



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO. 68 OF 2018

(FORMERLY HCC APPEAL NO. 536 OF 2011 CONSOLIDATED WITH HCC APPEAL NO. 548 OF 2011 AND HCC APPEAL NO. 551 OF 2011)

J.H PRODUCTIONS LIMITED.....1<sup>ST</sup> APPELLANT

MEGJI LALJI..... 2<sup>ND</sup> APPELLANT

SAMBAI MEGHJI HALAL.....3<sup>RD</sup> APPELLANT

SALUMU PRODUCTS & ENTERPRISES LTD.....4<sup>TH</sup> APPELLANT

VERSUS

MARY KATANU KAMEME .....1<sup>ST</sup> RESPONDENT

PURITY KAMANA M'MUTURI .....2<sup>ND</sup> RESPONDENT

(Sued on behalf of themselves and on behalf of 44 other members of Embakasi Quality Self-Help Group)

(Being an Appeal from the ruling of the whole ruling and orders of Honorable L.M. Njora (Mrs) Principal Magistrate in Milimani Chief Magistrate Court Civil (CMCC) Case No. 523 of 2011 dated 27-9-2011)

MARY KATANU KAMEME .....1<sup>ST</sup> PLAINTIFF

PURITY KAMANA M'MUTURI .....2<sup>ND</sup> PLAINTIFF

VERSUS

MEGJI LALJI .....1<sup>ST</sup> DEFENDANT

J.H PRODUCTIONS LIMITED..... 2<sup>ND</sup> DEFENDANT

SALUMU PRODUCTS & ENTERPRISES LTD.....3<sup>RD</sup> DEFENDANT

SAMBAI MEGHJI HALAL ..... 4<sup>TH</sup> DEFENDANT

JUDGEMENT

### **Introduction**

1. The Appeal originates from the ruling of Honourable L.M Njora, Principal Magistrate delivered on 27<sup>th</sup> September 2011 in **CMCC No 523 of 2011**. The ruling was in respect to the Amended Chamber Summons application dated 29<sup>th</sup> July 2011.
2. At the lower court, the Respondents sought injunctive measures against all Appellants with regard to the suit property i.e. **LR No**

**9042/141, 9042/140 and 9042/137.** The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Appellant did not oppose the application whereas the 3<sup>rd</sup> Appellant his respective grounds of opposition stating it was he was owner of the suit property having enjoyed quiet possession since October 2006. It was further submitted that the 3<sup>rd</sup> Appellant had been paying rates and possessed the title to the property.

3. Similarly, the Respondents' claimed ownership of the suit property having been allocated the property by Nairobi City Council during the construction of the eastern by-pass. Consequently, the trial Court proceeded to give the following orders:

**i. That a temporary injunction be and is hereby issued restraining the Defendants by themselves, their agents and/or employees from entering and/or trespassing on and/or fencing and/or interfering with and/or alienating and/or dealing in any manner whatsoever with Plot Number 1-75 which were sub-divided from what used to be LR No 9042/141, 9042/140 and 9042/137 pending hearing of the main suit.**

**ii. That a permanent injunction be and is hereby issued restraining the Defendants by themselves, their agents and/or employees from entering and/or trespassing on and/or fencing and/or interfering with and/or alienating and/or the Defendants be restrained from interfering with the Plaintiff's use, enjoyment and development of the suit plots herein and/or in any manner whatsoever dealing with Plot Number 1-75 which were sub-divided from what used to be LR No 9042/141, 9042/140 and 9042/137.**

**iii. That the Officer Commanding (OCS) Embakasi Police Station be and is hereby ordered to ensure compliance with this order.**

**iv. That the main suit be listed down for hearing within 30 days.**

**v. That the costs of the application be borne by the 3<sup>rd</sup> Respondent.**

4. The 2<sup>nd</sup> Defendant/1<sup>st</sup> Appellant filed a Motion application dated 18<sup>th</sup> October 2011 seeking a stay of the orders in CMCC 523 of 2011. The following was ordered by consent before Ang'awa J (as she then was):

**i. That there be a stay of execution of the Order dated 27<sup>th</sup> September 2011 in CMCC 523 of 2011 pending the hearing and determination of the appeal.**

**ii. That the status quo be maintained and neither party shall enter, develop or interfere with the suit property as particularized in the plaint dated 29<sup>th</sup> July 2011 until the hearing and determination of the appeal.**

**iii. That the costs for the application dated 18<sup>th</sup> October 2011 be in the appeal.**

5. Following the Parties' consent before Mbogholi J (as he then was), the Court on 5<sup>th</sup> December 2018, ordered for the transfer of the appeal to the Environment and Land Court for hearing and disposal. The Appeal was canvassed by way of written submissions.

#### **The Appellants' case**

6. The 1<sup>st</sup> Appellant being aggrieved with the said orders filed a Memorandum of Appeal dated 18<sup>th</sup> October 2011. The appeal was raised on the following grounds:

**i. That the Honourable Magistrate erred and misdirected herself in law when she presided over the said case while the value of the subject matter was beyond her pecuniary jurisdiction**

**ii. That the Honourable Magistrate erred and misdirected herself in law and facts when having found that the issue of ownership was highly contentious, proceeded to grant orders of injunction against the appellant who was in possession of the land in dispute**

**iii. That the Honourable Magistrate erred and misdirected herself in law when she issued orders of injunction when the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had not satisfied the well-established standard of proof**

**iv. That the Honourable Magistrate erred and misdirected herself when she held that the appellant had not opposed the application yet, it had filed lengthy replying affidavit and submissions which documents were in court record.**

**v. That the Honourable Magistrate erred in law when she showed open bias against the appellant all through the prosecution of the application dated 16<sup>th</sup> March 2011 and amended on 29<sup>th</sup> July 2011.**

**vi. That the Honourable Magistrate erred and misdirected herself when she proceeded to grant orders of injunction and directed the police to assist the 1<sup>st</sup> and 2<sup>nd</sup> respondent in occupying the land in dispute.**

7. The 1<sup>st</sup> Appellant further prayed for the appeal to be allowed and the following orders to issue;

a. An order be issued setting aside the orders and ruling in Milimani CMCC No 523 of 2011

b. An order dismissing with costs the 1<sup>st</sup> and 2<sup>nd</sup> Respondents application in Milimani CMCC No 523 of 2011 dated 16<sup>th</sup> March 2011 and amended on 29<sup>th</sup> July 2011

c. An order for costs of the appeal against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants filed their Memorandum of Appeal dated 26<sup>th</sup> October 2011 and relied on written submissions dated 16<sup>th</sup> December 2019. They relied on copies of the grant, deed plan and transfer to assert themselves as the registered proprietors of **LR No 9042/140**. They claimed to have purchased the land around March 1995 for an amount of Kshs 3,700,000/=

9. It was further submitted that at the commencement of the trial, the property had been charged to Imperial Bank Limited for a loan facility of Ksh 8,000,000 Million. They relied on the bank's valuation report that valued the property at Ksh 37,000,000 Million.

10. The Appellants averred that despite having a sworn affidavit and annexing the copies of the title, transfer and valuation report, the Honourable Magistrate failed to appropriately consider the issue of pecuniary jurisdiction. **They relied on Section 5 of the Magistrates Court Act** that limited the court's jurisdiction to subject matter valued at **Ksh 300,000. (later increased to Ksh 4 Million by the Statute Law (Miscellaneous Amendments) Act 2012)**. They also cited the case of **Civil Appeal N0 244 of 2010 [Phoenix of E.A Assurance Co Limited vs S.M. Thiga t/a Newspaper Service**

11. It was asserted that granting permanent and mandatory injunction orders in an interlocutory application was unconstitutional and contrary to natural justice. In conclusion, they prayed for the appeal to be allowed and costs for the lower court and court of appeal be granted to them.

12. The 4<sup>th</sup> Appellant filed their Memorandum of Appeal dated 26<sup>th</sup> October 2011. The Memorandum raised grounds of appeal and prayers similar to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant. The 4<sup>th</sup> Appellant also filed complementary written submissions dated 2<sup>nd</sup> October 2020 and 29<sup>th</sup> November 2021. They equally relied on the cases of **Samuel Kamau Macharia & Another vs KCB and Interim IEBC –Constitutional Application No 2 of 2011** to support their averments.

#### **Respondents' case**

13. Parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Respondents never filed any submissions and none was on record by the time of preparation of this Judgment.

#### **Analysis and Determination**

14. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In **China Zhongxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR** it was stated as follows:

**“The appropriate standard of review established in these cases can be stated in three complementary principles:**

**a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**

**b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**

**c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”**

15. The High Court in the **China Zhongxing Construction Company Ltd** case (*supra*) cited the Court of Appeal for East Africa in **Peters vs Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:

**“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.”**

16. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.

17. Having considered the written submissions and documentary evidence it is clear that the issues for determination before this appellate court are as follows:

i. Whether the Trial Court had jurisdiction to entertain the suit.

ii. If the lower court was justified based on the facts, evidence and the law in arriving at the decision made by its ruling dated 27<sup>th</sup> September 2011?

#### Issue No. 1

**Whether the Trial Court had jurisdiction to entertain the suit.**

18. It was submitted that at the commencement of the trial, the property had been charged to Imperial Bank Limited for a loan facility of Ksh 8,000,000 Million. They relied on the bank's valuation report that valued the property at Ksh 37,000,000 Million.

19. The Appellants averred that despite having a sworn affidavit and annexing the copies of the title, transfer and valuation report, the Honourable Magistrate failed to appropriately consider the issue of pecuniary jurisdiction. They relied on **Section 5 of the Magistrates Court Act** that limited the court's jurisdiction to subject matter valued at **Ksh 300,000/-** at the time of filing suit.

20. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

21. The Supreme Court in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

**"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

22. It therefore behoves this Court to consider and determine whether or not the lower court had jurisdiction to entertain the suit.

23. I have perused the entire record of Appeal and noted that the issue of jurisdiction was first raised at the lower court where the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had by way of a Replying Affidavit placed before the court documentary evidence showing the value of the suit property which was way beyond the pecuniary jurisdiction of that court. As such I concur with the written submissions of the Appellants and it is the finding of this Court that the magistrate court lacked the pecuniary jurisdiction in hearing the matter the matter and granting the orders sought.

#### Issue No. 2

**If the lower court was justified based on the facts, evidence and the law in arriving at the decision made by its ruling dated 27<sup>th</sup> September 2011?**

24. In its ruling dated 27<sup>th</sup> September 2011, the lower court granted both a temporary and permanent injunctive order on an interlocutory application.

25. The courts are obliged to consider all the relevant provisions in the exercise of its discretion in granting injunctions at the interlocutory stage. In the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR**, the Court of Appeal sitting in Malindi held that the trial judge erred in granting an injunction at the interlocutory stage when it failed to consider the rights of the registered proprietor pursuant to **section 24 and 24 of the Land Registration Act**. The Court of Appeal also held that such special circumstances that would incline the court to grant a mandatory injunction at the interlocutory stage would include those involving simple acts that could easily be reversed or remedied should the court find otherwise after trial.

26. The Courts have consistently held that though it maintains the judicial discretion to also grant mandatory injunctions at the interlocutory stage, such an injunction should not be granted in the absence of special circumstances or only in the clearest of cases, see **Kenya Breweries Ltd & Another v Washington O. Okeyo [2002] eKLR (Nairobi Court of Appeal), Gusii Mwalimu Investments Co. Ltd & Others v**

**Mwalimu Hotel Kisii Ltd [1996] Eklr (Kisumu Court of Appeal) and East Africa Fine Spinners Ltd(In receivership) & 3 Others v Bedi Investments Ltd, [1994] eKLR (Nairobi Court of Appeal).**

27. In the instant case, having analysed the facts of this case, it is evident that there was contention on the ownership of the suit property and as such the trial magistrate erred in granting permanent injunction at the interlocutory stage. The same ought not to have been granted at that stage. It would have been prudent to hear the evidence of the parties before considering granting such orders. By granting the orders of a permanent injunction, the trial court had shut out and closed the Appellants case at the interlocutory stage. In view of the foregoing, it is the finding of this Court that the trial magistrate at the lower court had no justification in granting the orders sought as per her ruling that was delivered on 27<sup>th</sup> September 2011.

**Final orders**

28. In conclusion, I find and hold that the trial Magistrate erred in granting a permanent injunction in **Milimani CMCC No. 523 of 2011** by a ruling delivered on the 27.09.2011. I allow this appeal, set aside the orders issued on 27.09.2011 by Hon L.M Njora, Principal Magistrate and substitute them with an order dismissing the application dated 29<sup>th</sup> July, 2011.

29. On the issue of costs, I direct that each party to bear their own costs of the Appeal and the lower court.

30. Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2022**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**B.M Musyoki for the 1<sup>st</sup> Appellant also h/b for Mwangi for 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.**

**Karongo for the 4<sup>th</sup> Appellant.**

**N/A for the 1<sup>st</sup> Respondent.**

**N/A for the 2<sup>nd</sup> Respondent.**

**Court Assistant; Caroline Nafuna**