



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 67 OF 2019

THE CHURCH COMMISSIONERS FOR KENYA

ST PETERS ACK CHURCH.....APPELLANT

VERSUS

ARCHDIOCESE OF NAIROBI KENYA

REGISTERED TRUSTEES.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

THE LAND REGISTRAR KIAMBU.....3RD RESPONDENT

(Being an Appeal from the Ruling and Order of the Principal Magistrate's Court at Kikuyu by Hon.D.N Musyoka in Kikuyu ELC No.75 of 2018 delivered on 31st October 2019)

JUDGEMENT

The 1st Respondent herein filed **ELC No.75 of 2018**, at the **Kikuyu Law Courts**, through Notice of Motion dated **20th November 2018**. The claim was against the Appellant, 2nd and 3rd Respondents herein and it sought for orders that;

- 1. Pending the inter parties hearing and determination of this Application, a Temporary Injunction do issue against the 1st Defendant/Respondent by itself, its servants and/or agents from undertaking any further construction on the parcel of land being Title Number Dagoretti/Uthiru/394.*
- 2. Pending the inter parties hearing and determination of this Application, a Temporary Injunction do issue against the 1st Defendant/Respondent by itself, its servants and/or agents or howsoever otherwise from trespassing upon, dealing, operating on, or in any other manner whatsoever interfering with the Applicant's parcel of land Title Number Dagoretti/Uthiru/394.*
- 3. Pending the inter parties hearing and determination of this Suit, an Injunction do issue restraining the 1st Defendant/Respondent by itself, its servants and/or agents from undertaking any further construction on the parcel of land being Title Number Dagoretti/ Uthiru/394.*
- 4. Pending the inter parties hearing and determination of this Suit, an Injunction do issue against the 1st Defendant/Respondent by itself, its servants and/or agents or howsoever otherwise from trespassing upon, dealing, operating on, or in any other manner whatsoever interfering with the Applicant's parcel of land Title Number Dagoretti/Uthiru/394.*
- 5. An order that in the event of any defiance of any Court order on the part of the 1st Respondent the Kenya Police and in particular, the office in charge of Uthiru Police post do ensure of the Honorable Court's Orders.*
- 6. Costs be provided for.*

The Application was grounded on the Supporting Affidavit sworn by **Sylvester Kariuki Ndwati**, the Vice Chairperson of **St Stephen's Catholic Church**. He deponed that the Plaintiff/Applicant was and continues to be the registered owner of the parcel of land title Number **Dagoretti/ Uthiru/394**, having acquired and was issued with a title deed dated **10th April 2003**. That the 1st Respondent through its agents

moved into the Plaintiff/Applicant's property and cut down the fence that protected the property. He contended that the Plaintiff was allocated the parcel of land by the now defunct County Council of Kiambu in the year 1974.

It was his further contention that unless the aforesaid acts of trespass by the 1st Defendant over the Plaintiff's suit property are urgently restrained by an Injunction, the 1st Respondent shall continue with its illegal acts of trespass, thereby occasioning further damage, degradation and losses.

The Application was opposed and the 1st Respondent filed its Replying Affidavit dated 24th January 2019, sworn by **Walter Mungai Muigai**, who averred that the 1st Respondent was allocated **Plot No T.394**, and started following up the issuance of title deed in the year 2003, and upon going to collect the said title deed, he was informed that the land had been registered in favor of the Applicant. It was his contention that the Applicant lied during the Application for their title that their position on the ground was **Plot No T.394**. That on 2nd February 2004, the Town Council of Kikuyu wrote to the Permanent Secretary and explained the mix up of the two plots i.e. **Plot No T.394** and **T.4100**, attached with minutes referenced as **MIN/WTAM/36/2003**.

Consequently, on 26th March 2019, Hon. Musyoka (PM) referred the matter to Court Annexed Mediation, one **Rosemary Mwangi**, was appointed the Mediator and filed her report. None of the parties was willing to change their position and the matter was referred back to court for determination.

Hon. D.N Musyoka (PM) delivered his Ruling on the Notice of Motion dated 20th November 2018, on 31st October 2019 issuing **Temporary Orders restraining the 1st Defendant from developing the suit property**.

The Appellant was aggrieved by the above determination of the Court thereon and it has sought to challenge the said Ruling and Order through the **Memorandum of Appeal** dated 25th November 2019, and filed on 27th November 2019. The grounds upon which the Appellant sought for the Appeal to be allowed are;

1. The Learned Magistrate erred in Law and fact in holding that the 1st Respondent had met the threshold laid down in Giella –v- Cassman Brown, without showing how the threshold has been met by the 1st Respondent.

2. The Learned Magistrate erred in Law in failing to appreciate, analyse, consider and/or articulate the submissions and evidence that the Appellant's Advocate had tendered before the Court that clearly showed that the 1st Respondent had not met the requirements for an Injunction to be granted.

The Court directed that the Appeal be canvassed by way of written submissions. The Appellant through the **Law Firm of Wakini Kiarie & Co. Advocates**, filed its written submissions on the 27th January 2021, and urged the Court to allow the Appeal. The 1st Respondent on the other hand through the **Law Firm of Nyawira Milimu & Omotto Advocates**, filed its submissions on 25th February 2021, and submitted that the Appeal is frivolous and an abuse of the Court process and hence ought to be dismissed with Costs.

The Court has keenly considered the Pleadings filed by the parties and found that the main issues for determination are;

i. Whether the trial court erred in granting Temporary Injunction to the 1st Respondent

ii. Whether the Appellant's Appeal is Merited

i. Whether the trial court erred in granting Temporary Injunction to the 1st Respondent

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.”

There is no doubt that the 1st Respondent (***Applicant in Elc No.75 of 2018***) herein was seeking for injunctive orders against the 1st Defendant/Respondent by itself, its servants and/or agents or howsoever otherwise from trespassing upon, dealing, operating on, or in any other manner whatsoever interfering with the Applicant's parcel of land being title Number **Dagoretti/Uthiru/394**.

Since the Plaintiff/Appellant (1st Respondent herein) was seeking for injunctive orders, at that juncture, the Court was not called upon to deal with the disputed issues with a finality, given that the available evidence had to be ascertained. The trial court was only called upon to determine whether the Applicant thereon was deserving of injunctive orders based on the usual criteria laid down in the case of **Giella... Vs... Cassman Brown & Co. Ltd 1973 EA 358**, which are:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.

The 1st Respondent attached a copy of title deed for parcel of land title Number **Dagoretti/Uthiru/394**, in its name which is dated **10th April 2003**, and a Certificate of official search. A letter from County Council of Kiambu dated **27th June 1974**, shows that the 1st Respondent was allocated Title Number **Dagoretti/Uthiru/394**. Therefore by the time the Appellant acquired its title in the year 2003, the 1st Respondent was in possession of its title deed.

The 1st Respondent also annexed documents which showed the root of its title. On who should own Plot **T.394** or Plot **T.410**, that is not an issue that could have been determined by the trial Court at that juncture without calling evidence which can only be availed at the main trial. However, it is evident that the 1st Respondent's Certificate of title is the first in time. On the face of it, then the 1st Respondent's title being the first in time, it should prevail unless there is contrary evidence. See the case of *Gitwany Investment Ltd & 3 Others...Vs...Commissioner of Lands, HCCC No.1114 of 2002*, where the Court held that:-

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

On the other hand, the Appellant attached correspondences but did not explain satisfactorily the root of its title. For the above reasons, the Court finds that the 1st Respondent had established that it had a *prima-facie* case with probability of success and the trial Magistrate did not error in holding so.

On the second limb of whether the 1st Respondent would suffer irreparable loss which cannot be adequately compensated by an award of damages, if the Appellant was allowed to proceed and construct a Cathedral on Plot **T.394**, that would change the nature of the case and in the event the 1st Respondent was a successful litigant at the end of the main trial in **Elc No.75 of 2018**, then it would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See the case of *Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR*, where the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

On the balance of convenience, the court finds that the same would tilt in favour of maintaining the **status quo** and the **status quo** herein was not to allow any activity on the suit property. See the case of *Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR*, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

Having carefully considered 1st Respondent's Notice of Motion Application dated **20th November 2018**, this Court finds that the Learned Magistrate did not error in granting the Applicant thereon (1st Respondent herein) a Temporary Injunction, since the Applicant thereon(1st Respondent herein) had established all conditions for grant of Injunctive orders.

ii. Whether the Appellant's Appeal is Merited .

Having found that the Learned Magistrate did not err in granting the 1st Respondent (Applicant thereon) temporary Injunction, and for reasons explained above, the Appeal herein is found **not** merited.

Further, having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the annexures and written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is disallowed entirely and the Ruling and Order of the trial court dated **31st October 2019**, is upheld. On the issue of costs, the Court finds the same is granted at the discretion of the court. The 1st Respondent will have the Costs of this Appeal.

Dated, signed and Delivered at Thika this 1st day of July 2021.

L. GACHERU

JUDGE

1/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Ngania for the Appellant

M/s Awude holding brief for Mr. Olemba for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

L. GACHERU

JUDGE

1/7/2021