



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 158 OF 2017

GERALD KARIUKI WAHOME.....APPELLANT

-VERSUS-

COUNTY COUNCIL OF NAIROBI.....RESPONDENT

(An appeal from the ruling delivered by Honourable D.A. Ocharo (Mr.) (Senior Resident Magistrate) on 17th March, 2017 in CMCC NO. 2380 OF 2011)

JUDGMENT

1. The appellant in this appeal was the plaintiff/applicant in CMCC NO. 2380 OF 2011 whereas the respondent was the defendant/respondent therein.

2. The appellant filed an application dated 4th July, 2011 before the trial court seeking a mandatory injunctive order against the respondent, ordering it to grant the appellant lawful possession of house no. 463-58 in Bondeni Estate, Nairobi. The respondent thereafter filed a reply to the same and parties were directed to file written submissions.

3. Ultimately, the trial court delivered its ruling on the said application, dismissing the same on the basis that the appellant did not meet the threshold for the granting of an injunction.

4. Being aggrieved by the aforesaid ruling, the appellant has now lodged an appeal to this court. The memorandum of appeal dated 12th April, 2017 is premised on six (6) grounds as follows:

1. THAT the learned trial magistrate erred in law and in fact in holding that the appellant did not suffer any irreparable loss that could not be compensated by way of damages.

2. THAT the learned trial magistrate erred in law and in fact in holding that the appellant was not entitled to the costs of the suit.

3. THAT the learned trial magistrate erred in law and in fact in failing to note that the appellant had proved his case on a balance of probabilities.

4. THAT the learned trial magistrate erred in law and in fact in failing to note that the appellant was the legal tenant of house no. 463-58 at Bondeni Estate, Nairobi.

5. THAT the learned trial magistrate erred in law and in fact by failing to order the respondent to settle the appellant in an alternative house.

6. THAT the learned trial magistrate erred in law and in fact by failing to order the respondent to refund the money paid by the appellant as rent.

5. The appeal was disposed of by way of oral arguments though it was noted that only the appellant, acting in person, participated in the same. That said, the appellant submitted that when he obtained the subject premises, it had a debt amounting to Kshs.31,070/= attached to it and which debt had been incurred by the previous tenant. The appellant added that he had applied for allocation to the subject premises sometime in 2000 and which application was approved by the respondent.

6. It was the appellant's further contention that in 2011, he was authorized to pay the outstanding debts attached to the house, which he did, but that he was evicted from the subject premises by the respondent on the basis that the previous tenant was keen on returning to the said

premises; adding that the learned trial magistrate did not give him an opportunity to explain himself or consider the mental anguish that he and his family had endured as a result of the removal.

7. The appellant also argued that despite the respondent's indication that it would allocate him a different house, this has not been done and that attempts to have the matter settled out of court have borne no fruit.

8. I have considered the arguments presented to me by the appellant and will now address the respective grounds of appeal.

9. In relation to the first ground, it is well noted that irreparable loss forms part and parcel of the three (3) conditions to be considered by the court in granting an interlocutory injunction. Put another way, irreparable loss or harm is that which cannot be adequately compensated by way of damages, as was rightly established in the *Giella v Cassman Brown* (1973) EA 358.

1. The above was reinforced in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR with reference to *Halsbury's Laws of England* as hereunder:

“...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.

10. That said, I have looked at the impugned ruling together with the appellant's submissions before the trial courts and his oral arguments before me; there is nothing to show that irreparable loss will befall the appellant in such a manner as to deem compensation by way of damages inadequate. In any case, the appellant in his application sought for a mandatory injunction and not an interlocutory injunction as a substantive prayer. Consequently, ground 1) cannot stand.

11. As concerns the second ground of appeal, my response is two-fold: firstly and as far as I am aware, what was before the learned trial magistrate for determination was the appellant's application and not his suit. Secondly, the granting of costs lies purely within the discretion of the court rather than as a matter of right; no party can therefore claim entitlement on costs. I am satisfied that the learned trial magistrate properly exercised his discretion in finding that parties ought to bear their own costs on the application. Ground 2) is therefore untenable.

12. I will now collectively address my mind to the remaining grounds since I have found the same to be correlated. In so doing, I cannot emphasize enough that the appellant's suit is yet to be determined, hence grounds 3) to 6) of the appeal are premature before this court and cannot be considered at this point. Consequently, the aforesaid grounds fail.

13. Having determined the above, I also wish to clarify that the appellant in his application to which the impugned ruling was delivered, sought the substantive order for a mandatory injunction. That being the case, I am of the humble view that whereas the trial magistrate arrived at a correct finding in respect to the said application, he did not address his mind to the abovementioned order as sought and instead analyzed the principles of an interlocutory injunction which was never sought substantively.

14. Needless to say, when it comes to mandatory injunctions, the courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR for instance.

15. In the present instance, it is not clear when, if ever, the appellant took possession of the premises in question; it is also in dispute as to whether or not the appellant was removed from the premises by the respondent or a third party as claimed by the respondent. In the premises, this is not a clear-cut case and thus, there was no basis on which to grant a mandatory injunction at the interlocutory stage to begin with.

16. Consequently, I find no merit in the appeal and dismiss the same. Each party to bear its own costs of the appeal.

Dated, signed and delivered at NAIROBI this 28th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent