



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC APPEAL NO. 36 OF 2019**

**FATUMA MOHAMED ABDI .....1<sup>ST</sup> APPELLANT/APPLICANT**

**MOHAMED DHAHIR (Suing as their guardian ad litem and next friend of**

**AMINA CHAWAHIR SAID and FATUMA SHUKRI SAID)...2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**MICHAEL BARASA MANG'ENI.....RESPONDENT**

***(Being a Ruling delivered by HON. C.A.S Mutai – SENIOR PRINCIPAL MAGISTRATE, in BUNGOMA CMC L & E NO. 64 OF 2019)***

**RULING**

On 4<sup>th</sup> October 2019 **HON C. A. S MUTAI** (Senior Principal Magistrate) delivered a ruling in which, although he did not explicitly say so, amounted to a dismissal of the Appellants' Notice of Motion dated 24<sup>th</sup> June 2019. The trial magistrate in the last paragraph of the said ruling simply made the following order:-

***“For now, I direct that the status quo as per the interim orders be maintained matter to proceed for hearing where evidence to be taken viva voce.”***

**MR WERE**, counsel for the Appellants must have understood that ruling to mean, and I share the same view, that the trial magistrate dismissed the Appellants' Notice of Motion dated 24<sup>th</sup> June 2016 and that is why the parties are in this Court on appeal. However, a Court's Judgment or ruling ought to be clear on whether the remedies sought by the parties were granted or dismissed so that the matter is not left to speculation.

Having said so, the Notice of Motion dated 24<sup>th</sup> June 2019 and which led to the impugned ruling sought the following orders: -

- 1. That service of the application be and is hereby dispensed with at the first instance.**
- 2. That an interim injunction be and is hereby issued restraining the defendant/Respondent either himself or through his agents and/or employees from entering, utilizing, developing and/or otherwise dealing with land L.R NO E. BUKUSU/S.KANDUYI/7010 pending the hearing and determination of this application inter – partes.**
- 3. That plaintiffs/Applicants either by themselves and/or through their agents, family members or servants be and are hereby allowed to enter and inspect the L.R NO E. BUKUSU/S. KANDUYI and the premises and developments thereon pending hearing and determination of this application inter – partes.**
- 4. That the OCS Bungoma Police Station to ensure compliance with these orders.**
- 5. That the plaintiffs/Applicants either by themselves and/or through their agents, family members or servants be and are hereby allowed to enter and inspect LR NO E. BUKUSU/S. KANDUYI/70 and the premises and developments thereon pending hearing and determination of this suit.**
- 6. That a temporary injunction be and is hereby issued restraining the defendant/Respondent, either himself or through his agents and/or employees from entering, utilizing, developing and/or otherwise dealing with LR NO E. BUKUSU/S. KANDUYI/7010 pending the hearing and determination of this suit.**

**7. That costs of the application be provided for and be borne by the defendant/Respondents.**

The gist of the application was that whereas the plaintiffs/Applicants are the registered proprietors of land parcel **NO E. BUKUSU/S. KANDUYI/7010** (the suit property), the defendant/Respondents are wasting it. That the suit property had been purchased from one **WANYONYI JOHNNEX WASWA** in 2019 but the defendant /Respondent had taken possession thereof pursuant to a lease agreement with the said **WANYONYI JOHNNEX WASWA** for a period of 5 years.

However, that lease was terminated for failure to pay rent. That there is privity of contract between the defendant/Respondent and the plaintiffs/Applicants who have even issued a termination notice to vacate because the defendant/ Respondent is running a beer business without the consent of the registered proprietor. That the defendant/Respondent is wasting the suit property by making permanent development and alterations without the consent of the plaintiffs/ Applicants and this is likely to be a recipe for chaos and violent physical confrontation and the plaintiffs/Applicants have a prima facie case with high chances of success and may also suffer irreparable loss. Annexed to the Notice of Motion are the title deed to the suit property, land sale contract between the 1<sup>st</sup> plaintiff and Multi - Business Shooters Investment Ltd in respect to the suit property, the lease agreement between the defendant/Respondent and **WANYONYI JOHNNEX WASWA**.

It is clear from the record that the application was opposed. Regrettably however, the defendant/Respondent's replying affidavit or whatever processes he filed are not in the file. What is important for now is that after hearing the parties, the trial magistrate made the order that I have cited above in his ruling the subject of this appeal.

The plaintiffs/Appellants promptly filed this appeal on 14<sup>th</sup> October 2019 against that ruling and raised the following grounds in seeking to set it aside:-

- 1. The learned trial magistrate erred in law and in fact when he failed to make any mention, decision and finding on the Appellants prayer to enter and inspect their land.**
- 2. The learned trial magistrate erred in law and in fact when he failed to find that the un – registered lease between the Respondent and the previous owner, a third party, does not afford the Respondent any protection against the rights of the Appellants to the land.**
- 3. The learned trial magistrate erred in law and in fact to find that the Respondent will not be prejudiced if the orders sought are granted because he has already sued the previous owner vide a separate civil suit seeking compensation for breach of contract.**
- 4. The learned trial magistrate erred in law and in fact in directing that status quo be maintained thereby denying the Appellants their rights to hold the title together with all privileges and appurtenances belonging thereto.**
- 5. The learned trial magistrate erred in law and in fact in holding that MR WASWA should be made a party to the suit or that there is need to have the civil suits consolidated yet MR WASWA has no legal interest in the suit land.**
- 6. The learned trial magistrate erred in law and in fact when he failed to properly comprehend prayers for an access to the suit land and temporary injunction and erroneously held that the orders sought in the application dated 24<sup>th</sup> day of June 2019.**

Simultaneously with the appeal, the Appellants filed a Notice of Motion dated 9<sup>th</sup> October 2019 seeking the following orders: -

- 1. Spent**
- 2. Spent**
- 3. That the Appellants/Applicants either by themselves and/or through their agents, family members or servants be and are hereby allowed to enter and inspect L.R NO E. BUKUSU/S. KANYUYI/7010 and the premises and developments thereon pending hearing and determination of this appeal.**
- 4. That a temporary injunction be and is hereby issued restraining the Respondent either by himself or through his agents and/or employees from entering utilizing, developing and/or otherwise dealing with land L.R NO E. BUKUSU/S. KANDUYI/7010 and the developments thereon pending the hearing and determination of this appeal.**
- 5. That costs of this application be provided for and be borne by the Respondent.**

The application is founded on the grounds set out therein and is also supported by the affidavit of **FATUMA MOHAMED ABDI** the 1<sup>st</sup> Appellant.

The gravamen of the application is that the Appellants are the registered proprietor of the suit property having purchased it in 2019 from **MULTI – BUSINESS SHOOTERS INVESTMENT COMPANY** under the umbrella of **WANYONYI JOHANNEX WASWA** the then registered owner and who had entered into an un – registered lease with the Respondent for a period of 5 years. That the Respondent is a mere trespasser on the suit property with no privity of contract with the Appellants. That the Appellants sued the Respondent seeking an order of eviction and contemporaneously filed an application to be given access and stop the Respondent from operating a hotel business on

the suit property. That the application was heard and the trial magistrate ordered that the status quo be maintained hence the appeal. That the Respondent is not paying rent and is wasting the suit property by making permanent developments hence this appeal which has high chances of success.

The application was opposed and the Respondent filed a Preliminary Objection alleging that the application is res – judicata and therefore vexatious, incompetent, fatally defective and an abuse of the Court process. He also failed grounds of opposition and a replying affidavit.

In the replying affidavit, the Respondent averred that he is not a trespasser on the suit property but has a tenancy agreement running for 5 years from 27<sup>th</sup> May 2017. That the previous owner of the suit property sold it to the gullible plaintiffs without his knowledge on 23<sup>rd</sup> March 2019 for Kshs. 21,000,000/= payable in instalments with the last instalment of Kshs. 6,185,000/= payable on or before 30<sup>th</sup> April 2019 but upon the vendor surrendering vacant possession. That the Appellants knew too well that he is a tenant who has a right to use the suit property until 2022 when the lease expires. That the lease has not expired and he has not been served with any notice to vacate and the Appellants bought the suit property knowing he was in possession. That the suits involving him and the previous owner at the Business Premises Rent Tribunal were dismissed on 19<sup>th</sup> June 2019 and he has two cases at the Bungoma Chief Magistrate’s Court where he is seeking damages as his property was destroyed by goons who he believes were hired by the Appellants. That he runs a hospitality business and has to keep the business upto standard and cannot therefore make permanent developments on property that is not his. That the Appellants are bound by the lease which pre-dates their purchase of the suit property since they did not buy it with vacant possession and the previous owner hid material facts while selling it to the Appellants. That the orders sought will prejudice his right as a tenant and it is fair that the application be dismissed.

The application was canvassed by way of written submissions which have been filed both by **MR WERE ADVOCATE** for the Appellants and **MR MALALAH ADVOCATE** for the Respondent.

I have considered the application the rival affidavits and annexures thereto as well as the submissions by counsel.

There are three substantive prayers for my determination in this application. These are: -

**1. Prayer to allow the Appellants either by themselves and/or through their agents, family members or servants to inspect the suit property and the developments thereon.**

**2. Prayer for a temporary injunction restraining the Respondent either by himself or through his agents and/or employees from entering, utilizing developing and/or otherwise dealing with the suit property pending the hearing and determination of the appeal.**

**3. Who shall meet the costs?**

The crux of the submissions by counsel for the Appellants is that the 5-year un – registered lease that the Respondent had with the previous owner of the suit property is not binding on the Appellants and cannot offer the Respondent any protection. That the Appellants are therefore entitled to enjoy the rights afforded by **Section 25(1) of the Registered Land Act**.

On the other hand, counsel for the Respondent has submitted that this application is infact res – judicata the same issues having been determined by the subordinate Court which granted an order for status quo to be maintained.

In determining this application which is an interlocutory application, I must refrain from making any concluded view on the issues in controversy which are still pending in the main suit so as not to prejudice or pre judge it. In **NIAZSONS (K) LTD .V. CHINA & BRIDGE CORPORATION KENYA 2001 KLR 12**, the Court held: -

***“As a Court sitting in it’s appellate jurisdiction on an interlocutory matter, the Court of Appeal could not properly express any concluded view on any of the issues touching on the merits of the suit and the application as doing so would infringe on the jurisdiction of the trial Court and may inhibit it in exercising it’s discretion in the matter”***

The same principle should when this Court is exercising it’s appellate jurisdiction.

Before I consider the application on it’s merits, I need to determine whether it is infact res – judicata as submitted by the Respondent’s counsel.

Res – judicata is provided for in **Section 7 of the Civil Procedure Act** as follows: -

***7 “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”***

From the above, the ingredients of res – judicata are: -

**1. The issue in dispute in the former suit between the parties must be directly and substantially in issue in a former suit.**

**2. The former suit must involve the same parties or parties under whom they or any of them claim litigating under the same**

title.

**3. The former suit should have been heard and finally determined.**

**4. The Court that heard the former suit must have been competent.**

It is of course true that the issues of temporary injunction and access to the suit property were canvassed in the trial Court. However, the Appellants are now exercising their right of appeal against the decision of the trial Court in which those remedies were denied. In the circumstances, res – judicata cannot be invoked because that would then mean that a party who is appealing from the decision of a subordinate Court cannot raise the same issues that were canvassed in the trial Court. That would not be a proper interpretation of the doctrine of res – judicata because it would stifle appeals yet that is a process provided for by law.

Secondly, the law itself recognizes that even where an application for orders of temporary injunction has been dismissed by the trial Court, the Appellate Court has the jurisdiction under **Order 42 Rule 6** to consider and grant such orders it reads: -

***“Notwithstanding anything contained in Sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”***

The Appellants having filed an appeal arising out of the ruling of the trial magistrate dated 4<sup>th</sup> October 2019 have the right to move this Court in the manner in which they have done.

In the circumstances, the Preliminary Objection dated 14<sup>th</sup> November 2019 that this application is frivolous, vexatious, incompetent defective and an abuse of the Court process for being res – judicata cannot be sustained. It is accordingly dismissed.

With regard to the prayer that the Appellants through their agents, family members or servants be allowed to enter and inspect the suit property, it is common ground that the Appellants are now the registered proprietors of the said property since 5<sup>th</sup> April 2019. They have annexed to their application the title deed to the said property. The Respondent confirms this when he depones in paragraph 6 of his replying affidavit dated 18<sup>th</sup> November 2019 as follows: -

***“That it has come to my attention that the previous owner of the property sold off the land to the gullible plaintiffs herein without my knowledge. (see copy of land sale contract dated 23<sup>rd</sup> March 2019 for Kshs. 21,000,000/= and marked ‘MBM 2’).”***

The Respondent is of the view that the lease between him and the previous owner of the property protects him until 2022 when the lease expires. The lease which is annexed to the Respondent’s replying affidavit is for a 5-year period. However, it is not registered. One of the issues in the appeal will be whether the un – registered lease can protect the Respondent against the Appellants who are third parties to the same. The Court will also have to consider the rights of the Appellants as protected by **Section 24 and 25 of the Land Registration Act** with respect to the suit property.

With regard to the application for the order of an injunction pending appeal, the Court shall be guided by the principles set out in **PATRICIA NJERI & OTHERS .V. NATIONAL MUSEUM OF KENYA 2004 eKLR**. These are: -

- 1. An order for injunction pending appeal is a discretionary one and the discretion will not be exercised in form of an applicant whose appeal is frivolous.**
- 2. That discretion will be refused where to grant the order will inflict greater hardship than it would avoid.**
- 3. The Applicant must demonstrate that to refuse the injunction would render the appeal nugatory.**
- 4. The Court should be guided by the principles in **GIELLA .V. CASMAN BROWN LTD 1973 E.A 358**.**

Therefore, although this Court is dealing with an application for injunction at an appeal stage, it must be guided by the principles set out in the **GIELLA** case (supra). These are: -

- 1. The Applicant must establish a prima facie case with a probability of success.**
- 2. The Applicant must demonstrate that unless the order for injunction is not granted, he might suffer irreparable injury that cannot be compensated by an award of costs, and**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

In **CHARTER HOUSE BANK LTD .V. CENTRAL BANK OF KENYA & OTHERS 2007 eKLR** the Court of Appeal held as follows: -

***“ ..... the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.”***

The status quo that the Appellants expect, as the registered proprietor of the suit property, is that it shall remain in the same condition in which it was when they purchased it and that it is not being wasted. That is what is deponed in paragraph 7 of the supporting affidavit of **FATUMA MOHAMED ABDI**. It is worth noting that in paragraph 36 of his replying affidavit, the Respondent avers that he had ***“invested heavily in the suit property”*** and is not in breach of his ***“contractual obligations.”*** The bottom line however is that there is no contractual obligation between the parties. By virtue of being the registered proprietors of the suit property, a prima facie case is established. This Court must also bear in mind that the dispute involves immovable property which may be difficult to revert to its original condition if indeed permanent alterations and developments are being made to it as deponed in paragraph 12 of the supporting affidavit of **FATUMA MOHAMED ABDI**. That explains why the Appellants seek to enter and inspect the suit property.

Having said so, the prayer for temporary injunction sought by the Appellant is that the Respondent either by himself or through his agents and/or employees be restrained: -

***“from entering, utilizing, developing and/or otherwise dealing with the land L.R NO E. BUKUSU/S.KANDUYI/7010 and the developments thereon pending the hearing and determination of this appeal.”*** Emphasis added.

It is common ground that the Respondent is currently in occupation of the suit property. To grant the above orders would amount to evicting him and thereby determining the suit in a summary manner at an interlocutory stage. In saying so, I take cognizance of the fact that the main remedy sought by the Appellant in the subordinate Court against the Respondent and which is yet to be determined, is a prayer for: -

***a. “An eviction order to forcefully eject the defendant either himself and/or acting through his agents, servants or family members from L.R NO. E. BUKUSU/S. KANDUYI/7010”***

Though worded as a prayer for a temporary injunction pending appeal, the above prayer is, in my view, actually seeking a temporary mandatory injunction pending appeal. And while this Court has the power to grant such an injunction even at an interlocutory stage, that can only be issued in rare cases. It cannot be granted where to do so would amount to making a final and conclusive determination of the facts in dispute even without hearing the parties on a claim that is still pending. That would render the trial in **BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE NO 64 OF 2019** a mere academic exercise. It would not therefore be prudent for this Court to grant such a prayer at this stage.

On the other hand, the Appellants are the registered proprietors of the suit property. They have a right to access it to ensure that it is not being damaged or wasted.

Ultimately therefore and having considered all the issues herein, I make the following orders with respect to the Appellant’s Notice of Motion dated 9<sup>th</sup> October 2019: -

- 1. The Appellants, their agents, family members or servants shall be allowed to enter and inspect the premises on land parcel NO L.R EAST BUKUSU/SOUTH KANDUYI/7010 pending the hearing and determination of this appeal.**
- 2. The entry and inspection shall be conducted on the 1<sup>st</sup> and 15<sup>th</sup> day of each month commencing 1<sup>st</sup> March 2020 and the Respondent shall ensure un – hindered access until this appeal is heard and determined.**
- 3. The prayer for temporary injunction is denied as granting it will amount to evicting the Respondent in a summary manner and yet that is the main remedy sought by the Appellants in the suit pending before the subordinate Court.**
- 4. The Appellants shall prepare, file and serve the record of appeal within 30 days from to – day.**
- 5. The record shall thereafter be placed before me for orders on admission.**
- 6. Costs shall be in the appeal.**

**Boaz N. Olao.**

**J U D G E**

**20<sup>th</sup> February 2020.**

Ruling dated, delivered and signed in Open Court this 20<sup>th</sup> day of February 2020 at Bungoma.

Ms Mburu for Respondent present

Mr. Wekesa for Mr Were for the Applicant present

1<sup>st</sup> Applicant present

Joy/Okwaro – Court Assistants

**Boaz N. Olao.**

**J U D G E**

**20<sup>th</sup> February 2020.**