Wainaina v Gichuhi (Environment and Land Appeal E043 of 2021) [2022] KEELC 3053 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3053 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E043 OF 2021

JG KEMEI, J

MAY 19, 2022

BETWEEN

WANJIRU WAINAINA ..... APPELLANT

AND

SAMUEL KINYANJUI GICHUHI ..... RESPONDENT

RULING

1. Dissatisfied with the trial Court's Ruling delivered on 20/4/2021, the Plaintiff now Appellant, instituted this Appeal vide a Memorandum of Appeal dated 19/5/2021 on grounds that;

    a. The Honorable trial Magistrate erred in law and in fact to appreciate that the Sale Agreement was rescinded upon non-compliance by the Respondent hence occasioning miscarriage of justice.

    b. The Honorable trial Magistrate erred in law and in fact in failing to appreciate that the subject matter was a controlled transaction and consent from the Land Control Board had not been obtained within the requisite time due to breach by the Respondent hence arriving at the wrong conclusion.

    c. The Honorable trial Magistrate erred in law and in fact in failing to appreciate that the sums paid to the Appellant had indeed been channeled back to the Respondent way back on 28/8/2014 as such a valid contract did not exist.

    d. The Honorable trial Magistrate erred in law and in fact in failing to appreciate the validity of a contract and the limitation of actions therefrom as per the *Contract Act* laws of Kenya.

    e. The Honorable trial Magistrate erred in law and in fact in holding that convenience favours the Respondent whereas having breached the agreement and a refund made, he became a trespasser and the balance of convenience was in favour of the Appellant.

f. The Honorable trial Magistrate erred in law and in fact in failing to appreciate that the Respondent's occupational (*sic*) of the suit land was illegal.

g. The Learned trial Magistrate erred in arriving at erroneous computation of damages which itself is a miscarriage of justice.

2. The Appellant urged this Court to allow her appeal; set aside the Ruing in Thika MCL&E No. 83 of 2020 delivered on 20/4/2021; set aside the judgment on loss of dependency (*sic*) and costs of the suit.

3. By way of brief background, the Appellant filed an application dated 12/10/2020 in the trial Court seeking interalia a temporary injunction against the Respondent and his agents from interfering with land parcel known as Gatuanyaga/Ngoliba Block 1/1249 (hereinafter referred to as the suit land) pending the hearing and determination of the suit. The Respondent opposed the Application which was canvassed by way of written submissions. In its Ruling dated 20/4/2021, the trial Court found that the Appellant had failed to establish her case to warrant the orders sought and thus dismissed the Application with costs, the subject of this Appeal.

4. On 17/3/2022, directions were taken to canvass the appeal by way of written submissions. Only the Appellant filed her submissions dated 25/3/2022 through the firm of Wagiita Theuri & Co. Advocates. Thus the appeal is unopposed. Despite lack of opposition of the appeal the Appellant has a duty to proof her case.

5. The Appellant submitted that the subject of the appeal stems from a sale agreement dated 2/10/1998 found at page 12 of the Record of Appeal. That the agreement was later revoked by a letter dated 28/8/2014 at page 14 of the Record of Appeal asking the Respondent to collect his money. Instead the Respondent vide a letter dated 13/3/2017 (page 31 of the Record of Appeal) wrote to the Appellant asking for execution of transfer documents. That the said letter ought to have demanded refund of the purchase price money according to the default clause contained in the sale agreement that bound the parties. The case of Nbi HCCA No. 48 of 2015 *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* was cited in support of that proposition.

6. On the issue of Land Control Board consent, the Appellant argued that the transaction was *void ab initio* for want of Land Control Board as envisioned under Section 6 of *Land Control Act*. Reliance was placed on the Eldoret HCCA No. 51 of 2015 *Willy Kimutai Kitilit Vs. Michael Kibet*.

7. The Appellant further contended that the Respondent's occupation of the suit land was pursuant to a void sale agreement whose cause of action is time-barred under Section 4 of the *Land Adjudication Act*. That since the sale agreement was void, the Respondent's entry on the suit land amounted to trespass. In the end the Appellant faulted the Trial Court findings that the balance of probabilities was not in her favour yet being the registered owner of the suit land the said balance tipped in her favour because the Agreement was void and time barred; no Land Control Board consent was obtained; the agreement was rescinded and that in case of any breach, the default clearly spelt out the payment of damages.

Analysis & Determination

8. The main issue for determination is whether the appeal is merited.

9. The law on the duty of the first Appellate Court is well settled. In the case of *Abok James Odera T/A A. J Odera & Associates Vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court of Appeal stated that the primary role as a first Appellate Court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

10. In exercise of its Appellate duty, it is a strong thing for an Appellate Court to differ from the finding, on a question of fact, of the Court that tried the case and exercised its jurisdiction to reach the impugned decision. Accordingly, it is not enough that the Appellate Court might itself have come to a different conclusion. This was the holding of Sir Kenneth O'Connor in the Court of Appeal of East Africa case of *Peters Vs Sunday Post Limited* [1958] EA 424.

11. This is an interlocutory appeal challenging the Ruling of the trial Court declining the Appellant's Notice of Motion dated 12/10/2020. The Record of Appeal shows that the Application was opposed through the Respondent's Replying Affidavit sworn on November 30, 2020. The application was canvassed by way of submissions dated 14/12/2020 and 5/1/2021 respectively.

12. The underpinning law on temporary injunctions is provided for under Order 40 rule 1 of the *Civil Procedure Rules* that;

> " 1. Cases in which temporary injunction may be granted [Order 40, rule 1.]
>
> Where in any suit it is proved by affidavit or otherwise—
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,
>
> the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders."

13. It is trite therefore that injunctive reliefs are discretionary orders that are issued in deserving cases and not as a matter of right. It is noteworthy to reiterate the holding in the celebrated case of *Mbogo and Another V Shah* [1968] E.A. 93 that;

> "...that this Court will not interfere with the exercise of...discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The Appellant's case was that she was the bona fide registered owner of the suit land *vide* annexure WW; a title deed issued in her name on 20/5/2016. That she fully possessed the suit land and prior to that had sold it to the Respondent via a sale agreement dated 2/10/1998; WW1. That the purchase price was agreed at Kshs. 42,500/= out of which the Respondent paid her Kshs. 39,500/= at the time of executing the Agreement leaving a balance of Kshs. 3000/- that was payable after transfer of the suit land – see clause 2(b) of WW. However that the Appellant rescinded the sale agreement through a letter by her advocate dated 28/8/2014 addressed to the Respondent and despite that, the Respondent had started construction on the suit land hence the Application and suit against him. The Appellant further

deponed that a recent official search on the suit land dated 24/8/2020 revealed that the Respondent had registered a caution over the suit land.

15. In her written submissions in the trial Court, the Appellant argued that she had established a *prima facie* case in her favour as the registered proprietor of the suit land according to her title deed. On irreparable loss, she contended that as a sole owner of the land, the Respondent has trespassed and commenced unlawful construction thus depriving her peaceful enjoyment of the land. That consequently the balance of convenience was in her favor to persuade the Court to preserve the subject land pending the determination of the main suit.

16. In opposition, the Respondent admitted the sale agreement between him and the Appellant and reiterated that the balance of Kshs. 3K was due upon transfer of the suit land to him. That he immediately took possession of the suit land and has extensively developed it. He denied receiving any termination notice as alleged by the Appellant and maintained that on 13/3/2017, his Advocates wrote to the Appellant asking for requisite transfer documents in line with clause 4 of the Sale agreement. Annexure SKG2; copy of the said letter was annexed. That the Appellant ignored his letter and the Respondent reported the matter to the area chief for amicable settlement –see annexure SKG3 Chief's letter dated 3/2/2020 inviting the Appellant to discuss the subject land. He also conceded to placing the caution over the suit land to protect his interests having paid substantial amount of the purchase price after being served with the suit papers accusing him of defaulting with the payments.

17. The Respondent faulted the Appellant for breaching the sale agreement by failing to transfer the suit land as agreed before the balance of Kshs. 3K was payable. That time was not of the essence and therefore the Appellant was not entitled to rescind the agreement by effluxion of time and in any case that he was not served with any completion notice. He concluded that the Appellant was not entitled to the orders sought for she failed to refund him the purchase price as agreed whilst he was ready and willing to settle the balance of Kshs. 3K.

18. Upon considering the pleadings and rival submissions, the Hon. Magistrate applied the principles for such an application as stated in the case of *Giella v Cassman Brown Co. Ltd* (1973) EA 358 found that the Appellant did not prove a *prima facie* case because the Respondent took possession of the suit land as per clause 3 of the sale agreement upon paying Kshs. 39,500/= being more than 90% of the purchase price. That the Appellant was not in possession of the suit that the Respondent had already commenced construction. Lastly that as a result of the foregoing, the balance of convenience actually favored the Respondent. The Court thus proceeded to dismiss the application with costs.

19. Did the Court err in reaching its verdict? In answering this question, I will look at the grounds of appeal *vis-à-vis* the impugned Rulings. In my view, the Appellant heavily submitted on issues that are pending determination in the hearing of the main suit. For instance the issue of the validity or otherwise of the sale agreement dated 2/10/1998, the Land Control Board consent and limitation of time on the Respondent's cause of action that did not form part of the interlocutory Application. The trial Court has not pronounced itself on these issues and cannot therefore be subject of the instant Appeal. The Trial Court considered the evidence before it and concluded that the Respondent's entry on the suit land was pursuant to a sale agreement admitted by both parties and according to it, the Respondent was to take possession immediately. The Respondent paid a substantial amount of the purchase price and the balance was payable upon transfer of the suit land to him, which process has not taken place. I find no reason to fault the Learned Magistrate to that end.

20. In the end I find that the appeal is without merit and the same is dismissed.

21. I order each party to meet their own costs.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Kariuki holding brief for Wagaita Theuri for the Appellant

Munene holding brief for Solomon Mugo for the Respondent

Court Assistant - Phyllis