



**Syombua & 2 others v JKM (Environment and Land Appeal 38 of 2019)
[2023] KEELC 22130 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 38 OF 2019
A NYUKURI, J
DECEMBER 6, 2023**

BETWEEN

**ANNA SYOMBUA 1ST APPELLANT
COLLINS MUSAU 2ND APPELLANT
ERICK MUSEMBI 3RD APPELLANT**

AND

JKM RESPONDENT

*(Being an appeal from the ruling of Hon. P.W. Wambugu (SRM) delivered on
14th August 2019 by Hon. P.M.Shikwe (in Kithimani ELC NO. 2 OF 2019))*

JUDGMENT

Introduction

1. This is an appeal against the ruling of Honourable P.W. Wambugu (SRM) delivered on 14th August 2019 by Hon. P.M.Shikwe, in Kithimani ELC NO. 2 OF 2019. In the impugned ruling, the learned trial Magistrate allowed the respondent's application dated 3rd June 2019, and granted orders of temporary injunction barring the appellants from interfering with houses on parcel No. Masinga/Masinga/xxxx (suit property). The court also ordered the eviction of the appellants from the suit property and directed the OCS Masinga police station to ensure compliance with the orders granted.
2. Dissatisfied with the above ruling, the appellants in this appeal, appealed against the same, by a memorandum of appeal dated 16th August 2019, citing the following grounds;
 - a. That the learned trial magistrate erred in law and in fact by issuing mandatory orders of eviction at an interim stage contrary to the principles of the law as no special circumstances existed and or were demonstrated.



- b. That the learned trial magistrate misdirected herself by issuing the orders at an interim stage since the same orders have been sought in the plaint and therefore the orders determined the suit before it could be heard.
3. Consequently, the appellant prayed for the following orders;
 - a. The appeal be allowed and the ruling delivered on 14.08. 2019 issuing mandatory orders of eviction be quashed and or set aside.
 - b. The respondent's application be dismissed
 - c. The respondent does bear the costs of this appeal and below.

Background

4. The respondent and the 1st appellant are biological parents of the 2nd and 3rd appellants, the latter having been born while their parents were cohabiting on the suit property. By a plaint dated 30th June 2019, filed vide Kithimani ELC No. 20 of 2019, the respondent herein, being the plaintiff in that suit, sued the appellants (the defendants therein) claiming that he had cohabited with the 1st defendant since 1989 resulting in the birth of the 2nd and 3rd defendants in 1990 and 1995 respectively. He stated that the 1st defendant terminated "the union" and left the plaintiff in 1995, while the 2nd and 3rd defendants left the plaintiff's home in 2013. He denied having been married to the 1st defendant. His complaint was that on 22nd May 2019, the defendants without his consent entered the suit property, forcefully entered his house by breaking the padlocks for the main gate and house and stole his property being maize, cow peas, beans, and chicken valued at Kshs.56, 000/= . He stated that the defendants had refused to vacate the suit property and had barred the plaintiff from accessing his house with threats to cause him harm. He sought the following orders;
 - a. A permanent injunction restraining the defendants, their servants, employees, and or agents from occupying, taking possession, using, vandalising or in any manner whatsoever interfering with the houses, stores and land parcel No. Masinga/Masinga/xxx.
 - b. A mandatory injunction to remove and or evict the defendants from the house erected on land parcel number Masinga/ Masinga/xxx.
 - c. General damages for trespass and mesne profits
 - d. Special damages of Kshs.56, 000/=
 - e. Costs of the suit.
5. Simultaneous with the filing of the plaint, the plaintiff also filed a notice of motion dated 3rd June 2019 under a certificate of urgency, seeking the following orders;
 - a. That a temporary injunction be issued restraining the defendants/respondents, their agents, servants, or employees from occupying, using, vandalizing or in any manner whatsoever interfering with the houses, stores and land parcel No. Masinga/Masinga/xxx pending the hearing and determination of this suit.
 - b. A mandatory injunction to remove and or evict the defendants / respondents from the houses and stores erected on land parcel number Masinga/ Masinga/xxx pending the hearing and determination of this suit.
 - c. The OCS Masinga police station to ensure compliance of this order



- d. That costs be provided for.
6. The application was premised on the supporting affidavit sworn by the plaintiff on 3rd June 2019. The plaintiff's case was that he had since 1989 cohabited with the 1st defendant leading to the birth of the 2nd and 3rd defendants, but that when the 1st defendant left him, he married CN in November 2015 whom they have been blessed with three children. He stated that on 22nd May 2019 the defendants forcefully entered his house on the suit property and stole his goods worth Kshs.56, 000/= and that they continued to occupy his house. He stated that despite reporting to the police, no action had been taken. He stated that the defendants had denied him access to his house, yet the suit property is registered in his name. He attached a letter to the Inspector General Kenya police service and a title deed for the suit property.
 7. In response, the 1st defendant filed a replying affidavit sworn on 12th June 2019 on her own behalf and on behalf of the 2nd and 3rd defendants. She stated that she got married to the plaintiff in 1989 and they were blessed with three issues, namely CMK, RKK and EMK. She stated that they did not divorce but only separated because the plaintiff was involved in an extra marital affair with CN who is now his current wife. She stated that after marriage, the plaintiff changed her names on her identity card to bear his name and his name is also on his children's identity cards.
 8. She stated that in 1994, she jointly with the plaintiff purchased the suit property from one Nzisa Muli who was in need of money to take care of her ailing husband. That the consideration thereof was Kshs.11, 000/=. That they also bought another plot in Katulye Market from one Mutungi Mwanza where she operated a posho mill, but that the plaintiff had sold it without her consent. She stated further that they initially paid Kshs.3000/= and that she is the one who paid the balance thereof in instalments. She also averred that she raised the children alone and even involved the children department. She insisted that she had to come back to the suit property as the plaintiff had deserted the 2nd and 3rd defendants and relocated to Masinga town. She denied stealing the plaintiff's goods as alleged and stated that the 2nd and 3rd defendants are the plaintiff's biological sons and had nowhere else to go.
 9. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 13th June 2019 by himself and a second supporting affidavit sworn by John Mugendi Nguku, who is alleged to be his house help and farm hand. The plaintiff stated that he did not consent for his name to be used on the 1st defendant's identity card. He stated that he had never denied paternity of the 2nd and 3rd Defendants and that he had built them a house on the suit property which is vacant and available for their occupation. He stated that he constructed the main house jointly with Carolyn Ndinda from 1996. He stated that the 1st defendant left in 2013. He denied the allegation that the 1st defendant contributed to the purchase of the suit property and stated that he sold his cow at Kshs. 7000/= and added his salary to buy the suit property from Muli Muasya. On the other hand, John Mugendi Nguku stated that he witnessed the defendants steal and sell the plaintiff's maize, cow peas, beans and chicken.
 10. Upon hearing the application, the trial magistrate found that the 1st defendant failed to prove existence of a marriage between her and the plaintiff. The court further found that there was no proof that the main house on the suit property was matrimonial property, was built while the 1st defendant lived on the suit property or that the suit property was jointly purchased with the plaintiff. The court also stated that the defendants cannot claim the house as their rightful inheritance. Consequently, the trial court found that the plaintiff was entitled to a temporary injunction to restrain the defendants as prayed.
 11. On the issue of eviction, the trial court stated that to prove entitlement of mandatory injunction, the applicant must show the existence of special circumstances. In that regard the court found that the respondent had proved existence of special circumstances and therefore issued eviction orders sought.



12. It is the above determination that provoked the current appeal.
13. This appeal was disposed by way of written submissions. On record are the appellants' submissions filed on 17th November 2022 and the respondent's submissions filed on 24th March 2023.

Appellants' submissions

14. Counsel for the appellant submitted that mandatory orders of injunction and eviction cannot issue at the interim stage without according both parties the opportunity to be heard. Counsel argued that mandatory injunction orders determine the suit with finality and therefore the same should not be issued at the interim stage. Reliance was placed on the case of *F.K V CMM* [2020] e KLR, for the proposition that it is a cardinal principle of law that no one should be condemned unheard. Further, counsel submitted that courts ought not issue mandatory injunctions unless it is so clear and straightforward that the court will not be looking over its shoulders wondering whether it made a mistake.
15. It was further submitted for the appellants that a different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted and there must be existence of exceptional and special circumstances for a mandatory injunction to be granted. Counsel submitted that there was evidence that the respondent lived in Masinga town and therefore there was no prejudice to be suffered by him and there was no reason to hurry the determination of the matter in granting an eviction without a hearing. Counsel relied on the case of *RPP v CAA* [2017] e KLR and contended that the court ought not have issued a mandatory injunction of eviction before interrogating the circumstances under which the appellants entered the suit property.

Respondent's submissions

16. Counsel for the respondent submitted that the trial magistrate did not err in granting eviction orders against the appellants as there existed special circumstances which included, the failure of the 1st appellant to prove existence of a marriage or contribution to the purchase of the suit property; failure by the 1st appellant to rebut the fact that they entered the respondent's house forcefully; the allegation by the respondent that he had constructed a house for the 2nd and 3rd appellants on the suit property; that the respondent constructed the disputed house in 1996 jointly with Carolyne Ndinda when the 1st appellant had left him in 1995; and that the title of the suit property is registered in the name of the respondent.
17. Reliance was placed on the cases of *Giella v Cassman Brown* [1973]EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003]e KLR as regards the conditions for grant of temporary injunction.
18. On the question of mandatory injunction, reliance was placed on the decisions in the cases of *Kenya Airports Authority v New Jambo Taxis* Civil Application No. 29 of 1997 [1997] KLR, *Nation Media Group & Others v John Harun Mwau* [2014] e KLR and *Robai Kandiri Agufa & Another v Kenya Power & Lighting Co. Ltd* [2015] e KLR for the proposition that where special circumstances are demonstrated, a mandatory injunction may be granted.
19. Counsel argued that the authorities relied upon by the appellants are distinguishable as the circumstances obtaining in those cases are not the same as those in the instant suit. Relying on section 26 of the *Land Registration Act*, counsel contended that the respondent who is the registered proprietor of the suit property is the absolute and indefeasible owner thereof, and whose title has not been challenged by the appellants. Counsel argued that the trial court was therefore guided by the



proper legal principles in arriving at the impugned decision. Counsel concluded that an appellate court should only interfere with the findings of the trial court where the latter's decision is founded on wrong legal principles.

Analysis and determination.

20. This court has carefully considered the appeal, submissions and the entire trial court record. The issue that arise for determination is whether the trial court rightly exercised its discretion in granting the injunctions sought by the respondent vide their application dated 3rd June 2019.
21. The duty of the first appellate court is to reassess, reanalyse and reconsider the trial court record and interrogate the decision appealed against and determine whether the trial court was justified in arriving at the conclusions made. (See *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machiara t/a Machira & Co. Advocates* [2013]e KLR)
22. The decision impugned was made by exercise of judicial discretion by the trial court and therefore this court sitting on appeal should not interfere with the exercise of discretion of the trial court unless it is satisfied that the trial court misdirected itself and arrived at a wrong decision, or it is demonstrated that the trial court was manifestly wrong in the exercise of its discretion which led to a miscarriage of justice.
23. In the case of *Shah v Mbogo* [1968] EA 93, the Court of Appeal discussed the instances where an appellate court can interfere with exercise of judicial discretion by the trial court as follows;

We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge, where his discretion as in this case, was completely unfettered. There are different ways in enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

24. In the instant case, the respondent sought for an injunction to restrain the appellants from occupying the houses and stores on land parcel No. Masinga/Masinga/xxx and a mandatory injunction to remove and or/evict the appellants from the houses and stores erected on land parcel No. Masinga/Masinga/xxx. Essentially, both injunctions sought, were meant to keep away the appellants from all the houses on the suit property as they were already in occupation as at the date of filing of the application.
25. The circumstances of this case manifest the intersection of land rights in the context of family relations. According to the respondent, he cohabited with the 1st appellant which led to the birth of the 2nd and 3rd appellants and that it is the 1st appellant who terminated what he termed as “the union”. Having been left, the respondent then married one CN in 1995.
26. In the plaint, the respondent herein stated that there was no marriage between him and the 1st appellant while the later insists that there was a marriage and that she contributed towards the purchase of the suit property. She further stated that the house which she resided in had only been extended and it is the same house in dispute. Although in his pleadings the respondent referred to their having been a “union” between him and the 1st appellant which was allegedly terminated by the 1st appellant, he did not define the nature of that “union”, only stating that the cohabitation was not a marriage. The respondent also denied the 1st appellant's allegation of contribution to the purchase of the suit



property. It is however not disputed that the respondent is the registered proprietor of the suit property and that the 1st appellant and the respondent cohabited on the suit property since 1989 and were blessed with the 2nd and 3rd appellants while staying thereon.

27. Faced with the above allegations, counter allegations, and facts, the trial court, in my view, correctly laid down the principles and conditions for grant of temporary and mandatory injunctions as set out in the decisions of *Giella v Cassman Brown* (supra) and *Nation Media Group & 2 Others v John Harun Mwanu* (supra), among other decisions. The trial court rightly stated that there must be special circumstances before a mandatory injunction is granted. The crux of the appeal is that the respondent did not demonstrate special circumstances to warrant an order of mandatory injunction of eviction.
28. Although the respondent's first prayer was to restrain the appellants from occupying the houses on the suit property, while the second prayer was for eviction, as earlier stated in this judgment, it is clear that in both prayers, the respondent sought to have the appellants kept off and /or removed from the suit property since an order restraining occupation, where the defendant is already in occupation, amounts to an eviction.
29. Having considered the plaint, it is clear that the prayers sought in the application and those in the plaint are the same and copied word for word, save that what is sought in the application is for a time; pending determination of the suit. Hence granting the prayers sought in the application essentially meant that the suit would be determined since the prayers in the suit and the application are the same.
30. While the court has jurisdiction to grant mandatory injunction like the one sought in the lower court, it is settled that the standard of proof in mandatory injunctions is higher than that in prohibitory injunctions. In the case of *Bandari Investments & Co. Ltd v Martin Chiponda & 139 Others* [2022] e KLR, the court cited with approval the decision in *Shepherd Homes v Sandham* (1970) 3 WLR page 356, where the court stated as follows;

Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the defendant was entitled to retain the erection.

31. It is now settled that mandatory injunctions are only granted in special circumstances where the applicant's case is clear and ought to be decided at once. In the case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) e KLR, the court stated as follows;

The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the court of appeal in the case of "Kenya Breweries Ltd v Washington Okeyo (2002) EA 109" had occasion to discuss and consider the principles that govern the grant of mandatory injunction was correctly stated in volume 24 Halsbury Laws of England 4th Edition paragraph 948 which states as follows;

"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 simple and a summary one which can



be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

32. Granting a mandatory injunction in many instances results in the summary determination of the suit, and therefore it amounts to making a conclusive determination of a matter without according the parties a hearing and allowing them to test the evidence given by affidavits by cross examination. Since granting a mandatory injunction determines the rights of the parties without a hearing of the suit on merits, the court ought to exercise that jurisdiction sparingly and only in exceptional circumstances where the applicant’s case is so clear that it is not necessary for their evidence to be subjected to cross examination to arrive at the proposition given by the applicant. The caution to be exercised by the court stems from the fact that the right to be heard is non derogable, and unless the interests of justice allow, a court ought to grant all the parties opportunity to be heard before a determination of the suit is made. Therefore, the court must be hesitant to make any decision that takes away the right to be heard, and only do so where, it is so clear that both procedural and substantive justice will still be done without hearing the parties.
33. In this matter, the trial court appreciated the principle that there ought to be exceptional circumstances for a mandatory injunction to issue. However, having considered the decision of the trial court I note that what the court referred to as amounting to special circumstances, was the fact that it was not disputed that the appellants were in occupation of the suit property. In my view, that was a wrong basis for finding that there existed special circumstances. I take the view that special circumstances ought to point to the fact that the applicant’s case is so clear that it need not be heard on merit for the court to arrive at the proposition made by the applicant. The fact that the appellants were in occupation was not, in my view, in any way a demonstration of the existence of exceptional circumstances to warrant orders of eviction.
34. In the instant matter, the respondent’s proposition was that the appellants were trespassers and being the registered proprietor of the suit property, he was entitled to evict them. To support this proposition, the respondent pleaded that he had some sort of a “union” but no marriage with the 1st appellant which the 1st appellant terminated after they had been blessed with the 2nd and 3rd appellants. On the other hand, the appellants’ position was that there was a marriage, and the suit property was purchased by the contribution of the 1st appellant who lived in the disputed house which was extended after she left.
35. While the court held that the appellant did not prove contribution in the purchase of the suit property, or the existence of marriage, my view is that, those questions ought to have gone on trial before making a conclusive determination on the same, considering that the respondent did not himself provide any evidence that he solely paid the purchase price of the suit property or that there was no intention of marriage between the parties. In my view, the respondent’s case is not so clear as to be determined at once by way of a mandatory injunction. Therefore, it is the finding of this court that the issues raised by the appellants ought to have gone to trial before an eviction order was issued. In the premises I find and hold that the trial court misdirected itself in construing the fact that the appellants’ occupation of the disputed house amounted to special circumstances warranting grant of mandatory injunction of eviction.
36. The upshot is that the appeal is merited, and the same is allowed. The lower court decision allowing the application dated 3rd June 2019, is hereby set aside and substituted with an order dismissing that application. As the parties herein are related, I make no order as to costs.
37. It is so ordered.



DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

1. Mr Ngure holding brief for Mr. Uvyu for respondent
2. Ms Kui for appellants
3. Court Assistant- Josephine.

