



No. 219

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 117 OF 2009

ZIPPORAH NYABOKE OMWENGA.....APPELLANT

VERSUS

ELIASIPH NYAKWARAH SAISI.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court

at Kisii, Hon. S. Wewa in CMCC No. 157 of 2009 dated 10th June, 2009)

1. Background

On 3rd March 2009, the respondent herein filed a suit against the appellant in the Chief Magistrate's court at Kisii namely, Kisii Chief Magistrate's court civil case No. 157 of 2009 (hereinafter referred to as "**the lower court or the lower court case**" where the context so admits) by way of a plaint dated 25th February, 2009 seeking; a permanent injunction to restrain the appellant by herself or through her agents, servants or anybody claiming through her "from trespassing and/or from planting maize and/or from interfering in any way with" the respondent's parcel of land more particularly known as **W. Kitutu/Mwakibagendi/1877** "until the resurrection morning", and costs of the suit together with interest. The respondent's suit was brought on the grounds that the respondent was at all material times the registered proprietor of the said parcel of land known as **W. Kitutu/Mwakibagendi/1877** ("hereinafter referred to as "**the suit property**") and that the appellant without any lawful cause trespassed on the same and illegally and forcefully started planting maize and beans thereon without the respondent's consent or knowledge. The respondent claimed further that despite several letters of demand to the appellant to stop the said acts of trespass, the appellant refused and/or neglected to do so and continued with the said unlawful acts. The respondent contended that as a result of the appellant's said acts of trespass, the respondent was unable to put the suit property to any profitable use and as such the respondent had suffered loss and damage arising from the loss of use of the said property. It is on account of the foregoing that the respondent sought a permanent injunction to restrain the appellant from continuing with the said acts of trespass.

2. The interlocutory application

Together with the plaint, the respondent brought an application by way of chamber summons application

dated 25th February, 2009 seeking an interlocutory injunction to restrain the appellant by herself or through her agents from interfering in any way with the suit property pending the hearing and determination of the suit in the lower court and that the OCS, Rioma Police Station do ensure compliance with the said order. The respondent's application was brought on the grounds that were set out on the face thereof and on the affidavit of the respondent that was sworn on 3rd March, 2009. The respondent's application was brought on the same grounds on which the suit in the lower court was based which grounds I have already highlighted above while setting out the background of this appeal.

3. In summary, the respondent reiterated in his affidavit in support of his application for interlocutory injunction that; he was the registered owner of the suit property on which the appellant had trespassed and that unless the appellant was restrained from continuing with the said act of trespass, the respondent stood to suffer irreparable harm which could not be compensated in damages. The respondent annexed to his affidavit in support of the application; a copy of undated agreement for sale between the respondent and one, **Joseph Maxwely Omwenga** made in the year 1998 relating to a purchase by the respondent from the said **Joseph Maxwely Omwenga** ("hereinafter referred to as "**Omwenga**") of a portion of the suit property measuring 522 feet by 69 feet at a consideration of kshs. 78,000/= of which the respondent paid a sum of kshs. 41,745.00 leaving a balance of kshs. 36,255.00 which the respondent was to pay in three (3) installments with effect from September, 1999 until payment in full and, a copy of the mutation form for the intended subdivision of the suit property into two (2) portions. The respondent's application was opposed by the appellant. Through a replying affidavit sworn on 27th March, 2009, the appellant contended that she was the widow and the legal representative of Omwenga who was the registered proprietor of the suit property. The appellant denied the respondent's claim that he was the registered proprietor of the suit property. The appellant contended that she had occupied the suit property together with her family for over 30 years and that Omwenga died in the year 2001 and left them in occupation of the suit property. The appellant annexed to her affidavit in reply; a copy of grant of letters of administration ad litem issued to her on 20th March 2009 in respect of the estate of Omwenga, a copy of a certificate of official search dated 9th August 2006 which showed that as at that date, Omwenga was the registered proprietor of the suit property and a copy of the title deed for the suit property in the name of Omwenga as the registered proprietor thereof. The appellant contended that the respondent had no known interest in the suit property and that the purported agreement between the respondent and Omwenga was not genuine as it was made by the respondent with the aim of grabbing the suit property.

4. The respondent's application was heard by S. Wewa, RM on 19th May 2009 when Mrs. Asati, advocate appeared for the appellant and Mr. Kaburi, advocate appeared for the respondent. In his submission, in support of the application, the respondent's advocate submitted that the respondent had purchased the suit property from Omwenga, deceased who was not married at the time and that sometimes in the year 2009 the appellant who was claiming to be the wife of Omwenga entered the suit property and started planting maize thereon. The respondent's advocate submitted that according to the mutation that the respondent had submitted to court, the suit property was sub-divided into two (2) portions and that the respondent was entitled to the portion marked as "B" in the said mutation form and that the appellant was claiming the entire parcel of land.

5. In her response to the respondent's advocate's submissions, the appellant's advocate submitted that the respondent had not made out a case for an interlocutory injunction. The appellant's advocate submitted that the respondent's case was premised on the fact that the respondent was the registered proprietor of the suit property a fact which the respondent had failed completely to prove. The appellant's advocate submitted that contrary to the respondent's allegation about his proprietorship of the suit property, the purported agreement for sale which the respondent had annexed to his affidavit in support of the application showed that the respondent had purchased only a portion of the suit property and that even for that portion, he had only made part payment. The appellant's advocate submitted that the respondent had not placed any evidence before the court that he had paid the full purchase price. The appellant's advocate submitted further that the purported agreement was neither dated nor witnessed by an advocate and that no evidence was placed before the court that a consent of the Land Control Board was obtained for the transaction within the prescribed time. The appellant's advocate submitted that in the absence of consent from the Land Control Board, the transaction was null and void and could not confer upon the respondent any proprietary interest on the suit property which could form a basis for an interlocutory

injunction. The appellant's advocate urged the court to dismiss the respondent's application for injunction with costs.

6. On a short ruling delivered on 10th June 2009, S. Wewa, RM allowed the respondent's application and ordered the costs to be in the cause. The learned resident magistrate held that the respondent had established the conditions set out in the case of **Giella –vs- Cassman Brown [1973] E. A. 358** for granting interlocutory injunction. The learned resident magistrate held that it was clear from the respondent's submission that the respondent had intended to purchase a portion of the suit property and that as to what portion the respondent was to purchase was a matter to be decided at the trial. The learned resident magistrate held further that the agreement for sale and the mutation form that was placed before the court showed that the respondent had interest on a portion of the suit property and for that reason, the appellant had no right to stake a claim over the entire parcel of land. The learned resident magistrate observed that the circumstances under which the said agreement for sale was entered into and the mutation drawn needed to be interrogated at the trial.

7. The appeal to this court;

The appellant was dissatisfied with the said decision of S. Wewa R.M (“the lower court”) and preferred this appeal against the same. The appellant has challenged the decision of the lower court on four (4) grounds namely;-

“1. The learned trial magistrate erred both in law and in fact in holding that the respondent had established a prima facie case.

2. The learned trial magistrate misguided herself in the principles applicable in granting temporary injunction.

3. The learned trial magistrate erred in law and in fact in not holding that the respondent had failed to demonstrate any grounds for grant of temporary injunction.

4. The learned trial magistrate erred in law and in fact in failing to discuss the respondent's application dated 25th February 2009 with costs.”

8. On 28th May, 2013, the parties agreed to argue this appeal by way of written submissions. The respondent filed her submissions on 16th July 2013 while the appellant filed his submissions on 30th July 2013. I have considered the proceedings and judgment of the lower court. I have also considered the appellant's grounds of appeal and the respective submissions by the advocates for the parties together with the cited cases. In my view, there is only one issue that arises for determination in this appeal namely; whether the respondent had met the conditions for granting interlocutory injunction in the lower court? Whether or not to grant an interlocutory injunction is a matter for the discretion of the court. This appeal therefore is against the exercise of the lower court's discretion. As was held in the case of **Mbogo vs. Shah [1968] E.A. 93**, an appellate court would not interfere with the exercise of the trial court's discretion unless it is satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there has been misjustice. The court's discretion must be exercised judiciously on well established legal principles and not at the whims of the trial court. In the case before me, what the trial court was to decide was whether or not to grant an interlocutory injunction that was sought by the respondent. That decision had to be made on the basis of the material that was before the trial court and on the well established principles on interlocutory injunction.

9. As I have already stated above, the lower court made a finding that the respondent had met the conditions for granting interlocutory injunction that were laid down in the case of **Giella –vs- Cassman Brown** (supra) namely, the respondent had demonstrated that he had a prima facie case with a probability of success against the appellant, and that he stood to suffer irreparable injury unless the injunction sought was granted. It is clear from the foregoing that the lower court appreciated the principles of law that were applicable to the case before it. What is in dispute is whether the lower court applied the said principles

correctly to the facts of the case. The appellant has urged me to find that there was no basis upon which the lower court could have held that the respondent had established a prima facie case with a probability of success against the appellant. On the other hand, the respondent has contended that the lower court was right in its finding that a prima facie case had been disclosed by the respondent.

10. I have perused the pleadings of the lower court, the application for injunction that was before the lower court and the affidavit that was filed in support thereof. I have also perused the affidavit that was filed by the appellant in response to the said application. I am in agreement with the submission by the appellant that the lower court erred in holding that the respondent had established a prima facie case against the appellant. There was completely no basis upon which the lower court could have arrived at that finding. The respondent's case in the lower court as set out in his plaint was that he was the proprietor of the suit property and that the appellant had entered the same without his permission and commenced cultivation of maize and beans thereon. This was the case that was the basis of the respondent's application for interlocutory injunction. The lower court held that on a prima facie basis, the respondent had established this case and granted the respondent the injunction sought that restrained the appellant from trespassing into the suit property pending the hearing and determination of the suit in the lower court. What did the respondent place before the lower court that could justify such a finding? To his affidavit in support of the injunction application, the respondent annexed a copy of the agreement for sale that he claimed to have entered into with Omwenga with regard to the suit property and a copy of what was said to be a mutation form through which the suit property was sub-divided into two portions.

11. As I have already stated above, the respondent's case was that he was the registered owner of the suit property. The onus was upon the respondent to satisfy the lower court on a prima facie basis that he was the registered owner of the suit property. With all due respect to the lower court, the respondent placed no evidence of whatsoever nature in proof of his alleged ownership of the suit property. The agreement for sale between the respondent and Omwenga that I have already referred to although purports to have been drawn by an advocate, was neither witnessed nor dated. Furthermore, the said agreement contrary to the respondent's contention showed that the respondent had only purchased a portion of the suit property and not the entire parcel. The purported mutation form on the other hand was neither signed by Omwenga who was the registered owner of the suit property nor registered at the land registry by the land registrar. The respondent also placed no evidence before the court that he had obtained consent of the Land Control Board for sub-division of the suit property and for the sale of a portion thereof by Omwenga to the respondent. The respondent did not also place any evidence before the court that he had paid the full purchase price for the suit property or for a portion thereof to Omwenga. I would wish to add that the evidence that was placed before the lower court in support of the application for interlocutory injunction and the submissions that were made by the respondent's advocate before that court were totally inconsistent with the respondent's case as pleaded in the plaint. Whereas the respondent had pleaded that he was the registered owner of the suit property, the respondent through annexures to his affidavit in support of the injunction application and his advocate's submissions made before the lower court attempted to prove that he had purchased and was entitled to a portion of the suit property. Unfortunately, the lower court was convinced by this evidence and submissions and proceeded to hold that the respondent had shown that he had an interest in a portion of the suit property which interest required further interrogation at the trial. This is what informed the lower court's finding that the respondent had established a prima facie case against the appellant. The respondent had not pleaded in the plaint or in any subsequent pleading that he was the owner of a portion of the suit property. The respondent did not even make the claim in the affidavit that he swore in support of the injunction application. The law is clear that parties to a civil suit are bound by their pleadings and a party would not be allowed without an amendment of pleadings to set up a case which is inconsistent with its own pleadings. This in my view is what the respondent was allowed to do in this case. In the case of, **Gandy vs. Caspair [1956] EACA 139**, it was held that unless the pleadings are amended, parties must be confined to their pleadings and that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record. Again in the case of, **Fernandes vs. People Newspapers Ltd. [1972] E.A. 63**, Law Ag. V.P. at page 64 said; " A civil case is decided on issues arising out of the pleadings. No allegation of negligence against the appellant has ever been made and it was not open to the court to find negligence on his part."

12. It is my finding that the respondent did not establish a prima facie case against the appellant in the lower court on the basis of which he could have been entitled to the interlocutory injunction that was granted to him. The appellant had placed ample evidence before the lower court that disproved the respondent's claim that he was the registered proprietor of the suit property. On the material before me, there is no basis upon which the lower court could have found that the respondent had established a prima facie case against the appellant and that he had also shown that unless the injunction was granted he would suffer irreparable injury. I find merit in all the grounds of appeal mounted by the appellant against the decision of the lower court.

13. Before concluding this judgment, I would have to revisit the issue that I underlined hereinabove at the beginning of this ruling. In the plaint in the lower court, the respondent had sought a permanent injunction against the appellant to restrain her from interfering with the suit property "***until the resurrection morning***". However in the chamber summons application for interlocutory injunction, the respondent sought a temporary injunction against the appellant pending the hearing and determination of the suit. There was no reference whatsoever to "the resurrection morning" which means that the injunction that was sought at the interlocutory stage was at variance with what was sought in the main suit. This is contrary to the provisions of Order VI Rule 6 of the repealed Civil Procedure Rules under which the application was brought and should also have disentitled the respondent to the injunction sought. However, since the issue was not raised by the parties in the lower court, I would not wish to determine this appeal based on the same save only to state that litigants should take their pleadings seriously and keep jokes aside. I have said enough prior to touching on this last point to show that the appellant's appeal must succeed.

14. The appellant's appeal against the ruling and order of the lower court made on 10th June, 2009 is allowed. The orders granted by the lower court on 10th June, 2009 are hereby set aside and in place thereof, the respondent's application in the lower court dated 25th February, 2009 is dismissed. The appellant shall have the costs of this appeal and the application in the lower court.

Delivered, dated and signed at KISII this 28th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:

N/A for the Appellant

Mr. Kaburi for the Respondent

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE