Kuria & 2 others v Joseph (Environment and Land Appeal E004 of 2022)
[2022] KEELC 15541 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15541 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E004 OF 2022

LN GACHERU, J

DECEMBER 20, 2022

BETWEEN

TABITHA WANJIRU KURIA ..... 1ST APPELLANT

NJOROGE KURIA ..... 2ND APPELLANT

JOHN KURIA GITUNDU ..... 3RD APPELLANT

AND

JAMES MWANGI JOSEPH ..... RESPONDENT

(Being an appeal from the Ruling delivered on 16th March, 2022, by Hon. E. Agade (SRM) in Kigumo Chief Magistrates Court ELC Case No. E003 of 2021)

JUDGMENT

1. The Appellants herein are the Defendants in Kigumo Chief Magistrates Court ELC Case No. E003 of 2021, while James Mwangi Joseph is the Plaintiff. In respect of the Notice of Motion Application dated 30th September 2021, the Appellants herein were the Applicants while James Mwangi Joseph was the Respondent.

2. By a Notice of Motion dated 30th September 2021, the Applicants had sought for orders;

    1. THAT a temporary injunction be issued restraining the respondent, his servants, employees and or agents from cutting down trees, planting any type of crops or trees, encroaching, occupying, erecting boundary features and/or fencing off or in any manner whatsoever interfering with Land Parcel No. Loc 2/Kinyona/898, pending hearing and determination of this Application.

    2. THAT a temporary injunction be issued restraining the respondent, his servants, employees and or agents from cutting down trees, planting any type of crops or trees, encroaching,

occupying, erecting boundary features and/or fencing off or in any manner whatsoever interfering with Land Parcel No. Loc 2/Kinyona/898, pending hearing and determination of this suit

3. THAT the OCS Kinyona Police Station to ensure compliance of this Order.

4. THAT costs be provided for.

3. The Application was premised on 9 grounds set out on the face of the said Application and on the Supporting Affidavit of John Kuria Gitundu sworn on 30th September 2022. It was the Applicants disposition that at all material times, Land Parcel No. Loc 2/Kinyona/566, was registered in the name of Gitundu Karanja which registration was done on 2nd July 1962. That Land Parcel No. Loc 2/ Kinyona/566, was illegally and fraudulently subdivided by one Harry Waturu Gitundu on 3rd October 1977, to produce two parcels of land being Land Parcel No. Loc 2/Kinyona/898, and Land Parcel No. Loc 2/Kinyona/899. That the said subdivision was fraudulent because there was no succession proceedings in the estate of Gitundu Karanja until 2018, when a Succession cause was filed. That after subdivision, land Parcel No. 898 was registered in the name of Henry Waturu Gitundu and land Parcel No.899, was registered in the name of Gitundu Karanja.

4. That the late Gitundu Karanja died on 9th May, 1977 and therefore the alleged subdivision of land Parcel No. 566, on 3rd October 1977, was illegal and fraudulent. That the Henry Waturu Gitundu of ID xxxx, who allegedly subdivided the land illegally is different from Henry Waturu Gitundu of ID No. xxxx. That the Respondent filed Succession Cause No. 35 of 2016, in respect of the estate of Henry Waturu Gitundu and fraudulently obtained a Certificate of Confirmation of Grant dated 9.5.2017, which gave him absolute ownership over Land Parcel No. Loc 2/Kinyona/898.

5. That on diverse dates between 24th -27 September 2021, the Respondent wantonly cut down trees planted by the Applicants on land Parcel No.898, valued at an estimated cost of Kshs. 250,000/=. That the Respondent did not plant or own the said trees and he was not in actual possession of Land Parcel No. Loc 2/Kinyona/898. That though the Respondent is the registered owner of land Parcel No. 898, his registration was acquired fraudulently and the said registration has been challenged by the Applicants in their Defence and Counterclaim on record. That unless the Respondent is stopped by and Order of this Court, he was likely to continue his unlawful activities.

6. The Application was opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by James Mwangi Joseph on 7th October, 2021. It is the Respondent's contention that he is the legal registered owner of Land Parcel No. Loc 2/Kinyona/898, and his ownership is guaranteed and protected by law. That he legally acquired Land Parcel No. Loc 2/Kinyona/898, through a legal process after he completed Succession of his father's estate in Kericho Succession Cause 35 of 2010. That Land Parcel No. Loc 2/Kinyona/898, was owned by his father as a free property prior to his demise. That the Application before the Court is spiteful and an abuse of the court process. That the Application as filed before the Court is unnecessary and underserving of the Orders sought.

7. The Application was canvassed via written submissions and on 16th March 2022, the trial court delivered a ruling in favour of the Respondent and stated as follows;

> "From the foregoing, the Applicants have failed to demonstrate all the 3 conditions set in Giella vs. Casman brown (Supra). An injunction as sought by the Applicants cannot be granted."

8. The Appellants were aggrieved by the above determination of the Court in favour of the Respondent herein and has sought to challenge the said Ruling through the Memorandum of Appeal dated 5th April 2022, and sought for orders as follows;

    1. That the Appeal be allowed.

    2. That the Ruling of the lower court delivered on 16th March 2022 be set aside.

    3. That the Honourable Court be pleased to grant the orders sought in the Appellants' application dated 30th September 2021.

    4. Any other relief the honourable court may deem fit to grant.

9. The Grounds of Appeal are :-

    1. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellants had established a prima facie case with a probability of success.

    2. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellants could not have the title in respect to the suit property being Loc 2/Kinyona/898, since it was acquired fraudulently, illegally, and unprocedurally.

    3. That the learned trial Magistrate erred in law and in fact in holding that the only option available to the appellants was to challenge the Respondent's transmission of the property in the Succession Cause while in fact the appellants had filed an application to set aside the Grant in Kericho Succession Cause 35 of 2016.

    4. That the learned trial Magistrate erred in law and in fact in holding that the appellants were licencees by virtue of an alleged agreement dated 19th September 2017, whose authenticity had been challenged by the Appellants.

    5. That the learned trial Magistrate erred in law and in fact in failing to appreciate the principles set out in Giella vs. Cassman Brown (1973) EA 358 which the Appellants had satisfied in their application before Court.

10. The Appeal was canvassed by way of written submissions.

11. The Appellants filed their written submissions dated 13th June 2022, through the Law Firm of M.M. Uvyu & Co Advocates. On the 1st ground of appeal, the appellants submitted that the Learned Magistrate ought to have found that indeed the title which is registered in the name of the Respondent herein was obtained fraudulently and therefore the Appellants had established a prima facie case with a probability of success. That the title registered in the name of the Respondent was unprocedurally acquired and the Court ought to have put that into consideration and grant the injunctive orders. That the matter in the Lower Court being ELC 3 of 2021 is still pending hearing and determination and therefore the learned magistrate ought to have granted the interim orders.

12. On the 2nd ground of appeal, the Appellants submitted that according to Section 26 (1) of the *Land Registration Act*, even a first registration can be challenged on grounds of fraud and misrepresentation or where the Certificate of title has been acquired illegally or through a corrupt scheme.

13. On the 3rd and 4th ground of the Memorandum of Appeal, the Appellants submitted that the Learned Magistrate failed to put in consideration the fact that the appellants had filed an application to revoke the Grant issued in Kericho Succession Cause No. 35 of 2016 in delivering her ruling. Further that the

Appellants were not licensees and the learned magistrate erred in law and fact in describing them as such based on the agreement dated 19th September 2017.

14. On the 5th ground of appeal, the Appellants submitted that they satisfied the grounds for grant of an injunction set out in Giela vs. Cassman Brown (supra) and hence the appeal should be allowed as prayed. Reliance was placed on the case of Mbogo vs. Shah (1968) EA 93 where it was held that appellate court shall not interfere with the exercise of discretion of the judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and is clearly wrong.

15. The Respondent on the other hand filed his submissions dated 7th June 2022 through the Law Firm of Kirubi Mwangi Ben & Co Advocates. It is the Respondent's submissions that the Appeal as filed is frivolous and vexatious. That the Appellant failed to seek leave to file the instant appeal as envisaged by Section 73(1) of the *Civil Procedure Act* as read together with Order 43 of the Civil Procedure Rules. The end result is that there is no competent Appeal for determination by this Court. That the Appellants failed to establish the principles for grant of an injunction and hence the appeal should be dismissed with costs.

16. The Court has considered the evidence adduced in court as well as the submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows;-

17. This is a first appeal and by law it can be based on both law and facts and this Court takes cognizant of fact that it neither saw nor heard the witnesses. It is thus aptly guided by the holding of the Court in Peters vs Sunday Post Limited where the Court held:

    i. Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate Court will not hesitate so to decide.

    ii. As there was documentary and other evidence which either tended strongly to confirm the appellant's evidence or, alterative to show that the Respondent's principal witness was unworthy of credit the full significance of which the trial judge had apparently not appreciated this was a case where the appellate court ought not to allow the conclusion reached by the trial judge to stand.

18. The duty of the 1st appellate court was further explained in the case of Selle vs Associated Motor Boat Co. {1968} EA 123. This is also captured by Section 78 of the *Civil Procedure Act*, which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

19. This provision was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

> "We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

20. Further, in the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212, the Court of Appeal held inter alia, that:-

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

21. This Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it as the trial court had the advantage of hearing the parties.

22. However, in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. Further, as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo vs Shah (1968) EA at Page 93, where the Court 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 matters on which it should not have acted on 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."

24. Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions by the parties, and the Ruling by the trial Court, this Court and finds that the issue for determination is whether the instant Appeal is merited.

25. It is not in doubt that the instant appeal emanates from a Ruling of the trial Court dismissing an application seeking temporary injunctive orders filed by the Appellants herein.

26. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

> " Where in any suit it is proved by affidavit or otherwise—
>
> a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
>
> b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may

be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

27. The conditions for consideration further in granting an injunction is now well settled in the case of Giella vs Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

28. The test for granting of an interlocutory injunction was considered in the American Cyanamid Co. vs Ethicom Limited (1975) A AER 504 where three elements were noted to be of great importance namely:

1. There must be a serious/fair issue to be tried,
2. Damages are not an adequate remedy,
3. The balance of convenience lies in favour of granting or refusing the application.

29. The circumstances for consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a Decree or that the Defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

30. Therefore, in granting an application for an interlocutory injunction, the Court has to satisfy itself that the Applicant has a prima facie case with a probability of success and that the Applicant if not granted the Orders sought will suffer irreparable damage which cannot be compensated by way of damages.

31. A prima facie case was defined In Mrao Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR, where the Court of Appeal defined a prima facie case as:

> A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"

32. In the instant case, the Appellants contend that the suit land LOC 2/KINYONA/898, was a subdivision of LOC 2/KINYONA/566. That LOC 2/KINYONA/566, was initially registered in the name of Gitundu Karanja (deceased) and was illegally and unlawfully subdivided by the Respondent herein and or Henry Waturu Karanja. That after the said illegal subdivision, LOC 2/KINYONA/566 gave rise to the suit land and LOC 2/KINYONA/899. That LOC 2/KINYONA/898 being the suit

land is registered in the name of the Respondent herein, but the said registration was obtained by fraudulent means.

33. It is trite that a Certificate of title is conclusive evidence of ownership unless the contrary is proven through calling of evidence. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the *Land Registration Act*, 2012. Section 24(a) provides:

> 24. Subject to this Act
>
> (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

34. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. In the instant case it is not in doubt that the Respondent is the registered owner of LOC 2/ KINYONA/898. Therefore, from the above, unless evidence to the contrary is produced, the court finds and holds that the Respondent is the registered owner and has beneficial interest over parcel LOC 2/KINYONA/898.

35. It is the Appellants further contention that on diverse dates between 24th and 27th September 2017, the Respondent herein wantonly cut down trees on the suit land which trees were planted by the Appellants. The Respondent on the other hand contends that he is the duly registered owner of the suit land having acquired it pursuant to a Confirmation of Grant at Kericho High Court in Succession 35 of 2010. That being the duly registered owner, he had exclusive and absolute rights to utilize the suit land and such right should at all times be protected by this Court. That the Appellants are not deserving of the orders sought as they are guilty of material non- disclosure and that the Appellants have approached this Honorable Court with unclean hands.

36. On whether the Respondent fraudulently and unlawfully acquired the suit land, and whether the initial subdivision was proper and done to book, is a matter of evidence, and the trial court could not conclusively determine these issues in interim before the matter proceeded to full hearing. The said determination will have to await the calling of evidence, testing of the same in cross examination and evaluation of the tendered evidence. At the interim stage, the trial court was only mandated to arrive at a finding of whether the appellant had met the threshold for grant of injunctive orders as was set out in the case of Giella Vs. Cassman Brown & Co. Ltd 1973 (supra)

37. Further in the case of Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002, the court held that:-

> "In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria"

38. Based on the above, the question that begs an answer is whether the Appellants had satisfied the criteria established for grant of a temporary injunction. To answer this question, the Court has analyzed the evidence available and finds that the Respondent herein is the registered proprietor of the suit property as evident from the Certificates of title, attached as annexures to the pleadings. As a proprietor of the suit property, the Respondent enjoys the rights of a proprietor as provided by Sections 24 and 25 of the *Land Registration Act*. Further, the said Certificate of title can only be challenged under Section 26(1) (a) & (b) of the said Act.

39. While the Appellants claimed that the Respondent was unlawfully and fraudulently registered as the owner of the suit land, the temporary Orders they sought via the Notice of Motion Application dated 30/9/2021 which is the subject of this appeal, is a temporary injunction be issued restraining the Respondent, his servants, employees and or agents from cutting down trees, planting any type of crops or trees, encroaching, occupying, erecting boundary features and/or fencing off or in any manner whatsoever interfering with Land Parcel No. Loc 2/Kinyona/898, pending hearing and determination of trial court suit.

40. This Court finds and holds that this Order if granted on the interim, would have the effect of limiting the absolute rights of the registered owner of land contrary to the provisions of Article 40 of *the Constitution*. The Onus was on the Appellants to show and prove to the Court that the suit land was in danger of misuse, disposal and/or alienation which they failed to do.

41. Based on the foregoing it follows therefore that the Appellants on a balance of probability did not prove the existence of prima facie case to warrant the grant of a temporary injunction. In the case of Kenya Commercial Finance Company Limited Versus Afraha Education Society & Others, Civil Appeal No 142 of 1999 (2001) IEA86 where the Court held that:-

> "The judge should address himself sequentially on the conditions for granting of an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title's dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available"

42. The second limb for determination in the grant of a temporary injunction is whether the Appellants had established that they would suffer irreparable loss which cannot be adequately compensated by an award of damages. In the case of Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal held that:

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage 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."

43. The said Court went on to state that:

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. 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."

44. In the instant Appeal, even though the Appellants had established a prima facie case which they have not, Court is of the considered view that any loss suffered by the Appellants can be compensated by way of damages.

45. Guided by the definition of irreparable damage in the Nguruman Limited case cited above, the Court finds that the Appellants have failed to establish the element of irreparable damage necessary for the granting of a temporary injunction. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

> However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them".

46. On the balance of convenience, the Court is not in doubt that the Appellants have also failed to make a case for irreparable loss in any case the Appellants can be adequately compensated by way of damages if the trial Court finds in their favour after the substantive hearing.

47. The upshot of the above is that the Appellants have failed on a balance of probability to establish all the elements necessary for the grant of a temporary injunction as outlined in the case of Giella vs. Cassman Brown (supra). Consequently the Court finds and holds that Appellants' Appeal Vide the Memorandum of Appeal dated 26th April, 2022, is found not merited and the said Appeal is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF DECEMBER 2022.

L. GACHERU

JUDGE

Delivered online;

In the presence of

M/s. Wayua holding brief Mr. Uvyu – 1st Appellant

2nd Appellant

3rd Appellant

Absent - Respondent

Joel Njonjo – Court Assistant.

L. GACHERU

JUDGE