



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 98 OF 2012

(Being an appeal from the Ruling of Hon. J. Njoroge, SPM in CMCC No. 579 of 2011 delivered on the 23rd April, 2012)

RELIANCE METALS LIMITED..... APPELLANT

VERSUS

JAMES NJUGUNA MUGO.....RESPONDENT

JUDGMENT

1. This appeal arises from the decision of Hon. J. Njoroge, Senior Principal Magistrate made on 23rd November 2012 wherein the learned trial magistrate granted the Respondent an injunction to restrain the Appellant from trespassing on the property known as NAKURU MUNICIPALITY BLOCK 4/54, evicting or interfering with the Respondent's peaceful enjoyment and use of the said land or otherwise interfering with the same.

2. The facts leading to this appeal may be related briefly. James Njuguna Mugo (*the Respondent herein*) filed a suit in the lower court wherein he alleged that he was a tenant of portions Nos. B, C, D and E on land parcel No. NAKURU MUNICIPALITY BLOCK 4/54 (*suit premises*) having leased the same from Samuel Mbugua Ikumbu T/A Heiwa Autospares and Distributors Limited. The initial lease agreement was for a period of 5 years commencing the year 2005. Upon its expiry, the same was renewed under a Lease Agreement dated First January 2010 and registered on 4th May 2011.

4. During the pendency of his lease the suit premises were sold to Reliance Metals Limited (*the Appellant*) by Barclays Bank of Kenya Limited in exercise of their statutory power of sale pursuant to a Charge that had been created thereupon. Upon being declared the successful bidder during a public auction conducted on 13th October 2010 and payment of 25% of the Kshs. 30,000,000/= purchase price, the Appellant was issued with a Memorandum of Sale and the property was later registered in its favour on 22nd June 2012.

5. After purchasing the property, the Appellant issued the tenants who included the Respondent with a two months notice dated 19th October 2010 to vacate the premises and a further 14 days eviction notice on 16th June 2011. Aggrieved by these notices, the Respondent filed a suit before the lower court in which he sought a declaration that the Respondent is bound by the terms of the lease agreement that subsisted between the Respondent and the original owner Samuel Mbugua Ikumbu and a permanent injunction restraining the Respondent from interfering with his rights under the lease.

6. Together with the Plaintiff, the Respondent filed an application dated 1st July 2011 seeking *inter alia*, temporary injunctive orders restraining the Appellant from with interfering with his rights under the Lease and with his occupation and use of the property. The Appellant on its part filed an application dated

24th October 2011 wherein it sought a mandatory injunction compelling the Respondent to deliver vacant possession of the suit premises. Both applications were heard together and by the Ruling issued on 23rd April 2004 the court found that the Respondent had demonstrated that he was in occupation of the suit premises pursuant to an unexpired lease agreement and further that he had been paying rent under the lease. He was therefore not a trespasser as alleged and had established a *prima facie* case to warrant the issue of the injunctive orders sought pending the hearing and determination of the suit. The court therefore granted the Respondent the injunctive orders sought in his application dated First July 2011 and dismissed the Appellant's application dated 24th October 2011.

7. Aggrieved by this finding, the Appellant appealed to this court and in a Memorandum of Appeal dated 7th May 2012 set out the following grounds of appeal -

1. *that the learned magistrate erred in fact and law in failing to appreciate that the Appellant was the registered proprietor of the suit property and an injunction could not issue against it especially when the Respondent had failed to disclose any rights,*
2. *that the learned magistrate erred in law and fact in failing to appreciate that the Appellant and the Respondent had no landlord-tenancy relationship and in essence the Respondent was actually a trespasser on the Appellant's property after having been given notice to vacate the suit premises and failing to comply with that notice,*
3. *The learned magistrate erred in law and fact when he failed to appreciate and apply the principles of granting a mandatory injunction to evict the Respondents from the Appellant's parcel of land,*
4. *The learned magistrate erred in law and fact in finding that the Respondent had satisfied the prerequisites for the grant of an order of injunction against the Appellant and more so because the Respondent was depositing rent in court and that the Appellant had not shown it would suffer irreparable harm and loss,*
5. *the learned magistrate erred in law and fact in failing to consider all the facts, documentary evidence, written submissions and the binding authorities,*
6. *the learned magistrate applied wrong principles of law in arriving at the Ruling.*

8. And for those reasons, the Appellant prayed for the appeal to be allowed, the Ruling delivered on 23rd April 2012 be set aside, the Respondent's application dismissed with costs and the Appellant's application dated 24th October 2012 allowed with costs. In the alternative, the Appellant prayed that the appeal be allowed in terms of the prayers sought above and the case between the parties be determined finally pursuant to the provisions of Section 78 of the Civil Procedure Act, (*Cap 21 Laws of Kenya*).

9. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 20th November 2013 while the Respondent's were filed on 18th March 2013. I have carefully considered the record of appeal, and the submissions of the parties and the authorities annexed thereto. The main issue for determination as disclosed by the pleadings is whether the trial court erred in finding that the Respondent herein had an interest in law capable of being protected by way of temporary injunction and which prevented the grant of the mandatory injunction compelling him to vacate the suit premises.

10. An interlocutory injunction under Order 40 of the Civil Procedure Rules, 2010 is intended to preserve the status quo of the property at the time when the cause of action arose and to protect the rights of the parties which may be defeated if the orders are not granted pending the hearing and determination of the matter before court. In granting these orders, the court exercises the discretion vested in it which will only be interfered with by an appellate court where it is satisfied that the trial court exercised its discretion under a mistake of law or on wrong principles of law or under misapprehension as to the facts or that the court took into account irrelevant matters or failed to exercise its discretion at all or that its order would result in injustice. (See **MBOGO & ANOTHER Vs. SHAH [1968] E.A 93**).

11. The principles for grant of an interlocutory injunction were firmly laid down in **GIELLA Vs. CASSMAN BROWN [1973] E.A 358** in the following words-

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. 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.”

12. In his first and second grounds of appeal, the Appellant argued that the Respondent failed to establish a prima facie case, to warrant the grant of the orders sought as he failed to demonstrate a legal interest in the land. **Firstly**, it was his submission that there was no valid lease as the consent of the Chargee had not been obtained before the same was leased to the Respondent. He relied on Section 69 of the Registered Land Act under which an implied condition is created in the charge that the chargor shall obtain the written consent of the chargee before leasing the **charged** property for a period of more than 1 year.

13. However, in the instant case, I have perused carefully the record of appeal and find no evidence of when the Charge was created to enable this court to make a finding that in fact when the Sub-Lease dated 1st January 2010 was made, there was in existence a Charge and without the consent of the chargee, or that such terms were not binding upon him or a person who subsequently purchased the property from the chargee in exercise of its powers under the Charge. Neither the Charge document nor statements from the chargor or chargee on this fact have been exhibited. Consequently, I find that this is a question that will be determined at the trial after evidence has been presented to the court.

14. On the **second** ground, the Appellant argued that the Respondent had no rights capable of being enforced against the Appellant as the registered proprietor of the land. It was his case that the lease relied upon by the Respondent was for a term of 5 years and having not been registered, was not enforceable against third parties. He relied on the holding in **NEW STANLEY HOTEL LIMITED Vs. ARCADE TOBACCONISTS LIMITED (NO. 2) [1986] KLR 760** where the court considering the question whether an interest created under a sub-lease was capable of being enforced against a subsequent purchaser held-

“As the sublease between the vendor and the defendant was never registered, it was ineffectual to pass any interest in land on transfer to the plaintiff then.... there was no privity of contract between the plaintiff and the defendant tenant on account of the sub-lease. The plaintiff was a third party and the sub-lease being an equitable interest, it could be enforced between the parties to it but it could not affect the third parties.”

14. It is not contested that the Appellant is the registered proprietor of the suit land and his title is only subject to the limitations set out in the Registered Land Act (Repealed) which provides-

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

15. In the instant case, the sub-lease dated 1st January 2010 was registered on 19th May 2011, after the suit premises had been sold by public auction to the Appellant but before the certificate of lease was issued to it on 22nd June 2011. It was not successfully registered as an encumbrance to the Appellant's

certificate of title and is not reflected therein. Consequently at the time when the suit premises was being sold by the Bank in exercise of its statutory powers of sale when the rights over the property had passed from the original owner and were now vested in it, the Respondent had not acquired a lease for a period of 5 years as such a lease ought to have been registered as provided for under Section 47 of the Registered Land Act for it to be complete and have effect.

16. The question that follows is whether at that time of registration of the Lease, the Respondent had acquired a legal interest over the suit premises which was enforceable against the Appellant, the new owner of the premises.

Section 46 of the Registered Land provides-

46. (1) Subject to any written law governing agricultural tenancies-

(a) where in any lease the term is not specified and no provision is made for the giving of notice to determine the tenancy, the lease shall be deemed to have created a periodic tenancy;

(b) where the proprietor of land permits the exclusive occupation of the land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy;

c. the period of a periodic tenancy created by this subsection shall be the period by reference to which the rent is payable, and the tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other written law, be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

17. In the case of **WJ BLAKEMAN LIMITED Vs. ASSOCIATED HOTEL MANAGEMENT SERVICES LIMITED [1986] KLR 156-** the court held that an unregistered lease was void as it concerned a lease for more than one year. It could however operate as an agreement inter-partes which if followed by possession and payment of rent creates a tenancy from month to month. Further even if there had been no written agreement for extension of the earlier lease, where the Respondent continued in occupation of the property with the consent of the landlord, and the latter continued to receive rent, a periodic tenancy is created under Section 52 of the Registered Land Act and the Respondent acquired a holding over interest. A periodic tenancy created under Section 46 is deemed to be an overriding interest attached to the land although not registered under Section 30 of the Registered Land Act. It states-

S. 30 Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

.....

(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;

.....

18. Consequently at the time when the ownership of the property passed to the Appellant, the Respondent had been in occupation of the suit land with the consent of the original owner and had been paying rent on a monthly basis. He therefore had acquired an interest over the said land. The question of whether this interest could be properly enforced as against the Appellant, is one for determination by the trial court. At this juncture the Respondent only needed to demonstrate that he possessed sufficient interest in the suit land which ought to be protected pending the final determination of the rights and interests of the parties.

19. **Thirdly**, it was contended by the Appellant that the Respondent became a trespasser when the notices to vacate the suit issued to him expired. It was his case that upon purchasing the property, it caused to be

issued a notice for sixty days on 19th December 2010 and a further fourteen days eviction notice on 16th June 2011. When the period lapsed, any rights that the Respondent may have had on the property were extinguished.

20. Under Section 27 of the Registered Land Act, rights over property as proprietor are vested upon registration of the interest. It provides as follows-

27. Subject to this Act -

.....

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

21. By the above section an interest as proprietor of land under a lease is created upon successful registration of the lease. In the instant case, the lease in favour of the Appellant was registered on 22nd June 2011. Prior to such registration the Appellant had a beneficial interest only as a purchaser and therefore remains a question whether as such it could properly issue notices to the Respondent to vacate the suit premises, as it did on 19th December 2010, and 16th June 2011. These are proper questions to be answered by the trial court.

22. Consequently I agree with the trial court's finding that the Respondent was able to demonstrate rights and interests over the suit premises which ought to be finally determined upon full hearing. I therefore find no merit in the first and second grounds of appeal.

23. In its third ground of appeal, the Appellant contended that the trial court erred in failing to issue a mandatory injunction against the Respondent compelling him to vacate the premises and grant the Appellant vacant possession thereof. A mandatory injunction will only be issued at an interlocutory stage in clear and plain cases where it is obvious that the party against whom it is sought is the wrong doer. This was the holding of the Court of Appeal in ***KAMAU MUCUHA –VS- THE RIPPLES LTD [1990-1994] EA 388 where the court observed*** thus:-

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or influence a decision thereon, I am of the view that the order of the learned judge, granting a prohibitory and mandatory injunctions ought not to be disturbed at this stage.”

24. And in ***KENYA BREWERIES LTD & ANR –VS- WASHINGTON OKEYO (2002) IEA*** the court held that the test for grant of a mandatory injunction was correctly stated I Vol. 24 Halsburys Laws of England 4th Edition para 948 that provides thus:-

948 “A mandatory injunction can be granted on an interlocutory application as well as at the hearing. But in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”

25. In the instant case, I find that the Appellant has not demonstrated any special circumstances to warrant the grant of the mandatory injunction sought. The facts as disclosed herein demonstrate that there are justiciable issues that need to be determined during trial before an adjudication of the rights can be made.

26. It was further argued that in the fourth, fifth and sixth grounds of appeal that the Appellant was suffering irreparably as a result of the continued occupation of the land by the Respondent, that it had acquired a loan Kshs. 30 million to purchase the property which it was still servicing, and had also been

unable to develop the property.

27. The court must balance the interest of the parties to arrive at a just determination. The Respondent had been in possession of the suit premises, where he was carrying on a business and had made improvements thereon. Having established on a *prima facie* basis that he had an interest in the premises, it was just for the status quo to be maintained pending the final determination of the case. In the instant case, any loss which may be suffered by the Appellant could be properly remedied by an award of damages. In addition the rents for the property continued to be deposited in court by the Appellant. I therefore find no merit in the fourth, fifth and sixth grounds of appeal.

28. The Appellant sought an alternative prayer in the appeal for this court to determine the case between the parties finally in exercise of its powers under Section 78 of the Civil Procedure Act.

29. In determining this matter, this court is exercising its appellate jurisdiction. The jurisdiction conferred by S. 78 is exercisable only where the matter before this court was finally determined by the court trying the suit and the said section allows the Appellate court to make final orders on the matter as those that could have been made by the trial court whose decision is being challenged. In the instant case, the decision being challenged arose out of two cross-interlocutory applications made by the parties. Therefore this court cannot determine substantive matters that are yet to be determined by the trial court. In doing so the Appellate court would be trying a matter that is pending before a court of competent jurisdiction and it is barred from doing so under Section 6 of the Civil Procedure Act. Consequently, any determination it makes outside the appeal and that relate to the substantive issues would be null and void ab initio and therefore unenforceable.

30. In the circumstances I find no merit in this appeal and find that the trial court's decision to have been sound and therefore uphold the same. The appeal herein is therefore dismissed with costs.

Dated, signed and delivered at Nakuru this 28th day of March, 2014

M. J. ANYARA EMUKULE

JUDGE