



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 109 OF 2010

HASSAN ALI OSMAN APPELLANT

- VERSUS-

ABDULRAHMAN M.. BASHEIKH &

MOHAMED AHMED MOHAMED RESPONDENTS

JUDGEMENT

On 30th of October, 2009 the appellant Mr.Hassan Ali Osman filed a Chamber Summons and prayed for the following orders

(b) *That the Court be pleased to issue a mandatory injunction compelling the defendant through its servants, agents or licencees to demolish the wall and structures build infront of the plaintiff's house on Plot Number 2681/V1/MN.*

(c) *That the Court do issue a temporary injunction restraining the defendant it's servants, agents or licencees from selling ,blocking access road construction or in any other way dealing with access space so as to render it unavailable for the use of the plaintiff's house and hotel pending the hearing and determination of this suit and or application.*

On the plaint filed on 18th July 2009 the appellant/plaintiff prayed for the following orders.

(9) . . . *permanent injunction against the defendant preventing him from selling , blocking an access road and a mandatory injunction to endorse the construction plan so as to afford the plaintiff a reasonable opportunity to carry on his affairs and shape his livelihood.*

(11) . . . *A declaration that the space infront of the building is an access space solely for the use occupancy and enjoyment of building in issue herein and that the defendant has no right of access or entitled to sell the same.*

There is no doubt that the prayers inthe application dated 30th October, 2009 and the prayers in the suit earlier filed on 18th July 2009 are the same. I will came to this point later. This matter came before Mrs. Rosemelle Mutoka the learned Chief Magistrate. After listening to the parties and perusing the

submissions she gave her ruling on 14th May, 2010. She dismissed the application. It is her ruling aforesaid that is subject to this appeal. The appellant has filed 12 grounds of appeal. These grounds can be condensed to the effect that the complaint is that the Learned Chief Magistrate erred in law in categorically stating that the access road belonged to and was part of the defendants plot and that she erred in her finding that the applicant/ plaintiff had no proprietary interest in the space between the road and plot no. 268/V1/MN and that there was no loss or damage to the plaintiff if the access space was blocked permanently by the defendants construction, the plaintiff having bought house without land.

Miss. Kidiki Learned Counsel argued the appeal. She argued that the Hon. Justice Mohamed Ibrahim had issued a temporary injunction against 2nd respondent from continuing with construction pending the hearing of the case and that it was this injunction that the Learned Chief Magistrate vacated. She argued that the space being built is the only access to the appellants house. That if the plaintiff is allowed to close it the appeal and indeed the pending case in the lower court shall be rendered nugatory. She argued that the appellant wished to turn the house he bought into a hotel and that without the access to it the hotel would be useless. She urged the Court to issue a permanent injunction to stop the defendant from construction on the said access road.

Mr. Kaburu Learned Counsel for the respondent argued that Civil suit No.. 2304 was filed when there were prayers for injunction by the appellant. That they were ex parte pending the hearing of the same inter partes. He argued that Justice Ibrahim granted the orders pending the hearing of this appeal. Mr. Kaburu argued that the Chief Magistrate rightly held that the open space belonged to the defendant. He argued that the Chief Magistrate ruled that the appellant did not buy that space, and that therefore the appellant could not obstruct the respondent from building on the same. Mr. Kaburu urged the Court to dismiss the appeal with costs, and discharge the injunction and the matter be referred back to the lower Court for full hearing.

In dealing with the matter before her, the Learned Chief Magistrate on page 6 of her judgment in line 9 she stated;

"It is my belief and thus finding that the portion in dispute was never part of the house that Abdi Ibrahim sold to the plaintiff and that the latter's affidavit is an afterthought intended to assist the plaintiffs claim and case."

She went on to say

"Secondly in apparent contradiction, the plaintiff claims that the portion in dispute does not belong to the defendant but rather to the Municipal Council of Mombasa. If it does not, then does she have the locus standi to sue the defendant? He is not an agent of the Municipal Council of Mombasa and has therefore no locus standi."

On page 6 line 22 she continues to say;

"The portion I find belongs to the defendant and he has the sole proprietary right to it."

On page 6 line 24 in apparent contradiction to the above holdings, she says this of the application.

"For the purposes of this application, it is not this courts duty to determine whether the plaintiff is entitled to the said portion as access to his house. This was not an issue and can be canvassed in the hearing of the main suit."

Coming back to the suit and application that was before the Learned Chief Magistrate, one can clearly see that the application and the suit applied for the same thing. When the Learned Chief Magistrate made the categorical findings of fact on the space/or area of access that the plaintiff's house belonged to the defendant, she unfortunately determined the suit. She did so without having had the benefit of the evidence from the parties. She was not able to see the witnesses, their demenour on cross examination. Her ruling in this case clearly compromised the pending case in Court. This occasioned a miscarriage of

justice on the part of the plaintiff/ appellant herein. This Court and the Court of appeal has severally pointed out the dangers in making definite findings in interlocutory proceedings.

1 Trinity Prime Investment Ltd. vs- Savings & Loan & Another Civil Appeal No. 90 of 1989.

Shadrach Kiruki M'Laari v Samuel Kiptanui Korir & 2 others Civil Case No. 2013 eKLR

Africa Safari Club Ltd v Commissioner of Police and 6 others Civil Application No. 248 of 2011; (2013)eKRL.

Mr. Kaburu Learned Counsel for the respondent urges the Court to dismiss this appeal, discharge the orders and send the case to the lower Court for hearing. If the court were to allow Mr. Kaburu's request what issue would be before the trial Court? Would not the Court find that the issues had already been dealt with in the ruling of the Chief Magistrate?. Would this not amount to wasting of valuable judicial time?.

With profound respect, I find that the Learned Chief Magistrate misdirected herself and erred when she made definitive findings that determined the suit on an interim application. Those findings and orders made on 14th May, 2010 are set aside. They are substituted by an order of status quo as ordered by Justice Ibrahim This should be maintained until the suit is heard and all issues in CMCC 2304 of 2009 are canvassed before the trial Court.

The end result is that this appeal is allowed with an order of status quo pending the hearing of the suit herein. The costs of the appeal shall be to the appellants.

It is so ordered.

Dated and delivered in open Court at Mombasa this 14th day of February, 2014.

S.N. MUKUNYA

JUDGE

14.2.2014

Read in the presence of:

Mr. Njoroge Advocate holding brief for Maina Advocate for the applicant

Mr. Kaburu Advocate for the respondent
