



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 77 OF 2019

COUNTY GOVERNMENT OF MERU.....APPELLANT

VERSUS

MITUNGUU MARKET STORES SELF HELP GROUP

THROUGH ITS CHAIRMAN BENARD MUGAMBI..... 1ST RESPONDENT

EVANS MAWIRA KAARIA.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon J.IRURA (PM) in NKUBU ELC NO. 127 of 2018 delivered on 15/5/2019)

JUDGMENT

1. The appellant along with the 2nd respondent were the defendants in the trial court where they were sued by the 1st respondent vide a plaint dated 6/09/2018 seeking;

- a. An Order of permanent injunction restraining the defendants, from demolishing or otherwise interfering with the plaintiff's members' stall no. 1-65 surrounding Mitunguu open air market.*
- b. Costs of this suit and interests.*
- c. Any other relief this Honorable court may deem fit and just to grant.*

2. The suit in the trial court was filed contemporaneously with an application dated 6/09/2018, where the 1st respondent/ plaintiff sought temporary orders of injunction against the defendants pending the determination of the application and the suit. The said order was granted *ex parte* on 11.9.2018 and confirmed on 18/10/2018 to which both defendants filed their own separate applications seeking the setting aside of the earlier order of 18.10.2018. Vide a ruling given on 15/5/2019, the court dismissed both applications with costs to the plaintiff, triggering this appeal.

3. The appellant being aggrieved by the decision filed its memorandum of appeal dated 04/06/2019 containing five (5) grounds as follows:-

- i. That the learned trial magistrate erred in law by issuing final orders of injunction over the application dated 6/9/2018 on a mention date of 18/10/2018.**
- ii. That the learned trial magistrate erred in law by condemning the Appellant unheard, contrary to the rules of natural justice.**
- iii. That the learned trial magistrate erred in law by interpreting and applying the provisions of Sections 1A and 1B of the Civil Procedure Act and the provisions of Article 159(2) of the Constitution in favor of the plaintiff thereby resulting into injustice and hardship for the appellant.**
- iv. That the learned trial magistrate's ruling negated the oldest tenets of justice, that no party should be driven out of the seat of justice unheard.**
- v. That the learned trial magistrate exercised her discretion injudiciously and capriciously thereby denying the appellant an opportunity to have a say before final orders were issued against it.**

4. It was submitted for the appellant that the rules are clear as glass that a matter should not proceed during a mention date unless by consent

of parties and a court will not have a duty to determine substantive issues on a mention date. Further it is true from the court record that there was no affidavit of service by the court process server on the part of the appellant thus the appellant was unaware that the matter was scheduled to be heard. The courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.

5. In support of its case, the appellant relied on the following cases; **Tetra Pak Limited V Macheo Limited [2018]eKLR, Republic V Anti-Counterfeit Agency & 2 Others ex-prte Surgippharm Limited [2014]eKLR, Onyango V Attorney General (1986-1989) EA 456, Mbaki & Others V Macharia & Another [2005] 2 EA 206.**

6. The 1st respondent submitted that the ruling being appealed from addressed the appellant's application in which it was dismissed. The appellant was well aware and was served with the hearing date of the application but failed to appear and should not try and hoodwink this court that the orders were issued on a mention date. That the courts are given inherent powers to pronounce decrees or make orders that may be expedient and meet the interest of justice and the court had the judicial duty to issue orders of injunction to preserve the suit property so as to prevent its final judgment in the main suit being rendered nugatory. Thus the appellant should pursue the main suit instead of wasting precious time of the court.

7. The 2nd respondent herein is not opposing the appeal.

Analysis and determination

8. From the outset, I have to point out that the suit before the trial court is at the infancy stage, thus the substantive issues are yet to be determined by that court. It is also clear that the appellant is challenging the issuance of injunctive orders issued on 18.10.2018. However, the appellant did challenge those orders vide its application dated 19.11.2018 culminating in a ruling delivered on 19.5.2019.

9. Basically, the appellant claims that it was not given an opportunity to prosecute the application dated 6.9.2018. The right to be heard is one of the cardinal fundamental rights regarding the rules of natural justice. In the case of **Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR**, the Court of Appeal stated that;

“The right to be heard is a cardinal rule established under the principles of natural justice generally expressed as audi alteram partem. This Latin phrase literally translates 'hear the parties in turn' and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means that a party, no matter how seemingly frivolous or inconsequential, must be given a fair hearing.”

10. In regard to their application seeking the setting aside of the previous orders of 18.10.2018, I find that the appellants were given a platform to ventilate their issues as the said application (of 19.11.2018) was heard via submissions and determined. This then negates the allegation that the appellants were never accorded an opportunity to be heard.

11. A perusal of the ruling of 19.5.2019 reveals that the trial court gave an in-depth analysis of how the appellant was served with the suit papers and the interim orders of injunction. It is not lost to this court that the affidavit of service to that effect was somehow omitted in the record of appeal filed by the appellant. It is only the 1st respondent who took steps to file the said affidavit via a supplementary record of appeal. The said document shows that service was effected on 2.10.2018.

12. As at the time the matter came up before the court on 18.10.2018, no documents had been filed in opposition to the said application of 6.9.2018 or the suit. I take the view that the appellant was indolent in taking action and in opposing the application.

13. I also find that the allegations made by the appellant that the court gave final orders are not a true reflection of the facts of the case. At this juncture, I do find it prudent to quote the said orders verbatim;

a. “THAT orders of temporary injunction be and are hereby issued against the defendants/respondents, their workers, representative, agents, employees and anyone else working at their behest preventing them from demolishing, interfering with the applicants occupation and any other dealing adverse to the applicants ownership and peaceful occupation and possession of stall nos. 1-65 surrounding Mitunguu open air market until the determination of this suit”.

14. Thus the orders were only to subsist awaiting a full trial.

15. Further, the appellant has not demonstrated how the said order is prejudicial to them or how it drove them from the seat of justice. On the other hand, I find that the trial court took into account the overall repercussions of setting aside the orders of 18.10.2018 before the hearing of the main suit, in that the defendants (read the appellant and 2nd respondent) through their workers, representatives, agents, employees and anyone else working at their behest would be at liberty to do whatever they wished, thus not preserving the suit land.

16. It follows that the trial court arrived at a proper determination in invoking the provisions of Article 159 (2) of the Constitution, and the provisions of Section 1A and 1B of the Civil Procedure Act which embrace the concept of rendering substantive justice in a just and expedient manner.

17. Finally, I have taken into account that the 1st respondents/ plaintiffs are seeking for permanent orders of injunction, which means that the issues the appellant desires to ventilate in the application of 6.9.2018 can adequately be ventilated in the main suit. In the circumstances, I find that the appeal lacks merits, the same is hereby dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22ND DAY OF SEPTEMBER, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to 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.

HON. LUCY N. MBUGUA

ELC JUDGE