



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANGA**

**ELCA NO 21 OF 2020**

**BAHATI RIDGE MANAGEMENT PHASE 1A LIMITED.....APPELLANT**

**VS**

**SAMMY MAINA KAMAU.....RESPONDENT**

**(Appeal from the Ruling and orders of the Court in MCL & E No. 10 of 2020, Kandara**

**delivered by the Learned Hon E M Mutunga SPM on the 26/11/2020).**

**RULING**

1. By way of background the Appellant is the management Company of the development christened Bahati Ridge Estate in Gatanga, Muranga County. It is owned by the home owners of the estate, the Respondent included through shareholding.
2. The Respondent is the registered proprietor of House No 107 situate on LR No 28736 as well as a shareholder of the Appellant company.
3. The Respondent filed suit on the 29/7/2020 alleging inter alia; that the Appellant had through its agents and employees prevented him from accessing his property thereby infringing on his right to quiet and peaceful enjoyment of his property as well as occasioning him unnecessary harassment and embarrassment; allegations that part of his property encroached on public land.
4. The Respondent sought amongst other orders; a declaration that his property does not include public land; a permanent injunction against the Appellant from blocking his access to his property or in any way interfering with his quiet possession and enjoyment.
5. Vide its statement of defence filed on the 21/12/2020 the Appellant denied that it had denied access to the Respondent of his property and put him in strict proof. Further it stated that the issue of the encroachment of his property on public land had been amicably sorted and was therefore not in issue. That the Respondent took matter in his own hands refused to take a temperature check, and in total disregard to the precautionary measures taken by the residents towards containment of the COVID 19 pandemic, and threatened to arm the guards at the gate using a machete, which incident was reported to the Ndururumo police station and for which the Respondent was later charged in Criminal case No 468 of 2020-Kandara with the offence of creating a disturbance in a manner likely to cause a breach of peace.
6. Simultaneously with the filing of the suit, the Respondent moved the Court for orders of injunction seeking to restrain the Appellant from preventing the Respondent from accessing his house and a declaration that his property has not encroached public land.
7. Parties elected to canvass the application by way of written submissions. Upon considering the application, the trial Court granted the application in favour of the Respondent in its ruling delivered on the 26/11/2020.
8. Aggrieved by the decision of the trial Court the Appellant filed an appeal and raised 4 grounds. That the trial Court erred in misapprehending the issue before the Court as that of property ownership while it contends that the issue in the main was that of enforcement of COVID 19 precautionary measures endorsed by the residents pursuant to clause 2.2. and 2.29 of the lease agreement; that the Respondent's right to property was not affected by the precautionary measures administered by the Appellant; that the conduct of the Respondent was a threat to the peaceful co-existence of the residents with respect to the prevention and spread of COVID 19 pandemic.
9. It was the contention of the Appellant that the Respondent had not proved a prima facie case to warrant the orders granted. That the Hon trial Court misdirected itself when it strayed into non issues such as the allegations to muzzle the Respondent as to the management affairs of the company. Finally, that the Court misdirected itself when it went ahead to render a determination on the position of the adjoining parking space next to the Respondent's house when the same was a non – issue.

10. The Appellant prayed for orders that the appeal be allowed and the ruling dated the 26/11/2020 be set aside. In addition, that judgment be entered dismissing the Respondent's application dated the 28/7/2020.
11. The Appellant and Respondent filed rival submissions dated 22/7/2021 and 30/8/2021 respectively.
12. With respect to whether the Appellant used the pandemic to harass and/or muzzle the voices of the Respondent with respect to the manner in which the Appellant was managing the estate, the Appellant submitted that clause 2.2 and 2.9 of the lease agreement obligated the Respondent to abide by the home owner's rules formulated by the Appellant from time to time. That pursuant to the said clauses, the estate formed the Bahati Ridge Covid 19 Task Force which formulated the precautionary measures which were circulated to the homeowners, the Respondent included and cannot be heard to feign ignorance of the same. That the measures were taken through public participation and the Respondent did not raise any objection.
13. That on the 3/7/2021 the Respondent in total disregard to the said precautionary measures, refused to subject himself, upon request to comply with the regular temperature checks at the main gate of the estate and instead threatened the guards with a machete as a result of which the Respondent was charged (Criminal case No 468 of 2020- Kandara) with an offence of creating disturbance in a manner likely to breach peace. That the measures taken by the Appellant were in public interest of protecting the spread of the pandemic to the residents of the property. The Appellant urged the Court to take judicial notice that the Ministry of Health guidelines were replicated in the precautionary measures formulated by the Appellant in conjunction with the residents and therefore the Appellant cannot be faulted in implementing the measures to mitigate the health risks of the pandemic.
14. Further the Appellant accused the Respondent of using abusive and inappropriate language in whatsapp communication, act that led to his regular reprimand to desist to no avail.
15. With respect to grounds Nos. 1 and 4 the Appellant submitted that the implementation of the precautionary measures which was the gist of the dispute did not undermine right of the Respondents right to own property. That the Learned trial Court misdirected itself when it based its findings on a non-existent property dispute. That the issue regarding the plot size and or encroachment of public land /access was none issue as it was undisputed. That the finding by the Court that the Appellant interfered with the quiet enjoyment and possession of the Respondent's property was baseless.
16. Relying on the case of **Raphael Kahindi Kawala Vs Mount Elgon Beach properties Limited (2018) ECLR** the Appellant urged the Court to find that the trial Court erred in its decision when it arrived at a finding not supported by evidence thus reaching an erroneous conclusion that the Respondent had proved a prima facie case.
17. Further the Appellant submitted that the Respondent approached the Court of equity with unclean hands and thus was undeserving of the orders. Relying on the case of **Caliph Properties Limited Vs Barbel Sharma & Anor (2015) eCLR**, Appellant submitted that an injunction being an equitable remedy is available to one who comes to equity with clean hands and must be ready to do equity. That the conduct of the Respondent betrayed him.
18. Finally, that the Respondent did not meet the criteria set out in the case of **Giella Vs Cassman Brown** to warrant the grant of injunction.
19. The appeal is opposed via the submissions of the Respondent filed on the 30/8/2021.
20. The Respondent submitted that he was muzzled and harassed by the Appellant for querying the management style of the Appellant in running the estate with respect to the accounting for service charge and other estate costs.
21. That he and his wife were detained severally at the gate for registering high temperatures contrary to the precautionary measures which required a resident posting high temperatures to go home and would be subjected to further testing and monitoring by the local healthcare team. He faulted the conduct of the Appellant's guards in detaining residents instead of complying with the precautionary measures. He admitted that due to the continuous harassment he forced his way into the main gate which led to his being charged with a criminal offence of disturbing the peace at the estate, which case is pending determination in Kandara Court.
22. He submitted that he was denied access to his property which denial infringed on his property rights and argued that the pandemic cannot be sued to deny him access to his property.
23. The Respondent beseeched the Court not to interfere with the impugned Ruling as it was judiciously arrived at. Reliance was placed on the cases **Elwak Water Supply Association & 17 others v County Government of Mandera & another [2019] eCLR** and **Daniel Methusallah Momanyi v Wakenya Pamoja Sacco Society Limited [2020] eCLR**.
24. In my view the main issues for determination in this appeal are;
- a) Whether the Respondent established a case for grant of injunction?
  - b) Whether the trial Court erred in arriving at its decision?
25. In exercise of its appellate powers, this Court is invited to revisit the evidence that was adduced before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion. It is also trite that an appellate Court will not interfere with the exercise of the trial Court's discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice. See the case of **Mbogo & Another vs Shah [1968] EA**.

26. Before I deal with the issues above let me determine whether the property size and encroachment was an issue. From the pleadings, it is undisputed that Timday Surveyors were engaged to determine the issue of the property size. It is said that the Surveyors Report conclusively determined the dispute as evidenced in paragraphs 10 & 11 of the Appellant's Supporting Affidavit sworn on 19/8/2020 and Respondent's Further Affidavit sworn on 8/9/2020. That said, and in any event, the issue is one that required the adduction of evidence to arrive at a logical conclusion. By entertaining a matter at an interlocutory stage, without the benefit of evidence led and its veracity tested, in my considered view, the learned trial Court erred in that regard.

27. In tackling the first issue, I will rely on **Order 40 Rule 2** of the Civil Procedure Rules 2010 which provides as follows:

**2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]**

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems fit.

28. The principles for the grant of an injunction were laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case it is stated that the Court needs to consider three principles; First, that an Applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

29. What is the definition of a prima facie case? This was defined in the case of **Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR** that a prima facie case as one which on the material presented in 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 Respondent.

30. The same position was adopted by the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed.”

31. On the first limb, did the Respondent establish prima facie case with a probability of success? It is the Respondent's case that he and his wife have been subjected to harassment by the Appellant through its agents and employees. That she was refused access to the property by the security guards at the gate. The gist of this being that on the 3/7/2020 his wife's temperature was found to be high and was denied access to the property whereupon it led to altercation with the guards.

32. The allegations were denied by the Appellant. It argued that the precautionary measures were agreed by the residents, the Respondent included and that the measures complied with the Ministry of Health guidelines and were necessary to protect the residents in the face of the raging pandemic at that time.

33. According to the lengthy estate/residents communication presented by both rival parties trouble between the Respondent and the Appellant started way back in 2018 when there was an altercation with the Respondent and the guards arising from the procedure of admission of visitors by the residents. It is clear that the Respondent failed to sign for his visitors against the rules of the estate. This incident, according to the Appellants was addressed. In addition, the Appellant requested the Respondent to inform the management in writing that he wished not to sign the security pass for his guests. It would appear that none was made. The Respondent was also given the assurance that there would be no restriction of movement of his contractor at the gate while undertaking renovations on his house.

34. It is not in dispute that the relationship between the Appellant and the Respondent is governed by contract i.e the lease agreement comprising the Respondent's title in the property and registered in 2017, in which the Appellant was obligated to formulate rules for the estate residents on the one hand which rules, the residents agreed to bind themselves to. Bahati Ridge Management Limited home owner's rules and regulations and the COVID 19 task force precautionary measures were such rules formulated for the healthy, good and orderly occupation of the residents of the estate. These rules and regulations are anchored on the contract between the parties.

35. The issue in the case is whether or not the Respondent complied with the regulations as to the precautionary measures formulated to curb the spread of the COVID 19 pandemic. Did the Appellant deny the Respondent access to his property? There is a letter dated the 3/7/2020 addressed to one Paula Katee Mbote requesting her to comply with the precautionary measures at the gate and that no entry will be permitted to any resident for the breach of the measures. There is therefore evidence that the precautionary measures had been brought to the attention of the Respondent and his wife. On the same date the Respondent vowed in an estate communication that he would not comply with the said precautionary measures and that evening at 20.50 hours admitted forcing himself to open the gate without following the procedure set out in the rules.

36. The Covid 19 precautionary measures at page 56 of the Record of appeal provided for mandatory temperature checks at the main gate with a second test if the initial reading is more than 37.8C. That a seating area would be provided as a resident awaits the second test before being advised to proceed for self-isolation in their houses if the temperature still exceeds 37.8C. Nowhere is it indicated that a resident would

be denied access to their house on account of the said temperature checks. The issue of full payment or non-payment for the property was not raised in the first place. With respect to the Learned Magistrate, I am satisfied that the trial Court misdirected itself in finding that the Respondent had established a prima facie case to justify the grant of injunction.

37. It is trite that an injunction is an equitable remedy. He who comes to equity must come with clean hands and be prepared to do equity. The conduct of the Respondent in refusing to subject himself to temperature checks and if found to post high temperatures comply with the estate rules, allegations of threats to the Appellant's guards with harm, does not endear him to the equity. His conduct disentitles him to the orders.

38. In my view the Respondent did not demonstrate a prima facie case to warrant the orders of injunction.

39. With respect to the second limb in granting injunction which is whether the Respondent would suffer irreparable harm if the orders are not granted. The Respondent argued that he suffered embarrassment and harassment and was denied access to his house. He admitted opening the gate for himself and driving to his house therefore there was no denial of access to his house. The incident happened at the main gate and not his house. Furthermore any harassment can be quantified in monetary terms and therefore the harm is capable of being compensated.

40. With respect to the balance of convenience and noting that the Court is not in doubt, the balance tilts in not granting the injunction.

41. As to whether the trial Court erred in arriving at its decision, given the analysis above it is my considered view that the trial Court considered issues that were not in controversy. Even if they were to be in contestation, they would only be canvassed in the trial but not at the interlocutory stage. The issue of property ownership is not in issue. Issues relating to management of the estate are best left to the hearing where evidence will be led and tested.

42. In the upshot the appeal is merited. It is allowed. The Ruling dated 26/11/2020 be and is hereby set aside and the application dated the 28/7/2020 is unmerited and the same is dismissed.

43. The Respondent shall meet the cost of the application and the appeal.

44. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF OCTOBER 2021**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Odhiambo holding brief for Kabaiku for the Appellant

Mungai for the Respondent

Ms. Phyllis Mwangi – Court Assistant