



REPUBLIC OF KENYA



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**Rumba v Moki (Environment and Land Appeal 7 of 2020)
[2022] KEELC 12658 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 7 OF 2020
MAO ODENY, J
SEPTEMBER 27, 2022**

BETWEEN

ESTHER RUMBA APPELLANT

AND

PAUL MULATYA MOKI RESPONDENT

(Being an appeal against the whole Ruling the Senior Resident Magistrate (Hon. N C Adalo) dated 21st July 2020 in Mariakani in Senior Resident Magistrate's Court Environment and Land Case No.26 of 2019 Paul Mulatya Moki Vs Esther Rumba)

JUDGMENT

1. This appeal arises from a ruling dated July 21, 2020 by Hon CN Adalo (SRM) in Mariakani Environment and Land Case No 26 of 2019. The appellant herein being aggrieved by the whole ruling lodged a memorandum of appeal dated July 27, 2020 and listed the following grounds: -
 1. The honourable court has erred in fact and in law in altering the name of the appellant as Esther Rumba aka Mama Maua instead of Esther Rumba as appearing on the record.
 2. The honourable magistrate has erred in fact and in law in failing to appreciate all the facts on record and failing to apply the principles of granting injunctions.
 3. The honourable magistrate erred in fact and in law in finding that the respondent had made out a prima facie case yet the identity of his plot could not be ascertained.
 4. The honourable magistrate erred in fact and in law in finding that the respondent would suffer irreparable loss yet the value of the subject matter was known.
 5. The honourable magistrate erred in fact and in law in failing to deal with the ambit of the balance of convenience yet the appellant was in possession of the suit property.



6. The honourable magistrate erred in fact and in law in determining the issue of the title fully at an interlocutory stage yet the issue of title was in dispute and there were triable issues that required full trial.
 7. That the honourable magistrate erred in fact and in law in failing to appreciate the law relating to contracts under section 3 of the *Law of Contract Act*.
 8. That the honourable magistrate erred in fact and in law in failing to appreciate that there was no privity of contract between the appellant and the respondent yet the appellant would be adversely affected by the orders issued.
 9. That the honourable magistrate erred in fact and in law in issuing injunctive orders at interlocutory stage which resulted in mandatory orders being issued ejecting the appellant from the suit property when she was in possession and the issue of title was disputed.
2. Counsel agreed to canvas the appeal vide written submissions which were duly filed.

Appellant's submissions

3. Counsel for the appellant relied on the case of *Mbogo v Shah [1968] EA 93* on the issue of discretion and urged the court to review the documentary evidence before the magistrate to determine whether the conclusion arrived at after hearing the evidence and the documents produced was valid.
4. Ms Osino condensed the issues for determination to 4 namely, whether the trial magistrate erred in failing to consider, interpret and apply the legal principles for the grant of an injunction, whether the trial magistrate erred in determining the issue of the title fully at an interlocutory stage yet the issue of title was in dispute, whether the trial magistrate erred in granting injunctive orders which had the effect of ejecting the appellant from the suit premises and whether the trial magistrate erred in being biased against the appellant in her decision.
5. On the first issue, counsel submitted that the honourable magistrate was bound by the principles set out in the case of *Giella vs Cassman Brown* which she identified but failed to consider, interpret and apply in analyzing the merits of the application. Counsel further submitted that the magistrate in her ruling at paragraph 22 at page 255 of the record of appeal found that the plaintiff had no title to the property but has an equitable right because of an alleged agreement between her and one Kennedy Kamoti Kioko.
6. Ms Osino further faulted the honourable magistrate in finding that the respondent has equitable title to the property when in his pleadings, he stated that he had a legal title which was not established.
7. Counsel also submitted that issues flow from pleadings hence the court must be guided by rules and may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination as was held in the cases of *Philmark Systems Co Ltd vs Andermore Enterprises (2018) eKLR*, *Galaxy Paints Company Limited v Falcon Guards Limited Court of Appeal Case Number, 219 of 1998*, *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor vs Adam Vassiliadis (1986)* } and that of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR*. According to counsel, the respondent never established a prima facie case and relied on the case of *Deborah Achieng Aduda & Another v Florence seyanoi Kibera (2015) eKLR*.
8. Counsel further submitted that the actual identity, location and character of the alleged respondent's land had not been identified and connected to the land occupied by the appellant therefore the magistrate erred in totally failing to consider the appellant's documents on the land known as plot



- 5A Mazeras Township along Mazeras Road which she occupied, had been approved by the county government and for which she paid rates.
9. According to counsel, the court erred by totally failing to mention these documents or consider and analyze the appellant's submissions and instead entirely relied on an alleged agreement between the respondent and one Kennedy Kamoti Kioko which had no correlation with details of land occupied by the appellant. That the ruling totally failed to show the relationship between the two plot numbers and that the court erred in focusing on the plot without a number as described by the respondent.
 10. On the issue of irreparable damage, counsel submitted that the appellant was carrying out construction to extend her business which could increase the value of the property and that no damage would have been suffered by the respondent in the event that the land was found to be his. It was also counsel's submission that if indeed the respondent was the owner of the property, then damages on alleged rent due are quantifiable.
 11. On the issue of balance of convenience, counsel submitted that the honourable magistrate having found the first two conditions in favour of the respondent did not belabour to deal with the third condition. That the respondent having failed to meet the test on prima facie case and irreparable loss, that this was the only condition left for the magistrate to consider.
 12. Ms Osino Submitted that the balance of convenience was in favour of the appellant as the allegation for payment of rent was quantifiable and the court erred in not considering these factors. Further that the trial court found that the respondent had equitable title to the property and failed to consider the appellant's documents on possession and title as contained at 117-140 of the record of appeal.
 13. Counsel relied on the case of *Family Bank Limited v Tassels Enterprises Limited & 2 Others [2021] EKLR* and urged the court to find that the trial magistrate erred in granting an injunction which had the effect of ejecting the appellant from the suit premises. Counsel therefore urged the court to allow the appeal as prayed with costs.

Respondent's submissions

14. Counsel submitted that the respondent established a prima facie case with probability of success by exhibiting by way of evidence that he purchased the suit property and relied on the case of *Kenleb Construction Ltd vs New Gatitu Service station Ltd & another, (1990) eKLR*.
15. It was counsel's submission that land being emotive and unique in nature no one parcel of land can be equated in value to another and it would not be right to say that the respondent could be compensated by damages as has been advanced by the appellant and that the trial court was right to stop the appellant from continuing with the construction on the suit property.
16. Ms Obanda further submitted and relied on the case of *Jan Bolden Nielsen vs Herman Phillipius Steyn & 2 Others (2012) eKLR*, that in preservation of the suit property by restricting and restraining further construction or development of the suit property by the appellant pending the hearing of the full suit, the court ascertained and appreciated the lower risk.
17. Counsel therefore submitted that the respondent met the threshold for granting of an injunction and has further demonstrated that in the circumstances of the case and that the orders of interlocutory injunction were rightfully issued pending hearing and determination of the suit.



Analysis and determination.

18. This being a first appeal, the court alive to the fact that its primary role is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions can stand or not with reasons for both as was held in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] Eklr.*

19. Similarly in the case of *Selle & Another –vs- Associated Motor Boat Co Ltd. & others (1968) EA 123* the court held as follows: -

' 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 demeanor of a witness is inconsistent with the evidence in the case generally.'

20. Counsel for the appellant submitted that the respondent did not meet the threshold for grant of temporary injunctions and that the orders granted were final in nature as it had the effect of ejecting the appellant from the suit premises.

21. The conditions for the grant of interlocutory injunctions are well settled as stated in *Giella v Cassman Brown & Co Ltd 1973 EA 360*, where a party seeking interlocutory injunction must show that he or she has a prima facie case, that unless the orders are granted he or she will suffer irreparable loss which cannot be adequately compensated by damages and finally if the court is in doubt should decide on a balance of convenience.

22. The trial court had this to say in the ruling that is subject to this appeal;

' The plaintiff does not have a title to the said parcel but has an agreement of sale between him and one Kennedy Kamoti Kioko. That is an equitable right. It is contested as to whether reference is made to the same plot when it is said that the plaintiff's claim is over a parcel measuring 25 feet by 50 feet along the Mazeras Kaloleni road. The defendant submits that the injunctive orders shall be in vain as the plaintiff had not clearly stated the location and description of the property. The applicant has an arguable case. Rent was remitted to him via Mpesa by the defendant. The applicant has made every effort to disclose all facts in his possession and the court finds that on the first limb, the applicant has succeeded in establishing that he has a prima facie case'.

23. The above wording of the ruling show that the trial magistrate inferred and came to the conclusion that even though the respondent did not have a title to the suit land she was the equitable owner of the suit land contrary to the respondent's pleadings that he had a legal title. The learned trial magistrate went ahead and stated that it was contested whether the reference was over parcel of land measuring 25 feet by 50 feet along Mazeras road. This contention was not substantially clarified and this should have guided the learned trial magistrate on whether to grant an injunction at the interlocutory stage or not.



24. Parties are bound by their pleadings and issues for determination by a court flow from the pleadings as was held in the cases of *Philmark Systems Co Ltd vs Andermore Enterprises* (2018) eKLR, and *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* (2014) eKLR.
25. Looking at the appellant's documents which were not considered by the trial court, what has been referred to is Plot 5A Mazeras Township along Mazeras road where she pays rates, the respondent relied upon the agreement of sale between him and a third party who is not a party to these proceedings. Had the trial magistrate considered the appellant's documents on the land known as plot 5A Mazeras Township along Mazeras road which the appellant occupied and paid rates for then she could have come up with a different conclusion.
26. In the case of *Hesbon K Limisi v Delilah Achieng Mathews & 2 others [2015] eKLR* the Court of Appeal held that all the court needs to consider for the grant of an injunction order is whether the applicant's documentation is sufficient enough to establish that he has a claim over the suit property.
27. Similarly, in the case of *National Commercial Bank v Olint Corporation 2009 WLR 1405* the privy council stated; -
- ' The purpose of interlocutory injunction is to improve the chance of the court being able to do justice after a determination of the merits at trial.'
28. I find that the respondent failed to establish a prima facie case with a probability of success to enable him benefit from the orders of injunction.
29. On whether the respondent would suffer irreparable loss that cannot be compensated by an award of damages, I note that the trial court considered that, that was the respondent's lifetime investment and at the time he was receiving Kshs 5,000/- from the appellant which amount would be paid to him in the event that the court found in favour of him. This shows that the damages were quantifiable and hence an award of damages would adequate in the circumstance.
30. I have considered the grounds of appeal, the submissions by counsel and find that the trial magistrate failed to consider the material facts in the plaint in reaching the conclusion that the respondents were entitled to an injunction. I therefore make the following orders: -
1. The appeal is hereby allowed, order of injunction issued on July 21, 2020 is hereby set aside and substituted with an order dismissing the notice of motion dated October 25, 2019 with costs to the appellant in this appeal together with the subordinate court application.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF SEPTEMBER, 2022.

MA ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

