REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 13 OF 2019

JOSEPH MUIRURI MUGO..... APPELLANT

-VERSUS-

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

FRANCIS NDERITU.....2ND RESPONDENT

JANE NYAMBURA.....3RD RESPONDENT

LUCY WANJIKU……..….4TH RESPONDENT

(Being an appeal against ruling and order in Nyeri Chief Magistrates Court Case No. 13 of 2019 (Hon. Maisy Chesang, Senior Resident Magistrate) dated 4 February 2019).

JUDGMENT

This appeal is against the lower court's ruling on an interlocutory application in which the appellant had sought various interim orders pending the hearing and determination of the main suit.

In a plaint filed in court sometimes in November, 2018, the appellant contended that he operated three stalls of particular dimensions at Nyeri open air market. Between the year 2015 and January, 2016, the 1st respondent sought to renovate and upgrade the market to modern status and, for this reason, all the traders were to be relocated to an alternative site pending completion of the construction works. It was his case that he, in particular, only relocated on condition that he would reclaim his previous site, where his stalls were, in the upgraded market once the renovation was complete. As a matter of fact, a consent order was entered to this end in Nyeri High Court Petition No. 1 of 2016 in which he was the petitioner and the 1st respondent, the respondent.

Contrary to this consent order, the 1st respondent allocated some of the appellant's space to the 3rd and 4th respondents and further, he was barred from reconstruction of his stalls to the condition in which they were before the renovations.

He therefore prayed for, among other things, a declaration that he was entitled to his stalls in the same dimensions in which they were before the relocations. He also sought for an order against the respondents, jointly and severally, to be restored to his previous location in line with the consent order in High Court Petition No.1 of 2016. Further, he sought an order to restrain the respondents, their servants or agents from interfering with his business stalls.

Alongside the suit, the appellant filed a notice of motion seeking for interlocutory orders some of which were framed as follows:

> ***"a) ...***
>
> ***b) an interlocutory order be issued for the preservation of the beacons standing on the ground marking the business premises occupied by the plaintiff's stores known as stalls 1, 2 and 3 prior to the relocation in Nyeri open air market pending the hearing and determination of the suit.***
>
> ***c) a mandatory injunction be issued against the first defendant ordering it to restore the plaintiff's stalls as they were on the premises marked for stalls 1,2,3 in Nyeri open air market or failing which alternatively;***

d) the plaintiff be allowed at his cost (recoverable from the 1st respondent) to re-erect his stalls known as stall 1,2,3 within Nyeri open air market and the defendant be restrained from restricting, damaging or destroying such erections and or improvements pending the hearing and determination of this application.

e) such orders (a-d) be granted pending the hearing and determination of this suit."

The respondents opposed both the suit and the application. In her ruling delivered on 4 February 2019 the learned magistrate dismissed the motion.

This appeal is against the dismissal order; in the memorandum of appeal dated 20 February 2019 and filed on even date, the appellant raised three grounds of appeal which he framed as follows:

"1. The learned trial magistrate erred in fact and in law in failing to apprehend the case before her.

2. The learned trial magistrate erred in fact and in law in failing to take into account the relevant matters and or taking into account irrelevant matters and arriving at the wrong conclusion.

3. The learned trial magistrate erred in fact and in law in misdirecting herself on the applicable facts and law thereby arriving at the wrong conclusion."

The appeal was opposed and I have a chance to consider the written submissions for the respective parties.

In the submissions filed on behalf of the appellant, it was urged that the substratum of the appellant's suit and application in the magistrate's court was the consent entered into between the appellant and the 1st respondent in Nyeri High Court Petition No. 1 of 2016. To quote the learned counsel for the appellant, he urged as follows:

"11. It is our submission that this consent was recorded to secure the respective parties(sic) interests. It has to date not been reviewed or set aside. The consent order, as has been held by the court many times, has the effect of creating contractual obligations between the parties.

12. It is this contract that the appellant sought to enforce by way of the suit in the subordinate Court. It was the subject of this application, in which he was seeking the preservation of the subject matter when the traders were being restored to the market stalls after the completion of the construction works. It was the foundation of the application: the substratum of the case."

Now, if the consent order obtained in this Honourable Court was that central to the appellant's suit and the motion with which it was filed, it deserves some attention in this appeal.

The consent was extracted as a decree of the court and, in its pertinent part, material to the appellant's suit, it read as follows:

"IT IS HEREBY DECREED BY CONSENT

That the petition be at his hereby compromised in the following terms;

(i) that the county government respondent gurantees and shall ensure that the petitioner goes back to the same site as is currently trading from after the completion of the roofing and repairing of the Open Air Market.

(ii) That in the meantime the petitioner do (sic) temporarily relocate within (3) three days hereof to whispers park where the rest of the traders have already been relocated to.

(iii) that each party to bear its own costs.

Given under my hand and the seal of the court this 1st day of February 2016."

The decree was signed by the Deputy Registrar and issued on 4 February 2016.

One question that needed to have bothered the trial court and which also ought to concern this Honourable Court is whether, in the face of this consent and, considering the appellant's own pleadings on its materiality to the issue at hand, the suit in the Magistrates' was necessary in the first place.

Asked differently, wouldn't the decree that embodied the consent have been enforced in the same proceedings from which it was derived rather than filing a fresh suit in the lower court and whose purport was to effectively enforce that decree? Further still, assuming the respondents or any of them had disobeyed the order or the decree, as the appellant suggested in his suit and the application, wouldn't he take committal proceedings against them and wouldn't those proceedings be initiated in the same suit in which the decree was obtained?

My answer to all these questions is in the affirmative. The decree that embodied the consent between the parties could only be executed, by whichever means available to the appellant, including committal to civil jail for contempt of court, in the same proceedings from which it

had been derived.

It follows that the lower court had no jurisdiction to entertain the suit before it.

If anything, considering that a suit involving the same subject matter had been filed and concluded in a court of competent jurisdiction, the suit in the magistrates' court offended order 4 Rule 1(f) and (2) on the particulars to be included in a plaint. That rule states that the plaint shall contain, among other things, an averment that there have never been any proceedings between the plaintiff and the defendant over the same subject matter. It states as follows:

> ***1. (1) The plaint shall contain the following particulars—***
>
> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) …***
>
> ***(e) …***
>
> ***(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.***
>
> ***(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.***

By swearing an affidavit affirming the correctness of the averment made in accordance with order 4 rule 1(1)(f) when he knew very well that indeed there had been a suit between himself and the 1st respondent over the same subject matter, the appellant not only committed perjury but the suit was, for all intents and purposes, an abuse of the process of the court.

It follows that the question of whether the appellant deserved the orders prayed for in the motion should not even have arisen.

And even if it arose, there was no basis upon which it could be urged that there were special circumstances that warranted grant of mandatory order at the interlocutory stage of the proceedings.

For reasons that have been given, there was no possibility of success of the appellant's suit. From what I gather in the appellant's own pleadings and affidavits, he was no more than a licensee and who, for that particular reason, had no proprietary interest on any particular location in the 1st respondent's open air market. The site he claims to have been his spot over the years was not demarcated and registered in his name and it couldn't, not least because, as its name suggests, this was an open air market where any other licensee would trade his wares for as long as the licence allowed; in the appellant's case, it was an annual licence.

In these circumstances, the possibility of the appellant's case succeeding would, in my humble view, be remote. The case did not meet the threshold prescribed in the **Giella versus Cassman Brown Co.Ltd 1973 E.A. 358** for grant of interim injunction because, first, I am not satisfied that the appellant had demonstrated that his case was a *prima facie* case with a probability of success; and, second, it was never proved that the appellant would suffer irreparable harm that would not adequately be compensated by an award of damages if the injunction was not granted. Having failed in these two conditions, the question whether the application would have been decided on a balance of convenience could not have arisen.

In short, therefore, no case was been made for restrictive or mandatory injunction. If I have to say something more on this latter injunction, I would make reference to **Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/ (1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions. A**ccording to paragraph 378 thereof, 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 **(see Parker v Camden London Borough Council [1986] Ch 162, [1985] 2 All ER 141, CA**). Circumstances in which it has been held that a mandatory interlocutory injunction is merited include the following:

> (i) Where a case is clear and one which the court thinks ought to be decided at once. **(see Allport v Securities Corpn (1895) 64 LJ Ch 491).**
>
> (ii) If the act done is a simple and summary one which can be easily remedied **(see Ghani v Jones [1970] 1 QB 693, [1969] 3 All ER 720; affd [1970] 1 QB 693, [1969] 3 All ER 1700, CA** (her the police seized the applicant's passport without justification).
>
> (iii) If the defendant attempts to steal a match on the claimant, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed. (see **Daniel v Ferguson [1891] 2 Ch 27, CA, followed in Von Joel v Hornsey [1895] 2 Ch 774, CA**, where the defendant, knowing that the claimant was endeavouring to serve a writ, evaded service for some days and in the meantime hurried on his buildings).

The appellant's application did not fit into any of these special circumstances and neither did it present circumstances that, in its own peculiar way, would be described as special circumstances.

I am therefore of the humble opinion that, for reasons I have given, the applicant's appeal is not merited and it is therefore dismissed with costs to the respondents.

Signed, dated and delivered on 7th June 2021

Ngaah Jairus

JUDGE