



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 249 OF 2010**

**YUSUF OMAR.....1<sup>ST</sup> APPELLANT**

**CALEB MUTALI.....2<sup>ND</sup> APPELLANT**

**CHARLES SABATIA.....3<sup>RD</sup> APPELLANT**

**BENJAMIN ORWA.....4<sup>TH</sup> APPELLANT**

**COUNTY COUNCIL OF LUGARI.....5<sup>TH</sup> APPELLANT**

**-VERSUS-**

**WILFRED T. MUKHWAYA.....RESPONDENT**

**(Being An appeal from the Ruling and Order of Hon. D.K. Kemei, Principal Magistrate, delivered on 25 November 2010 in Eldoret CMCC No.985 of 2009)**

**JUDGMENT**

[1] This is an interlocutory appeal from the Ruling and Order of the Principal Magistrate's Court (**Hon. D.K. Kemei**) made on **25 November 2010** in **Eldoret Chief Magistrate's Civil Case No. 985 of 2009: Wilfred T. Mukhaya vs. Yusuf Omar & 4 Others**. The Respondent had sued the five Appellants before the lower court contending that on the **28 October 2009** or thereabouts, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants went to her posho mill and took away one belt for the engine drive, one water pump belt and one rocket box cover along with its nut; thereby rendering her posho mill inoperable. She further averred that although she had paid for her single business permit for her posho mill for the year 2009, the Defendants had refused to issue her with the permit. It was her case therefore that the Appellants had subjected her to loss and damage for no justifiable cause.

[2] Accordingly, the Respondent sued the Appellants before the lower court praying for Judgment against them jointly and severally for:

- [a] An order directing the Appellants to issue her with a business permit for the year **2009**;
- [b] An order directing the Appellants to release the Respondent's items as listed in Paragraph 6 of the Plaintiff;
- [c] General Damages for loss of business;
- [d] Costs of the suit
- [e] Any other or further relief that the Court may be pleased to grant.

[3] Contemporaneously, the Respondent filed a Notice of Motion with her Plaintiff seeking interlocutory reliefs pursuant to **Section 3 and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order L Rule 1** of the old **Civil Procedure Rules**. She thus prayed for the following orders:

- [a] An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to release the confiscated components of her posho mill, namely: one belt for the engine drive, one water pump belt and one rocket box cover along with its nut;

[b] An order compelling the Appellants to issue her with a business permit for her posho mill for the year **2009**;

[c] That the Appellants be compelled to pay her damages for loss of business from the date when they took away her posho mill components until the date of determination of the case; and

[d] That costs be in the cause.

[4] That application was duly served for *inter partes* hearing and a Ruling, which is the subject of this appeal, delivered on **23 November 2010**. The lower court was of the view that:

**"...firstly that the Applicant who is a trader operating a posho mill in the village should pay 1500/= as permit fees and not 2400/= as contended by the Respondents. Secondly that it is against the rules of natural justice and the provisions of legal notice 147 of 2008 for the Respondents to confiscate the Applicant's tools of trade namely components of his posho mill as that would go against the county's efforts at economic development. The Respondent should resort to a civil manner in demanding for fees from business people of the Applicants but not to resort to unpleasant and unorthodox means to make business people amenable to their demands for fees. Thirdly the Respondents should forthwith return the Applicants posho mill components to enable him continue with his business. Forthwith issue the Applicant a permit for his posho mill business upon payment of the lawful permit fees of 1500/=. Finally ... Applicant's application dated 7/12/2009 has merit and I allow the same in terms of prayers 2, 3 and 5 thereof. Prayer 4 shall await the hearing of the main suit herein..."**

[5] Being aggrieved by the Ruling and Order of the lower court, the Appellants, who were the Respondents in the said application, filed this appeal on **5 January 2011** on the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in ruling that the fee payable to the 5<sup>th</sup> Appellant is **Kshs. 1,500/=** instead of **Kshs. 2,500/=** as per the revised schedule;

[b] That the Learned Trial Magistrate erred in law and fact in ruling that the equipment allegedly confiscated by the 5<sup>th</sup> Appellant be released back to the Plaintiff;

[c] That the Learned Trial Magistrate erred in law and fact by not considering the evidence of the Appellants;

[d] That the Learned Trial Magistrate erred in law and fact in granting final orders in an interlocutory application;

[e] That the Learned Trial Magistrate erred in law and fact in failing to appreciate that matters arising out of criminal proceedings could not be enforced in a civil case;

[f] That the Learned Trial Magistrate erred in law and fact in failing to find that the 1<sup>st</sup> to 4<sup>th</sup> Appellants were wrongly jointed in the suit.

Accordingly, the Appellants prayed that the appeal be allowed and the Ruling of **25 November 2010** be set aside; and that the costs of the appeal be awarded to them.

[6] The appeal was canvassed by way of written submissions which I have given careful consideration. The Appellants' written submissions, filed on **18 November 2014**, were to the effect that, since nothing was confiscated from the Respondent when she was arrested for operating a posho mill without a licence, the lower court committed an error in making an order for the release of the items, as there was nothing to release. In the same vein, it was the submission of the Appellants that it was improper for the court to make final orders at the interlocutory stage without affording itself an opportunity to hear out the parties regarding the circumstances of the case. The cases of **Shepherd Homes vs. Sundham [1970] WLR 348**; **Mucuha vs. the Ripples [1992] LLR 2164**; **Virginia Njoka vs. Joel Nathan Ouma & Another [2013] eKLR**; **Locabail International Finance Ltd vs. Agro Export and Others [1986] 1 ALLER 901** were cited in support of the Appellants' arguments. The Appellants also drew the attention of the Court to **Kenya Power and Lighting Co. Ltd vs. Justice (Rtd) David Rimita [2014] eKLR**; and **Kenya Airports Authority vs. Paul Njogu Muigai & 2 Others** on the same point. It was further the submission of the Appellants that since the 5<sup>th</sup> Appellant had the power to sue and be sued in its own name, the Learned Trial Magistrate erred in failing to find that the 1<sup>st</sup> to the 4<sup>th</sup> Appellants were wrongly jointed in the suit.

[7] In her submissions herein, the Respondent urged the Court to find that the appeal is completely lacking in merit as the Trial Magistrate based his decision on the evidence placed before him in the interlocutory application. She further submitted that the Ruling was based on the issues which were framed by the parties by consent; adding that the issue of criminal proceedings or misjoinder of the 1<sup>st</sup> to 4<sup>th</sup> Appellants never came up during the argument of the application dated **7 December 2009**. She accordingly urged for the dismissal of the appeal with costs.

[8] There is no question that the Ruling appealed from was in exercise of the lower court's discretion and I am mindful that an appellate court ought not to interfere with the exercise of discretion by the trial court, even if, on the facts, it would have come to a different conclusion. Accordingly, the limited circumstances under which an appellate court can interfere with the exercise of discretion by the trial court were well articulated by **Madan, JA** (as he then was) in **United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd [1985] E.A 898**, as follows:

***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the***

*judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”*

[9] Moreover, this being an interlocutory appeal, I am mindful that the issues in dispute between the parties are yet to be tried before the lower court. I note too that the question of joinder of the Appellants, which has been made the subject of Ground 6 of appeal, is a matter that is yet to be argued before the lower court. It cannot therefore be a proper subject of this interlocutory appeal. I will therefore confine myself to those grounds of appeal that directly attack the Ruling of the lower court in so far as they relate to the twin orders for the release of the Respondent's posho mill components and the payment of permit fees. The Appellants contend that the trial court erred in granting those orders, granted that in effect, the court disposed of the entire suit summarily and without giving the parties a hearing.

[10] There is no doubt that the impugned orders are in the nature of a mandatory injunction; and whereas the Court can in appropriate cases issue such orders, it is now settled that such orders can only be granted in clear and plain situations in which the court has the assurance that the orders are warranted. Thus, in **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 24 Paragraph 948** it is opined that:

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the Act done is a simple and a summary one which can be easily remedied, or if the Defendant attempted to steal a march of the Plaintiff...it can be granted on an interlocutory application.”**

[11] The same viewpoint was taken in **Locabail International Finance Ltd. V. Agro export and others [1986] I ALL ER 901** at page 901 thus.

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.**

[12] In the instant matter, the record of the lower court shows that the parties were not in agreement as to whether or not some posho mill components had been confiscated from the Respondent by the Appellants. Similarly, there was controversy regarding how much the Respondent was required to pay for a posho mill permit. Thirdly, the orders sought by way of mandatory injunction, aside from the prayer for damages, were the very orders sought in the Plaint. In the premises, it was pre-emptive and premature, in my considered view, for the Learned Trial Magistrate to handle the matter summarily without affording the parties an opportunity to ventilate their respective positions. It is therefore my finding that the Learned Trial Magistrate misdirected himself in the matter, granted that the facts were disputed. Indeed in **Virginia Njoka vs Joel Nathan Ouma & Another [2013] eKLR** it was held that:

**“A court will only grant a mandatory injunction in plain clear and oblivious cases where the facts are not disputed or where it is clear that the party against whom the injunction is sought is clearly the wrong doer.”**

[13] In the result, I would allow the appeal and set aside the Ruling and Orders of the lower court dated **25 November 2010** and direct that the suit before the lower court be heard and determined on the merits.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 20<sup>TH</sup> DAY OF FEBRUARY 2019**

**OLGA SEWE**

**JUDGE**