



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 69 OF 2001

ABRAHAM WANJALA NAMBILO APPELLANT

VS

FENTRY W. WANASI

DAVID W. WANASI RESPONDENT

J U D G M E N T

The appellant filed a plaint before the Senior Principal Magistrate's court at Bungoma dated 2nd October 2001 in which he sought for inter alia a perpetual injunction plus costs of the suit.

At the time of filing the plaint, the appellant filed a chamber summons of the same date pursuant to the provisions of Order XXXIX rules 1, 2 and 9 of the civil procedure rules where the appellant sought for an order of injunction to restrain the Respondent from entering, trespassing or interfering in any way with the plaintiff's occupation of L.R. NO. KIMILILI/KIMILILI/1178. The application was opposed by the Respondent who filed a replying affidavit. The application was heard by the learned Senior Resident Magistrate who at the end of the day dismissed the application on the ground that the appellant did not meet all the conditions necessary for a grant of an order of a temporary injunction. The appellant being dissatisfied with the aforesaid ruling now appeals against the decision. This appeal proceeded to be heard ex parte when the Respondent failed to attend the hearing despite having been served with the hearing notice.

The first ground of Appeal argued by the appellant is that the learned trial magistrate misdirected himself in dismissing the appellant's application without addressing his mind to the conditions necessary to or refuse to an order of injunction.

I have examined the record and found that the appellant had exhibited in his affidavit in support of the summons a copy of the title deed in respect of parcel number KIMILILI/KIMILILI/1178 to establish that he is the registered owner of the same. The Appellant also exhibited in the same affidavit a copy of the official search which clearly indicated the particulars of the registered owner being the appellant.

The learned Senior Resident magistrate acknowledges in his ruling that these documents were indeed annexed to the appellant's affidavit in support. He was of the view that the documents were worthless because they were copies which were not certified. He was surprised why the original documents were not produced. He formed the opinion that the documents were suspect.

It is apparent that the learned Senior Resident magistrate dealt with the application as though it was a substantive hearing of the main suit where original documents would be required or in the absence of the original documents, a party would be required to tender in evidence certified copies of the original. It is trite law that in interlocutory proceedings copies of documents annexed to affidavits are readily accepted

so long they are properly commissioned and their sources are disclosed. It is not necessary for a party to produce the original or certified copies of the same. The learned trial Senior Resident Magistrate misapprehended this point thus arriving at a wrong decision.

The matter before the learned senior resident magistrate was an application for a temporary injunction pending the hearing and determination of the main suit. The trial magistrate was bound to consider the principles necessary before granting or dismissing the prayer for an order of a temporary injunction. What the trial magistrate did was to dismiss the application without considering the well known principles. This being a first appeal I am entitled to reconsider and evaluate the evidence presented before the lower court.

The principles of injunction are well settled. I refer to the case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A. P. 358**

The first principle is that the applicant must show that he has a prima facie case with a probability of success.

Secondly, that an applicant must also show that if he is not granted an order of temporary injunction he is likely to suffer an irreparable loss which cannot be compensated by way of damages.

Thirdly, that if the court is in doubt, the application should be decided on a balance of inconvenience.

The learned senior Resident Magistrate did not address himself to these conditions save for the fact that he mentioned them by passing. This is a great misdirection which has caused a miscarriage of justice. The evidence on record indicate that the appellant purchased L.R. NO. KIMILILI/ KIMILILI/1178 herein - after referred to as the suit premises from one Julius Wanasi (now deceased), the father to the Respondents in 1987. It is also shown that appellant obtained title to the suit premises on 29/5/1987. It is also clear from the record that the deceased died sometimes in 1997, about ten (10) years after the appellant had obtained title to the suit premises. The appellant has therefore established that he is the registered owner of the suit premises as evidenced by the title deed and certificate of official search annexed to the affidavit in support of the chamber summons.

It is in my considered view that the appellant had established a prima facie case with a probability of success. The trial Resident Magistrate misdirected his mind when he failed to appreciate the fact that the appellant established a prima facie case with a probability in view of the glaring facts presented to him at the inter partes hearing of the summons.

It was also a misdirection on the part of the trial magistrate to impute that the documents presented were suspect without prove or particulars of fraud being pleaded as required by law.

It has also been stated by the appellant that he would suffer irreparable loss because the respondents were busy harvesting coffee which were ripe. The learned trial senior resident magistrate should have considered this matter. I am convinced that the appellant would suffer irreparable loss.

It was also stated that the appellant would be more inconvenienced than the respondents if an injunction is not granted. The appellant has been in occupation since 1987 until the year 2001 when the Respondents made or lodged a claim over the ownership of the suit premises. Surely it is clear that the appellant has been in continuous occupation since 1987. It is crystal clear that the appellant would be more inconvenienced than the Respondent if an order of injunction is refused.

In the final analysis therefore, I am of the view that had the trial Senior Resident Magistrate taken time to consider the conditions to be met before granting an order of injunction he would have come to a different conclusion than the decision now being challenged. It is apparent that he did not take time to consider the submissions of the appellant's counsel.

For the above reasons I have formed the opinion that the appeal must succeed. Consequently the appeal is allowed with the resultant order that the order dismissing the appellant's chamber summons dated 2nd

October 2001 is set aside and substituted with an order allowing the same with costs to the appellant. The appellant is entitled to costs of the appeal.

DATED AND DELIVERED THIS 9th DAY OF March 2004

J.K. SERGON

JUDGE