No.3019

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NUMBER 60 OF 2009

SAMUEL M. MWAURA. ..... 1ST APPELLANT

RAPHAEL RUNYE..... 2ND APPELLANT

LENGISIA OLE LORKIPERRA ..... 3RD APPELLANT

VERSUS

NARURAIRI ENE LEMEEKI..... 1ST RESPONDENT

JACKSON LEMEEKI ..... 2ND RESPONDENT

TARAYIA LEEING ..... 3RD RESPONDENT

(Being an appeal from Original Ruling/Order of Hon. Mr. W. N. Kaberia Senior Resident Magistrate delivered on 26th March, 2009 in Kajiado SRMCC.203 of 2008)

JUDGMENT

In the suit filed before the Senior Resident Magistrate's court at Kajiado, the appellants sought for orders of injunction against the respondents to restrain them from evicting, entering to plant and or in any other way from interfering with the appellants' quiet enjoyment of the portion they occupy in respect of land parcel **Loitoktok/Olkaria/886** hereinafter, "**the suit premises**", until further orders of the court. They also prayed for a declaration that the title deed held by the 1st respondent be cancelled and the Kajiado Land Registrar be ordered to effect the cancellation to reflect and register the previous owner, **Lenkesia Ole Lorkiperrati**, costs of the suit and interest.

Subsequent to the suit, the appellant filed a chamber summons application dated 9th October, 2008 under order XXXIX rule 2(1), (2), 9 of the Civil Procedure rules, section 3A of the Civil Procedure Act and all other enabling provisions of the law. In the application they sought for an order of injunction to restrain the respondent from entering, subdividing, alienating, transferring and or leasing or in any way interfering with their quiet enjoyment of the suit premises.

The application was premised on the grounds that the respondents in clear breach of a high court order quashing the decision of the Land Disputes Tribunal had gone ahead and effected a transfer of the

suit premises to themselves and evicted the owners by using the local administration. That the appellants would suffer irreparably if the suit premises were alienated to 3rd parties and also if they are restrained from planting for the season since that was their livelihood.

According to the appellants, they bought 3.5 and 2.5 acres respectively of land to be hived of the suit premises registered in the names of the 3rd appellant. Following a dispute over the suit premises between the 1st respondent and 3rd appellant, the matter was referred to the Land Disputes Tribunal which made an award in favour of the 1st respondent. Being dissatisfied with the award, the 3rd appellant successfully challenged the same in the High Court by way of judicial review which award was subsequently quashed. The 1st respondent was served with the High Court order aforesaid. However, by then, the 1st respondent had already obtained a fresh title deed of the suit premises which title was null and void as it had been quashed. The 1st respondent had nonetheless moved to alienate the suit premises by seeking to evict everybody and had used the Provincial Administration to restrain the appellants from cultivating the premises of a quashed title deed. Unless the respondents therefore were restrained the appellants would suffer irreparable loss and the suit would be rendered nugatory.

In response, the 1st respondent stated that he was the registered proprietor of the suit premises. The other appellants purportedly bought the suit premises from the 3rd appellant, a step brother and the title deed was first issued to the 1st respondent on 2nd May, 2002. Yet the agreement for the sale of the suit premises between the 1st, 2nd appellants and 3rd appellant was entered into on 20th December, 2004. Therefore the 3rd appellant could not have sold that which he did not have.

The application was heard inter partes and in a ruling delivered on 26th March, 2009 the learned Magistrate dismissed the application holding thus:

"... The applicants have not shown that they own any part of the suit land. Although the applicants claim that the 1st defendant's title has been cancelled by the High Court , no certificate of official search was annexed to show that it is indeed the situation; without proof of ownership, I find the applicants have not demonstrated a prima facie case with a probability of success against the respondents."

It is against the aforesaid ruling that the appellants lodged this appeal. They faulted the ruling on 5 grounds to wit:-

"1. THAT the trial magistrate erred in fact and in law in his ruling of 26th March, 2009 by holding that the title held by the respondent was valid despite the fact that the High Court quashed the tribunal proceedings that gave her the title in question.

2. THAT the trial magistrate erred in fact by not appreciating that was still at an interlocutory stage and proceeded to make final orders without the benefit of hearing parties on merit.

3. THAT the trial magistrate erred in fact by not appreciating the fact that both parties had title was sufficient ground to maintain status quo to enable him establish at a full hearing how the two titles were issued.

4. THAT the trial magistrate erred in ruling that the applicants did not show they own part of the land when indeed they produced sale agreements as well as the copies of title deed in the names of the 3rd applicant, and all confirmed being in possession for more than a decade.

5. THAT the trial magistrate erred in holding that the applicants were not to suffer irreparable loss, when they stand to be evicted and there being evidence that they had been denied to cultivate their land which cultivation is a source of their livelihood."

When the appeal came up for directions before me on 10th November, 2011, part of the directions agreed upon and issued were that the appeal be canvassed by way of written submissions. It is instructive that though the respondents were served with the hearing notice for the directions, they failed to turn up. Again when the appellants filed and served on them their written submissions as well as a mention notice they again failed to turn up or file their written submissions. Accordingly, the appeal proceeded as unopposed.

I have carefully read and considered the appellants' written submissions as well as authorities cited. The principles to guide a court on whether or not to grant a temporary injunction are settled. The applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which cannot be compensated by an award of damages if the injunction is denied should be proved and in event of doubt the court would determine the application on a balance of convenience. See **Giella Vs. Cassman Brown and Company Ltd. (1973) E.A. 358**. Again prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented 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. See **Mrao Ltd. Vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**.

On the material placed before the learned magistrate at the time, I do not think that he was right in dismissing the application. He failed to appreciate that the award by the tribunal that gave the suit premises to the 1st respondent had been quashed by the High Court. There was an order of the High Court to that effect before the learned Magistrate. That authenticity of the said court order was not at all questioned by the respondents. To that extent, it was valid. That being the case, the 1st respondent could not claim ownership of the suit premises on the footing of a title deed which had been impugned by a court order. On that basis alone, the appellant had established a prima facie case.

There was evidence as well that the 1st and 2nd appellants had bought portions of the suit premises for value from the 3rd appellant. There were agreements to that effect. The two appellants too had lived on the suit premises for a while. To deny them an injunction exposed them to the possibility of being evicted. The learned magistrate was thus wrong in denying them injunction on the ground that they had not demonstrated that they owned any part of the suit premises. There are other ways of demonstrating ownership of land and not necessarily by flagging around a title deed. Nor was it necessary at that juncture for the appellants to demonstrate that the title had been cancelled by production of a certificate of official search. In my view and in the face of the material before him, the wise decision that the learned magistrate should have come to was to allow the appellants to retain the portions of land they claim to have purchased pending the hearing and final determination of the suit. The validity of the land transactions entered into between the appellants could only have been tested through a plenary hearing of the suit.

Having purchased portions of the suit premises, at least for now, and lived in and cultivated the same for more than 10 years and faced with imminent eviction, the appellants would no doubt suffer irreparable loss, which warranted the grant of injunction. In those circumstances, the learned magistrate erred in holding that the appellants could not suffer irreparable loss. There was even evidence, which was not at all challenged by the respondent that they had been prevented from cultivating their parcels of land which was their only source of livelihood.

Even on the grounds of balance of convenience, the scales tilted in favour of the appellants. As it were both parties have titles in respect of the suit premises. The status quo prevailing at the material time ought therefore to have been maintained to enable the court to establish at a full trial the authenticity or otherwise of those titles. To allow the respondents to carry out the eviction was tantamount to favouring their title as against that of the appellants.

In the result, I allow the appeal and set aside the order of the learned magistrate dismissing the appellant's application for injunction. In substitution, I grant the injunction sought in prayer 2 of the

application dated 9th October, 2008. On condition however, that the appellants shall execute and file an undertaking as to damage in the tune of KShs.500,000/- each within the next seven days from the date of this ruling. The appellants shall have the costs of this appeal as well as of the application aforesaid.

Dated and **delivered** at **Machakos**, this **16th** day of **January**, **2012**.

ASIKE-MAKHANDIA
JUDGE