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Lumasayi & 21 others v Alukhaba (Suing as a legal representative of the Estate of Jonah Ochami Nangabo) & 2 others (Environment and Land Appeal 22 & E4 of 2020 (Consolidated)) [2022] KEELC 3104 (KLR) (14 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3104 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL 22 & E4 OF 2020 (CONSOLIDATED)

DO OHUNGO, J

JUNE 14, 2022

BETWEEN

FRANCIS ATWOLI LUMASAYI .... 1ST APPELLANT

RAMADHAN RUBIA WANGA .... 2ND APPELLANT

AND

EUNES ALUKHABA (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JONAH OCHAMI NANGABO) .... RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL E4 OF 2020

BETWEEN

HILLARY MARTIN AKHUNGU RAPANDO & 19 OTHERS .... APPELLANT

AND

EUGINES ALUKHABA JONAH .... 1ST RESPONDENT

PANDI OPONYO .... 2ND RESPONDENT

(Being appeals from the ruling of the Senior Principal Magistrate's Court at Mumias (W K Cheruiyot, Senior Resident Magistrate) delivered on 3rd September 2020 in Mumias ELC No 35 of 2019 Eunes Alukhaba (Suing as legal representative of Jonah Ochami Nangabo) v Pandi Oponyo and others)

JUDGMENT

1. These two appeals were consolidated pursuant to an order of the court made by consent on 30th June 2021. ELCA No. 22 of 2020 was selected as the lead file. The appellants in both appeals are aggrieved by the ruling of the Senior Principal Magistrate's Court at Mumias (W K Cheruiyot, Senior Resident Magistrate) delivered on 3rd September 2020.

2. The background of the appeals is that on 8th April 2020, Eunes Alukhaba Jonah filed an application by way of Notice of Motion dated 8th April 2020 in which she sought an injunction to restrain the appellants in ELCA No. E4 of 2020 from alienating, laying claim to, trespassing onto, utilizing, developing, constructing on, carrying out any works on and or in any other manner dealing with land parcel numbers East/Wanga/Isongo/4691, 4692, 4693, 4694, 4695, 4696, 4697, 4698, 4699, 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4709, 4710, 4711, 4712, 4713 and 4714 pending the hearing and determination of the suit pending before the subordinate court. She further sought an order of prohibition (sic) in respect of the said properties and leave to amend her plaint.

3. The record shows that the application was placed before the learned magistrate under certificate of urgency on 8th April 2020. In view the then downscaled operations of the courts due to the COVID-19 pandemic, the court certified the application urgent, granted interim orders and gave directions for filing of submissions. Parties' advocates later appeared before the court on 6th May 2020 to confirm filing of submissions. Ruling was ultimately delivered on 3rd September 2020. The learned magistrate granted the injunction, 'prohibition' and leave to amend which had been sought. In the opening line of the ruling, the learned magistrate referred to the application before the court for determination as Notice of Motion dated "23rd September 2019".

4. Aggrieved by the outcome, the appellants filed the consolidated appeals. The common thread running through the two memoranda of appeal is that the appellants contend that the ruling was in respect of a non-existent application dated 23rd September 2019 hence ambiguous as regards which application it determined, that the court issued orders against persons who were not properly joined in the proceedings, that the court did not consider the appellants' replies and submissions, that the court based the ruling on speculation and disputed facts, and lastly, that the court did not properly apply the law and principles that guide granting of interlocutory injunctions.

5. The appellants therefore prayed that the orders made in the ruling be set aside and that they be awarded costs of the appeals.

6. The appeal was canvassed through written submissions.

7. Appellants in ELCA No. 22 of 2020 argued that the learned magistrate erred in forming an opinion that the applicant had established a prima facie case since the respondents admitted having purchased the suit land. They contended that the finding was a mistake and that no such admission was ever made and further argued that the court did not explain its reason for believing that the applicant was apprehensive that the suit properties would be transferred to third parties to defeat her interest. They went on to argue that the court granted issued an injunction against the fifth to twenty third proposed defendants who were not parties to the suit since the prayer for leave to amend was in respect of new plot numbers as opposed to the owners of the said plots. Finally, they argued that the principles of granting interlocutory injunctions were not considered by the court.

8. On their part, the appellants in ELCA No. E4 of 2020 argued that in the opening paragraph of the ruling the court referred to an application dated 23rd September 2019 yet no such application was ever filed and that instead, what are on record is an application dated 9th January 2020 and another dated 8th April 2020. That when the court stated later in the ruling that it allowed prayers 5, 6, and 7 of an application dated 8th April 2020, it contradicted itself and created ambiguity.

9. Regarding the question of whether the ruling and orders were made against persons not properly joined in the proceedings, the appellants in ELCA No. E4 of 2020 argued that by allowing amendment of the plaint to include parcel numbers East Wanga/Isongo/4691 to 4714, which parcels they own, the court essentially made them parties to the suit. That nevertheless, they were to become parties to the suit once the plaint was amended, in the period post the ruling. That at the time of delivery of the ruling, they had not yet become parties and that the court therefore granted an injunction against strangers to the suit.

10. The appellants in ELCA No. E4 of 2020 further argued that the subordinate court neither considered nor analysed their evidence and submissions. They faulted the subordinate court for granting an injunction against them despite the applicant admitting that they were not only the registered owners of the suit properties but were also in active use and occupation thereof since September 2011. That consequently, the injunctive orders contravene Sections 24, 25 and 26 of the *Land Registration Act*, 2012 and amounted to evicting them from their properties prior to the hearing and determination of the suit. They therefore urged this court to allow their appeal with costs and to set aside the impugned orders.

11. In response, the respondents argued that when the application dated 8th April 2020 was filed, responses and written submissions were filed in respect of the application. That the learned magistrate considered the application and delivered the ruling on 3rd September 2020. That consequently, it is wrong for the appellants to claim that the subordinate court delivered a ruling on non-existent application. That the learned magistrate was satisfied that the applicant had satisfied the test for granting an interlocutory injunction.

12. The respondents further argued that the appellants did not raise any objection regarding their participation in the matter prior to the conclusion of the hearing of the application and that they ought not introduce the issue on appeal. They contended, in conclusion, that the orders of 3rd September 2020 should remain in force pending the hearing and determination of the suit since the application was properly on record and was heard and determined on merit.

13. I have carefully considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the orders were made on a non-existent application, whether the orders were made against persons who were not parties and whether the application was merited.

14. The appeals are against an order made in exercise of discretion. The circumstances in which an appellate court can interfere with exercise of discretion were discussed by the Court of Appeal in *Mbogo and Another v Shah* [1968] EA 93. Simply put, an appellate court should not interfere with the exercise of discretion unless it is satisfied that the court appealed from has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court appealed from has been clearly wrong in the exercise of discretion and that as a result there has been mis-justice.

15. The first issue, as to whether the orders were made on a non-existent application, can be quickly resolved. I have, at paragraphs 2 and 3 of this judgment, given the background of the appeals. There is no dispute that on 8th April 2020, Eunes Alukhaba Jonah filed an application by way of Notice of

Motion dated 8th April 2020 in which she sought specific orders of injunction, prohibition (I think she meant 'inhibition' as provided under Section 68 of the [Land Registration Act]) and leave to amend her plaint. The record shows that on 8th April 2020, the application was placed before the learned magistrate who granted interim orders and gave directions for filing of responses and submissions. By way of examples, Ramadhan Rubia Wanga who is the second appellant in ELCA No. 22 of 2020, filed a replying affidavit on his own behalf and on behalf of the first appellant in the said appeal on 22nd April 2020. Similarly, on 19th May 2020, Hillary Martin Akhungu Rapando who is the first appellant in ELCA No. E4 of 2020, filed a replying affidavit on his own behalf and on behalf of the other appellants in the said appeal.

16. When parties' advocates appeared before the court on 6th May 2020 to confirm filing of submissions, there was no doubt that the responses and submissions were in respect of Notice of Motion dated 8th April 2020. While it is correct that in the opening line of the ruling that was ultimately delivered on 3rd September 2020, the learned magistrate referred to the application before the court for determination as Notice of Motion dated "23rd September 2019", I have no doubt in mind that it was just a typing error, one that could be corrected under Section 99 of the [Civil Procedure Act], if the parties brought it to the attention of the court. That much is confirmed at page 4 of the ruling where the learned magistrate stated "I shall therefore allow the application dated 8th April 2020 in terms of prayers 5, 6 and 7." In view of the foregoing, I find that the orders were not made on a non-existent application, but on Notice of Motion dated 8th April 2020.

17. The next question for determination is whether the orders were made against persons who were not parties to the suit. A reading of Notice of Motion dated 8th April 2020 shows that on the face of it, it listed the second to twentieth appellants in ELCA No. E4 of 2020 as fifth proposed defendant to twenty third proposed defendant. Filed together with the application was a draft amended plaint which also listed the second to twentieth appellants in ELCA No. E4 of 2020 as fifth proposed defendant to twenty third proposed defendant. Under prayer 7 of the application, the respondent sought leave to amend the plaint to include parcels of land owned by the proposed defendants. Leave to amend was granted in the ruling. The appellants in ELCA No. E4 of 2020 have conceded in their submissions that by allowing amendment of the plaint to include their properties, they were essentially made parties to the suit. Their complaint however seems to be that orders ought not to have been made against them until an amended plaint was filed. I find that argument to be self-defeating. On the one hand they concede that they became parties while on the other they claim that orders ought not to have been made against them. That kind of argument flies in the face of Article 159 (2) (d) of [the Constitution] of Kenya and Section 19 of the [Environment and Land Court Act] which emphasise the overall mission of the court to do substantive justice. Having allowed amendment and in fact having heard the appellants in ELCA No. E4 of 2020 in opposition to the application that was before the court, the court's hands could not be tied in issuing injunctive orders against the parties who had been heard. It follows therefore that the orders of 3rd September 2020 were not made against strangers to the suit. While Notice of Motion dated 8th April 2020 could have benefited from better drafting, the appellants in ELCA No. E4 of 2020 were effectively parties to the suit upon delivery of the ruling on 3rd September 2020.

18. The last issue for determination is whether Notice of Motion dated 8th April 2020 was merited. The aspect of the orders granted by the subordinate court that the appellants are aggrieved with is the interlocutory injunction. The principles that guide any court which is considering an application for an interlocutory injunction are well known. They were laid down in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated with more clarity in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. In summary, such an applicant must establish a prima facie case with

a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The learned magistrate aptly identified these principles.

19. In analysing the material that was before the court, the learned magistrate stated in part:

> The applicant contends that her deceased husband was the registered owner of land parcel No East/wanga/isongo/893. She states that the 1st respondent in cahoots with her son stole the title deed and fraudulently caused the land to be sub divided into two portions and later transferred one portion to the defendants herein which was later again sub divided into several portions. ...
>
> The 1st defendant/respondent filed a replying affidavit admitting the alleged fraud.
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> The 3rd respondent states that he and the 4th respondent purchased the parent land parcel from the 2nd respondent and later sold it to the rest of the defendants ....
>
> The 5th to 23rd respondents state that they purchased the various land parcels for value without notice and are entitled to the same. They annexed their various title deeds. ...
>
> The 1st respondent in his defence admits that he committed fraud. He states at paragraph 6 of the defence that he impersonated the husband of the plaintiff and disposed the land in question. ... This buttresses the plaintiff's case at this stage.
>
> The respondents have stated that the 1st respondent is colluding with the plaintiff. However, that is a matter for trial.

20. There is no dispute that the parcel of land known as East/Wanga/Isongo/893 was owned by the respondent's husband Jonah Ochami and that the said title was closed upon subdivision into East/Wanga/Isongo/3586 and East/Wanga/Isongo/3587. East/Wanga/Isongo/3587 was later closed upon subdivision into East/Wanga/Isongo/4691 to 4714. In short, the suit properties trace their root to the respondent's husband's East/Wanga/Isongo/893. As regards the allegations of fraud, the record confirms that the second respondent in ELCA No. E4 of 2020 filed a statement of defence in which he stated that he stole the title deed and sold the land. Whether or not that is true and whether or not there is collusion are all matters to be determined at trial. The learned magistrate correctly found that a prima facie case had been established. Clearly, there is need to preserve the suit properties pending trial and damages would clearly not be an adequate remedy. I am satisfied that a case was made for the injunction sought as well as an order of inhibition that would ensure preservation of the suit property. The appellants have failed to demonstrate that the subordinate court misdirected itself in some matter or that it arrived at a wrong decision.

21. There is however one small aspect of the situation of the new registered proprietors that needed to be taken into account. The respondent in her application had admitted that the new registered proprietors had been in use and occupation of the suit properties since September 2011. While the need to preserve the suit properties must be maintained, the subordinate court should have been careful to phrase the injunction in a way that respects the user rights of registered proprietors in occupation. To that extent only, I find some justification in the appellants' fears that left unchecked, the orders of 3rd September 2020 may be a threat to their possession. Save for minor adjustment in the wording of the injunction

and replacing the word ‘prohibition’ with ‘inhibition’, I find that Notice of Motion dated 8th April 2020 was merited.

22. In view of the foregoing, I make the following orders:

a. The order made by the subordinate court under prayer 5 of Notice of Motion dated 8 th April 2020 is adjusted to read as follows:

An order of injunction is hereby issued against the respondents restraining them either by themselves, or by their relatives, employees and or agents from alienating, developing or constructing on land parcel numbers East/Wanga/Isongo/4691, 4692, 4693, 4694, 4695, 4696, 4697, 4698, 4699, 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708, 4709, 4710, 4711, 4712, 4713 and 4714 pending the hearing and determination of the suit”

b. The order made by the subordinate court under prayer 6 of Notice of Motion dated 8 th April 2020 is adjusted to read as follows:

An order of inhibition is hereby issued against title numbers East/Wanga/Isongo/4691, 4692, 4693, 4694, 4695, 4696, 4697, 4698, 4699, 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708, 4709, 4710, 4711, 4712, 4713 and 4714 pending the hearing and determination of the suit”

c. The order made by the subordinate court under prayer 7 of Notice of Motion dated 8th April 2020 remains unchanged.

d. Costs of Notice of Motion dated 8 th April 2020 shall be in the cause that is pending before the subordinate court.

e. Considering that both sides in the consolidated appeals have had some measure of success, each party shall bear own costs of the appeals.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF JUNE 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Balusi holding brief for Ms Muleshe for the appellants

Ms Ashitsa holding brief for Mr Namatsi for the respondent

Court Assistant: E. Juma