Lokopis & 5 others v West Pokot County Government (Environment and Land Appeal 2 of 2020) [2022] KEELC 14845 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14845 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 2 OF 2020

FO NYAGAKA, J

NOVEMBER 17, 2022

BETWEEN

JOHN LOKOPIS ..... 1ST APPELLANT

DIFNA CHEROTICH ..... 2ND APPELLANT

MARGARET LIMARENG ..... 3RD APPELLANT

SUSAN C. PKEMOI ..... 4TH APPELLANT

DAMARIS ROTINO ..... 5TH APPELLANT

HELLEN NGETICH ..... 6TH APPELLANT

AND

WEST POKOT COUNTY GOVERNMENT ..... RESPONDENT

(Being an Appeal arising out of the Ruling and Order of Hon. M.M. Nafula (Principal Magistrate) in Kapenguria Chief Magistrate's Court ELC Case No. 31 of 2019 delivered on 11 th March 2020)

JUDGMENT

Introduction

1. Alongside their Plaint and other accompanying documents, the Appellants filed a Notice of Motion Application on November 18, 2019 in Kapenguria PMC ELC Case (sic) No 31 of 2019. Substantively, they sought a temporary injunction restraining and/or prohibiting the Respondent or anyone under its instructions, from entering onto, trespassing and interfering with the Appellants' suit properties pending the determination of the suit.

2. In its Ruling delivered on March 11, 2020, the trial court found that the Application failed to meet the threshold set out in the locus classicus case of *Giella v Casman Brown [1973] E.A. 358*. Consequently, the Application was dismissed with no orders as to costs.

The Appeal

3. It is the dismissal order that is the subject of the present Appeal. Vide their Memorandum of Appeal filed on March 12, 2020, the Appellants impugn the trial court's ruling on three (3) grounds, namely:

    1. The learned trial magistrate erred in law and fact in failing to consider, analyze and evaluate the evidence adduced.

    2. The learned trial magistrate erred in law and fact by ruling that the Appellants had not proved their case despite overwhelming evidence to the contrary.

    3. The learned trial magistrate erred in law and fact by disregarding the Appellants' submissions on record.

    4. The Appellants urged this court to set aside and/or quash the said Ruling. They did not pray for any further order or relief of this Court after the quashing of the decision if the instant Appeal is successful.

Hearing of the Appeal

5. After its admission to hearing, the Appeal was heard on the fundament of the parties' rival written submissions upon directions being given by the Court. The Appellants' submissions maintained that they had established the principles for the grant of injunction as determined by the case of Giella v Cassman Brown (Supra).

6. Firstly, on whether the Appellants had a prima facie case on the merits, it was submitted that the Appellants were allotted plots within Makutano Junction in 1999. As a pre-condition for the grant and retention of the said plots, the Appellants, after applying and being allotted plots No 5, 7, 14, 16, 17 and 19, paid a monthly rent of Kshs 500.00. Furthermore, they erected permanent structures on the plots for business. For these reasons, they submitted that they had a prima facie case. Additionally, they faulted the trial magistrate for holding that the Appellants were mere licensees. They cited that due to this, the trial court took into account irrelevant facts, misapprehended the law and consequently arrived at flawed decision.

7. Secondly, on whether the Applicants stood to suffer irreparable harm that could not be compensated by an award of damages, the Appellants submitted the invitation by the Respondent to the public to apply for plots No 5, 7, 14, 16, 17 and 19 would deprive them of their beneficial ownership yet they constructed the stalls.

8. Lastly, the Appellants submitted that the balance of convenience tilted in their favor. They submitted that they raised valid grounds to warrant an interference of this court in the trial court's exercise of jurisdiction. They urged this court to set aside the ruling with costs to the Appellants.

9. The Respondent on the other hand propitiously welcomed the trial court's ruling. It continued that since the Appellants were mere licensees, having failed to establish proprietorship, they had not established a prima facie case. They further submitted that the Appellants neither demonstrated that they would suffer irreparable harm that could not be compensated by an award of damages nor elaborated how the balance of convenience tiled in their favor. They prayed that the Appeal be dismissed with costs.

Analysis and Determination

10. I have considered the parties' rival written submissions, the relevant law, the proceedings at trial and the impugned decision. The Appeal emanates from the exercise of a court's discretionary power to grant or refuse an order of injunction as provided in Order 40 of the Civil Procedure Rules.

11. As a first appellate court, I remind myself that this court will not ordinarily interfere with the exercise of discretion unless it has been shown that the discretion was exercised injudiciously. On this, I invite the parties to refer to *Kiriisa v Attorney General & another [1990 - 1994] EA 244*]. Also, Madan JA (as he then was) in *United India Insurance Company Limited v East African Underwriters (Kenya) Limited [1985] EA 898* held:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."

12. The trial court was tasked to determine a grant of injunction as prayed by the Appellants. The trial court, and rightly so, was guided by the principles set out in Giella v Cassman Brown (Supra). The law on grant or refusal of injunction is now well settled, and therein its foundation was firmly laid. The principles that must be met for the grant of injunction is that an Applicant must demonstrate the following:

    a. An applicant must show a prima facie case with a probability of success;

    b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

    c. When the Court is in doubt, it will decide the application on the balance of convenience.

13. I have carefully analyzed the Application and the supporting documents and the Response thereto. On March 26, 1999, the Kapenguria Municipal Council invited potential investors to apply for plots within the municipality. It further invited objections to its part development plan. Following this invitation, the Appellants successfully applied and were allotted spaces No 5, 7, 14, 17 and 19 at Makutano Bus Park. They were required to construct a permanent building according to the Council's specified plan and pay Kshs 500.00 monthly rent. Since they abided by those set out conditions, the Appellants were granted licences in their favor.

14. Vide Gazette notice number 858, it was notified, the transitional authority was mandated to verify and validate assets and liabilities of the defunct local authorities. On December 1, 2014, the Transition Authority through the local dailies published a moratorium on transfer of assets and liabilities during the transition period pending validation and verification processes.

15. On March 27, 2019, the Respondent issued an eviction notice to all stall owners citing intention to refurbish, streamline revenue collection, invite fresh applications and reallocate after refurbishment. The notice stated that it was in the process of verifying the true occupants of the stalls at the Bus Park. It urged occupants to vacate within a stipulated period failure to which forceful eviction would have been effected.

16. In response to the Application, the Respondent deposed that while allotment letters were issued in favor of the Appellants, they were not absolute. It added that it had discretionary powers to regularize its assets as and when required.

17. On December 17, 2018, the Respondent held a meeting to deliberate on the need to refurbish the Bus Park. While admitting that it issued an eviction notice, it justified that it was necessitated by the need for refurbishment and the need to raise revenue collection.

18. The Respondent further deposed that the Appellants could not dictate the actions of the Respondent in the discharge of its mandate when it came to implementation of policies. It emphasized that the Appellants were only enjoying the spaces as allottees/tenants and were subjected to the directions of the Respondent.

19. The Respondent further opposed the Application by stating that it had been overtaken by events. This was owing to the fact that the Bus Park had been refurbished and was awaiting reallocation. It further objected that the Appellants had not been dutifully remitting their rent as required. As a result of the foregoing, the Appellants had approached this Court with unclean hands.

20. The Appellants, responded by way of rejoinder to the Respondent's opposition by way of Replying Affidavit. They interpreted that the allotment letters were proof of ownership. They were not aware of any meeting that had been held by the Respondent as stated. They had religiously remitted the Kshs 500.00 monthly pay. They admitted that they complied with the eviction orders but remained illegal. They observed that Kitale ELC No 32 of 2019 issued a temporary injunction on such similar issue. They lamented that they ought to have been involved in the decision making process.

21. On whether the Appellants had established a prima facie case, the trial court was guided by the Court of Appeal in *Mrao v First American Bank of Kenya Limited & 2 Others (2003) KLR 125* in establishing what constituted a prima facie case. The trial court found that the allotment letters issued in favor of the Appellants were not documents of title. Since they were not registered owners, they could not benefit from the orders sought. In that regard, they were licencees who transferred their stalls to the Municipal Council of Kapenguria. Additionally, the trial court observed that Application was lodged after the Makutano Bus Park had been refurbished.

22. Looking at the evidence in totality, I find that the fairness or otherwise of the eviction notice issued upon the Appellants was serious matter of contention. I say so because it was done without their involvement and input. It must be borne in mind that the Appellants were investors of the said Bus Park. They had been issued with allotment letters. The said letters, though not evidence of title and subject to conditions to be laid by the County Government of West Pokot gave the recipients a legitimate expectation that they would, in priority, be licenced to use the spaces allocated. It was for that reason that they set up permanent structures thereon at their own costs. They further remitted monthly rent regularly to the Council.

23. This Court finds that the trial magistrate did not exercise discretion judiciously over the issue. It was improper to determine that Appellants had no prima facie case by virtue of the fact that they had not documents of title. The Appellants had demonstrated that they complied with the terms of allotment. Having been allotted the spaces, it was only fair to imagine and think that they ought to have been involved in any decision making process that would affect the status quo. That would have amounted to giving them a fair hearing on the process and place them on the plane of public participation as stakeholders of the spaces. They had set up structures that continued to run along.

24. The issuance of the eviction notice, in my view, ought to have involved their proper participation before taking such drastic steps. While this Court encourages and recognizes progressive continuous

developments across counties and the country as a whole as and when required, it would only be fair and just that it is done in consultation with and in consideration of stakeholders. The manner in which the eviction notice was issued was, thus, not only improper but also illegal. As rightly pointed out by the Appellants, the fact that compliance was done was not tantamount to a legality. For the above reasons, I do find that the trial court injudiciously held that the Appellants had not established a prima facie case with probability of success. But it is not enough to grant an injunction just because a prima facie case has been established by an Applicant: other limbs of the law on injunctions have to be satisfied.

25. Thus, I turn to the second limb. On whether the Appellants stood to suffer irreparable harm that could not be compensated by an award of damages, the trial court found in the negative. It is not gainsaid that allotment letters, of whatever nature and import they be, were issued to the Appellants. It is trite law that a letter of allotment of a temporary licence is not a document of title. Importing the words of Kimondo J in *Stephen Mburu & 4 Others v Comat Merchants Ltd & Another [2012] eKLR*, "It is a transient and [is] often a right or offer to take property." Going by this fact, it becomes difficult to establish what irreparable harm the Appellants stood to suffer. Damages would be appropriate if it would be found that any loss was suffered by the Appellants.

26. Furthermore, the Appellants, as rightly pointed out by the trial court, failed to established irreparable harm. To my mind, any harm that may have been occasioned can be compensated by pecuniary means. I thus find that the Appellants had not established this ground. Consequently, this takes this court to determine whether the balance of convenience titled towards granting rather than refusing the injunction.

27. According to the Respondent, the eviction process had already taken place. That was also admitted by the Appellants. Subsequently, the Respondent commenced the process of refurbishment. In fact, all that was left was the reallocation. It stated that, resultantly, the Application had been overtaken by events.

28. Indeed, and by virtue of the stated circumstances, the grant of injunction would have been an academic exercise because the Respondent has already entered and conducted a refurbishment exercise on the Appellants' allotted stalls. This is the actual entry and interference of the suit properties yet this was the very action the Appellants wished to forestall.

29. The Court in *Stanley Kirui v Westland Pride Limited [2013] eKLR* held inter alia that "the Court cannot injunct what has already happened." In *Mavoloni Company Ltd v Standard Chartered Estate Management Ltd* Civil Appeal No 266 of 1997 [1997] LLR 5086, the court held that an injunction cannot be granted once the event intended to be injuncted has been overtaken by events. Lastly, in *Esso Kenya Ltd v Mark Makwata Kiye* Civil Appeal No 69 of 1991, it was stated that an injunction cannot issue to restrain an event that has already taken place.

30. I chastise the actions of the Respondent. It ought to have involved the Appellants in this whole process from the moment the idea ran across their mind or decisions. It is only by virtue of the fact that the Respondent has already interfered with the suit premise or changed the character thereof, that this Court finds that the grant of injunction tilts towards denying rather than granting it hence the balance of convenience is to the Respondents.

31. In view of the foregoing, I find that the Appellants Appeal lacks merit but based on the analysis laid out herein. It is hereby regrettably dismissed. As the Court partially concurred with certain elements of the Appeal, each party shall bear their own costs of the Appeal.

32. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 17TH DAY OF NOVEMBER, 2022.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE