



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 42 OF 2017

SAMUEL KARUBI NJENGA.....APPELLANT

VERSUS

JENNIFER NG'ENDO WAWERU.....RESPONDENT

JUDGMENT

1. This appeal emanates from the ruling of Ochieng SRM, delivered on 6th March 2017 in **Githunguri SPMCC Succession Cause No. 100 of 2012 In the matter of the estate of Joseph Njenga Waweru alias Njenga Waweru Ibongo** (deceased).

2. The ruling related to an application filed on 13th November 2016 by **Jennifer Ng'endo** the Respondent herein, to restrain Samuel Karubi Njenga (the Appellant) from constructing a permanent house on land **parcel No. Githunguri/Kimathi/607**. On grounds *inter alia* that the land was registered in the joint names of the deceased in the matter and one **Martin Kung'u Kaguri** and that the mode of distribution of the estate had yet to be ascertained. Prior to this, the Respondent and one **Peter Hwai Kung'u** claiming to be the son of Martin Kung'u Kaguri had through Ndung'u Mwaura & Co. Advocates filed affidavits of protest to the summons for confirmation of grant in the cause.

3. The protests are still outstanding although the Respondent had testified. Nevertheless, the application filed on 13th November 2016 was opposed by the Appellant and the court after hearing the parties ruled in the Respondent's favour on 6th March 2017. Aggrieved by this outcome the Appellant filed the present appeal. His memorandum of appeal raises the following grounds:

a. “ **THAT the Learned Magistrate erred in law and in fact by failing to appreciate the fact that the Appellant had lived on that particular parcel of land for over 40 years with his late father's consent.**

b. **THAT the Learned Magistrate erred in law and fact by denying the Appellant the right to enjoy the possession of his property.**

c. **THAT the Learned Magistrate erred in law and fact by failing to appreciate that the Appellant had already finished the construction of his permanent house and was only waiting to move in into the same.**

d. **THAT the Learned Magistrate erred in law and fact in failing to observe that the Appellant and indeed all the beneficiaries have their own portions where they have developed and established their homesteads and that it is only fair and just to let the Respondent develop his portion.**

e. **THAT the Learned Magistrate erred in law and fact and law by failing to observe that the Appellant's own father (the late Joseph Njenga Waweru) had signed a way leave for the Applicant to install electricity on this particular portion of land way back in 1991.**

f. **THAT the Learned Magistrate erred in law and in fact by failing to appreciate that the Appellant had failed to demonstrate how the upgrading of the Respondent's residence to a permanent structure would interfere with her own rights as to her property-especially as there are clear boundaries demarcating their portions.**

g. **THAT the Learned Magistrate erred in fact and law by failing to find that the Land Parcel number Githunguri/Kimathi/607 had been illegally registered to the deceased herein and the late Martin Kung'u Kaguri.**

h. **THAT the Learned Magistrate erred in law and fact by failing to observe that the other beneficiaries (save for the Appellant) have no objections whatsoever and that the application was motivated by the Respondent's ill will and malice earlier on she had lost a court case pitting her against the Appellant.**

i. **THAT the Learned Magistrate erred in law and fact by failing to observe that the Respondent herself currently enjoys the use of a permanent residence-a pleasure she seeks to deny the Appellant.**

j. **THAT the Learned Magistrate erred in fact and in law by failing to observe that the Appellant did not encroach on the Respondent's portion of land and neither did he encroach on any of the beneficiaries' portions and the Respondent herself did not claim so in her affidavit and her submissions.**

k. **THAT the Learned Magistrate erred in fact and in law by failing to appreciate the fact that the Appellant could not possibly live in the upgraded house without the house windows and doors as the ruling effectively stopped construction and thereby subjecting the Appellant to living in harsh and degrading conditions and continually incurring rental costs."**

4. The appeal was canvassed by way of written submissions. The Appellant principally reiterated the matters contained in the affidavits in respect of the motion in the lower court and asserting that the Respondent being a beneficiary like the Appellant has no right to stop the development of his distinct portion of the suit property. He pointed out that other beneficiaries had no objection as he occupied the portion assigned to him over 30 years ago by his father the deceased herein. Restating the history of the dispute regarding the joint registration of the suit property in the name of his father and one Martin Kung'u Kaguri, the Appellant claimed that he has suffered losses and been unable to occupy the building he was restrained from constructing.

5. The Respondent's submissions also highlight the fact that the suit property is owned by two parties and that the family of Martin Kung'u Kaguri the said co-owner of the property had not filed succession proceedings. Citing the case of **Peters v Sunday Post Limited [1958] EA 42** the Respondent argued that there is no justification for this court to interfere with the decision of the lower court, and that besides, the Appellant ought to have awaited the conclusion of the Succession Cause before embarking on constructing a permanent house on the suit land.

6. The court has considered the rival submissions on this appeal and the material canvassed in respect of the application in the lower court, as well as perusing the entire record of the cause in the court below. The court's duty as a first appellate court is to re-evaluate the evidence and to draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited [1958] EA 424; Selle and Another v Associated Motor Boat Co. Ltd and Others [1968] EA 123; and Williams Diamond Limited v Brown [1970] EA 1.**

7. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278** held that:-

"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a mis-- apprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

8. The common facts in this case are that the Appellant is one of several sons of the deceased Joseph Njenga Waweru alias Njenga Waweru Ibongo in respect of whom a **Succession Cause No. 100 of 2012** had been filed in the SPM's Court. The deceased died intestate while possessed of land parcel **LR. No. Githunguri/Kimathi/607** measuring 7 acres. It appears that the land had prior to the death of the deceased been controversially registered in the joint names of the deceased and one Martin Kung'u Kaguri in shares of 4 and 3 acres, respectively. This action was the subject matter of several suits including **Kiambu SPMCC No. 167 of 2009** filed after the death of the deceased by his son **Stephen Waweru Njenga** (the deceased husband to the Respondent) to stop the burial of the deceased on a portion of the suit property measuring 3 acres which he claimed to have bought from Martin Kung'u Kaguri and occupied. In its ruling delivered on 6th August 2009 (copy thereof attached to the Appellant's submissions) the court observed inter alia that:

"2.... The Applicant stated that he is a beneficial owner of the suit land; he also states that he is a purchaser for value and annexed a sale agreement dated 23rd June 2004. There is a letter dated 7th November 2005 stating that the Applicant leased the land from the late Martin Kaguri for a period of 30 years. It does not state from when the 30 years started running. The question now is can the Applicant be a beneficial owner, a purchaser and a lessee all at the same time."

The Applicant stated that he owns the 3 acres out of the 7 acres of land; which 3 acres and located where? Has there been any surveying done to establish which part of the land? This was not proved. From the replying affidavit and photographs annexed thereto it is obvious that the Applicant and the brothers have built in this parcel of land and the grave is outside one of the brothers' house. The Applicant did not clearly demonstrate which 3 acres is his and which is his father's. The land has no title in the Applicant's name.

9. The court, noting previous litigation in respect of the suit property including a Civil Suit No. 100 of 2003 by the Applicant before it, **Stephen Waweru Njenga** against the deceased, proceeded to find that the Applicant did not establish a prima facie case or demonstrate that he would suffer irreparable loss if the deceased was buried at the spot where the grave had been dug and therefore dismissed the application.

10. The summons before the lower court had invoked Rules 49 and 73 of the Probation and Administration Rules. However, the provisions of Order 40 of the Civil procedure Rules are applied to Succession Causes pursuant to rule 63(1) of the Probate and Administration Rules. The subject application was one for an interlocutory injunction and ought to have invoked Order 40 Rule 1 of the Civil Procedure Rules which provides that:

"1. 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 y g 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”.

11. It was therefore a misdirection for the trial court to state in the impugned ruling that:

“I do note that the order sought by the Applicant has not been provided for under the Law of Succession Act. Indeed, the Applicant has not relied on any such Section of the law. However, he has cited Rule 73 of the Probate and Administration Rules which saves the inherent powers of the court to prevent abuse of the court process and to meet the ends of justice.”(sic)

12. Having perused ruling of the court, I cannot find any reference or advertence to the principles that govern the granting of an interim injunction. This even though the *locus classicus* on such orders, namely, **Giella v Cassman Brown & Co. Ltd [1973] EA 358** had been cited in the written submissions of the parties. Thus, the trial court stated after setting out the depositions of the parties stated that:

“I have considered the application before me as well as the response on record. I have also looked at the rival written submissions by both counsel. Its clear that there are developments ongoing on a portion of the subject property Githunguri/Kimathi/607. The mode of distribution with regard to the disputed property is yet to be determined by this court. I am satisfied that its only just and fair that the disputed property be preserved pending confirmation of Letters of administration This being a court of equity, I am persuaded that this is a proper case to grant orders preserving the property namely Githunguri/Kimathi/607 pending the confirmation of the interim grant. For avoidance of doubt the Respondent is hereby restrained from doing further construction and/or developments on land parcel No. Githunguri/Kimathi/607 pending the distribution of the deceased person’s estate.....” (sic).

13. The principles governing the grant of interlocutory injunctions are settled. In **Nguruman v Jan Bonde Nielsen and 2 Others [2014] e KLR** the Court of Appeal restated the principles enunciated in **Giella v Cassman Brown** and observed that the role of the judge at interlocutory stage is merely to consider whether the principles for the grant of an interlocutory injunction had been met and that the court ought to be careful not to determine with finality any issues arising at that stage.

14. The Court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already 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) demonstrated irreparable injury if a temporary injunction is not granted.**
- c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor.”**

15. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

16. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows: -

“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case

closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. 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.” (emphasis added)

17. Applying the above principles to the material placed before the trial court, there is no doubt that the Respondent was a beneficiary to the estate of the deceased in her capacity, as the widow of her deceased husband Stephen Waweru Njenga . She had therefore a stake in the eventual distribution of the suit property. However, there was uncontroverted affidavit evidence by the Appellant that the children of the deceased, including the Respondent and her deceased husband had since the lifetime of the deceased herein occupied distinct portions of the suit property ; that the said children including the Respondent's deceased husband had developed these portions by putting up dwellings in distinct portions. Attached to the Appellant's replying affidavit were photographs marked **SKN1** showing these developments. Photograph 2 in particular showed the Respondent's stone perimeter wall and metallic gate to her compound and photo 5 showed the Respondent's home, while photographs 4, 6, 7, 8 showed the location where the Appellant had set up his home and was building a permanent house. Photograph 6 in particular showed the grave site of the deceased herein referred to in the ruling in Kiambu SPMCC No. 167 of 2009 referred to earlier, which grave lies adjacent to the said construction by the Appellant.

18. By his replying affidavit, the Appellant had asserted that beneficiaries of the deceased occupied distinct portions of the suit property and that he was developing a new house where his older house had sat, that the Respondent herself had a permanent house on her distinct compound and that the Respondent was acting as a proxy for the family of Martin Kung'u Kaguri. This latter assertion was denied in the Respondent's supplementary affidavit and no more; the Respondent restating that the Respondent had not disputed the development and that the succession cause was pending.

19. As argued in the Appellant's submission in the lower court, the Respondent did not demonstrate that the Appellant had encroached on her occupied distinct portion of land or demonstrate beyond asserting that distribution was incomplete, that her anticipated share of the asset would be somehow affected by the construction of the house on the portion where the Appellant was putting up a house.

20. What was the unmistakable right to be protected that was directly threatened by the construction by the Appellant? It is pertinent that by affidavits and submissions in the lower court and before this Court, the parties highlighted the claim by the family of Martin Kung'u Kaguri to the deceased's land; and the Appellant had in his replying affidavit alluded to the suit filed by the Respondent's late husband to stop the burial of the deceased on the portion adjacent to the construction site on allegations that the said brother had purchased the land from Martin Kung'u Kaguri. The Appellant viewed the Respondent's application in the lower court as an extension of the said dispute which terminated in the court dismissing the late Stephen Waweru's application.

21. Indeed, the view may not be farfetched given the facts of this case. However, the Respondent in her affidavits and submissions did not advert to any claim by her late husband to that portion of the property, instead emphasizing the alleged ownership of Martin Kung'u Kaguri to part of suit property. It has to be said that neither the said party nor his administrators had filed an application to stop the Appellant's development and it does appear plausible that the Respondent was only using the issue of the pendency of the succession cause to indirectly champion the disputed claims to part of the deceased's land by her late husband, as allegedly acquired through Martin Kung'u Kaguri per the depositions by the said Stephen Njenga Waweru in Kiambu SPMCC No. 167 of 2009.

22. Reviewing the Respondent's material, this court finds that there was no demonstration of an unmistakable right of the Respondent that was threatened by the construction. He who comes to equity must come with clean hands; the Respondent having developed and in occupation of her distinct portion of the land without hindrance was quick to take steps to halt the Appellant's use and development of a portion which he had also admittedly occupied for many years, like other children of the deceased. The lower court failed to consider in any detail the material before it and was merely persuaded by the act of the Appellant's construction without considering whether there was an unmistakable right due to the Respondent that was thereby threatened. No *prima facie* case was made, in my considered view.

23. Secondly, the trial court did not address its mind to the question of irreparable damage being suffered by the Respondent. Indeed, nowhere in her affidavits and submissions did the Respondent claim the risk of such damage, again merely relying on the fact of the uncompleted succession cause. In the **Nguruman** case, the Court of Appeal observed on this score that:

“ If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “*leap-frogging*” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

On the second factor, that the applicant must establish that he “*might otherwise*” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “*adequately*” be compensated by an award of damages. An injury is irreparable where there is no standard by which

their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy” (emphasis added).

24. The Appellant and the Respondent were undeniably in occupation of and enjoying distinct portions of the suit property which arrangement existed even during the lifetime of the deceased. There is no evidence that the Appellants’ new house on the undisputed distinct portion he was possessed of interfered in any way with the Respondent’s enjoyment of her own portion or would in the future diminish or impinge upon her share of the suit property upon distribution.

25. In his submissions before the lower court, the Appellant pointed out that there had been no interference with the Respondent’s suit premises on which she had developed a house and questioned the possibility of loss or damage to be suffered by the Respondent. And while it is true, as submitted by the Respondent that none of the children of the deceased settled on the suit property held titles to their respective portions, the mere statement that the Appellant’s construction would “complicate” the distribution of the estate was both ironical and inadequate to demonstrate irreparable damage on the part of the Respondent. As the Court of Appeal stated in **Nguruman** the equitable remedy of temporary injunction issues solely to prevent “grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages”.

26. The Respondent did not furnish any cogent evidence that she stood to suffer such loss or at all. At any rate, there was no claim that the Respondent was the person entitled to inherit the particular portion on which construction was ongoing or that it was part of her compound. The trial court erred by failing to apply the principles governing the granting of an interlocutory injunction to the material placed before it. The result was an erroneous decision which on all accounts was oppressive on the Appellant, and tantamount to his constructive eviction while the Respondent and other beneficiaries continued their occupation and enjoyment of portions on which they are settled.

27. Secondly, the court ought to have considered carefully the history of the matter and not glossed over the Appellant’s complaint that the real motivation behind the Respondent’s application was to secure the claim to the suit property earlier made by her deceased husband, and/or to possibly further the claims to a part of the suit land by the family of Martin Kung’u Kaguri who had shied away from filing their own application in the matter. It was telling that the Respondent’s submission on this appeal dwelt almost exclusively on the fact that the late Martin Kung’u Kaguri co-owned the suit property with the deceased herein. The Respondent’s motion in the lower court was on the face of it intended not so much to secure the suit property pending distribution as claimed but to secure the claims to part of the asset by her deceased husband which were based on the controversial joint ownership by the late Martin Kung’u Kaguri. The court finds that grounds 1, 2, 4, 6, 8, 9, 10 of the memorandum of appeal have merit as the lower court failed to consider all the evidence before it and to apply the relevant principles of law.

28. In the circumstances, the court will allow the appeal and set aside the ruling delivered on 6th March 2017. This means that the Appellant is at liberty to complete the construction and move into occupation his new residence. For the avoidance of doubt the completion envisaged only entails the installation of windows and doors as stated in prayer (b) of the appeal and not the construction of other premises or structures or commencement of other works on the portion occupied by the Appellant.

29. In closing, this Court entertains some doubt as to whether the SPM’s court at Githunguri has the requisite pecuniary jurisdiction to deal with the subject matter herein given the total acreage of the suit land and current market value of land in that area. The parties may address the court on this aspect when the original file is returned to the trial court. This Court directs that the summons to confirm the grant that has been pending since 2014 and the protest by the Respondent and by **Peter Hwai Kung’u** both dated 22nd August 2014 be heard and determined without any further delay. The registry is directed to expedite the return of the lower court file. The costs of the appeal will be borne by the parties equally.

SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER , 2020.

C MEOLI

JUDGE