



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 1 of 2010

PRAVIN GALLOT. APPELLANT

VERSUS

MOHAN GALLOT. RESPONDENT

(From the ruling and orders of K Muneeni, Principal Magistrate in Kiambu SPMCC No. 339 of 2009)

J U D G M E N T

In a Chamber Summons dated 25th November, 2009, the Respondent who was the Plaintiff at the lower court of Kiambu, Under Civil Case No. 339 of 2009 sought inter alia, the following orders: -

i. That this honourable Court be pleased to grant an order of temporary injunction restraining and/or prohibiting the Defendant (appellant herein), by himself or his servants or associates ... from bringing into, admitting, placing in situ or in any other way, keeping guards or any security guards, watchmen any security workers who are not employees of the plaintiff or without permission of the plaintiff, on Gallot Estate being L.R. No. 7022/7 ..., pending the hearing and determination of this application for such period of time as this court may deem fit.

ii. That this court be pleased to grant ... (a similar order pending the hearing and determination of this suit ...)

iii. That this Honourable Court ... issue a temporary injunction against the Defendant restraining or prohibiting the Defendant ... from refusing, preventing, barring or in any way denying plaintiff and his family and friends, visitors etc, ... entry or causing violence, etc ... when entering, having entered or are on the said premises ... until the final determination of the application and/or suit.

iv. That OCPD Kiambu was to assist in implementation of the orders issued.

The record shows that the honourable lower court at Kiambu actually on 25th November, 2009, granted ex parte orders sought above until the Chamber Summons would be heard and determined. Upon that event and on being served with the ex parte orders, the Defendant herein filed a Notice of Motion dated 26th November, 2009 seeking that: -

i) The orders of injunction made ex parte on 25th November, 2009, be varied, be set aside and/or be discharged.

ii) that the orders meanwhile be stayed pending the hearing and determination of the Notice of

Motion.

iii) that the main suit itself be stayed pending the hearing and determination of Nairobi HCCC No. 2247 of 2007 and Nairobi HCCC No. 49 of 2009 in both of which the subject matter and parties we allegedly similar.

The record further shows that both the above applications, were by consent, jointly heard on 17th December, 2009 and the following orders were made by the Honourable Mr. K Muneeni, Principal Magistrate, Kiambu: -

i) That this Honourable court do hereby grant an order of Temporary injunction, restraining and/or prohibiting the defendant (appellant herein)... from bringing into, admitting, placing in suit or in any other way keeping guards or security guards, watchmen and security workers who are not employees of the plaintiff (the Respondent herein) or without permission or consent of the plaintiff on Gallot Estate being L.R. No. 7022/7 Kiambu District, until the suit is heard and finally determined.

ii) That this Honourable Court ... do issue a temporary injunction against the Defendant restraining or prohibiting the Defendant ... from refusing, preventing, barring or in any way denying plaintiff... entry or causing violence, harm ... etc when entering, having entered or while on L.R. No. 7022/07, Kiambu District.

iii) That OCPD Kiambu Police Station to ensure implementation.

iv) That the Appellant's Notice of Motion dated 26th November, 2009 aforementioned was to stand dismissed.

It was the above orders that led to this appeal being filed by the appellant who was the Defendant in the lower Kiambu court suit No. 339 of 2009. Before I examine the grounds of appeal, however, it is necessary to understand other issues closely related, particularly the relevancy of Nairobi High Court Civil Cases No's 2247 of 2007 and HCCC 49 of 2009.

The Plaintiff in Nairobi HCCC No. 2247 of 2007 is also the Plaintiff in Kiambu SPMCC No. 339 of 2009 and is the Respondent in this appeal. He claimed for vacant possession of Kiambu L.R. No. 7022/7, as well as, permanent injunctions restraining the appellant herein from interfering with or trespassing on the said piece of land or premises therein. He also sought mesne profits and in the alternative, orders of eviction of the defendants who included the Appellant, Pravin Galot and two others, Ganeshalal Pusharan Galot and Rajesh Galot, apparently, the two sons of the Appellant herein.

At the same time a Chamber Summons dated 30th January, 2009 was also filed by the Respondent herein under suit Nairobi HCCC No. 2247 of 2007 Respondent seeking the following orders: -

i) that the Respondents (of whom one is the Appellant) be restrained by a temporary injunction, from wasting, damaging ... etc or otherwise interfering with the ownership of, occupation, enjoyment, access of plaintiff or his agents from the L.R. No. 7022/7 Kiambu, pending the hearing and determination of the application and suit.

ii) That an order of mandatory injunction be issued to compel the Respondents and their agents to remove all security guards, agents, servants and other strangers form the said premises, L.R. No. 7022/7, Kiambu forthwith.

iii) That orders of eviction issued against the Respondents and the OCPD Kiambu Police Station assist in implementation of the orders.

Furthermore, the Respondent herein also filed a further suit, Nairobi HCCC No. 49 of 2009 on 5th

February, 2009 in which he also claimed the following reliefs in summary: -

- i) An order disentitling the defendants therein and their agents, a right of entry and remaining in occupation of any part of L.R. No. 7022/7 Kiambu.**
- ii) Aggravated damages for trespass and meisne profits.**
- iii) An order of injunction restraining the defendants or agents from continuing with intimidation or coercion of the plaintiff or his agents.**

It is further observed that a Chamber summons dated 5th February, 2009 was filed under the new suit above-mentioned by the Respondent in this appeal, seeking injunction orders against the Defendants who were now six (6) inclusive of the three (3) Defendants of Nairobi HCCC No. 2247 of 2007. The application sought to restrain the Defendants from entering into, or committing acts of trespass on, or remaining or residing in or within any of the houses or in L.R. No 7022/7 Kiambu aforesated.

The record further shows that in response to the orders of injunction sought by the Respondent herein, the Appellant filed a Chamber Summons under the suit Nairobi HCCC No. 49 of 2009, dated 16th July, 2009, seeking temporary injunction orders restraining the plaintiff therein (here the Respondent) from interfering in any manner, with the Defendant's quiet possession, enjoyment and right of access in the premises known as L.R. No. 7022/7 Kiambu aforesated, until the application and suit are determined.

It is not in dispute that the three main suits i.e. Kiambu CMCC No. 339 of 2009, i.e. Kiambu CMCC NO. 339 of 2009, the Nairobi HCCC No. 2247 of 2007 and the Nairobi HCCC No. 49 of 2009, are all still pending and unheard. The application filed under Nairobi HCCC No. 2247 of 2007 was heard ex parte on 30th January, 2009 by Kihara Kariuki, J and he granted interim injunction to the effect that the Defendant was restrained from wasting, damaging, removing, disposing or otherwise interfering with the ownership, occupation, enjoyment and access of the plaintiff of, and to, L.R. No. 7022/7 Kiambu, until the application is heard. The court however by conduct, declined to grant any injunction towards removal of the Defendant's security guards until the hearing inter partes and determination of the application. The application has so far not been heard inter partes.

Thereafter, the two High Court suits abovementioned were consolidated and directions taken by Mbogholi Msagha, J on 27th July, 2009. On that date the Judge gave orders to the effect that until all the applications pending in the files were heard and disposed off, a **status quo** regarding all the matters in the suit property and in dispute, be maintained.

As earlier hereinabove shown, the Respondent in this appeal, later filed a fresh suit in the lower court at Kiambu, being Kiambu CMCC No. 339 of 2009 under which both the said Respondent and the Appellant also filed interlocutory applications. The applications were jointly heard by Mr. Muneeni Senior Principal Magistrate on 17th December, 2009 and while he dismissed the application of the Appellant herein seeking stay of the interim orders of 25th November, 2009 and the stay of the whole suit above mentioned until the High Court suits are heard, he nevertheless granted the orders sought by the Respondent herein. The orders the Honourable Magistrate granted included, in summary: -

a) that an injunction do issue against the Defendant (appellant herein)restraining and prohibiting him and his agents from placing insitu or in any other way keeping guards or security guards who are not employees of the Respondent without appellant's permission, on L.R. No. 7022/7, Kiambu until the suit is heard and finally determined.

b)that a temporary injunction do issue against the Defendant (Appellant) restraining and prohibiting him from preventing the Respondent or agents from entering into the premises or causing violence or harm on the Respondent while in the said premises.

The bone of contention, as this court understands it therefore, is whether or not the honourable Senior

Principal Magistrate, had at the time he made the above orders, power and jurisdiction to make them. If he did not have the jurisdiction, this court will rule and find that the orders were and are void.

In his Memorandum of Appeal, the Appellant raised in summary, the following grounds of this appeal before the court: -

1)that the learned trial magistrate erred in law and fact in granting orders of injunction without the satisfaction by the Respondent of principles of granting such injunctions.

2)that the learned magistrate erred in law in granting mandatory injunctions at the interlocutory stage.

3)that the learned magistrate erred in law and fact and had no jurisdiction in granting injunctions in disregard of the existing orders of status quo of the High Court dated 27th July, 2009 under Nairobi HCCC No. 2247 of 2007 and 49 of 2009.

4)that the learned trial magistrate erred in granting equitable or discretionary orders where the application had failed to disclose material facts.

5)that the learned trial magistrate erred in rejecting stay application made by the appellant in the circumstances of the case.

I have carefully perused all the relevant records inclusive of the lower court suits and applications, the orders granted under the applications, the two High Court suits and the applications made thereunder by the High Court Judges. I am certified that the main order or orders in dispute at this juncture are the orders concerning the removal of and keeping them out, the appellants security guards from the premises known as L.R. No. 7022/7, Kiambu, otherwise called Galot Estate.

It is not in dispute that the Respondent filed the Kiambu CMCC No. 339 of 2009 after he had much earlier and recently filed Nairobi HCCC No. 2247 of 2007 and Nairobi HCCC No. 49 of 2009. There is also no dispute that the respondent's prayer for injunction orders to restrain the Appellant from maintaining the presence of security guards in the said premises had not been granted by Kihara Kariuki, J in January, 2009, despite granting other reliefs touching on ownership, possession and enjoyment thereof, in relation to the premises.

In my understanding of the above orders, the Learned Judge was not satisfied at that stage that it was proper to grant an order for removal of the security guards. The Judge, thus, at that stage, declined to grant such orders although he did not specifically state so and could have indeed declared so.

A second point of importance to note is that in July, 2009 the two High Court cases, together with the applications for injunctions pending under them, came before Msagha Mboghli, J and he made orders that there be status quo over the issues and orders made in respect of the premises. The reasonable and logical interpretation of the status quo order, is that any orders made by the court by then would remain as is, and the situation on the ground of the premises constituting L.R. No 7022/7, Kiambu at that time, should remain constant and be maintained so until the applications would be heard and determined.

Come November, 2009, the Respondent filed a fresh suit in Kiambu court, being Kiambu CMCC No. 339 of 2009. He sought, among other reliefs, an order of mandatory injunction against the Appellant herein, to remove and be prevented from introducing security guards on the premises. I have examined the pleadings forming the Respondents applications aforesaid. They indeed include the issue and orders of removing or keeping out of L.R. No. 7022/7, Kiambu security guards of the appellant unless there was permission of the Respondent. The main party against whom the said orders were to operate, were Moham Galot and his two sons in HCCC No. 2247 of 2007 while in HCCC No. 49 of 2009, it was the same parties, plus three sons of the main party, Pravin Galot. However, in Kiambu CMCC No. 339 of 2009, the party was Pravin Galot, alone. It is clear accordingly, that Pravin Galot was a party in all the three suits and any orders made in any of the three suits, would affect him.

It is not clear why the Respondent herein found it necessary to file three suits in three courts, seeking similar reliefs. It is also baffling that applications filed by the Respondent under each of the three suits sought similar injunction orders to remove and keep out the Appellant's security guards from the suit premises. The Respondent did not give an acceptable legal explanation. The Appellant attempted an explanation when he argued that it was because the Respondent failed to obtain the relevant injunctions under HCCC No. 2247 of 2007 which was the earliest suit to be filed.

The issue before this court, however is whether the honourable trial magistrate at Kiambu, had jurisdiction to issue injunction orders he did, while the status quo order of the High Court made earlier still stood? In my view, the order made by the High Court to maintain status quo was a substantive order, though interlocutory and procedural. Only the High Court or a higher court on appeal, could vary, discharge or set aside those orders. The principle of precedent which lays down the hierarchical nature of our court system would and do so demand.

It is not as if the honourable trial magistrate was not aware of the existence of the orders of status quo made earlier by the High Court. Far from it, because the same was clearly brought to his attention by the sworn affidavit of the Appellant, Pravin Galot, dated 26th November, 2009, which was filed in support of one of the two applications which the trial court was hearing and which he considered before making the orders appealed from. In my view, therefore, the Senior Learned Magistrate's orders in that sense, were made without jurisdiction and were accordingly null and void.

Besides the findings above, it not in dispute that the Kiambu suit and application were filed on 25th November, 2009 while the Nairobi HCCC No. 2247 of 2007 was filed in 2007 and the application seeking removal of the security guards which was eventually not granted, was filed and heard on 30th July, 2009. I am not in doubt and it is this court's finding, that the principle of res subjudice embedded in Section 6 of the Civil Procedure Act which states thus:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

In this case the issue of removal of security guards had been sought by the Respondent (Plaintiff) in Nairobi HCCC No. 2247 of 2007 and declined on 30th January, 2009. The parties were the same although more parties had been included in the two Nairobi High Court suits. The orders of injunction ordering removal of security guards from the premises were made against Pravin Galot who was also a party in those two suits. In any case, the other parties in the two High Court suits were the sons or close relatives or relatives due to their benefiting through Pravin Galot. And finally, the main subject matter upon which the interlocutory relief of injunction was sought and obtained was the same i.e. L.R. No. 7022/7, Kiambu otherwise called Galot Estate.

In the view and finding of this court, the Senior Principal Magistrate who was confronted with the above facts, should have downed his tools by staying the suit before him until the Nairobi HCCC No. 2247 of 2007 and Nairobi HCCC 49 of 2009 are heard and finally determined one way or the other. He would then know what are the relevant orders to make. Instead he ignored the existence of the High Court suits and the orders already made therein, and proceeded to make the orders now the subject of this appeal. In the view of this court, his orders were made in error and in contravention of the said Section 6 of the Civil Procedure Act.

Thirdly, it is questionable as to whether the Respondent (plaintiff) in the Kiambu CMCC No. 339 of 2009 made sufficient disclosure to the trial court at Kiambu. In this court's view, notwithstanding the duty of the Appellant (Defendant therein) to bring all relevant information to the trial court) the applicant/plaintiff should have deponed to the effect that the issue of removal and keeping out of the Galot Estate, security guards, was an issue and relief which he had sought under the earlier High Court suits, but failed to obtain. This, the Respondent herein again, had failed to disclose to the Kiambu Court. Furthermore, it was

his duty to specifically bring it to the attention of the Kiambu Court of the orders of status quo earlier made by the High Court. This, the Respondent herein again, had failed to disclose. In view of the fact that the Respondent sought equitable or discretionary reliefs of injunction which required full disclosure of all relevant information to assist the court make a judicious decision, his failure to disclose such information misled or may have misled the trial court. This court in the circumstances finds that had full disclosure been made, the trial magistrate could have reached a different finding.

In conclusion, this appeal has merit. it is hereby allowed with the following orders:-

a) The appeal is allowed and the orders of injunction of Kiambu Senior Principal Magistrate dated 17th December, 2009 are hereby set aside.

b)The Kiambu CMCC No. 339 of 2009 is hereby stayed until the Nairobi HCCC No. 2247 of 2007 and Nairobi HCCC No. 49 of 2009 as consolidated, are heard and finally determined.

c) Costs of this appeal and of the Kiambu Application dated 25th November, 2009 and Kiambu Application dated 26th November, 2009 filed by the Defendant therein, be met by the Respondent herein.

Dated and delivered at Nairobi this 14th day of March, 2013.

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D A ONYANCHA

JUDGE