REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 5 OF 2019

DORIS VOSENGE MOGA.....APPELLANT

VERSUS

ALPHONCE JUMA NYONGESA.....RESPONDENT

(An appeal arising out of the orders issued on 4/2/2019 by Hon. Cherono M. Kesse (SRM) in Kitale CMCC No. 7 of 2019)

JUDGMENT

The Appellant's Case

1. This appeal arises from a suit in which the appellant, then plaintiff, filed a plaint dated **25/1/2019** in **Kitale SPMCC Civil Suit No. 7 of 2019** in which she sought the following orders against the respondent, then defendant therein:-

> **(a) An order for valuation of the permanent building and land (2.5 acres) on land parcel No. 17839/31, Kiminini Sub-County, Trans-Nzoia County, commonly known as Ingavi Farm**
>
> **(b) An order after valuation that the suit property be sold and plaintiff and defendant be paid according to each party's contribution to purchase and development of the property.**
>
> **(c) An interim order allowing the plaintiff to collect her belongings.**
>
> **(d) Costs of the suit.**
>
> **(e) Any other relief the court may deem just to grant.**

2. The appellant herein filed an application in that suit dated **25/1/2019** seeking an order allowing her access to the matrimonial home on land parcel No. **17839/31** Kiminini Sub-County, Trans-Nzoia County commonly known as Ingavi Farm to collect some items. The application was granted on an interim basis on **25/1/2019** and fixed for *inter-partes* hearing on **12/2/2019**.

3. The respondent herein was aggrieved by the orders granted on **25/1/2019** and on **4/2/2019** he filed a notice of motion dated **1/2/2019** seeking to have various household items returned to the matrimonial home. The court allowed the application *ex-parte*, while the previous orders were still pending *inter-partes* hearing.

4. In the appellant's Memorandum of Appeal dated **14/10/2019** and filed in court on **11/12/2019** she raised the following grounds:

> **(1) The learned magistrate erred in law and in fact when she issued subsequent orders on 4/2/2019 when the earlier orders of 28/1/2019 were still subsisting.**
>
> **(2) That the learned magistrate erred in law and in fact when she failed to appreciate that the respondent's application dated 1/2/2019 ought to have been first served before issuing any orders.**
>
> **(3) That the orders of 4/2/2019, were uncalled for and had no legal basis.**
>
> **(4) That the orders issued by the court lacked legal basis.**

5. The appellant seeks that this appeal be allowed and the orders of **4/2/2019** be set aside.

6. According to the grounds the issues for determination in this appeal are:

> **(a)** ***Whether the learned magistrate erred in law in issuing orders of 4/2/2019 while the orders of 28/1/2019 were still subsisting and without service of that application of 4/2/2019.***
>
> ***(b) Whether the orders issued regarding the application of 4/2/2019 are of any legal basis and effect.***
>
> ***(a) Whether the learned magistrate erred in law in issuing orders of 4/2/2019 while the orders of 28/1/2019 were still subsisting and without service of that application of 4/2/2019.***

7. That orders were issued in respect of both applications as stated in the appeal is not in dispute.

8. Relying on **Msa Civil Appeal No. 6 of 2015 - James Kanyita Nderitu & Another -vs- Marios Philotas Ghikas & Another** and **Nyeri HC Civil Suit No. 101 of 2011 Wachira Karani -vs- Bildad Wachira**, the appellant submitted that **Order 51 rule 3** of the **Civil Procedure Rules** requires that a party affected by an *ex-parte* order ought to apply for its setting aside.

9. The provisions of **Order 51 rule 3** are as follows:

> **"No motion shall be made without notice to the parties affected thereby:**
>
> **Provided, however, that the court, if satisfied the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex-parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just and any party affected by such order may move to set it aside."**

10. No submissions were filed on behalf of the respondent.

11. This court has to delve into the background of the matter briefly in order to determine this appeal.

12. The application dated **25/1/2019** was brought under **Section 1A and 1B** and **Section 63** of the **CPA.** The application dated **1/2/2019** was brought under the provisions of **Section 1A 1B, 3 3A, 28, 34, 38, 63(a), (b), (c)** and **(e)** and **80** of the **CPA**, **Order 40 rule 1, 4, 7** and **10, Order 45 rule 1, Order 51 rule 1** of the **CPR.**

13. In the application dated **1/2/2019** the defendant sought orders for, pending *inter-partes* hearing, the plaintiff to take into the possession of either the OCS Kiminini/Kitale police station numerous items which were certainly more than those listed in the order issued on **25/1/2019,** which the defendant alleged were taken from his home on **28/1/2019**. It sought further orders that the OCS Kiminini police station do provide the court with a report within **14** days or as directed by court, of the circumstances under which the house of the defendant on the suit land was broken into and the mentioned items taken away.

14. Prayer No. 4 of the application sought a review of the *ex-parte* orders issued on **25/1/2019** which allowed the plaintiff access to the defendant's home to collect the items named therein.

15. In support of that application the applicant set out the grounds stating that *ex-parte* orders should be granted on the rarest of occasions and the circumstances of the application dated **25/1/2019** did not warrant *ex-parte* orders; that he was not granted a hearing; that in the execution of the order his house was broken into and items not listed in the order taken away in his absence yet the court order never authorized the breaking in; that the orders were obtained by way of a false allegation that the plaintiff had been evicted from the suit premises and that the defendant is aggrieved by the orders as they were granted without any evidence tendered by the defendant to court.

16. It is clear that in both applications the magistrate gave orders which were of a mandatory injunction nature and relating to property that was alleged to be in the suit premises or to have been taken therefrom.

17. Order 51 rule 3 which is cited by the appellant is persuasive that any party who is aggrieved by an order issued *ex-parte* ought to apply for its setting aside which was done in this case, although the court issued a different orders on the setting aside application rather than the specific order of seeking setting aside and did so *ex-parte*. In this case the provisions of **Order 51 rule 3** applied to the respondent in so far as he was aggrieved with the order of **25/1/2019**.

18. In my view it matters not what adverse effects the orders had on the defendant or how urgently the need to correct the effect of those orders was: **Order 51 rule 3** ought to have been followed to the letter.

19. Can the application dated **1/2/2019** be deemed to be a proper reaction to the orders issued on **25/1/2019?** In my view it *was*. The only unsatisfactory event that took place was the granting of an order *ex-parte* by the learned magistrate which effectively countermanded the earlier orders of **25/1/2019** without the hearing of both parties on the second application.

20. Though the magistrate gave the second application dated **1/2/2019** a close hearing date, that is, **12/2/2019** as is evident on the face of that order, some events in compliance with the order she gave were bound to take place before that hearing.

21. In my view the learned magistrate ought to have set down both applications for hearing *inter-partes* on a priority basis instead of granting an order such as that which she issued on **4/2/2019**. This would have enabled her to hear the parties' respective submissions on the prayer **No. 4** in the application dated **1/2/2019** before issuing the order. That would have been the most appropriate manner of testing the veracity of

the parties' respective depositions in their affidavits.

22. In my view therefore, the appellant, being a party who had obtained some rights under the interim orders issued on **25/1/2019,** appears to have been denied a hearing.

23. It may be argued that the substantive orders issued on **4/2/2019** were in respect of **prayer 2** of the application and not prayer **No. 4** which would then be heard afterwards. However the effect of implementation of that order would possibly occasion much chaos and prejudice the efficient progress of the hearing of the two applications. The answer to the first issue above is therefore in the positive: the learned magistrate erred in issuing the orders of **4/2/2019** while the orders of **25/1/2019** were still subsisting. It is within the inherent jurisdiction of this court to order their setting aside in the interests of justice pending the hearing of both applications.

***(b) Whether the orders issued regarding the application of 4/2/2019 are of any legal basis and effect*.**

24. In this appeal I find that the two parties subjected each other to the same kind of fate: final orders of mandatory nature at an interlocutory stage of the suit, but only the appellant has approached this court to seeking to have the orders issued against her set aside.

25. The court has jurisdiction to issue a mandatory injunction order in fitting cases. (See the case of **Kenya Breweries Ltd V. Washington Okeyo, CA No. 332 oF 2000)** However, orders of this nature are to be discouraged. (See the case of **Locabail International Finance Ltd. V. Agroexport [1986] 1 All E.R. 901**,)

26. In this court's view, where necessary an application seeking such orders should be issued a priority date upon satisfaction by the court that such prayers are urgent, to avoid any hardship to one party without a substantive hearing. In the case of **Lucy Wangui Gachara -vs- Minudi Okemba Lore [2015] eKLR** it was observed as follows:

> **"Ultimately the court granted what was for all intents and purposes a mandatory injunction for the eviction of the appellant from the suit property. It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage."**

27. Given the circumstances prevailing and the facts revealed in the affidavits supporting the two applications, the orders issued on **4/2/2019** are in this court's view invalid. The court erred in issuing such orders.

28. For the foregoing reasons this appeal succeeds. The orders issued on **4/2/2019** in **Kitale SPMCC Civil Suit No. 7 of 2019** are set aside.

29. It is further directed that the two applications be heard simultaneously by the learned magistrate on a date to be set on a priority basis.

It is so ordered.

Dated and signed and Delivered at Kitale on this **12th** day of **February, 2020.**

MWANGI NJOROGE

JUDGE

12/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyama for Respondent

Ms. Arunga for the Applicant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE