Nkonge v Kariuki (Environment and Land Appeal E002 of 2023)
[2023] KEELC 21897 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21897 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E002 OF 2023

CK YANO, J

NOVEMBER 30, 2023

BETWEEN

MARTIN GITONGA NKONGE ..... APPELLANT

AND

NANCY WANJIKU KARIUKI ..... RESPONDENT

JUDGMENT

Introduction

1. The appeal herein arises from the ruling dated and delivered on 10th February 2023 by Honourable H. I. Mwendwa, Senior Principal Magistrate in Chuka CMC ELC Case No. E064 of 2022. The appellant had filed a Notice of Motion application dated 25th November, 2022 seeking orders of injunction against the Respondent from interfering with the Appellant's ownership and possession of LR No Muthambi/Upper Karimba/267, 1892 and 189 pending the hearing and determination of the suit.

2. The said application was opposed by the Respondent vide a Replying Affidavit dated December 8, 2022.

3. Upon considering the application, the trial court found that the same was unmerited and dismissed it. The learned trial magistrate specifically found that the appellant's recourse, if any, lies in the succession cause in the Nairobi High Court Succession Cause No. 2579 of 2015 in which the suit properties were subject of that cause.

4. Being aggrieved by the said ruling, the appellant filed this appeal and raised the following grounds:

    1. That the learned magistrate erred in law and fact by failing appreciate and factor the essence and purport and the overriding objective of the provisions of order 40 rule 1 and 2 of the *Civil Procedure Rules* 2010.

2. That leaned magistrate misdirected himself into using wrong principals (sic) of the law in arriving at an erroneous decision when there was clear evidence tendered by the Appellant in support of his case in his application for injunctive restraining orders.

3. The learned trial magistrate erred in law and in fact in failing to appreciate that it was necessary to maintain and preserve the status quo of the suit property pending hearing and determination of the suit by the plaintiff that is pending before him in Chuka Chief Magistrate's ELC Case No. E064 of 2022.

4. The learned trial magistrate erred in law and in fact by failing to appreciate that there is a suit by the applicant pending hearing and determination before him thus failing to grant the restraining orders would most likely render the suit nugatory and/or academic.

5. The learned trial magistrate erred in law and fact by failing to find that equity, the balance of convenience and logic weighed in favour of the Appellant and which omission led to a wrong decision and ruling.

5. The Appellant seeks the appeal to be allowed and the ruling of the trial court set aside and/or vacated and the orders sought in the said application be allowed as prayed as well as costs.

6. The appeal was canvassed by way of written submissions which were duly filed by the parties through their advocates on record. The appellant filed his submissions dated 12th October, 2023 through the firm of Waklaw Advocates while the Respondent filed hers dated 23rd October, 2023 through the firm of Walker Kontos Advocates. The court has read and considered the said submissions together with authorities relied on and I need not reproduce the same in this Judgment.

7. I have perused and considered the record of appeal, the grounds of appeal and the submissions. This being a first appeal, this court is under an obligation to reconsider the evidence and come to my own conclusion. (See *Selle & Another v Associated Motor Boats Company Limited* [1968] EA 123 and *Williamson Diamonds Limited v Brown* [1970] EAI among many other decisions from the superior courts. I am also alive to the fact that as an appellate court, I ought to pay homage to the findings of the trial court unless such findings are based on no evidence or misapprehension of the evidence or the trial magistrate is shown to have acted on wrong principles in reaching the findings *Jabane v Olenja* [1986] KLR 664 among others).

8. With the above in mind, the issue for determination as I can deduce from the grounds of appeal are whether or not the learned trial magistrate rightly exercised his discretion in dismissing the Appellant's application for orders of injunction and whether the appeal is merited or not.

9. The principles upon which an interlocutory injunction may be granted are well settled in the famous case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. One has to establish a prima facie case with a probability of success and 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. If in doubt, the court will decide the matter on a balance of convenience.

10. In the case of *Nguruman Limited v John Boude Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held that:

> "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) ally any doubts as to b), by showing that the balance of convenience is in his favour.

These are the three pillars on which the rest of the order of injunction interlocutory or permanent. It is established that all the above conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequently.....

If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the applicant will suffer, in the event the application is not granted will be irreparable..."

11. I have perused the record of appeal herein. In paragraph 14 of the plaint dated 25th November, 2022, the appellant has pleaded that L.R No. Muthambi/Upper Karimba/267, 1892 and 1895 are ancestral land and belonged to his deceased grandparent, Protasio Nkonge. It is apparent from the pleading that the Appellant's claim is grounded on the fact that the suit properties were owned by the said deceased person. The Respondent has exhibited a certificate of confirmation of grant for the estate of Protasio Nkonge granted in Nairobi Succession Cause No. 2579 of 2015. The Appellant does not appear as one of the beneficiaries to the said estate. The appellant has also not shown that he possessed letters of grant of administration issued to him on behalf of the estate of Protasio Nkonge. It is therefore doubtful whether the Appellant had the requisite authority or capacity to file and maintain the suit on behalf of the estate of the deceased. In the absence of letters of administration that have been issued to the Appellant, this court finds that the Appellant has not established a prima facie case with a probability of success. Therefore, in my view, the learned trial magistrate was justified in dismissing the application for injunction. It is a matter of law that anyone who wishes to approach a court claiming a beneficial interest in a property registered in a deceased person must be clothed with the authority to do so by first and foremost obtaining a grant of Letters of Administration. I would on my part, without the need of considering the remaining two tests in *Giella v Cassman Brown & Co. Ltd* (*Supra*) dismiss the appellant's appeal with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH NOVEMBER, 2023

C.K YANO,

JUDGE

In the presence of:

Court Assistant – Martha

Muriithi holding brief for Kirimi for the Appellant

Kimani for the Respondent