



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MURANG'A
ELCA 4 OF 2020

JOHN MICHUKI MUHWANG'A.....1ST APPELLANT

GEORGE THUO MUHWANG'A.....2ND APPELLANT

PHILOMENA WANJIKU MUHWANG'A.....3RD APPELLANT

EDITH WAIRIMU MUHWANG'A.....4TH APPELLANT

VS

MIRIAM WANJIKU NGANGA.....RESPONDENT

(Being an appeal from the ruling delivered on 20/2/2020 in CMCC No 27 of 2019

by Hon E Mutunga SRM

JUDGMENT

1. The Respondent filed suit in the lower Court seeking inter alia a permanent injunction against the Appellants from interfering with her quiet and peaceful enjoyment of LOC4/NGARARIA/908/51(2B) and an order of eviction of the said Appellants from the suit land.
2. It was her case that she is the registered owner of the suit land having acquired it from her octogenarian mother in 2018. That the Appellants through craft and fraud encroached on the suit land taking advantage of her aged mother, put tenants into the shops and building and collected rent to the disadvantage of her mother, the previous owner of the suit land.
3. In hot pursuit the Appellants filed a defence denying the Respondents suit and in their counterclaim averred that the suit land belonged to their mother Siphira Nyambura Muhwanga having acquired the same from the Respondents mother as a gift. They accuse the Respondent of acquiring the property through fraud. Consequently they sought orders of cancellation of the title in the name of the Respondent and inter alia the title be reverted to Siphira Nyambura Muhwanga.
4. In addition to the suit, the Respondent filed a motion on the 23/7/19 seeking the following orders;
 - a. That the rental income and or monies collected from the shops and the building standing on the suit land be deposited in the Court account or in the joint account of the firm of advocates for both Plaintiff and the defendants.

b. That a temporary injunction do issue restraining the 1st - 4th Defendants from trespassing leasing occupying and or collecting rental income from the shops or building standing on the suit land.

5. The Appellants response was through grounds of objection filed on the 8/8/2019 setting out the grounds as ; the orders cannot issue at the interlocutory stage; the title of the plaintiff is fraudulently acquired and has come to Court with unclean hands; there is need for an explanation by the plaintiff how she acquire the title without a succession of the previous owner having been sought and obtained; the suit is resjudicata in view of Thika CMCC No 113 of 1998 which was dismissed from want of prosecution; the threshold for grant of an interlocutory injunction has not been met.

6. The Learned Hon Magistrate determined the application and in his ruling delivered on the 20/2/2020 granted prayer a of the application which is; That the rental income and or monies collected from the shops and the building standing on the suit land be deposited in the Court account or in the joint account of the firm of advocates for both Plaintiff and the defendants.

7. Aggrieved by the ruling the Appellants have preferred an appeal on five grounds; the Court gave mandatory orders in the absence of material to warrant the same; the Respondent failed to proof how she acquired the property as a precondition of granting the injunction; the Court failed to appreciate that the orders made were incapable of being implemented.

8. In other words the Court is being faulted for granting orders without sufficient grounds on how the title was acquired; the threshold of granting injunction was not met; orders are incapable of implementation.

9. Parties canvassed the application through written submissions which I have read and considered.

10. The Appellants submitted that the suit land belongs to Siphira Nyambura Muhwanga deceased. That her estate is yet to be succeeded. They accused the Respondent of acquiring the property through fraud and on that basis lacked the prima facie to lay claim on the suit land. That the Appellants stand to suffer irreparable harm that cannot be compensated with an award of damages as the rental income is their source of income and by taking away the rental income, the Appellants have been in convenience.

11. The Respondent on the other hand opposed the appeal and submitted that she is the registered owner of the suit land and hence deserved the orders given by the Court. That the Appellants forcefully took over the property from the Respondent's mother who was aged and ailing. She faulted the letters of grant of administration held by the Appellants as they were sued in their personal capacities. That the Appellants have no iota of evidence to support propriety of the suit land.

12. The issue is whether the appeal has merit.

13. At the interlocutory stage, the role of the Court can best be captured in Order 40 rule 1 of the CPR 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.”

14. 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**.

15. 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.

16. 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.

17. 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.”

18. The background of this case is that the Respondent avers that she is the owner of the suit land having acquired the same from her mother. The Appellants claim the land through the estate of Siphira Wanjiku. From the pleadings there are accusations and counter accusations of fraud by both sides. It is trite that at this stage the Court is not determining the merits or otherwise of the claims of the parties as they are best left for the trial Court where evidence will be tested by way of cross examination.

19. In answer to grounds 1, 2 and 5, the Court holds that each party to the suit shall have the opportunity to litigate their case at the hearing. That the proof of title shall be at the hearing and not at the interlocutory stage.

20. According to the search dated the 25/6/2018 the Respondent is said to be the registered owner of the suit land and therefore prima facie has established a right that need protection in the interim from the Court. The standard of proof of that prima facie case is on a balance of probabilities or, as otherwise put, on a preponderance of probabilities Issues of fraud will be determined at the trial. I see no reason to fault the trial Court in holding as much. That answers grounds 3 and 4 of the appeal.

21. In the upshot the appeal is without merit and is dismissed with costs to the Appellants.

22.It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Appellants - absent

Respondent – absent

Ms. Phyllis Mwangi – Court Assistant