault the decision which she arrived at on the basis of the evidence available.

20. The appeal is accordingly dismissed with costs to the Respondent.

BOAZ N. OLAO

JUDGE

13TH JULY 2023

Judgment dated, signed and delivered at BUSIA ELC by way of electronic mail on this 13th day of July 2023.

BOAZ N. OLAO

JUDGE

13TH JULY 2023