



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 14 OF 2015

CHRISTOPHER MURITHI KUBAI.....1ST APPELLANT

JOSHUA MWITI KARAI.....2ND APPELLANT

PETER KIUNGA M'MWENDA.....3RD APPELLANT

JULIUS ITHANYA.....4TH APPELLANT

BEATRICE KAUMO5TH APPELLANT

WILLIAN M'MBURA NABEA.....6TH APPELLANT

HENRY NJEA MUNORU.....7TH APPELLANT

VERSUS

KARANI MUCHEKE.....RESPONDENT

R U L I N G

1. This Application, stated on the face of the Notice of Motion to have been brought Under Sections 3 and 3A of the Civil Procedure Act, is dated 19th May,2015 and seeks Orders:-
 1. ***THAT the Learned trial Magistrates erred in Law and fact in giving Injunctive Orders whose net effect is eviction of the Appellants from their lands.***
 2. ***THAT the Learned trial Magistrates erred in Law and facts in shifting the burden of proof from an applicant to the Respondent.***
 3. ***THAT the Learned trial Magistrates erred in Law and fact in failing to appreciate that the Appellants parcels of land are not, and have never been, sub-divisions of the suitland.***
 4. ***THAT the Learned trial Magistrate erred in Law and fact in failing to appreciate that the Orders issued are incapable of being implemented.***
2. The Application is supported by the Affidavits of the seven Appellants and has the following grounds:-
 - i. ***The Appellants have been injected from their lands where they have settled for many years.***
 - ii. ***The Respondent is using the Injunctive Orders to evict the Appellants from their lands.***

- iii. *The Appellants are holders of title deed to these parcels of lands and the same have not been conceded.*
- iv. *The sub-ordinate Court proceeded on the wrong premises that the Appellants' parcel of land are sub-divisions of the Respondent's land parcel No. 1984 AMWATHI/MAUA.*
- v. *In trying to enforce the Injunctive Orders by way of evicting the Appellants/Applicants the Respondent actions may lead to violent confrontations.*
- vi. *The Respondent has been shy of prosecuting his main suit and seeks to thrive on interlocutory applications and it is imperative that the whole suit be speedily concluded.*

3. At the outset, I do note that the Memorandum of Appeal prays that this Court allows the Appeal, overturns the Ruling of the CM's Court at Maua and awards costs of the appeal to the Appellants.
4. I do note that in seeking prayers 2 and 3 of the Application, which are prayers for stay, contrary to the express Provisions of Order 42 Rule 6 (1) and 6(2) Rule 6 (1) states:

***“ 6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order Stay of Execution of such Decree or Order, and whether the Application for such stay shall have been granted or refused the Court appealed from. The Court to which such appeal is proffered shall be at liberty, on Application being made, to consider such Application and to make such order thereon as it seems just, and any person aggrieved by an order of stay made by the Court from whose decision is preferred may apply to the Appellate Court to have such orders set aside.*”**

Rule 6(2) states: “ (2) No order for stay of execution shall be made under subrule (1) unless :-

(a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

(b) Such security as the Court Orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

5. The Appellant's claim that they own the suit lands and that there is a Miraa crop thereon that fetches an average of between Kshs, 500,000/= and Kshs. 1,000,000/= each month. They also claim that the suit lands have indigenous and exotic trees. They argue that after Injunctive Orders were given, the Respondent moved into the Appellants different portion of land and took possession.
6. The Appellants proffer that the best way to obtain Justice is to ensure an immediate disposal of the primary suit. They say that the primary suit, Maua CMCC No. 79 of 2011 involves the Plaintiff and 11 defendants. They seek an order from this Court the CM's Court at Maua be ordered to hear and conclude the primary suit within 60 days.
7. The Applicants say that they are willing to give up possession of their Miraa plantations to the Respondent to control, manage and utilize “as long as it is agreed that the cumulative value of the Miraa harvested from the Lands per month is agreed at Kshs. 800,000/= per month”. They submit that this agreement is necessary so that whichever party fails shall have a refund from the other of the value of the Miraa plucked for whatever number of months.
8. The Appellants proffer another alternative that all the suit lands be kept under guard of both the Appellants and the Respondent and all the proceeds of the Miraa harvested therefrom be deposited either in Court or in a joint account of their respective Advocates pending the hearing and determination of the main suit.

9. The Respondent submits that he is the son of the original owner of Land Parcel NO. Amwathi/Maua/1984. He says that he is aged over 60 years and was born on the land. He tells that after his late father died, he discovered that the original land had been secretly and fraudulently subdivided into several sub-divisions and transferred to nine persons. He sought the mandatory Consent of the District Lands Adjudication and Settlement Office and filed suit No. Maua CMCC No. of 79 of 2011. The Defendants in their defence admitted that original Parcel No 1984 had been subdivided but denied that it belonged to the Respondent's father.

10. The Respondent submits that he had sole possession of the original suit land which contained the various subdivisions the Appellants were claiming he states that the consent of the District Lands and Settlement Officer had a specific condition that the final order of the Court shall determine the ownership of the suitlands. Despite this condition some of the nine Defendants who included the 3rd to 7th Appellants obtained titles and started to hurriedly sell and to attempt to take possession of the suitlands.

11. It is proffered that the 1st Appellant bought Parcel No. 4471 from the 4th Appellant in 2011 when CMCC NO. 79 of 2011 had not been determined. The 4th Appellant, the Seller, had not himself taken possession of the land. In Maua CMCC No 79 of 2011 the 4th Appellant who was the 6th Defendant in the Maua suit had in his statement filed in Court on 28th November, 2012, at paragraph 2 specifically admitted that the Respondent was in possession of the suit land. This Court confirms this position. The transfer of the land to the 1st Appellant took place on 26.05.2014 when the suit at Maua was extant.

12. The Respondent proffers the affidavit of the second Appellant marked JMKI. Where the Appellant denies ownership of any land. The Respondent tells the Court that he only applied to enjoin the Appellant in the Lower Courts case when he threatened to invade the suitland, claiming that he had bought it from the 3rd Appellant who is the 2nd Defendant in the Maua case. The 3rd Appellant had in his written statement filed in Court on 28th November, 2012 clearly admitted that the Respondent had prevented him from using or occupying the land, meaning that he was not in possession of the suit land.

13. The Respondent submits that 2nd, 6th and 7th Appellants did not file Replying Affidavits in respect of the Application for Injunction at Maua. As they had not opposed the Application it is the view of the Respondent that they had no business appealing against the Order of Injunction granted by the CM's Court at Maua.

14. The Respondent Submits that the 5th Appellant's own statement filed in Court on 28th November, 2011 confesses that the Respondent had prevented him from occupying and using the suit land way back in 2011. This is proffered as proof that the 5th Appellant was not in occupation and possession of the suit land.

15. The Respondent Submits that it was the duty of the District Lands and settlement officer, who consented to the filing of the dispute in Maua CMCC NO. 79 of 2011, to ensure that the registration was not done until determination of ownership by a Court of Law.

16. The Respondent denies that the Injunction Orders are being used to delay the hearing of Maua CMCC NO. 79 of 2011. He says that the Order were only granted on 19/3/2015. He tells the Court that the case had been fixed for hearing on 12th June, 2015 when some of the Appellants failed to attend Court and thus, causing an adjournment.

17. The Respondent submits that the Order of Injunction granted by the trial Magistrate had been granted after the Court found the Respondent had satisfied the Principles necessary for grant of an Injunction as set out in the case of Giella Versus Cassman Brown.

I have carefully examined the pleading and the submissions proffered by the Parties. The Primary suit at Maua seeks to establish ownership of the suitlands. Many of the issues raised by the Appellants and the Respondent touch on the the issue of ownership and possession. I am guided by the Court of Appeal which in the case of Mbuthia Versus Jimba Credit Corporation[1988] KLR1 opined as follows:

“The correct approach in dealing with an Application for an interlocutory Injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The Lower Court Magistrate had gone beyond his proper duties and made final findings of fact on disputed affidavit”.

17. I refuse to make final findings in disputed issues which findings can only be made after the primary suit at Maua has been heard. I, however, agree that the District Land Adjudication and Settlement Officer Igembe District should have ensured that titles were not issued before Maua CMCC 79 of 2011 was determined.

I wish to state that this Court has got no Jurisdiction to foist an agreement or a Consent upon the parties. This they can only do if they agree. That is why such an arrangement is called an agreement or consent. Such an arrangement is predicated upon the informed free will of the concerned parties. I do not agree to grant an order to the parties to deposit Miraa proceeds in Court in a joint account to be operated jointly by their Advocates. In any case, this suggestion was not part of the prayers in the application. It is also not contained in the Memorandum of Appeal .

18A. This Court will be guided by the opinion of Newbold, President, in Mbogo and Another Versus Shah, (1968) EA where he opined as follows:

“ For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a long 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”.

18B. I have read the Ruling of Hon J.G. Kingori, CM, delivered on 19/03/2015. For a Court to interfere with a Courts discretion in granting Injunctive Orders, cogent and palpable reasons must be given. A litigant doing so must impeach its propriety and prove that it was injudicious. I do find the reasoning of the Learned Chief Magistrate well thought out and reasoned. He, for one, found that the Respondent was in occupation. I find that he had properly addressed his mind to the principles to be satisfied before Injunctive orders are issued.

19 Weighing the propositions proffered by the parties, I find that the Respondents propositions carry more weight. In the Circumstances, I refuse to grant prayers 2,3,and 4. To that extent the application is dismissed accordingly. Regarding prayer No 5, I find that the applicant should canvass this Prayer during the hearing in Maua CMCC No 79 of 2011. The prayer is, accordingly denied.

20. Regarding prayer 6 that this Court directs that Maua CMCC No 79 of 2011 be heard on priority basis within a specific period not exceeding ninety (90 days), I do opine that it would be bad public and judicial policy for superior Courts to micromanage Judicial proceedings in Lower Courts. This would deprive the lower Courts of their freedom carry out judicial functions without being fettered. I therefore decline to grant prayer 6 in the Application.

21. I am, however, persuaded that Maua CMCC 79 of 2011 merits expeditious hearing and determination. I therefore, direct the Plaintiff to set this case down for directions before the Chief Magistrate's Court at Maua within 30 days. The Court will give apposite directions regarding expeditious hearing and determination of the suit.

22. As the Appeal's main prayer is to overturn the Ruling of the Chief Magistrate in the Lower Courts and as the parties are eager to have the suit heard and determined expeditiously, I find it necessary in terms of Section 79 B of the Civil Procedure Act, to decline to admit the .Appeal and accordingly dismiss it. The main reason, though, is that the Interlocutory Application herein is, inter alia, also seeking the substantive order sought by the appeal. If the Appeal remains undismitted it will be a veritable tool that the parties may use to delay the hearing and determination of the Primary suit CMCC NO 79 of 2011 at Maua Law Courts. Accordingly, the Appeal herein is dismissed.

Costs will be in the Primary Suit at Maua.

It is so ordered.

Delivered in open Court at Meru this 30th day of July, 2015 in the presence of:

CC:Lilian/Daniel

Kirimi Mbogo for Appellants

Harun Gitonga for Respondent

P.M.NJOROGE

JUDGE