



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELCA CASE NO. 4 OF 2018

IYE MOHAMMED BAKARI.....APPELLANT

VERSUS

MAWENI ESTATE LIMITED

KITHEMU AUCTIONEERS

KINYAMAL BUSEINEI MURGUYIAH.....RESPONDENTS

JUDGEMENT

The Appellant herein IYE MOHAMED BAKARI being dissatisfied with the Orders and Ruling delivered by the Honourable Magistrate, Makungu on 18th January 2006 in the Chief Magistrate Court. Civil No. 863 of 2005 hereby appeals to this Court against the entire ruling and sets forth the following Grounds of Appeal;

1. That the Hon. Magistrate erred in law and in fact in dismissing the Appellant's entire application dated 23rd August 2005.
2. That the Honourable Magistrate erred in law and in fact in failing to appreciate the fact that the appellant had proved a Prima Facie case for grant of the Orders sought-for in the appellant's Application dated 23rd August 2005
3. That the Honourable Magistrate erred in law and in fact in failing to appreciate the fact that the sale and transfer of the house and/or the portion of land on where the house stands on sub-plot No. 8 of plot No. 1534/1/M.N to the 3rd Respondent was unlawful and/or illegal and/or unprocedural.
4. That the Honourable Magistrate erred in law and in fact in making a finding that the sale and transfer of the house was proper, yet it is obvious that the 1st respondent resorted to the application of the jungle law by obtaining two remedies without an Order of the Court or Rent Restriction Tribunal.
5. That the Honourable Magistrate erred in law and in fact in failing to appreciate that Distress for Rent Act cannot be invoked on purported rent which has not been agreed to are not agreed by the defaulter.
6. That the Honourable Magistrate erred in law and in fact in failing to consider the fact that the house and/or portion of land on where the house stands on Sub-plot NO. 8 of Plot No. 1534/1/MN, the subject matter of this suit would be wasted and/or demolished and thereby destroying the evidence on the ground and that the respondents would be incapable of making any reparation in damages.

The appellant prays for;

- a) Appeal be allowed.
- b) The impugned Ruling and consequential Orders of Hon. Makungu be set aside.
- c) The costs of the appeal be provided for.

The Respondent submitted that the appeal arises from the Ruling of HON. R. N. MAKUNGU (SRM) delivered on the 18th January, 2006 dismissing the Plaintiff/Appellant's Chamber Summons dated the 23rd August, 2005 in which the Plaintiff/Appellant had sought Injunctive Orders against the Respondents from evicting the Appellant from the House situated on Plot No.8 of Plot No. 1534/1/MN which said house

was the property of Mohamed Bin Bakari who died sometimes on the 28th June, 1994. That the said Mohamed Bin Bakari was the father to the Appellant in this matter and the said Appellant obtained a Limited Grant on the 15th March, 2005 only for the purposes of bringing the current suit against the Respondents. That at the time of bringing the current suit, no full grant had been obtained by the Dependents of Mohamed Bin Bakari and the house standing on Plot No.8 of Plot No. 1534/I/MN had not passed to the Appellant/Plaintiff. That the Appellant has raised six (6) Grounds of Appeal against the Ruling of Hon. R. N. Makungu (SRM) and stated that the Honourable Magistrate erred in law and fact by dismissing the Appellant's entire Application dated the 23rd August, 2005. The Appellant had moved to the Honourable Court through a Certificate of Urgency when she was served with a notice to vacate the premises she was occupying as the same had been sold to the 3rd Respondent Kithemu Auctioneers on the pretext of Ground Rent Arrears of Ksh.61,176/=. That the 1st Respondent did not file any suit for the recovery of the Ground Rent against the Plaintiff/Appellant before any Court, but instead instructed the 2nd Respondent Kithemu Auctioneers to distress and sell the Appellant's house as would be in the situation of a Landlord distressing the household goods of a tenant who has fallen in rent arrears. The Appellant's abode being the house on Plot No.1534/I/MN was itself the goods. That the house which was being sold was not the Appellant's but the deceased Mohamed Bin Bakari who died on the 28th June, 1994 and the 1st Respondent had not yet transferred the said house to the Plaintiff in line with the Agreement entered between the deceased Mohamed Bin Bakari in 1996 which required consent from the 1st Respondent. That the Honourable Magistrate erred in law and fact by failing to appreciate the above facts that the Respondent could not Auction the House standing on Plot No.8 belonging to the deceased Mohamed Bin Bakari without first bringing a suit against his legal representatives and the Honourable Court asserting that indeed the Estate of Mohamed Bin Bakari was in Ground Rent Arrears as claimed.

That the 1st Respondent Maweni Estates Limited were aware that their tenant Mohamed Bin Bakari whom they had entered into a Tenancy Agreement on the 17th August, 1966 had passed on. That the instruction to distress for Ground Rent arrears vide the 1st Respondent's Advocates on the 30th November, 1994 was not proper as the same amounted to meddling in the property of the deceased. There was no tenant to be served with Distress Notices as the tenant Mohamed Bin Bakari had died in 1994.

That the Honourable Magistrate erred in law and fact in failing to appreciate the fact that the sale and transfer of the house and or the portion of land on where the house stands on Plot No.8 of Plot No.1534/I/MN to the 3rd Respondent was unlawful and or illegal and or unprocedural. That without first filing a suit against the Legal Representatives of the Deceased, the Respondents particularly 1st and 2nd could not proceed and sale the house standing on Plot No.8 belonging to the Deceased Mohamed Bin Bakari. That the auction of the Respondents goes against the provisions of Section 45 of the Law of Succession which prohibits intermeddling with the property of the Deceased person. That the distress for rent by way of selling the house of the late Mohamed Bin Bakari is also in contravention of the provisions of the distress for Rent Act (Cap 293) Laws of Kenya which prohibits the Landlord from achieving two remedies at the same time of recovering rent arrears by distressing tenants goods and evicting the tenant from the said premises occupied by the tenant.

That the house of the Deceased Mohamed Bin Bakari is a house without land standing on Plot No.8 vide an Agreement entered between the Deceased and Maweni Estate Ltd, the 1st Respondent in 1966. That, the 1st and 2nd Respondents by selling the premises to the 3rd Respondent, effectively evicted the Appellant from the Premises. That in the Replying Affidavit of Kinyamal Buseinei Murguyiah sworn on the 5th September, 2005 and at paragraph 8 he states that indeed his Advocates had issued notices to the Appellant to vacate the premises. That it would have been proper for the 1st Respondent to move to Court, sue the Appellant for rent arrears and then seek Eviction Orders.

1st Respondent's submitted that by the time the Appellant was moving to court for the interlocutory injunction orders; the house had already been sold and transferred to the 3rd Respondent by a sale agreement dated 1st April 2005. The Appellant's suit and application are therefore non- starters which have been overtaken by events. That the Appellant has therefore not demonstrated any irreparable loss at all and her appeal ought to fail based on this second principle.

That the Appellant has not established a prima facie case with a probability of success and it has not established that it will suffer irreparable injury that cannot be compensated by damages. That the Appellant's case is that the sale and transfer of the house and / or the portion of land on where the house stands on sub-plot No. 8 of plot No. 1534/1/MN to the 3rd Respondent was unlawful and / or illegal and/ or unprocedural and that the 1st Respondent resorted to the application of the jungle law by obtaining two remedies without an order of the court or rent restriction tribunal House without Land by its definition is more or less a lease. The now repealed Indian Transfer of Property Act (ITPA) 1882 applicable then defines a "lease" under section 105 as the transfer, of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money to be rendered periodically or on specified occasions to the transferor by the transferee.

That the rights of the Appellant have been limited to that of a tenant only entitled to enjoy the use of the land on which the house is constructed upon subject to a consideration of a price paid, promise or money. The deceased stopped paying the ground rent and the same was carried forward to the Appellant as the personal representative who also refused to take any action on payment. The 1st Respondent was allowed to seek various remedies at law one of them being to levy distress for rent.3.5. Under section 3 (1) of the Distress for Rent Act (Cap 293) states that "Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case."

That the 2nd Respondent gave the Appellant proper notice of Distress in writing of which the Appellant took no action. The Appellant's Advocates were well aware of the foregoing and instead chose not to pay the outstanding rent and rates or take any action. The 2nd Respondent listed the house as part of the movable property to be auctioned since 'house without land' is considered movable property as it does not attach to the land and is temporary in nature. This position was upheld by Muriithi J. in the case of Abdulrazak Khalifa Salim vs. Harun Rashid Khator (as Administrator of the Estate of the Rashid Khator Salim, Deceased) & Anor (HCCC No. 188 of 2006). The house was therefore sold to the 3rd Respondent in a clear Sale Agreement where risk passed to the latter. The 3rd Respondent became the new tenant of the house and under the instructions of his advocates by a letter dated 27th July 2005 addressed to the Appellant; he demanded vacant possession of the house.

That the Appellants case is that Distress for Rent Act cannot be invoked on purported rent which has not been agreed by the defaulter. That the deceased was already in arrears of ground rent as from 1988 and several reminders were made to him vide letters over the period of years. In 1991, the Appellant agreed to the revised monthly rent of Kshs. 150/- by paying the aforesaid amount. However, there were still arrears in respect of rent. Thereafter, the 1st Respondent informed the Appellant on the increase in municipal rates in respect of plot No. 1534/1/MN and that the increase was to be shared proportionally amongst the houses. That the deceased, Mohamed Bin Bakari died on the 28th June 1994 and was therefore well aware of the increase in rent and did not complain or raise the issue with the 1st Respondent. They pray that the Appellant's Appeal be dismissed with costs to the Respondents.

This court has considered the appeal and submissions therein. This court as a first appellate court can therefore examine the evidence afresh and make a determination on the Appellants' claim on its merits, as per *Selle and another vs Associated Motor Boat Company Ltd and others (1968) 1 EA 123* which stated:

"...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

The conditions for the granting of an interlocutory injunction are now, we think, well settled. In *Giella v Cassman Brown & Co Ltd (1973) EA 358* at page 360, it was stated as follows;

"First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In the case of **Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR**, the Court of Appeal held that:

"....A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter...."

In the case of **Suleiman vs Amboseli Resort Ltd (2004) KLR 589**, Ojwang Ag. J (as he then was) stated thus:

*"Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in *Giella – v- Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. *Justice Hoffman in the English case of Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella –v- Cassman Brown*, the court has to consider the following questions before granting injunctive relief:*

- i) Is there a prima facie case....*
- ii) Does the applicant stand to suffer irreparable harm....*
- iii) On which side does the balance of convenience lie.....*

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant."

It is not in dispute that the Respondents sold the said house without land on the grounds that the tenant deceased Mohamed Bin Bakari was in ground rent arrears without moving to Court and proving that indeed the said deceased tenant was in arrears against the provisions of the Law of Succession and Section 45 thereof. It is also not in dispute that the deceased, Mohamed Bin Bakari died on the 28th June 1994 hence the Respondents sold the property of a deceased person Mohamed Bin Bakari who died in 1994 and were aware of the position. This is not the proper procedure in law. I find that the Appellant has established a prima facie case. I find that the balance of convenience lies with the Appellant as she has lived in the premises throughout her life. In the instant case I find that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. I find that, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined. I find that the Trial Magistrate erred in law and in fact in failing to appreciate the fact that the appellant had proved a prima facie case for grant of the Orders sought for in the appellant's Application dated 23rd August 2005. For these reasons I find the appeal is merited and I allow the same as prayed with costs to the Appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JANUARY 2022.

N.A. MATHEKA

JUDGE