Cheru v Mwaniki (Environment and Land Appeal E006 of 2021)
[2024] KEELC 3497 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3497 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL E006 OF 2021

JM MUTUNGI, J

MAY 2, 2024

BETWEEN

FELICIA WANJA CHERU ..... APPELLANT

AND

JAMLECK KAMAU MWANIKI ..... RESPONDENT

(Being an Appeal against the Ruling and Order of the Hon. P.M Mugure, Principle Magistrate sitting in Wang'uru ELC Case No. 42 of 2019 and dated 14.10.2019)

JUDGMENT

1. The subject of this appeal is land parcel Rice Holding No. 2461 A, Thiba Section of Mwea Irrigation Scheme (Rice Holding) that belongs to the Respondent and that had been leased to the Appellant. From the proceedings of the lower court, the Appellant filed an application dated 9th July 2019 under Certificate of Urgency seeking for Interim Orders for injunction to issue as against the Respondent, to restrain him from repossessing, interfering with the Appellant's quiet possession and use of the suit property pending the determination of the matter.

2. The application was predicated upon by the Supporting Affidavit of even date sworn by the Appellant. The Appellant averred that she was a farmer and that the Respondent had leased to her the Rice Holding from 2019 up to the end of the 2024/2025 season, for the sum of Kshs. 180,000/- which she had paid in advance. She claimed that she had prepared the Rice Holding for planting and had purchased planting materials, expending a sum of Kshs. 202,000/-. She deponed that the Respondent had threatened to breach the agreement and was using all means possible to remove her from the Rice Holding. On his part, the Respondent filed a Replying Affidavit dated 13th July 2019 and deponed that he was the licensee of the rice holding. He averred that after leasing the rice holding to the Appellant, his family objected to the said lease and opted to refund the lease consideration as per the letter dated 25th June, 2019 to the Appellant. The Respondent stated as at the time the offer for refund was made, the

Appellant had not prepared the Rice Holding for planting. The Respondent averred that he was willing and ready to reimburse to the Appellant the lease consideration for the unutilized lease consideration.

3. The parties canvassed the application by way of written submissions. The Appellant submitted that the suit before the Learned Magistrate was one that was based on written lease agreements between the parties which stipulated the terms and conditions that governed the contract. She submitted that the suit was for restraining the Respondent from committing acts of breach of the contract which was still valid and enforceable. She submitted that the Respondent had admitted his intention to unilaterally rescind the lease agreement at the instigation of his family members who were not party to the contract. She relied on the case of Aikman Versus Muchoki (1984) KLR 353 to support her submissions.

4. The Respondent submitted that what he was seeking from the lower Court was his right to repossess the Rice Holding. He stated that he had absolute right over the rice holding and sought for the dismissal of the application.

5. By its Ruling dated 21st January 2022, the trial Court declared that the relief sought by the Applicant were not warranted for the reason that the damages would have been adequate remedy. The Learned Magistrate further held that the damage that the Appellant would suffer could be remedied as the Appellant's main concern was the amount she had paid for the lease and the sums she had expended in preparing the land which the Respondent was ready to pay back.

6. Aggrieved and dissatisfied with the decision of the Court, the Appellant appealed to this Court against the decision. He filed a Memorandum and Record of Appeal dated 11th December 2019 and 3rd July 2023 respectively.

7. The Appellant's Memorandum of Appeal set out 7 grounds of appeal. The grounds are as follows:

    1. The Learned Senior Resident Magistrate erred in law and fact by treating the matter before her clearly indicated as a Civil Suit in the Plaint and whose cause of action was the Respondent's admitted threat to commit a breach of contract(s) as a Land and Environment dispute which led to her misapprehension of the whole dispute and the applicable law and her making a wrong decision in respect of the application before her.

    2. The Learned Senior Magistrate erred in fact and in law by failing to appreciate that under the provisions of Order 40 Rule 2 (1) and on the basis of the intended breach of contract complained of and expressly admitted by the Respondent the Appellant who had performed and was strictly observing all her obligations under the contract deserved the injunctive orders sought whether compensation was claimed in the suit or not.

    3. The Learned Senior Magistrate erred in law and in fact by holding that the Appellant was not entitled to the injunctive order she sought under the principles laid down in Giella Versus Cassman Brown's case whereas each of the principles set out in the said case was on all fours in favour of the grant of the order sought.

    4. It was unfair and against the principles of equity as recognized by the law and *the constitution* to deny the Appellant who had paid the full lease consideration for 2 acres of the Respondent's rice holding upto the year 2025, expended a sum of 202,000 in preparing and improving the same for planting, purchased planting materials and had a rice crop growing thereon to be denied the injunctive order she sought pending the hearing and determination of the suit.

    5. The Learned Magistrate who had by consent ordered maintenance of the status quo pending the hearing of the application erred in law and fact by holding that the only issue raised by the Applicant was the amount to be refunded to her by the Defendant and that the Defendant was

willing to refund the lease consideration whereas no such issue was raised by the Plaintiff and the Defendant was not willing to refund the full lease consideration for the unexpired period with interest as per the contract, compensate the Appellant for the expenses incidental to the preparation of and improvement of the rice field for planting, purchase of planting materials and inputs, the rice crop on the leased portion belonging to the Appellant and payment of general damages for the admitted intended breach of contract(s).

6. The Ruling/Orders of the Learned Magistrate if allowed to stand will assist the Respondent in his intended commission of unlawful breach of an enforceable contract(s) and unjustly enrich himself.

7. The Ruling/Orders of the Learned Magistrate amounted to deciding the Appellant's suit against her on her own interlocutory application which is contrary to law and occasioned grave injustice to the Appellant.

8. The Appellant prays that the Court do set aside the Ruling in Wang'uru SRM's ELC Case No. 42 of 2019 and allow the orders sought in the application dated 9th July 2019 with costs and also transfer the matter in the Lower Court to another Magistrate's Court for its determination.

9. The Appeal was canvassed by way of written submissions. The appellant filed her written submissions on 19th December 2023. The Appellant submitted that the Learned Magistrate failed to properly apply the facts and the law and misapprehended the nature of the dispute as one of ownership of the rice holding rather than the breach of contract which the Respondent had blatantly threatened to breach and which he had admitted to. It was the Counsel's position that the Appellant was entitled to the relief she sought as she was dealing with a Defendant who was ready and willing to unilaterally terminate the contract between them for his own gain. Counsel further submitted that the Learned Magistrate erred when she found that the only issue that the Appellant sought was that of a refund while what the Appellant sought to prevent was the actualization of the Respondent's threat to illegally repossess the land in clear breach of the contract.

10. The Respondent filed written submissions dated 9th February 2024. Counsel for the Respondent submitted that the Appellant was still in occupation of the Riceholding despite the orders being issued on 14th October 2019. Counsel further submitted that the only issues that remained to be settled was that of the expiry of the lease period and the refund to the Appellant. According to the Counsel for the Respondent, the Learned Magistrate rightly found that damages that the Appellant could suffer, could be adequately compensated. He further submitted that the Respondent applied the clause for terminating the contract and urged the Court not to interfere with the Ruling delivered by Learned Magistrate's.

11. The Appellant in her response to the Respondent's submissions reiterated her submissions dated 18th December 2023. Counsel submitted that the Appeal had been as a result of the Learned Magistrate's failure to uphold the contractual rights of parties contained in the lease agreement(s). Counsel further submitted that it was incorrect for the Respondent to limit their issues to the expiry of lease and the refund, while the key issue to address was the outright breach of a valid and enforceable contract by the Respondent.

12. I have considered the record of appeal and the submissions of the parties and the issue that arise for determination in the appeal is Whether the Learned Magistrate erred in law and facts in dismissing the Appellant's prayer for an interim injunction.

Analysis and Determination

13. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123.

Whether the Learned Magistrate erred in law and facts in dismissing the Appellant's prayer for an interim injunction.

14. The principle applicable in applications for grant of temporary injunction were set out in the Case of Giella Versus Cassman Brown (1973) EA 358 where the Court held that:

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."

15. The Civil Procedure Rules 2010 under:

Order 40, Rule 1 provides as follows:-

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

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 orders.

16. The conditions for grant of a temporary order of injunction as outlined in the Giella –vs- Cassman Brown Case(supra) are that an Applicant must firstly, demonstrate he has a prima facie case with a probability of success; Secondly, that unless the injunction is granted he stands to suffer irreparable injury or loss that would not be adequately be compensated by an award of damages; and thirdly, where the Court was in doubt, the Court would determine the application by considering the balance of convenience having regard to the Applicant and the Respondent.

17. The conditions are considered sequentially so that where no prima facie case is demonstrated, the application fails and if a prima facie case is demonstrated but damages would be an adequate remedy, then an injunction cannot be granted.

18. A prima facie case was defined by the Court of Appeal in Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR as follows;

> " a prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

19. The Respondent did not dispute that the Appellant was leasing the Riceholding No. 2461A from her and/or that the Appellant had paid the lease amount to her. The Respondent's contention was that members of her family whom he had not involved in the leasing arrangement had objected to the lease transaction and on that account he gave notice to the Appellant to terminate and/or rescind the lease. That prompted the Appellant to institute the suit before the Lower Court seeking injunctive orders against the Respondent from in any manner interfering with the Riceholding the subject of the suit until the suit was heard and determined. On the basis of the evidence and material placed before the Lower Court, the Appellant demonstrated he had a prima facie case which had a probability of success. Thus the Appellant satisfied the first condition for a grant of a temporary injunction.

20. In regard to the issue whether the Applicant would have suffered irreparable harm which could not be adequately compensated by an award of damages, the Appellant had to prove that he stood to suffer such harm or damage that could not be compensated by an award of damages.

21. The Court of Appeal in the Case of Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR held that: -

> " On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima 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 stand by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount, will never be adequate remedy."

22. In the Instant case there is no dispute that what was in issue was a contractual arrangement between the Appellant and the Respondent. The lease had a specified term and was for a specified consideration. Whatever the Appellant expended in preparing the land could be quantified and if there was any loss of income, the same could equally be quantified. In my view the Learned Trial Magistrate properly evaluated the matter and rightly came to the conclusion that an award of damages would have been an adequate remedy and declined to grant an order of temporary injunction.

23. Having come to the conclusion that an award of damages would have been an adequate remedy, I need not consider whether consideration of balance of convenience was necessary. The conditions for grant of temporary injunction are sequential such that once you fail in proving any of them then the injunction cannot be granted. The Appellant in my view did not prove award of damages would not have been an adequate compensation in the event she was successful in the suit.

24. In the premises I hold that the appeal lacks merit and I dismiss the same with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 2ND DAY OF MAY 2024.

J. M. MUTUNGI

ELC - JUDGE