REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C.A NO. 3 OF 2018

MUNGANIA TEA FACTORY CO. LTD.............................. PLAINTIFF

VERSUS

KIRIAMBURI NJAMIU... DEFENDANT

R U L I N G

1. This appeal arose from the ruling of the lower court (Hon. M.N. Gicheru, Chief Magistrate, Embu) on an application dated 8.9.2014. The ruling was delivered on 23.11.2015 in CMCC NO. 227 of 2014, Embu. The suit in the lower court involved two parties: The appellant herein – **MUNGANIA TEA FACTORY CO. LTD**. – as the plaintiff and the respondent – **KIRIAMBURI NJAMIU** – as the defendant. In the application, the appellant was the applicant while the respondent in the appeal was still the respondent in the application.

2. In the application, the appellant sought to restrain the respondent from harassing, intimidating, threatening, provoking, inciting, or in any manner interfering with the appellant's members quiet enjoyment of their property namely **NGANDORI/KIRIARI/3818.** On the property, the appellant operated a tea buying centre styled as **KARWIRO TEA BUYING CENTRE.** The property was said to measure 0.10 ha.

3. The ruling ended not only in the dismissal of the application but also in the cessation of the entire suit in the lower court. Aggrieved by the ruling, the appellant preferred this appeal, which faulted the lower court on eleven grounds as follows:

> *1) The learned Chief Magistrate erred in law and in fact in relying on a purported Land Registrar's Report which was un-authenticated.*
>
> *2) The learned Chief Magistrate erred in Law and in fact in relying on a document that was of no value to the dispute in question.*
>
> *3) The learned Chief Magistrate erred in Law and fact in relying on a document that did not specifically address the issue at hand, which is identification of the exact position of the tea buying centre.*
>
> *4) The learned Chief Magistrate erred in Law and fact in holding that the tea buying centre was in parcel No. NGANDORI/KIRIARI/353 despite glaring evidence to the contrary.*
>
> *5) The learned Chief Magistrate erred in Law and fact in finding that parcel No. NGANDORI/KIRIARI/353 belong to the respondent without any documentary proof placed before him.*
>
> *6) The learned Chief Magistrate erred in Law and fact in not taking the appellant's written submissions and supplementary submissions into consideration while arriving at his ruling.*
>
> *7) The learned Chief Magistrate erred in fact in not considering the consequences of the orders he issued/ruled.*
>
> *8) The learned Chief Magistrate erred in fact in failing to take cognizance of the importance of the tea buying centre to the society.*
>
> *9) Having found in his ruling that under Section 18 (2) of the Land Registration Act, the courts have no jurisdiction to determine a boundary dispute of a registered land as such jurisdiction is with the Land Registrar, the learned Chief Magistrate erred in Law and fact in proceeding to pronounce a ruling in respect of the said boundary issue.*
>
> *10) The learned Chief Magistrate erred in Law and misdirected himself in dismissing the entire suit at the application level.*

11) *In view of the circumstances set out herein above, the learned Chief Magistrate totally misdirected himself in delivering a ruling in favour of the respondent by failing to consider and appreciate the evidence on record tendered on behalf of the appellant*.

4. In the suit in the lower court, the appellant pleaded, inter alia, that it was the registered owner of land parcel No. NGANDORI/KRIARI/3818 where it operated a tea buying centre; that the respondent had taken over that land and barred members from accessing the tea buying centre; that the respondent was also committing acts of waste and degradation on the land including defacing of boundaries; and that all these actions by the defendant served to interfere with the proprietary rights of the appellant's members and also caused them loss as their produce was going to waste. The appellant sought a permanent injunction against the respondent. It also sought an order for reinstatement of boundaries for parcel No. 3818 plus costs of the suit with interest.

5. The respondent on the other hand filed a defence and counter-claim dated 25.9.14. He denied the appellant's claim and pleaded, inter alia, that he owned land parcel No. NGANDORI/KIRIARI/353 and that the appellant got registered as owner of land parcel No. NGANDORI/KIRIARI/3818 with knowledge of an existing court case between the respondent and one KIURA NJIRU, who was the original owner of parcel No. 3818.

6. In the respondent's counter-claim, the respondent pleaded that he owned land parcel No. 353 which has been sub divided into parcel Nos NGANDORI/KIRIARI/5389, 5390, 5391 AND 5392. Parcel No. 3818 was said to have been part of parcel No. NGANDORI/KIRIARI/2840 owned by KIURA NJIRU. The said KIURA NJIRU allegedly encroached on the respondent's land and that gave rise to civil case No. 68/2001 which is still pending in court. Further averment by the respondent has it that the Tea Buying Centre is in his land, specifically on parcel no. NGANDORI/KIRIARI/5389, a resultant entity from subdivision of the original parcel No. 353.

7. The respondent made several prayers including demolition of the tea buying centre and payment of damages and costs to him by the appellant.

8. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 30.3.2021. The trial magistrate was faulted for relying on a Land Registrar's report made available at the stage of filing submissions and the report itself was said to be vague and open to several interpretations. According to the appellant the report should not have been used as the basis for ending the suit.

9. Further, the appellant was said to have been in peaceful occupation for over 12 years before the respondent started interfering. The Tea Buying Centre on the land was said to have served the appellant's members who included the respondent for a long time. The trial magistrate was said to have failed to appreciate that the appellant's activities at the centre would affect its members who relied on it to market their produce. The appellant's right to be heard was reiterated with the case of ***SM VS HE [2019] eKLR*** to emphasize the position that right is a constitutional one. The case itself had embraced the position expressed in ***PINNACLE PROJECTS LIMITED VS PRESBYTERIAN CHURCH OF EAST AFRICA, NGONG PARISH & Another [2018] e KLR,*** which had emphasized the same position. This court was ultimately asked to allow the appeal, set aside the ruling and order that the matter proceed for full trial.

10. The respondents submissions were filed on 19.4.2021. According to the respondent, the Tea Buying Centre is on his land and it is not true to say that the appellant has peacefully occupied the place for over twelve (12) years. He submitted that there have been cases of both criminal and civil nature relating to the land. The respondent emphasized that the appellant want to take his land by force.

11. The ruling of the lower court was said to be fair considering that the learned magistrate had knowledge of the whole situation, having visited the land several times. The respondent wondered why the appellant insists on unfairly taking his land without compensation. He complained that the appellant does not appreciate that he has proprietary rights. The court was asked to dismiss the appeal.

12. I have considered the appeal as filed, rival submissions, and the lower court record. Two issues commend themselves to me as suitable for consideration to dispose of the appeal. They are as follows:-

1) Whether the merits of granting a restraining order sought in the application in the lower court were well demonstrated

2) Whether the ending of the entire suit as filed in the lower court was merited.

13. I will start with the first issue. The guiding principles in deciding whether or not to grant a temporary restraining order were spelt out in the **Locus Classicus case of Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. The principles require that an applicant should show that he has a prima facies case with a probability of success and that he is likely to suffer irreparable loss that cannot be compensated with damages. The third principle requires that if the court is in doubt concerning the fulfillment of the first two principles, it should decide the application on a balance of convenience. These principles have been followed in several cases including ***KENYA HOTES LIMIED VS KENYA COMMERCIAL BANK LTD & Another [2004] 1 KLR*** 80 where the court seemed to expand the scope by additionally holding that an injunction is an equitable remedy and the court may while remaining guided by these three principles, also look at all circumstances including the conduct of the parties.

14. In the application before the lower court, the submissions made while canvassing it did not demonstrate compliance with the requirement set out in Giela's case (Supra). The applicant had the burden to demonstrate such compliance. There was not even a mention of Giela's case or the principles set out in it. That is one weakness.

15. The other weakness seems to me to be the uncertainty relating to the legal status of the place where the Tea Buying Centre is said to be located. According to the applicant, the centre is on parcel no. 3818 owned by itself. But the applicant disputed this and pleaded in his counter claim that the same centre is on his land and that he would wish to have it removed. The uncertainty is further compounded by the fact that parcel No. 353 is said to have been sub-divided and may therefore have ceased to exist as a legal entity. According to the applicant, the Buying Centre is said to be on land parcel No. NGANDORI/KIRIARI/5389 which is one of the resultant portions from the subdivision of land parcel No. 353.

16. In my view, the contents of the counter claim should have been a wakeup call on the applicant to conduct a search to find out if the respondent's land had ceased to exist as originally known. It would have been prudent to do so because the respondent had already alleged that the Tea Buying Centre was on his land. And the conflicting claims of ownership concerning where the Tea Buying Centre is also brings uncertainty concerning the boundaries of both the applicant's and the respondent's land.

17. Where uncertainties abound, the court is always reluctant to grant a restraining order because such order may be ineffective or in vain. I will explain: In the old case of **Karama v Aselemi [1938] W.A.C.A 150** the plaintiff had applied for a declaration of title to land and an injunction to restrain the defendants, their successors, heirs and servants from any further interference with the land. The trial Judge found that part of the disputed land belonged to the plaintiffs. However, he refused to grant a declaration on the grounds that parts of the boundaries of the land claimed by the plaintiffs were not clearly defined. But the Judge granted an injunction and this provoked an appeal by the defendants. Their main ground was that the boundaries were not clear and the Court of Appeal agreed with them.

18. Further, in the Nigerian case of **Ayola vs Ogunjimi [1964] ALL N.L.R. 188** the Supreme Court Nigeria refused to grant an injunction in relation to a piece of land whose plan was not clearly delineated.

19. In the matter at hand, the applicant seems sure that the Tea Buying Centre is on his land. But the respondent seems equally sure also that the same centre is on his land. And that is where the uncertainty arises. The official records made available do not remove the uncertainty. It would appear that further evidence would be required to clarify things. In a scenario like this, it would be imprudent to grant a restraining order. The order may not be an effective one.

20. But the applicant may have helped the situation and possibly attracted a favourable consideration even in a scenario like that if it had undertaken to pay damages. If that had been done, it is possible for the court to consider that the respondent would not be prejudiced even if the issuance of the restraining order happens ultimately to have been wrong. But no such undertaking was given. In ***GATI VS BARCLAYS BANK (K) LTD [2001] KLR 525,*** the court held, inter alia, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

21. The lower court declined to grant a restraining order for reasons different from the reasons I have so far outlined. But the reasons I have stated herein persuade me that a restraining order should not be granted. I therefore decline to allow the appeal herein as regards the restraining order that the applicant was seeking. The lower court application therefore still stands dismissed in this regard.

22. I now come to the second issue namely: Whether the ending of the suit in the lower court was merited. The ending of the suit in the lower court seems to have taken place against the background what of appeared in the application itself and the submissions made by both sides on the application. At prayer 7 of the application for instance, the court was asked to order that the costs of the application and the suit be borne by the respondent. In the appellant's submissions in the lower court, the final request was follows:-

> "*The plaintiffs have demonstrated and proved on a balance of probabilities that it has a good case as against the defendant and as such pray that its application dated 8.9.2014 be allowed as prayed and the matter do proceed for full hearing".*

And the respondent's submissions themselves ended thus:

> "*In the premises, we submit that the plaintiff's application dated 8.9.2014 and indeed the main suit lacks merit, same are misconceived and amounts to an abuse of the court process and should be dismissed with costs".*

Further, paragraph 13 of the respondents replying affidavit also asks for dismissal of both the application and the suit.

23. When the learned magistrate therefore made a ruling that dismissed the application and ended the suit in the lower court, it is not difficult to tell where he was coming from. His action is not something that came out of the blue. The parties had already made reference to the fate of the suit in the application, the response to the application, and the rival submissions.

24. But the application before the court was essentially an interlocutory one and had no express prayer for ending the suit at the interlocutory stage. Having said that, it appears to me clear that the appellant fell into error when it asked for costs of the suit at prayer 7 of the application. It fell into the same error again when it asked in its submissions that the suit be allowed to proceed. The respondent was equally wrong to ask for dismissal of the suit in his replying affidavit and submissions. If he wanted to do that, a preliminary objection on point of law or a formal application with an express prayer to that effect would have been proper. What was before the court at the stage submissions were filed was a simple application to consider whether or not a temporary restraining order should issue.

25. The trial court itself fell into the same error when it ended the suit on the basis of an application that had no express prayer to end it and which in the circumstances only required the court to pronounce itself on the issue of a temporary restraining order.

26. The order ending the suit is itself problematic. One could ask: Did the order mean dismissal of the appellant's case given that the appellant's application had ended in dismissal? And what about the respondent's counter-claim? Did ending the entire suit mean the counter-claim was allowed? Did it mean it was dismissed? Can the respondent, for instance, extract a decree showing that he had been granted the prayers in the counter-claim? When one considers all this, one would come to the realisation that the order ending the suit is not in any way a conclusive settlement of the issues between the parties. The order lacks the desired definiteness required to settle the controversy or dispute between the parties.

27. The respondent would rather that the ruling remain as it is as "***the trial magistrate was fair and justified in ruling the way he did having considered all the circumstances surrounding the matter and having visited the area of dispute and noted for himself the position on the ground".*** These submissions appears to me wanting in several ways: First, the substance of the ruling does not show that the decision was

made due to any knowledge arising or derived from any visit to the land. The decision must be construed in light only of what is contained in the ruling and not on assumptions not captured in it. Second, the decision does not clearly spell out the fate of the respondent's own counter-claim. What seems to have ended is the appellant's suit. What of the counter-claim? Did the respondent win or lose it? To me, this is not clear. Thirdly, is it lawful to pronounce the end of a suit on the basis of an application that has not expressly asked for such ending? Methinks it is not. Fourth, is it proper to end a suit preliminarily without affording parties a hearing, particularly having regard to the fact that it is the weighty issue of ownership that is at stake? To me, the pre-eminence of the right of hearing in our laws, particularly under our constitution, would override such a move.

28. I think now it's clear that ending of the suit via the ruling that was delivered was not proper or sound from both a legal and factual perspective. This aspect of the appellant's appeal therefore needs to be allowed and I hereby allow it and order that the suit proceeds in the normal way in the lower court. I make no order as to costs.

Ruling read and delivered in the open court this 16th day of June 2021.

In the presence of:

Appellant – present

Rose Njeru (absent) for the appellant

Respondent – present

Kareithi for respondent

Court assistant – Leadys

Interpretation – English/Kiswahili

Right of Appeal 30 days.

A.K. KANIARU

JUDGE.