REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 132 "B" OF 2013

MUSA SAID HASSAN.....1ST APPELLANT

ABDULAHI MUSA SAID.....2ND APPELLANT

VERSUS

CAPE SUPPLIES LIMITED.....RESPONDENT

(from the ruling and order of the Senior Resident Magistrate's

Court dated 18th February 2013 in Nairobi CM CC 182 of 2013

delivered by the Honourable T.S. Nchoe).

JUDGMENT

1. This appeal arises from the ruling and order of the Senior Resident Magistrate's Court dated 18th February 2013 in Nairobi CM CC 182 of 2013 delivered by the Honourable T.S. Nchoe.

2. The ruling and order herein being challenged arose from the application dated 21st January 2013 by the plaintiff/applicant wherein the applicant sought orders for:

a. …..

b. The defendants by themselves or though their authorized servants, agents and or employees be restrained from in any way interfering with the plaintiffs entrance to LR NO. 36/IV/14(20 A) on Bahati area or from blocking the road thereto pending the hearing and determination of this application.

c. Costs of the application.

3. In the ruling delivered on 25th July 2013 after an interpartes hearing of the above application, the trial magistrate made the following orders.

a. That the defendants by themselves or through their authorized agents and or employees be and are hereby restrained from in any way interfering with the plaintiff's entrance to LR No. 36/IV/14(20A) in Bahati area from blocking the read thereto pending the hearing and determination of this application.

b. That costs shall be in the cause.

4. Being dissatisfied with the above order, the defendants who were respondents in the application which restrained them from blocking the named road, filed this appeal on 12th March 2013 setting out 10 grounds of appeal namely:

1. That the learned magistrate erred both in law and in fact in failing to appreciate sufficiency or at all that the appellants are the proprietors of plot No. 93 and plot No. 94 which property is the subject matter of the dispute;

2. The learned magistrate erred in law and in fact in failing to appreciate sufficiently or at al that the respondent never laid any claim of ownership over the said plots No. 93 and 94.

3. The learned magistrate erred in law and in fact in failing to appreciate sufficiently or at all the evidence that was placed before him by the appellants;

4. The learned magistrate erred in law and in fact in failing to find on a preliminary view or at all whether or not the property in dispute was an entrance and or road reserve as alleged or at all.

5. The learned magistrate erred in law and fact in failing to appreciate that the issue in dispute was not whether the parties had documents of ownership of their respective lands but rather, whether the plots 93 and 94 were an access road or private property.

6. The learned magistrate erred in law and fact in failing to find and hold that there was no evidence of whatever nature placed before him to substantiate the claim that the plots in issue were actually an access road;

7. The learned magistrate erred in law and fact and or in finding and holding that both parties had documents or ownership while only one party had documents of ownership of the specific plots in question being plot No. 93 and plot No. 94;

8. The learned magistrate erred in law in failing to state and present his analysis of the case presented by the parties and to give comprehensive reasons for the decision rendered;

9. The learned magistrate misdirected himself on the principles governing interlocutory injunction application that was before him;

10. In view of the circumstances set out herein above, the learned magistrate totally misdirected himself in delivering ruling and orders in favour of the respondent by failing to consider and appreciate the evidence on record tendered on behalf of the appellants.

5. The appellants prayed that this appeal be allowed; the ruling and order of the subordinate court dated 18th February 2013 be and is hereby set aside; The respondent's notice of motion application dated 4th February 2013 be and is hereby dismissed with costs to the applicants; costs of this appeal be and are hereby awarded to the appellants; and for any other order as the Honourable court may deem fit.

6. This being a first appeal, this court is obliged by Section 78 of the Civil Procedure Act to re-evaluate, reassess and re-examine the matter as conducted in the trial court and arrive at its own independent conclusion. This is the principle espoused in the **Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

" ***This court must consider the evidence, evaluate itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the***

trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression bases as the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammod Sarif vs Ali Mohamed Solan [1955] 22 EACA 270)."

7. In addition, as an appellate court, I will not interfere with the finding of fact of a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge/trial magistrate is shown to have demonstrably to have acted on wrong principles in reaching his conclusion. This is the principle espoused in **Mkube V Nyamuro [1983] KLR 403.** Further, in **Mbogo V Shah & Another [1968] EA 93** the Court of Appeal set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:

" I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

9. Thus, the decision/order of the trial court involved exercise of judicial discretion, the appellate court ought not to interfere with the discretion of the trial court save where the trial court has misdirected itself on the law, or misapprehended the facts or failed to take into consideration relevant matters or otherwise the decision was plainly wrong was held in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

9. On the other hand, the case of **United India Insurance Company Ltd v EA Underwriters (K) Ltd [1985] EA 898** Madan JA set out the circumstances under which the appellate court will interfere with the exercise of discretion by the trial court, which circumstances are said to be limited 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 or herself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should 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."

10. Applying the above principles to this case, it is worth nothing that the order that is appealed from is in an interlocutory proceeding wherein the respondent had sought an interlocutory injunction under Order 40 rule 1,2 & 4 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act, seeking to restrain the appellants, by themselves or through their authorized servants, agents and or employees from in anyway interfering with the plaintiff/respondent's entrance to LR NO. 36/IV/14(20A) in Bahati Area or from blocking the road thereto pending the hearing and determination of the application.

11. The grounds upon which the application was predicated are that the respondent was the registered owner of LR No. 26/IV/14/(20A) which consists of 2 portions divided by a river. One portion is on Eastleigh Section IV side while the other one is on Bahati Area; that the area of the plaintiff's land on the Bahati Area could only be accessed from Bahati side due to the river passing through the land; that the respondent had been using the area of his land on Bahati Area as a parking yard for its lorries since 2009; That the area is well fenced with a gate; that the defendants/appellants had threatened to block the entrance and the road to the respondent's land on Bahati area alleging that he was the owner of the road leading to the plaintiff's land; that investigations by the plaintiff had proved that there was no plot next to the entrance of the plaintiff's property on Bahati area and all the maps

from survey of Kenya support that position; That access road to the plaintiff's land from the Bahati side consisted of licences; easements and or restrictive covenants subsisting at the time of purchase and which the defendants now not empowered by law or otherwise to alter or vitiate; That the defendant therefore has no capacity to issue the threats to block the plaintiff's entrance; and that the defendant is likely to effect his oral threats which may cause a breach of the piece and irreparable loss and damages to the plaintiff.

12. The application was also supported by a sworn affidavit of Patrick Gitimu Kibanya annexing copies of conveyance; a map; parking yard and some photographs alleged to be of trenches and alleged way leave for the power line.

13. It is also worth noting that the application was filed simultaneous with the plaint dated 21st January 2013 and in the prayers thereof the plaintiff/respondent herein sought for orders of a permanent injunction restraining the defendant by himself or through his authorized agents servants and or employees from interfering with the plaintiff's entrance to LR No. 36/IV/14/20A on Bahati area or from blocking the road thereto; and a declaration that the plaintiff is entitled to an access road to its property on LR No. 36/IV/14/(20A) the Bahati side; costs of the suit.

14. As expected, the appellants who were the defendants opposed that application and filed a replying affidavit sworn by Musa Said Hassan the 1st appellant who clarified that he is not Addi Hassa Musa and contending that the suit property belongs to him and his son Abdullahi Musa Said. Further that the supporting affidavit accompanying application for an injunction alluded to irrelevant matters, is slanderous, utterly false, and malicious and made in bad faith. That he had never issued any threats to the respondent herein as alleged and that the alleged entrance or road on Bahati annex leading to the described land is nonexistent. Instead it was contended that there are 2 plots No. 93 and 94 situated in Bahati annex belonging to him and his son Abdullahi Musa Said vide transfer of 6th August 1992 from M. Thumbi & Mary N. Njoki respectively as shown by annexed letters of allotment for plots 93 and 94 respectively. That he consulted the land surveyor who identified the original boundaries to the said plots and who also issued beacon certificates; that as owners thereof, the defendant and his son paid charges to the city council; He also attached a map showing that the two plots are adjacent to each other; that the respondent had in 2012 approached the appellants with a request to purchase the said property and that as he planned to improve the said plots, the respondent requested for an access to the latter's plot LR 36/1V/14/20A as it shared a common boundary with plots 93 and 94 which, in the spirit of good neighbourliness, the appellants granted but the respondent reneged on his promise to buy the said plot from the appellants; and that the respondent had now turned around to claim that the 2 plots are an access road to his plot which is not true. That the map attached to the notice of motion does not assist the court know where the features are and it is misleading.

15. Further, the appellants contended that there was no irreparable harm or injury demonstrated to be suffered which cannot be compensated by costs; and that the application did not raise any prima facie case hence he urged the court to dismiss the application as it was him who would stand to suffer irreparable harm.

16. The appellants also filed a defence on 8th March 2013 denying the claim by the respondent wherein it is stated that there is no road but instead the 2 plots are owned by the defendants/appellants.

17. The application for injunction was argued interpartes on 11th February 2013 after the respondent was granted leave to amend the application to provide for correct names of defendants and in prayer 2 to read plural.

18. In his ruling of 5 paragraphs the Honourable Nchoe stated *interalia* that ***" Both parties have documents of ownership and it is important that status quo be maintained to ascertain their authenticity and legality. Reason wherefore the application dated 21st January 2013 is allowed."***

19. It is that brief ruling that prompted this appeal to challenge the order thereof.

20. The appeal herein was admitted to hearing on 13th May 2014 by Honourable Waweru J and directions were given on 21st July 2014 by Honourable Mutungi. The appeal was then fixed for hearing and on 18th May 2015 despite service of hearing of notice upon the respondent, there was no appearance in court on its behalf hence Honourable Onyancha J allowed the appellant's counsel to proceed and argue the appeal orally.

221. After urging the appeal, Honourable Onyacha J was to deliver a judgment on 29th June 2015 but the learned judge was transferred to Kabarnet High Court and later he retired hence the reallocation of this file to me after the typing of proceedings to enable me continue from where the learned judge had left the matter by writing this judgment.

22. In the brief submissions by Mr Gichamba on 18th May 2015, he submitted on behalf of the appellants and stressed on grounds 1,2,3 and 5 that the lower court restrained the appellants from the respondent's entrance to LR No. 36/IV/14/20A Bahati or from blocking road to that plot. That by doing so, the trial court was granting the respondent access through someone else's land. That earlier on, the appellant had just granted permission to the respondent to access to his land. That the appellants never sold land to the respondent and that those who sold the land to the respondent must have given it an access road which the respondents did not want to use for one reason or another. That the respondents had sought access from the appellants' land with a promise to purchase the appellant's land but that when the deal failed to sail through, then the dispute arose. However, that access was only given for a year which did not create rights since it did not last for 12 years. That the documents including City Council letters established that there was no access road.

23. The appellants' counsel urged this court to set aside the lower court order giving access road to the respondent over the appellants' land and allow the appellants to enjoy their rights on their land.

24. I have carefully considered this appeal, the grounds as argued, and the entire record. In my determination, I will first determine a preliminary issue of jurisdiction since it is not in doubt that the dispute relates to access or occupation of land which, by dint of Article 162(2) (b) and 165(5) (b) of the Constitution, as well as Section 13(1) of the Environment and Land Court Act is a dispute that exclusively falls within the jurisdiction of the Environment and Land Court.

25. However, this court proceeds to write this judgment by invoking the transitional and consequential provisions of Schedule 6 Section 22 on Administration of justice (of the Constitution) which makes it clear that proceedings which are pending before this court in the transitional period shall continue to be heard and determined by the court until the corresponding court is established or as may be directed by the Chief Justice or the Registrar of the High Court.

26. This court observes that the dispute was initiated in the lower court in February 2013 just at the time when the judges of the Environment and Land Court had been appointed and the court was not yet fully operationalised hence the filing of the appeal on the interlocutory orders of injunction on 12th March 2013 before the High Court which had the jurisdiction.

27. Accordingly, I find that in the transitional period the High Court had the power to hear and conclude matters filed in the court hence this appeal.

28. Proceeding on the substantive issues for determination, the issues for determination are:

a. Whether the trial court erred in granting an injunction restraining the appellants from his own land on which they had allegedly only granted temporary permission to the respondent to use as an access to the respondent's plot.

b. What orders should this court make; and

c. Who should bear costs of the appeal.

29. On whether the trial court erred in granting restraining injunction, the court notes that the ruling of the trial magistrate was simply that both parties had documents claiming ownership and that it was important that the status quo be maintained to ascertain their authenticity and legality and it is for that reason that he allowed the application for an injunction.

30. Nonetheless, what the trial magistrate did not state is documents of ownership to which particular plot or land, since whereas the plaintiff/respondent was claiming for an entitlement to an access road to its property on LR No. 36/IV/14 (20A) from Bahati side and not ownership of the access road, the appellants claimed to own the said access road. According to the plaintiff/respondent, it has no other way of accessing his land an unless the defendants/appellants are restrained, then it will be subjected to irreparable loss and damages.

31. My appreciation of the competing claims is that whereas the respondent was claiming for the right to access his plot through the disputed entrance, the appellants were claiming that the access was their plots No. 93 and 94 and that they had only permitted the respondent temporary access though plots 93 and 94, which permission did not give the respondent the right to permanently use the said plots as an entry to the respondent's plots. The appellants also denied that there were any easements through plots 93 and 94.

32. The grant of an injunction is a discretionary power of the court, which discretion, must nonetheless be exercised judiciously and on sound principles and not capriciously.

33. In law, a person who alleges has the primary duty to prove that which he alleges and in civil cases, the standard of proof is on a balance of probabilities.

34. In determining whether or not to grant a temporary retraining or prohibitory injunction like the one which was sought in this case the trial court exercised discretionary power and as stated earlier, an appellate court can only interfere with that discretion by the trial court where the trial court had misdirected itself on the law, or misapprehended the facts, or failed to take into account relevant considerations, or take into account irrelevant considerations or otherwise the decision is plainly wrong, as was espoused **in Mrao Ltd V First American Bank of Kenya Ltd & 2 Others** (supra), and **United India Insurance Company Ltd V EA Underwriters K Ltd** (supra).

35. In exercising that discretion to grant or refuse a temporary restraining injunction, the court must be guided by the established legal principles espoused in the **Giella Vs Cassman Brown** case-namely, that the applicant must satisfy the court that it *has a prima facie case with the probability of success; that an award of damages would not be an adequate remedy in the circumstances; and that where the court is in doubt, then it would decide the case on a balance of convenience*.

36. In an interlocutory appeal like this, however this court must refrain from making any conclusive views on the matters in dispute to avoid prejudging or prejudicing the pending suit since the interlocutory injunction granted by the trial court did not determine the entire dispute (see **David Kamau Gakuru V National Industrial Credit Bank Ltd CA 84/2001).**

37. Turning to the merits of the appeal, I am in agreement with the appellants that on the facts of the case, the respondent was not entitled to benefit from the provisions of Order 40 Rule 1 of the Civil Procedure Rules as there was no single allegation that the property (access) area was in danger of being wasted, damaged, alienated or wrongfully sold or that the appellants were threatening or intending to dispose it off so as to prejudice the outcome of the case in the lower court.

38. Although the respondent filed in court very many documents showing that it owned plot No. LR No. 36/IV/14(20A) which he purchased in 2008, and produced sketches and conveyances and maps, it did not at all attempt to claim that the appellants had or in any way interfered with the respondent's use of the said land.

39. In addition, although the respondent alleged that it had been threatened with closure of the use of

the access road to its said land as described above, when the appellants filed their replying affidavit and defence and deposed that the alleged access road was not an easement but two plots 93 and 94 which the appellants had allowed the respondent to use temporarily pending negotiations for the respondent to purchase from the appellants; and with the appellants even annexing evidence of the existence and ownership of the said plots No. 93 and 94 through allotment letters dated 23rd March 2009 and, a map (at page 68(b) of the record of appeal showing the location of the said plots; the respondent never filed any affidavit to counter those depositions.

40. Additionally, the appellants even annexed approved building plans for development of the said plots and still, there was no rejoinder to those allegations of the appellants by the respondent.

41. The respondent filed documents showing its ownership of plot No. 36/IV/14/20A and which no one was claiming ownership of. It did not demonstrate that the plots No. 93 and 94 were its lawful access road to it named plot by way of easement. To that extend, it is my humble view that the trial magistrate erred in law and fact in granting an injunction to the respondent who had not on a balance of probabilities proved that it had established a prima facie case with a probability of success.

42. Furthermore, the respondent did not even demonstrate that unless the injunction was granted, it would suffer irreparable loss which could not be adequately compensated by an award of damages.

43. In finding that both parties had ownership documents, I find that the trial court fell into an error of fact since there was no evidence that the appellants were claiming ownership of the respondent's land or that the appellants had sold any plot or land to the respondent and refused to grant/provide it with an access road. The appellants were clear in their defence and replying affidavits that as they had not sold any land to the respondent, they were not duty bound to grant it an access road as demanded in its plaint. Indeed, whoever sold the respondent the land must have provided it with an access road which is not even clear from the many convoluted maps which the respondent annexed to its supporting affidavit with no highlights to indicate to court where the respondent's plot is on the map and where its lawful access road is.

44. When plots are surveyed, access roads are provided as a matter of course as no man can live as an island. With the unrebutted depositions that the alleged access road were part of the plots Nos 93 and 94 belonging to the appellants, the learned trial magistrate erred in granting an injunction without assessing the affidavit evidence on record to establish whether the respondent had on a balance of probabilities established that it had a prima facie claim against the appellants with the probability of success.

45. In **Nguruman Ltd v Jan Bonde Nielsen & 2 Others, CA 77/2012** the Court of Appeal restated the principles on which the courts will grant an injunction 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*
>
> *a. Allay any doubts as to (b) above by showing that the balance of convenience is in his favour.*
>
> *These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See* ***Kenya Commercial Financial Company Ltd V Afraha*** *Educations* ***Society [2001] VOL 1 EA 86.***
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> *If the applicant established 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 respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit " leap – frogging" by the applicant to injunction directly without crossing the other hurdles in between."

46. In this appeal, this court notes that the learned trial magistrate did not even address his mind to the above principles applicable in interlocutory injunctions. He did not even mention whether the respondent had established that it had a prima facie case with the probability of success; or that the respondent would suffer irreparable harm which cannot be adequately be compensated by an award of damages; or that because he was in doubt then the balance of probabilities tilted in favour of the respondent before granting the interlocutory injunction or considering whether or not the interlocutory injunction sought was merited.

47. As a result, I find that the trial magistrate made an error of principle by failing to take into consideration factors that he ought to have taken into account when granting or refusing to grant an interlocutory injunction.

48. In **Dalpat Kumar & Another V Prahlad Singh & Others AIR 1993 SC 276**, Ramaswamy J of the Supreme Court of India stated that:

" the phrases " prima facie case", " irreparable loss" and " balance of convenience" are not mere rhetoric phrases for incantation; they are important factors to be carefully weighed and considered in each and every case where an application for an injunction is applied for"

49. I respectively agree with the above established principles and persuasive opinions of courts in similar jurisdiction of the Common wealth.

50. Further, where it was clear that to grant an injunction in the circumstances of this case would, in effect be granting to the respondent the right to trespass upon the appellant's land, the trial magistrate ought to have carefully analysed the affidavit evidence, before granting an interlocutory injunction if, as was submitted in the lower court, there was no land for allocation and that the access 'road' was a way leave, then it was encumbent upon the respondent to prove by way of evidence that indeed the land was under power line and not to merely conclude that the allocation of plots 93 and 94 to the appellants were void ab initio or that construction on the way leave by other people does not legalise the obstruction of the respondent's premises.

51. Besides, the respondent did not enjoin the Nairobi City Council which had allocated the appellants the plots which the respondent was claiming were in the path of way leaves. Neither did it get Kenya Power and Lighting officials to swear an affidavit to the effect that the plots No. 93 and 94 were on the way leaves. It neither appeared to oppose this appeal.

52. In the end, I find that in the circumstances of this case, the trial magistrate ought to have declined an injunction and directed for the hearing of the main suit as there was no sufficient material upon which he granted the respondent /plaintiff an injunction. I would therefore interfere with his discretion which I find was not exercised judiciously and allow this appeal, dismissing the respondent's application in the lower court dated 4th February 2013 and substituting the ruling and order of 8th February 2013 with an order dismissing the application dated 4th February 2013 with costs to the appellants. I also award costs of this appeal to the appellants.

Dated, signed and delivered in open court at Nairobi this 27th day of February 2017.

R.E. ABURILI

JUDGE