



REPUBLIC OF KENYA



KENYA LAW
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**Wangeci v Kagwara (Environment and Land Appeal 74 of 2021)
[2022] KEELC 13735 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 74 OF 2021
NA MATHEKA, J
OCTOBER 25, 2022**

BETWEEN

EDWIN MAINA WANGECI APPELLANT

AND

NJUGUNA KAGWARA RESPONDENT

JUDGMENT

1. This is an appeal from the ruling delivered on 8th October 2021 of the Senior Resident Magistrate Honourable FM Nyakundi in Voi Principal Magistrate at Environment and Land Court Case No 27 of 2019 formerly Mombasa Chief Magistrate Court Environment and Land Court Case No 47 of 2018 in the Notice of Motion dated September 20, 2018 on the following grounds:
 1. That the learned trial Magistrate erred in law and in fact in holding that the appellants had not satisfied the conditions for the grant of an interlocutory injunction as set out in *Giella vs Cassman Brown* (1973) EA 358.
 2. The learned Judge erred in law, in principle and in fact took into account matters he ought not to have considered and omitted to consider matters he ought to have considered hence exercised his discretion in rejecting the application wrongly.
 3. The learned trial Magistrate decision is contrary to the weight of evidence and on record contrary to the weight of evidence
 4. That the learned trial Magistrate erred in law and in fact in relying on the respondent further replying affidavit dated January 11, 2021 which was filed without leave of court and in refusing to expunge it from the record.
2. The appellant prays that the appeal be allowed with costs and the following orders;



- a. The order by the then Voi Senior Resident Magistrate Honourable FM Nyakundi in *Edwin Maina Wangeci v Njuguna Kagwara* Principal Magistrate Environment and Land Court Case No 27 of 2019 be set aside and be replaced with an order allowing the Appellant's Notice of Motion dated 20th September 2018 with costs.
 - b. Costs of this appeal.
3. This court has carefully perused the submissions and Record of Appeal filed on 3rd December 2021 against the ruling delivered on October 8, 2021 on the Appellant's Application dated September 20, 2018 which sought an order of temporary injunction to restrain the respondent from preventing the appellant from accessing his suit properties. The ruling which forms part of the record between pages 163 to 176 shows that the court found that the applicant had not established the ingredients of issuance of orders of interlocutory injunction as sought and dismissed the application with costs to the respondent.
4. In his memorandum of appeal, the appellant has averred that the Magistrate erred in law and in fact in holding that he had not satisfied the conditions for the grant of an interlocutory injunction and that the Magistrate took into account matters he ought not to have considered and vis versa when exercising his discretion. Further the Magistrate's decision went contrary to the weight of the evidence presented and for relying on a further replying affidavit from the respondent which was filed without leave of court. The appellant is inviting the court to consider whether or not the trial court exercised its discretion properly in arriving at the conclusion it did.
5. The Court of Appeal in *Nguruman Limited vs Jan Bonde Neilsen & 2 others* (2014) eKLR, held that

“Before advertent to the origin of the dispute, it is appropriate to reiterate before this court can interfere with the exercise of a discretion of a judge, it must be shown that the judge either erred in the principle of his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it.”
6. In *Mbogo and another vs Shab* (1968) EA 93 the Court of Appeal held that,

“I think it is well settled that this court will not interfere with the exercise of its 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 matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
7. In *Nguruman Limited (supra)*, the court further held that,

“As an appellate court this court has a limited function in an appeal for the grant or refusal of an order of injunction issues by the court below. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the judge in the court below and must not interfere with it merely upon the ground that the members of this court would have exercised the discretion differently.”
8. The Application dated September 20, 2018 was canvassed before Hon FM Nyakundi (SRM), he considered the material presented by way of affidavit evidence. He was not persuaded that neither a legal nor equitable right has been established by the appellant in relation to the suit properties (Plot



No 1329 and 1337) worth protection and that the applicant had not established a prima facie case. On irreparable injury, the Magistrate held that the applicant had not demonstrate the irreparable injury which would not be compensated by monetary value and that the balance of convenience is in favour of the Respondent.

9. On the application to expunge the respondent's further replying affidavit dated 11th January 2019 which was filed without leave of court, the trial court ruled that though the respondent did not have leave of court to file a further affidavit, he had a right to respond to the applicant's supplementary affidavit sworn on 25th October 2018. The purpose of a supplementary affidavit is to allow the applicant to respond to the Respondent's replying affidavit. Therefore, it only serves justice for the respondent to respond to the supplementary affidavit with a further replying affidavit to clarify any issue arising. The respondent has a right of response to any additional allegations leveled against him least there be a prejudice. The certified proceedings on page 180-195 of the record of appeal do not include the proceedings before the appellant filed his supplementary affidavit on October 25, 2018 to demonstrate that he had leave before filing the supplementary affidavit. I find that the trial court did not err in law or in fact by admitting into evidence a further replying affidavit that was filed without the leave of court.
10. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion. As an appellant court, I will not interfere with the exercise of the discretion by the learned Magistrate unless I am satisfied that the decision is clearly wrong because of some misdirection or because of failure to take into consideration relevant matter or considered irrelevant matters and arrived at a wrong conclusion.
11. The application dated September 20, 2018 was brought under order 40 rule 1 and 2 of the Civil Procedure Rules with the only issue for determination being an order of temporary injunction restraining the respondent from blocking the appellant from accessing the suit properties. It is common ground that neither the appellant nor the respondent presented a certificate of title issued by a Land Registrar as provided by section 26 of the Land Registration Act. It is not disputed that both the appellant and respondent bought their respective plots from one Juma Mgana Ramadhan on diverse dates. Further it is evident both the appellant and respondent produced a set of sale agreements between themselves and the said Juma Mgana Ramadhan that are meant to establish ownership to the suit properties, which has led to each accusing the other of mischief, malice and fraud. The role of the trial Magistrate, at that stage was limited to consider whether the principles for the grant of an interlocutory injunction at that stage were met.
12. The applicant had the burden of proving a prima facie case by showing a clear and unmistakably right that ought to be protected. The Sale agreements; Plot 1329 dated February 24, 2018, Plot 1337 dated February 24, 2018 and October 17, 2016 between the appellant and Juma Mgana Ramadhan have been strongly opposed by the Respondent. The court faulted the authenticity of the agreement for Plot 1329 presented by the appellant on the ground that the signature of the seller was not witnessed by the Advocate who is said to have drawn the agreement. The respondent in his replying affidavit dated October 15, 2018 claimed that he too bought Plot 1329, 1330 and 1331 from the same Juma Mgana Ramadhan on September 28, 2016 therefore Plot 1329 was not available for sale to the appellant. Though the agreement read Plot 1923, 1324 and 1325 he argued that the same were later changed to read 1329, 1330 and 1331. From the evidence presented, the trial Magistrate ruled that it was difficult for the Appellant to establish a prima facie case given the nature of the transactions and change of plot numbers.
13. I do concur with the trial court, the evidence presented by the Appellant did not discharge the burden of a prima facie case at the interlocutory stage. The trial court could not establish with certainty the legal or equitable interest that the Appellant has in the Plot 1329 and 1337 and was in order to rule that



all the issues raised would be determined during the hearing of the main suit where parties would have an opportunity to cross examine the witnesses on during the hearing. The appellant failed to satisfy the first of the triple requirements in an interlocutory injunction application, yet the three requirements ought to be applied separately and distinctly. As clearly stated in *Nguruman Limited* (supra)

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap-frogging by the Applicant to injunction directly without crossing the other hurdles in between.”

14. In my view, the evidence presented before the learned Magistrate did not discharge the burden of a prima facie case.
15. On irreparable injury, the learned Magistrate held that the respondent already removed the blockage after the issuance of the temporary orders and that any loss that would be suffered by the Appellant could easily be compensated by way of monetary value. In *Nguruman Limited* (supra) the Court of Appeal set out the threshold to be established in considering irreparable injury,

“The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

16. The learned Magistrate found that the injury that the appellant could suffer can be awarded by damages in form of monetary compensation. The appellant’s claim being commercial in nature, meant that the claim was capable of being qualified hence the learned Magistrate did not err in law and in facts in finding that damages would be sufficient compensation. In conclusion, I find no reason to interfere with the discretion exercised by the learned Magistrate on the application of the principles for the grant of temporary injunction. I find the Memorandum of Appeal dated November 2, 2021 has no merit and I dismiss it with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2022.

N.A. MATHEKA

JUDGE

