Nzioka v Katua & 3 others (Environment and Land Appeal E004 of 2020) [2022] KEELC 3657 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL E004 OF 2020

CG MBOGO, J

MAY 31, 2022

BETWEEN

BENSON WAITA NZIOKA ..... APPELLANT

AND

ALBANUS KATUA & 3 OTHERS ..... RESPONDENT

(Emanating from the ruling delivered by Honourable B.N. Ireri delivered on 26th October, 2020 in Makindu ELC Case No. 22 of 2020)

JUDGMENT

1. On August 13, 2020, the appellant filed a notice of motion application at the Magistrates Court in Makindu wherein he sought he sought the following orders from that court:

   a) Spent;

   b) Spent;

   c) This honourable court be pleased to issue an order of injunction barring the defendants whether by themselves their agents and/or servants from blocking the access road to and/or in any way interfering with the plaintiff's occupation and use of Makueni/Ngulu/21 pending the hearing and determination of this suit; and

   d) The costs of this application be in the cause.

2. By a ruling delivered on October 26, 2020, the trial court found the application lacking in merit, therefore, it was dismissed with costs to the respondents. In its reasoning, the trial court found that the appellant had not demonstrated an existence of a *prima facie* case since the evidence relied on had shown that there was no access road in the area the appellant had claimed there was one (access road). Aggrieved by the aforesaid ruling of the trial court, the appellant filed the instant appeal *vide*

a memorandum of appeal dated November 13, 2020 wherein he raised the following six (6) grounds of appeal:

(i) That the learned trial magistrate erred in law in failing to properly consider the principles applicable in an application for injunction;

(ii) That the learned trial magistrate erred in law and in fact in finding that the plaintiff's application lacks merit without considering the evidence before him;

(iii) That the learned trial magistrate erred in law and in fact in determining the substantive suit/ issues at interlocutory stage;

(iv) That the learned trial magistrate erred in both law and fact when he took into account extraneous matters;

(v) That the learned trial magistrate erred in both law and fact in deciding that the applicant did not establish a *prima facie* case; and

(vi) The learned trial magistrate erred in both law and fact when he made a finding that there was no existing easement.

3. The appellant therefore prayed for orders that:

a) The ruling of the honourable BN Ireri delivered on October 26, 2020 in Makindu ELC Case No 22 of 2020 be set aside and this honourable court does issue orders of injunction compelling the respondents to unblock the access road to Makueni/Ngulu/21 pending the hearing and determination of the main suit;

b) Costs of the appeal be provided; and

c) Such and any other order as this honourable court will deem fit.

4. On April 20, 2021, parties agreed to canvass the appeal by way of written submissions. While the appellant filed his written submissions on July 6, 2021, the 2nd respondent filed his on June 15, 2021. The other respondents did not file written submissions in spite being granted time to do so.

5. In his submissions, the appellant contended that his application had satisfied the test in *Giella vs Cassman Brown* case. Specifically, it was the appellant's submission that he had demonstrated an existence of a *prima facie* case, and that the trial court ought therefore to have allowed his application. The appellant maintained that the 2nd respondent had blocked an access road hence hindering his passage to his land.

6. According to the appellant, there was an issue to be determined by the trial court in terms of whether there was an easement or not, hence, the appellant submitted that he had a *prima facie* case. On irreparable loss, the appellant argued that by blocking of the access road, he had been denied access to his land hence he could not gain access or exit from his parcel of land. The appellant further submitted that he had been forced to trespass onto other peoples' lands in order to access his own land.

7. Further, the appellant also submitted that there were special and exceptional circumstances to warrant granting of the injunction. It was the appellant's contention that the fact that he is unable to access his property is a special circumstance that this court ought to take into consideration. The appellant also submitted that the trial court erred in determining the main issue of the suit at an interlocutory stage without giving him an opportunity to be heard in rebuttal.

8. In support of the appeal, reliance was placed on the case of *Giella vs Cassman Brown & Company Ltd* (1973) EA 358, *New Ocean Transport Limited & Another vs Anwar Mohamed Bayusuf Limited* [2014]eKLR, *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another* [1990]eKLR, *Mrao Ltd vs First American Bank of Kenya Limited & 2 Others* [2003]eKLR, *Simiyu Mukholosi vs John Khaemba* [2013]eKLR, *Nguruman vs Nielsen & 2 Others*, *Pius Kipchirchir Kogo vs Frank Kimeli Tena* [2018]eKLR, *Canadian Pacific Railway vs Rand* (1949) 2KB 239 at 249, *Locabail International Finance Ltd vs Afro-export* (1988) ALL ER 901 and the case of *Mbogo vs Shah* [1968]EA 93.

9. The 2nd respondent submitted that the trial court considered the evidence of the documents produced and hence made a proper finding that he is not bound by any law to create an easement for the appellant. Reliance was also placed on a surveyor's report which the 2nd respondent submitted that it showed that there was no access road as claimed by the appellant.

10. According to the 2nd respondent, the trial court duly considered the documents produced by the parties in the case as well as the submissions made, hence, it was the 2nd respondent's contention that the finding by trial court was proper.

11. Ultimately, the 2nd respondent urged the court to dismiss the appeal with costs.

12. Upon consideration of the material presented in respect of the appeal herein, the court is of the opinion that the following are the issues for determination:

    i) Whether the trial court erred in dismissing the appellant's application dated August 12, 2020; and

    ii) Whether the appeal herein is merited under the circumstances.

13. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

14. From the above case, the appropriate standard of review to be established can be stated in three complementary principles:

    a) That on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

15. The appellant was aggrieved by the ruling of the trial court, therefore, accusing that court of erring in law in failing to properly consider the principles applicable in an application for injunction. The principles a court applies when asked to consider an application for grant of interlocutory injunctions are now well settled by the leading and often cited case of *Giella vs Cassman Brown & Co Ltd* for an application seeking the grant of interlocutory injunctions to succeed, the applicant is required to prove the following:

i) Existence of a *prima facie* case with a probability of success;

ii) That the applicant is likely to suffer irreparable loss and damage if the orders sought are not granted; and

iii) That the balance of convenience is in favor of the orders sought being granted.

16. In this case, the trial court dismissed the appellant's application principally on the ground that the appellant had failed to demonstrate existence of a *prima facie* case. In its ruling, the trial court held in part as follows:

> "...having considered the application, the replies and the submissions as well as the cited authorities by the parties herein I find that the applicant has not satisfied one of the cardinal condition for granting of an interlocutory injunction for the main reason that the applicant has not demonstrated that he has a prima facie case as against the defendants herein.
>
> From the documents filed herein even by the plaintiff/applicant it is clear that there is no access road on the map of the area where the applicant claims that there is a road access to his plot. The surveyor's report filed herein by the 2nd defendant/respondent clearly shows that there is no access road between plots number Makueni/Ngulu/2953 and plot number Makueni/Ngulu/2954.
>
> The applicant has indicated that he bought the land from kalondu kasyoki kimuli the deceased and not from any of the defendants herein. It is also clear that the applicant was involved in the process of surveying which found out that there was no road access between the two parcels of land..."

17. In view of the foregoing, the court must re-evaluate the evidence on record in order to make a determination on whether the trial court erred in dismissing the appellant's application. In the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others*[2003]eKLR, a *prima facie* case was defined by the court as follows:

> "In civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

18. Further, in the *Mrao case* above, the Court of Appeal further opined that:

> "....a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant's case upon trial..."

19. In reconsidering and re-evaluating the evidence on record with a view of drawing my own conclusions, I have scrupulously gone through the pleadings as well as the documentary evidence filed by the parties herein before the trial court. The dispute concerns an access road which the appellant claims existed before it was blocked and/or closed by the 2nd respondent. The 2nd respondent on the other hand denies the existence of the access road. Looking at the Surveyor's report dated July 27, 2020 relied on by the appellant in his list of documents, it quite evident that the conclusion made by the 4th respondent upon survey exercise was that there is no existing access road as claimed by the appellant.

20. The aforesaid surveyor's report as well as the map relied on by both the appellant and the 2nd respondent do not aid the appellant's case. As was held in the *Mrao case*, to demonstrate existence of a *prima facie* case it is not sufficient to only raise issues, the evidence must show an infringement of a right and the probability of the applicant's case upon trial. Based on the material on record, and while having regard to the above cited authorities, I am unable to agree with the appellant's contention in challenging the ruling made by the trial court. In re-evaluating the material on record, I agree with the findings made by the trial court to the effect that the appellant did not place before the court sufficient material to demonstrate that he has a prima facie case against the respondents.

21. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, the Court of Appeal agreed with the definition of a *prima facie* case in the Mrao case and stated:

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

22. In the present case, the appellant was required to show that his right is being violated or is likely to be violated by the respondents which would shift the burden onto the respondents to explain or rebut the appellant's claim. It is not enough for the appellant to merely state that he has a prima facie case. That alone will not bring him within the meaning of a *prima facie* case as required by law.

23. The appellant in this case failed to bring evidence to support his claim on the existence of an access road which he alleges had been blocked by the 2nd respondent. Having read the pleadings and the documentary evidence by the parties, it is apparent that the appellant has failed to demonstrate the existence of a *prima facie* case.

24. The upshot of the foregoing is that I find no merit in the appellant's appeal. Accordingly, I dismiss the same with costs to the 2nd respondent.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 31ST DAY OF MAY, 2022.

MBOGO C.G,

JUDGE

31/5/2022

IN THE PRESENCE OF:

CA:TIMOTHY CHUMA