



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND APPEAL NO 7 OF 2019

CHRISTOPHER MENGE KIYAKA.....1ST APPELLANT

JOM.....2ND APPELLANT

VERSUS

FMM.....RESPONDENT

(Being an appeal from the Ruling/Order of Hon. S.N. Makila Senior Resident Magistrate,

delivered on 8th day of February 2019 in Chief Magistrate's Court

Environment and Land Case No. 232 of 2018)

JUDGMENT

INTRODUCTION

1. By a Memorandum of Appeal filed on the 28th February 2019, the Appellant appeals against the ruling delivered by S.N Makila (SRM) before the Chief Magistrates Court Kisii. Pursuant to that ruling the learned trial magistrate dismissed the Appellants' application stating that the Appellants failed to meet the principles of injunctions and thus failed to establish a prima facie case to justify the granting of the orders sought.

2. The Appellant being dissatisfied with the decision of the subordinate court filed a Memorandum of Appeal on the following grounds;

1. *The trial Magistrate erred in law and in fact by making a finding that land parcel No. Nyaribari Chache/B/B/BOBURIA/[XXXX] is a matrimonial property subject to distribution between the 2nd Appellant and the Respondent without any evidence or legal basis whatsoever.*
2. *The Trial Magistrate erred in law and fact in coming to the conclusion that the 2nd Appellant and the Respondent were at all material times in use and possession of the suit property contrary to the evidence on record.*
3. *The Trial Magistrate erred in law by laying a burden on the 1st and the 2nd Appellants to prove that the Respondent had any rights or interest over the suit land.*
4. *The Ruling was against the evidence on record.*

BACKGROUND

3. The Appellants in their application dated 8th October 2018 before the subordinate court claim that the 1st Appellant is the registered proprietor of land parcel title No. NYARIBARI CHACHE/B/B/BORURIA/[XXXX] ('suit property'). According to the Appellants, the 2nd Appellant and Respondent were married but the marriage was dissolved following the orders made in **Divorce Cause No 328 of 2011**. The 2nd Appellant claims that on 27th September 2018 the Respondent went to the residential house on the suit property accompanied by a group of armed people and threatened to take possession of the 2nd Appellant's house. The Respondent proceeded to change the locks to the house and as a result the 2nd Appellant was locked out of his house.

4. Before the application was heard, the parties by consent agreed that the 2nd Appellant to have access to the house on the suit land.
5. The order primarily sought by the Appellants was an order restraining the Respondent by herself, her servants or agents or any person acting on her instructions from entering, remaining, trespassing, living, occupying, accessing, claiming controlling or in any other manner interfering with the 2nd Appellant's occupation of the residential house situated on the suit property pending hearing and determination of the suit. The Appellants additionally sought an order directing the officer in charge of station (OCS) Central Kisii Police Station to ensure compliance of the orders given herein.
6. The appeal was dispensed of by way of written submissions and both parties complied by filing their respective submissions.
7. The Appellants submit that the suit land is not ancestral land but land that had been bought by the 1st Appellant thus the trial court's holding that the land is matrimonial property subject to distribution between the 2nd Appellant and the Respondent is not sustainable in law. While citing the provisions of **section 28 of the Land Registration Act, 2012** they argued that matrimonial property is not listed as one of the overriding interest which the property may be subject to. It was advanced that the Respondent had not tendered any evidence to prove that the suit land formed part of the matrimonial property as there was no evidence led to show her contribution. The Appellant submit that the court declared the Respondent's rights without jurisdiction and at the same time took away the propriety rights of the 1st Appellant. They contend that they satisfied all the conditions for grant of a temporary injunction.
8. The Respondent supported the trial court's findings. The Respondent submitted that she had been in possession of the house on the suit property since 1993 and the trial court made no error in finding that the property was matrimonial property. She contends that the Appellants have not shown that the decision complained of is tainted with illegality. It was submitted that the Respondent's claim is based on prescriptive rights in the nature of an overriding interest in the land as provided under **section 28 (a) of Land Registration Act**. The Respondent submitted that the Appellants have failed to discharge the burden of establishing a prima facie case.

ANALYSIS AND DETERMINATION

9. The sole issue for determination is whether the Appellants were entitled to a temporary injunction.
10. The applicable law on granting of interlocutory injunction is set out under **Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules 2010** which provides:-

"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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(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."

11. The principles on grant of interlocutory injunctions as set out in the *locus classicus* case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** are as follows;

*"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show **a prima facie case with a probability of success**. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise **suffer irreparable injury, which would not adequately be compensated by an award of damages**. Thirdly, if the court is in doubt, it will decide an application on **the balance of convenience**."*

12. The Court of Appeal in **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] eKLR** held as follows;

"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already settled by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a prima facie level*
- b) demonstrate irreparable injury if a temporary injunction is not granted.*
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."*

13. It is not in dispute that the suit property is registered in the name of the 1st Appellant as evidenced by the title deed. It is common ground that the 1st Appellant allowed the 2nd Appellant to construct a house on portion of the suit property. While the land is registered in the name of the 1st Appellant, it is not in dispute that the land where the house constructed by the 2nd Appellant sits belongs to him. The Respondent

contends that the house was constructed on the suit land in 1993.

14. Although the Appellants have established that the 1st Appellant is the registered proprietor, an analysis of the facts reveal that the Appellants have failed to demonstrate that they shall suffer irreparable harm if a temporary injunction is not granted. It has not been shown that the suit land is in danger of being wasted, damaged, or alienated by the respondent. Having considered the proceedings before the lower court the Appellants were allowed access to the residential house and there is no risk of the house being sold or disposed of as the title of the suit property is in the 1st Appellant's name.

15. The Appellant claims that the trial court found that the house on the suit land was matrimonial property. The trial magistrate in her judgment found as follows;

“In as much as the respondent is no longer legally married to the 2nd applicant, the rights of the respondent to any matrimonial properties or interest in such property still subsist until there is a determination by the court.”

16. After carefully considering the trial court's finding, I am constrained to agree with the trial court's finding that division of matrimonial property will only be determined upon the ascertainment of what consists of matrimonial property and upon distribution of such property. The trial magistrate did not make a finding that the suit property formed part of the 2nd Appellant and the Respondent's matrimonial property as alleged by the Appellants. The trial magistrate merely recognized that the rights of the Respondent to any matrimonial properties held by the 2nd Appellant and the Respondent will subsist until such time that the properties are distributed between the parties.

17. In the end, I find that the appeal before me is lacking in merit and it is hereby dismissed.

18. Each party shall bear their own costs.

Dated, signed and delivered at KISII this 13th day of October 2020.

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J.M ONYANGO

JUDGE