



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CIVIL APPEAL NO. 1 OF 2015.

VINCENT EGESA NYONGESA.....1ST APPELLANT

FLORENTIUS JUMA NYONGESA.....2ND APPELLANT

VERSUS

FRANCIS MUKHULU OMENGO.....RESPONDENT

J U D G M E N T.

1. BACKGROUND.

a. **VINCENT EGESA NYONGESA and FLORENTIUS JUMA NYONGESA**, hereinafter referred to as the 1st and 2nd Applicants, are the Defendants in Busia CMCC. No. 437 of 2014, which was commenced by **FRANCIS MUHULU OMENGO**, hereinafter referred to as the Respondent , through the plaint dated 28th October, 2014. The Respondent, pleaded in the plaint that he was the registered owner of land parcel BUKHAYO/BUGENGI/2987 in which the Appellants trespassed onto on 23rd October, 2014 and prayed for ;

“ a. Declaration that the trespass upon land parcel No. Bukhayo/Bugengi/2987 by the Defendants is illegal and consequent eviction forthwith.”

b. Costs of this suit.”

That filed contemporaneously with the plaint was the Notice of Motion under certificate of urgency dated 28th October, 2014 containing six prayers as follows;

“1 THAT this application be and is hereby certified as urgent and heard ex-parte at first instance.

2. THAT, pending hearing and determination of this Application Inter parties an Interim orders of injunction be and is hereby issued restraining the defendant, his servants,, workers or anyone under him from entering, using, tilling, working on or dealing in any way adverse to the interest of the Applicant Land Parcel No.BUKHAYO/BUGENGI/2987until further notice of this court.

3. THAT, pending the hearing and determination of this suit an order be and is hereby issued restraining the defendant, his servants, workers or anyone under him from entering, using, tilling , working on or dealing in any way adverse to the interest of the Applicant with Land Parcel No. BUKHAYO/BUGENGI/2987 until further notice of this court.

4. THAT both parties affected by this order be at liberty to engage surveyor to determine the boundary of

Land Parcel No. BUKHAYO/BUGENGI/2987.

5. THAT any Police Officer of National Police Service provides security in execution of any of the orders granted in court.
6. THAT in any event, the Honourable Court do issue any order it deems fit in resolution of dispute herein including but limited to order respondent to vacate Land Parcel. No. BUKHAYO/BUGENGI/2987 within specified period and upon expiry of said period to be forcefully evicted.’’

The application was served as confirmed through the affidavit of service sworn by Sebastiano Tikolo on 6th November, 2014. The Appellants opposed the application through the replying affidavit sworn by Florentius Juma Nyongesa on 10th November, 2014. The Appellants appointed the firm of Makokha Oaka & company advocates who filed the Notice of appointment dated 1st December, 2014. The lower court record shows that prayers 1 and 2 were granted *ex parte* on 29th October, 2014. The trial court then ordered that the application be served for *inter partes* hearing on 11th November, 2014. On the 11th November, 2014, the trial court heard counsel for the Respondent and each of the Applicants in person and reserved the ruling on 2nd December, 2014. On the day of the ruling, the Respondent was in court and Mr. Magae holding brief for Kasamani for the Applicants was present. It is that ruling that is the subject matter of this appeal.

2. **THE APPEAL.**

- a. The appeal was commenced through the Memorandum of appeal dated 16th January, 2015 which set out 9 grounds as reproduced herein below;

- ‘‘1. The Learned Trial Magistrate erred in Law and Fact in granting orders not prayed for in the plaint.
2. The Learned Trial Magistrate erred in Law and Fact in failing to enquire into the acquisition by Respondent of the 2nd Appellant’s parcel of Land Reference Bukhayo/Bugengi/2987.
3. The Learned Trial Magistrate erred in Law by issuing conclusive and mandatory orders thereby denying the appellants a hearing.
4. The Learned Trial Magistrate erred in Law and Fact by issuing interim orders that conclusively determine the dispute.
5. The Learned Trial Magistrate erred in Law and Fact by directing the parties to engage surveyors to determine boundary without establishing the ownership dispute.
6. The Learned Trial Magistrate erred in Law by conferring on the Court jurisdiction where none exists.
7. The Learned Trial Magistrate erred in Law and Facts by proceeding on wrong principles and arriving at a wrong decision on declarations and injunctions.
8. The decision of the Learned Trial Magistrate is against the weight of the evidence on record.
9. The Learned Trial Magistrate erred in Law and Fact by failing to give reasons for the decisions and orders made.’’

Filed contemporaneously with the Memorandum of appeal was the Notice of Motion under certificate of urgency dated 16th January, 2015 for stay of the trial court orders of 2nd December, 2014 pending the hearing and determination of this appeal. The Respondent opposed the application through his replying affidavit sworn on 26th January, 2015. The application was heard and granted by this court’s order of 24th February, 2015. The court further issued inhibition orders against the title of the suit land under section

68 of the Land Registration Act No. 3 of 2012 upon it being disclosed that the title had been transferred to a third party following the order subject matter of this appeal. That last order was aimed at ensuring that the legal status of the suit land does not change any further while the appeal is being heard and determined.

- b. That after the record of appeal was filed and served, Mr. Kasamani and Okutta advocates for the Appellants and Respondent respectively consented on 11th May, 2015 to have the appeal dealt with through written submission. The Appellants submissions dated 2nd June, 2015 were filed on 4th June, 2014 while that of the Respondent dated 18th June, 2015 was filed on the same date.

1. SUMMARY OF APPELLANTS SUBMISSIONS.

- a. That the plaintiff had sought declaratory order and the orders sought and granted through the application were not based on the pleadings in the plaintiff.
- b. That the learned trial Magistrate failed to take note of the Appellants filed defence which had challenged the process through which the Respondent had acquired title to the suit land.
- c. That the orders granted were not meant to preserve the suit property and status quo as they amounted to a conclusive determination of title to and use of the suit land.
- d. That in the absence of a value of the suit land being disclosed in the pleadings, the lower court had no jurisdiction to deal with the matter and issue the orders it did.
- e. That declaratory orders can only be issued by the Superior court. That as declaratory orders are equitable relief orders, the Respondent needed to have clean hands to come to court for equitable orders but going by the Appellants pleadings, his hands were tainted.
- f. That the learned trial Magistrate's ruling offends Order 21 Rule 4 of the Civil Procedure Rules as it does not contain a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision.

2. SUMMARY OF THE RESPONDENT'S SUBMISSION.

- a. That the ruling appealed against related from an application for a relief sought at the interlocutory stage, for equitable order of injunction to preserve the status quo in favour of the Respondent pending the hearing and determination of the suit and therefore this court should not interfere with the learned Magistrates orders.
- b. That the evidence presented before the trial court showed that the Respondent was the registered proprietor of the suit land and was entitled to injunctive orders in view of the provisions of section 25 of the Land Registration Act and section 27 and 28 of the Registered Land Act (Repealed).
- c. That the Lower court order were in conformity to Order 40 of Civil Procedure Rules as the Respondent had established that he deserved the orders on a balance of convenience which is one of the prerequisite principles to be established under *Giella –vs- Cassman Brown* Case for an applicant to succeed.
- d. That the orders issued were not final as the parties to the suit are yet to comply and the hearing to commence.
- e. That the lower court's jurisdiction was not challenged during the hearing of the application and that cannot form part of this appeal.
- f. That the Appellants were still at liberty to move the trial court to vary or vacate any of the orders subject matter of this appeal but did not do so.
- g. That the lower court's jurisdiction had not been raised and in any case, a case filed in a court without jurisdiction cannot be transferred to another court.

3. ISSUES FOR DETERMINATION.

- a. Whether the orders issued by the learned trial Magistrate on 2nd December, 2014 are based on the prayers in the plaintiff.
- b. Whether the issue of jurisdiction was raised in the lower court and if not whether that can be an issue on appeal.

- c. Whether the orders issued on 2nd December, 2014 were final in nature and therefore capable of determining the suit without affording the Appellants an opportunity to be heard on their defence on merit.
- d. Who pays the costs.

4. ANALYSIS AND CONCLUSION.

- a. That starting with the issue of jurisdiction of the lower court to issue the orders of 2nd December, 2015, the court notes that the Appellants did not raise that issue in the joint statement of defence dated 5th November, 2014 or in the replying affidavit of Florentius Juma Nyongesa sworn on 10th November, 2014 or in their oral submissions before the trial court on 11th November, 2014. An issue that has not been raised and canvassed before a trial court so that a ruling thereof can be made cannot form the basis of an appeal that is subsequently filed. In this regard ground 6 of the appeal has no merit and fails.
- b. That the Appellants had in the replying affidavit of Florentius Juma Nyongesa sworn on 10th November, 2014 deponed to facts that seem to suggest that the Respondent and one Mathias Imbwagah engaged fraudulent means to procure the registration of the suit land with the Respondent. The Appellants had raised similar averments in their joint statement of defence and in paragraph 3 indicated their intention to file a counterclaim over the suit land. The court has perused the lower court record that has been annexed to this file and find no counterclaim has been filed by the Appellants to date. The ruling of 2nd December, 2014 granted prayers 3, 4, and 5 of the application dated 28th December, 2014. The prayer 3 was to ensure that Appellants stopped interfering with the Respondent's use of the suit land pending the hearing and determination of the suit. This order and prayers 5 for police to provide security was to allow the Respondent continue using the land by injuncting the Appellants who had allegedly entered thereon on 23rd October, 2014. The provision of **sections 25 of Land Registration Act** No. 3 of 2012 sets out the rights of a registered proprietor of a land. Under **section 26 of the said Act** the court is obligated to take a certificate of title issued by the Registrar **‘as prima facie evidence that the person names as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and title of that proprietor shall be not be subject to challenge, except –**
 - a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
 - b. **Where the certificate of the title has been acquired illegally, unprocedurally or through a corrupt scheme.’**

Though the Appellant had raised some issues of fraud in their replying affidavit and statement of defence, they still have a duty to offer evidence to prove the fraud allegations that they attribute to the Respondent. If they are successful, then they will have effectively challenged the Respondent title to the suit land but until then the learned trial Magistrate was correct to hold that the Respondent, who had availed documentary evidence of ownership of the suit land, had a prima facie case with a probability of success. The court therefore do not find any basis on which to fault the learned trial Magistrate in her exercise of discretion to issue prayer 3 and 5 of the application.

- c. That in respect of prayer 4 which was also granted in the ruling of 2nd December, 2014 the court is of the view that it was to be useful to both parties. The surveyor's report would confirm the ground boundaries of the suit land and therefore determine whether there had been any encroachment either way. In the view of this court, no party stood to be prejudiced in the execution of that order as it does not stop the Appellants from continuing with their intention to challenge the Respondents title and use to the suit land. The foregoing shows that ground 1, 2, 3, 4, 5, 7, and 8 have no merit and fails.
- d. That the learned trial magistrate had in her ruling dated 2nd December, 2014 indicated that she had given due consideration to the **‘ application, supporting affidavit and annexures thereto. I**

have also considered the replying affidavit as well as the oral submissions made in court. The issue for determination is whether the Applicant has satisfied the court that he had met essential ingredients principles for granting an injunction .” The learned trial Magistrate went on to set out the principles of **Giella –vs- Cassman Brown** [1973] E.A 358 before making her finding in respect of the two principles of prima facie case with a probability of success and irreparable damage and the reasons thereof. Though ground 9 of the appeal seems to take an issue with the learned trial Magistrate’s ruling claiming it offends **Order 21 Rule 4 of the Civil Procedure Rules**, this court do not find merit on that submissions. The fact that another person could have captured the issue for determination , the decision and reasons for the decision in different and possibly more clearer terms is not enough for the appellate court to interfere with the ruling on appeal. The court therefore finds that ground 9 has no merit.

e. That the court would wish to express its displeasure to the Respondent’s act of transferring the suit land on 23rd December, 2014 while he knew that it was the substratum of the suit that was still pending before the lower court The court will therefore allow the inhibition order it issued on 24th February, 2015 to remain in force so as to safeguard the suit property and allow the parties to move the lower court as appropriate.

5. That having found as above, the Appellants appeal on the interlocutory orders of 2nd December, 2014 in Busia CMCC, 437 of 2014 is without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE

DATED AND DELIVERED ON 22nd ...DAY OF JULY, 2015.

IN THE PRESENCE OF;

1ST APPELLANT.....present

2ND APPELLANT..... present.....

RESPONDENT..... present.....

COUNSEL.....MR. ONSONGO FOR KASAMANI FOR APPELLANT S AND MR. OKUTTA FOR RESPONDENT.