REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC APPEAL NO. 2 OF 2021

LYDIA WAIRIMU JOB....................................1ST APPELLANT

STEPHEN NGUGI KARIUKI .... 2ND APPELLANT

VERSUS

JOHN NGUNYI MUCHIRI .... RESPONDENT

(Being an appeal arising from the Ruling of the Honourable L. Arika Chief

Magistrate delivered on 23/12/2020 in NAKURU CM ELC NO. 421 OF 2020)

BETWEEN

LYDIA WAIRIMU JOB ....1ST PLAINTIFF

STEPHEN NGUGI KARIUKI .... 2ND PLAINTIFF

VERSUS

JOHN NGUNYI MUCHIRI .... DEFENDANT

JUDGMENT

1. By a Memorandum of Appeal dated **20/1/2021** the Appellant being aggrieved and dissatisfied by the decision of HONOURABLE l. Arika CM delivered on 23/12/2020 **Nakuru CM ELC No. 421 of 2020** appeals to the Honourable Court on the Grounds:

> **1. That the Learned Magistrate erred in law and in fact in finding that the Plaintiffs now Appellants had not made a case warranting issuance of orders of temporary injunction pending the determination of the suit and in the process disregarded the overwhelming evidence on record including the judgment of the Court of Appeal serialized as John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR adduced by the Plaintiffs now Appellants in support of their application.**
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> **2. That the Learned Magistrate erred in law and fact in making a finding that the Plaintiffs now Appellants had not proved existence of the conditions for grant of an order of temporary injunction as espoused in the *locus classicus* case of Giella V. Cassman Brown [1973] EA 358 while there was overwhelming evidence adduced by the Plaintiffs now Appellants demonstrating existence of all the triplicate conditions.**
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> **3. That the Learned Magistrate erred in law and in fact and acted beyond her jurisdiction and entered into the arena of speculation on the outcome of the application for review made by the Respondent herein seeking to review the orders issued in the Court of Appeal judgment serialized as John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR and relied on the said fatally flawed theory to decline to grant the orders sought by the Plaintiffs now Appellants.**
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> **4. That the learned magistrate erred in law and in fact by applying her own theory in assessing the pleadings and evidence which made her fall into error of speculation and inserted her own facts and findings which were not supported by pleadings and evidence.**
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> **5. That the Learned Magistrate erred in law and in fact and acted beyond her jurisdiction in making a finding to allegedly maintain an illegal status quo and which was in total disregard of the judgment and decree of the superior court, the Court of Appeal decision serialized as John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR.**

6. That the Learned Magistrate erred in law and in fact and acted beyond her jurisdiction in illegally attempting to stay the execution of the judgment and decree of a superior court serialized as John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR and allegedly bestowing an illegal status quo to the Respondent which is contrary and in contravention of the aforesaid judgment and decree and which judgment and decree to date is yet to be reviewed, set aside or appealed against and as such remains in force.

7. That the Learned Magistrate erred in law and in fact in relying on material not placed before her and in so doing aiding the Respondent to avoid performance of their obligation to forthwith stop from trespassing and infringing on the Plaintiffs now Appellants' constitutional right to own property as the legal and rightful owners of the suit property arising from the judgment and/or decree of the Court of Appeal serialized as John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR .

8. That the Learned Magistrate erred in law and in fact in solely and blindly relying on the respondent's application for review of judgment of the court of Appeal case serialized John Kamunya & Another V. Jon. Nginyi Muchiri & 3 others (2015) eKLR to decline issuing the orders sought and in so doing failed to honour, respect and enforce a valid decree of the superior court and in its place validated the continued acts of disobedience and illegality by the Respondent who to date has ignored, refused and/or failed to abide by the orders of the Court of Appeal in the aforesaid cited case.

9. That the Learned Magistrate erred in law and in fact in purporting to put into the perspective materials and facts not contained in the pleadings, evidence and submissions of parties.

10. That the Learned Magistrate erred in law and in fact failing to consider the evidence on record, the Plaintiffs' pleadings, submissions and the circumstances of the case prior to making her findings.

11. That the findings of the learned magistrate are totally unsupported in law and by the evidence on record.

12. That the learned magistrate erred in law and fact in failing to decide the application before her on merit and further failed to employ the constitutional principle contemplated under Article 159 (2) (d) and eventually determining the application based a technicality over substantive justice.

2. The appellants therefore pray for the following orders:

a. That this Appeal be allowed.

b. That the whole of the decision and/or ruling of Honourable L. Arika delivered on 23/12/2020 in NAKURU CM ELC 421/2020 be set aside and/or varied and in its place a ruling be entered in favor of the Plaintiffs now Appellants herein as sought in their application dated 25/6/2020 in light of overwhelming evidence in support of the Plaintiffs now Appellants' case.

c. That the costs of the appeal and as well as the costs of the application in the lower court be borne by the Respondent.

3. The background of this appeal is essential.

4. The appellants filed a plaint in the Chief Magistrate's court seeking orders of declaration that they are the lawful and registered owners of all that parcel of land known as **Nakuru/Cedar Lodge /141,** a perpetual injunction against the defendants, an order of eviction against the defendants and costs of the suit. The basis of the plaintiff's claim is that the 1st plaintiff's father purchased the land known as **Nakuru/Cedar Lodge /33** and subdivided it into 3 parcels including the disputed parcel which was registered in his and the 3rd (there is no 3rd plaintiff in the title to the suit and I believe that the plaintiffs meant the 2nd plaintiff's) plaintiff's name; one other parcel, **Nakuru/Cedar Lodge/140** was registered in the names of the 1st and 2nd plaintiffs and their father; a suit arose involving the four parcels of land and the High Court ruled in favour of the defendant herein (who was the plaintiff then) declaring him the owner of **Nakuru/Cedar Lodge /33** and an appeal was filed in the Court Of Appeal by persons other than the plaintiffs; the Court of Appeal ruled that the suit as filed in the High Court was incompetent, and it set aside the judgment and decree of the High Court and dismissed the suit; the Court Of Appeal also cancelled the registration of the defendant as owner of **Nakuru/Cedar Lodge /33** and ordered that the **4** title deeds be restored in the names of the registered owners. The plaintiff's case is that the Court Of Appeal decision sanctified the plaintiff's ownership and occupation of parcel no. **Nakuru/Cedar Lodge /140.** However, on diverse dates between **2015** to the date of filing of the suit before the magistrate's court, the defendant trespassed on the suit land and refused to vacate, claimed ownership thereof and curtailed the plaintiffs proprietary rights, hence the suit and the prayers set out as above.

5. Contemporaneously with the plaint was filed an application for injunctive orders restraining the defendant from interfering with the suit land pending the hearing and determination of the suit. the defendant filed a replying affidavit to that application responding as follows: that he has been in occupation as admitted by the plaintiffs; that he is lawfully using the land; that there is a notice of motion application being **Nakuru Civil Application No 17 Of 2015** pending before the Court Of Appeal seeking to review the Court Of Appeal judgment; that the plaintiffs' suit is *res judicata*; that the plaintiffs' suit is an abuse of the court process as the review application is still pending and that the defendant is the registered owner of the suit land.

6. The defendant also filed a notice of preliminary objection which raises some factual and some legal issues. I am satisfied that the legal issues have been covered in the replaying affidavit I have analysed as above.

7. In a supplementary affidavit the 1st plaintiff responded that the review application before the Court Of Appeal has been pending for long

since the defendant has been very lackadaisical in its prosecution; that the Court Of Appeal has rendered a final determination on the matter and its judgment remains in force; that the suit before the magistrate's court is a new cause for vacant possession and the doctrine of *res judicata* does not apply; that the court should take note of the defendant's confessions in the replying affidavit and penalize the defendant for continued disobedience of court orders.

8. The 1st plaintiff also filed a reply to the grounds contained in the defendant's notice of preliminary objection. The main response in that regard is that the said grounds combine two pleadings into one, which is unrecognizable in law and further that it does not raise commonly accepted facts.

9. The plaintiffs and the defendants respectively filed submissions on the motion.

10. In her ruling dated **23/12/2020,** the learned trial magistrate, apprehensive about making definitive findings of fact that may embarrass the trial court in the main hearing, held that the existence of the review application pending before the Court Of Appeal could not be ignored and that in the circumstances the court ran the risk of making orders that may conflict with the appellate court's findings. She made a recommendation that either of the parties should request for expeditious disposal of the pending review application. In the final analysis she stated that she was not convinced that the application for injunction had merit and she dismissed it.

11. The issue that arises is whether the learned trial magistrate erred in law and in fact in declining to issue an injunction against the defendant as sought.

12.It is common ground that the appeal in the Court Of Appeal ended in favour of the plaintiffs, that the four title deeds including the one for the suit land were restored and the defendant's title cancelled, that the defendant is in possession and that there is a pending application for the review of the Court Of Appeal decision in that appeal.

13. While assessing the merits of an application for injunction it is necessary to consider the pleadings filed in the case. Ordinarily the merits or demerits of an injunction lie in the strength of the parties' respective case before the trial court and not on external factors. If the injunction sought concerns use and occupation of land the fact of use and occupation by one of the parties, be it the applicant or respondent, is likely to be of great significance, for a court may by orders overturning an existing *status quo* on the ground, render irreparable harm to a party. However the learned trial magistrate's consideration was focused mainly on the pending application and the risk of embarrassing the trial court or conflicting with the appellate court's findings by orders that she may have made on the injunction application. That is quite understandable. However the learned magistrate needed not consider whether the decision she may have made on the application would be in conflict with the Court Of Appeal findings on a review application that was yet to be determined. That was in the opinion of this court misdirection on her part. In the absence of a stay order, all that the trial court needed to consider is the Court Of Appeal decision in the main appeal and, even so, whether other factors on the ground which the court normally considers upon an application for injunction ought to influence her decision.

14. In the main appeal the Court Of Appeal cancelled the title in the name of the defendant and reinstated the plaintiff's titles. I do not see any further orders of eviction and or granting of vacant possession in the matter. I also find scant material on the issue as to whether the decree of the High Court in the **Nakuru HCCC 583 of 1996** was executed against the plaintiffs in favour of the defendant. However it is noteworthy that the plaintiff in that suit had claimed that he had been in possession since **1985** and had claimed adverse possession as part of his pleading in that case. Those are the additional facts that were available for consideration by the learned magistrate to consider but which she may have inadvertently overlooked. As they are on the record, this court is entitled to consider them in determining whether the learned magistrate erred in law and in fact in making a finding that the appellants herein had not made out a case in favour of the granting of an injunction.

15. I must state here that the facts that emerge is that had the learned trial magistrate considered those issues and made them the bastion of her ruling, they reveal a situation where the defendant was in possession and in which the case must go to full trial or to determine whether that possession ought to be brought to an end summarily by way of an injunctive order at an interlocutory stage as implicitly proposed in the application.

16. This court is aware of the need to safeguard the status quo in injunction applications to pave the way for determination of the main issues in the main suit on the merits. Summary trial of issues in an interlocutory application for interim orders of injunction which may lead to orders that have the effect of a mandatory injunction is highly discouraged in practice unless it can be demonstrated that the target of mandatory injunctive orders acted with an intention to steal a march on the applicants. In this case it is reasonably foreseeable that the appellants having admitted possession is in the respondent's hands the injunctive order sought perchance it is issued would amount to a mandatory injunction which is untenable while the review application and the main suit herein are still pending.

17. In the case of **Kenya Breweries Ltd & Another -Vs- Washington Okeyo (2002) eKLR** the Court of Appeal stated as follows:

> **"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:**
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> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff …….. a mandatory injunction will be granted on an interlocutory application".**

18. In the same case (**Kenya Breweries Ltd)** the Court Of Appeal continued as follows:

“Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

19. The Court of Appeal in **Kamau Mucuha v Ripples Ltd [1993] eKLR** stated as follows:

“The reason for the rule is plain. Megarry J put it succinctly in a subsequent passage in the Shepherd Homes case as follows:

“ …… .... if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained.””

20. In this appeal, it is noteworthy that the respondent being in occupation of the suit land, it may serve all parties better if the suit was heard on its merits and the substantive rights of the parties adjudicated. It is a good thing that the appellants have in their response to the respondent’s claim of *res judicata* stated that the suit from which the instant appeal originated is a fresh cause; arising from that assertion is the conclusion that the application for interim orders of injunction ought to be considered fully within the context of that suit, which requires to be finalised on its merits one day. If the orders were to be granted by the trial magistrate on the injunction application which is not in law the equivalent of an application for summary judgment, and the respondent was evicted, what would remain to be heard at the main suit? The conclusion is that the appellants had failed to establish that though they had a *prima facie* case damages were not an adequate remedy or that the balance of convenience in any event tilted in favour of granting the injunction. The trial magistrate followed a different path but eventually reached the same conclusion and her decision can not be faulted.

21. The upshot of the foregoing is that I find no merit in the instant appeal and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF DECEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU