



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 92 of 2006

JULIUS GITUMA MBOROKI APPELLANT

VERSUS

MWENDA M'MUGWIKA RESPONDENT

JUDGMENT

The appellant has been sued in the court below by the respondent who claimed in the plaint that the appellant's posho mill which is located on the adjacent plot to that of the respondent has caused damage to the latter's premises and is also a nuisance. He sought restraining orders.

The matter was argued inter partes and in his ruling the learned trial magistrate was satisfied that a *prima facie* case had been established and proceeded to grant an injunction pending the hearing of the suit. That order and finding has now been challenged in this appeal.

In his memorandum of appeal the appellant contends:-

- (i) that the learned trial magistrate erred in granting orders of temporary injunction when such orders were not sought
- (ii) that there was no evidence to support the application for injunction.

Arguing the above grounds, learned counsel for the appellant submitted that the application dated 8th August 2006 was grounded on the provisions Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules yet the learned trial magistrate granted an order of permanent injunction which is not provided for in the cited provisions. Secondly, it was submitted that the application did not provide any ground for the grant of an injunction. That damage to the respondent's premises and nuisance were not proved.

In reply, learned counsel for the respondent urged the court to dismiss the appeal as it is misconceived. That the appellant has not shown that the court below did not exercise its discretion judicially. It was submitted further that the injunction granted was based on Order 39 of the Civil Procedure Rules. That the omission to indicate that the orders sought were temporary was not fatal.

I have considered these arguments and hold the following view of the matter. This is an appeal against an interlocutory order. In considering it, care must be taken to avoid making definite findings of fact or of law as the hearing of the main suit is still pending.

Exception is taken by the appellant at the order sought and that granted. The respondent's chamber summons dated 8th August 2006, in prayer 1 seeks:-

“(1) That the Honourable Court be pleased to grant an order of injunction permanently to restrain the defendant/respondent by himself and/or his agent from running/operating a posho mill on plot No. 11 Ruiiri Market.”

After hearing the application inter partes, the learned trial magistrate in his ruling of 5th September 2006 ordered that:-

“To that extent I will grant prayer one pending the hearing and determination of the subject suit.”

The respondent's chamber summons was brought pursuant to sections 3, 3A and 63(e) of the Civil Procedure Act and Order 39 Rules (1), (2) and (3) of the Civil Procedure Rules.

Right away, sections 3 and 3A above have no application in this matter as there are express provisions concerning the issues at hand. Section 63(e) aforesaid provides:-

“63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –

(a)

(b)

(c)

(d)

(e) Make such interlocutory orders as may appear to the court to be just and convenient.”

This is the substantive law of temporary injunction. The procedure is provided for in Order 39 of the Civil Procedure Rules and decisions of the court developed over the years. The purpose of a temporary injunction is to preserve property in dispute from any danger of being wasted, damaged or alienated by any party to the suit.

Order 39 clothes the court with a wide discretion in the exercise of the jurisdiction in the equitable remedy of injunction. That exercise of discretion will only be interfered with on appeal if it can be shown that it was not exercised judicially. In **Mbogo V. Shah** (1968) E.A. 93 at 96 Sir Charles Newbold, P, said:-

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion had misdirected himself 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 judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

Applying the foregoing to the appeal before me can it be said that the learned trial magistrate did not exercise his discretion judicially?

The conditions for the grant of an interlocutory injunction are now well settled on the authority of **Giella V. Cassman Brown Ltd** (1973) E.A. 358. The learned trial magistrate correctly considered those three conditions and found that on the evidence presented a *prima facie* case had been made out by the respondent. The reasoning advanced by him are sound and I detect no error either in his approach or final determination.

Although the orders sought in the chamber summons were for permanent injunction, the learned trial

magistrate appreciated the fact that such an order could not be granted at that stage hence his order that the order of injunction would pend the hearing and determination of the suit.

It was improper for the respondent to seek final orders in an interlocutory application, but I find that in view of the order finally made by the court, no prejudice was caused to the appellant.

The other grounds raised by the appellant are and cannot be the subject of an interlocutory application for injunction which must be based on *prima facie* evidence as defined in the case of **Mrao Ltd V. First American Bank of Kenya Ltd**, (2003) KLR 125.

I find no merit in this appeal which is hereby dismissed with costs to the respondent.

Dated and delivered at Meru this 28th day of April 2008.

W. OUKO

JUDGE