



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL No. 15 OF 2018

(FORMERLY HIGH COURT CIVIL APPEAL No. 86 OF 2014)

ANTHONY THUO KANAI.....APPELLANT

VERSUS

GEOFFREY KINUTHIA.....1ST RESPONDENT

JOHN NG'ANG'A.....2ND RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. S. Mungai, Chief Magistrate) delivered on 28th May 2014 in Nakuru CMCC No. 952 of 2013 Geoffrey Kinuthia & John Nganga v Anthony Thuo Kanai)

JUDGMENT

1. The respondents herein filed Nakuru CMCC No. 952 of 2013 against the appellant herein on 28th July 2010. They averred in the plaint that they together with the defendant, who is an advocate, purchased the parcel of land known as Nakuru Municipality Block 6/72 and entrusted the defendant with the transfer and registration thereof in their joint names. They further averred that the defendant acted contrary to the arrangement and registered the suit property in his sole name despite the fact that it is owned by all of them jointly. They therefore prayed for judgment against the appellant for an order directing him to sign all the necessary documents to have the suit property registered in the names of all the parties as equal owners and in default the executive officer of the subordinate court to sign them.

2. The appellant filed a defence and counterclaim in which he denied the respondents' allegations and stated that he solely bought the suit property. He added that he forwarded the original of the certificate of lease and transfer to the 1st respondent for registration but the 1st respondent has unlawfully withheld the said documents. He further averred that the 2nd respondent has been unlawfully collecting rent from the suit property and depositing it into his personal account. He therefore urged the subordinate court to dismiss the respondents' case and to enter judgment in his favour for an order directing the 1st respondent to release the original certificate of lease and duly registered transfer, an order for account of all monies received by the respondents as rent as well as interest, an order requiring the 2nd respondent to avail bank statements in respect of where the money is deposited for the period from April 2010, an order for payment by the respondents of all sums of money found due and received by the respondents, an order of permanent injunction restraining the respondents from collecting, receiving and in any manner purporting to receive any payment in relation to any occupier of the suit premises whether as rent or howsoever interfering with the suit property whether by themselves or by agents, servants and/or employees, an order for inquiry and tracing of what assets in the hands of the respondents represent the sum of money received by them in relation to the suit property and interest at commercial rate on all sums found due.

3. Slightly over one month after filing the defence and counterclaim, the appellant filed a rather turgid Notice of Motion dated 19th March 2014 in which he sought the following orders:

1. ...

2. ...

3. *THAT this Honourable Court be pleased to order the plaintiffs to deposit the original Certificate of Lease and duly registered Transfer in respect of the property known as Nakuru Municipality Block No.6/72 to the custody of this Honourable Court pending the hearing and determination of the suit herein.*

4. *THAT this Honourable Court be pleased to order the Plaintiffs to provide to the Defendant a detailed account of all money received by them jointly and severally from occupants/tenants of the property known as Nakuru Municipality Block No.6/72 and/or as income derived from the said property indicating each month and amount received together with interest earned together with disclosure of each and every bank account number where the money was banked together with relevant certified copies of the bank*

statements for the period between April 2010 to date.

5. ...

6. *THAT this Honourable Court be pleased to order the payment of all sums found due from the Plaintiffs on taking of account under (1) above to the Defendant as the registered owner of the property know (sic) as Nakuru Municipality Block No.6/72 together with interest payable by the Plaintiffs for the duration of having kept the money.*

7. ...

8. *THAT this Honourable Court be pleased to order Century Feeds Ltd and Farm Treasures Enterprises who occupy the suit property and all other tenants/occupants of the said property to provide the Defendant with detailed accounts of all sums they have paid to the Plaintiffs including dates of each payment, bank account where money was paid and the certified copy of the lease entered into with the Plaintiffs.*

9. ...

10. *THAT this Honourable Court be pleased to grant a permanent injunction restraining the Plaintiffs jointly and severally by themselves through their agents, servant and/or employees or otherwise howsoever from renting, leasing, receiving, retaining and/or collecting any rent or any money whatsoever derived as income from property known as Nakuru Municipality Block No.6/72 and from interfering and/or trespassing over the said property in any manner whatsoever pending the hearing and determination of the suit herein.*

11. *THAT this Honourable Court be pleased to grant such other/further orders as it deems just.*

12. *THAT the costs of this application be provided for.*

4. Prayers 1, 2, 5, 7 and 9 were spent as at the date of inter parte hearing of the application.

5. The application was supported by an affidavit sworn by the appellant in which he reiterated that he was the registered proprietor of the suit property having purchased it at a public auction at KShs 4,700,000 and having paid for it through three bankers' cheques. He generally restated his case as pleaded in the defence and counterclaim and added that the 2nd respondent had collected KShs 1,593,190 from Century Feeds Ltd as rent. He pointed out that the respondents had admitted in their defence and counterclaim that they had been collecting rent.

6. The respondents opposed the application through a replying affidavit sworn by the 1st respondent. He deposed that the appellant was seeking orders similar to those sought in the counterclaim and that the application therefore sought to determine the counterclaim at an interim stage. He further deposed that the appellant had failed to show the total purchase price of KShs 4,700,000 and that they undertook not to transfer the property to their own names.

7. Upon hearing the application, S. Mungai, Chief Magistrate dismissed it in a ruling delivered on 28th May 2014. Aggrieved by that ruling, the appellant filed this appeal in the High Court as High Court Civil Appeal No. 86 of 2014. It was later transferred to this court. The grounds of appeal which are equally verbose, are as follows:

1. *THAT the learned Chief Magistrate erred in law and fact in disallowing the Appellant's application dated 19th March 2014 seeking Orders for deposit of Certificate of Lease and duly registered Transfer in respect of property known as Nakuru/Municipality Block No.6/72 to the custody of the Honourable pending hearing of the suit and further for Orders of account of money received by the Respondents as income derived from the said property registered in the Appellant's name as well as injunction against the Respondents horn trespassing and/or interfering with the suit property whereas the Respondents admitted and acknowledged the Appellant as the registered owner of the suit property as evidenced by the Certificate of Lease exhibited in court and which the Honourable Court found as an undisputed fact.*

2. *THAT the learned Chief Magistrate erred in law and fact by failing to consider and address the Appellant's submissions on the effect of Section 24 of the Land Registration Act on the registration of the Certificate of Lease in the Appellant's name which confers and vests upon the Appellant the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto to the exclusion of the Respondents.*

3. *THAT the learned Chief Magistrate erred in law and fact in failing to consider, address and apply his mind to the Appellant's submissions on the effect of Section 26 of the Land Registration Act on the registered owner of the property known as Nakuru/Municipality Block No.6/72 in the Appellant's name which is prima facie evidence of the Appellant as the absolute and indefeasible owner whose title cannot be challenged other than in accordance with the said provision of the law which the Respondents have not done.*

4. *THAT the learned Chief Magistrate erred and misdirected himself in law and fact by holding that the Appellant's had not responded to the Respondents averments made on oath on the existence of a partnership between him and the Respondent whereas there is no such averment contained in the replying affidavit dated 2nd April 2014 by the 1st respondent and in any event it is trite law that he who alleges must prove and it was therefore the Respondents burden to prove any allegation of existence of a partnership by producing evidence of its existence by way of a partnership deed.*

5. THAT the learned Chief Magistrate erred and misdirected himself in law and fact by failing to address himself to the trite principles of law on granting an injunction and Orders for account and deposit of the Certificate of Lease in court and thereby took into account an irrelevant issue of requiring the Appellant to explain why he entrusted the 1st Respondent with the documents to register for the Appellant at Nakuru Lands Registry which was not an issue raised in the Respondents Replying Affidavit nor was it relevant for determination of the application as the 1st Respondent does not deny being in possession of the Appellant's Certificate of Lease and duly registered Transfer.

6. THAT the learned Chief Magistrate erred and misdirected himself in fact by erroneously holding that the Respondents contend that the 2nd Respondent gave bankers cheques from his account to clear the purchase price whereas no such averment nor evidence of the bankers cheques paid by the 2nd Respondent was availed nor attached to the 1st Respondent's replying affidavit dated 2nd April 2014.

7. THAT the learned Chief Magistrate erred and misdirected himself in law in by shifting the Respondents legal burden of proof to the Appellant without any legal basis so that whereas it was the Respondents burden to prove how they contributed and/or paid for the purchase of the property known as Nakuru/Municipality Block 6/72 which was registered to the Appellant had discharged his burden of proof on ownership of the said property.

8. THAT the learned Chief Magistrate erred in law by failing to appreciate the weight of the Appellant's evidence and the facts and thereby arrived at an erroneous finding in respect of the application dated 19th March 2014.

9. THAT the learned Chief Magistrate erred in law and fact in failing to hold that the Appellant had established grounds for the order of injunction having prove (sic) a prima facie case with a probability of success and further failed to appreciate that as held in the High Court authorities cited before him, it was the Court's sacrosanct duty to uphold the law and legal rights of parties as in the Appellant's case where he is the registered owner of the property which required that the preservative orders be granted as sought in the application.

10. THAT the learned Chief Magistrate erred in law and fact in failing to appreciate that an injunction can be granted where there is a continuation of the infringement or breach complained of and there is time bar against the application for the orders for injunction, account and deposit of the Certificate of Lease.

11. THAT the learned Chief Magistrate erred in law and misdirected himself by failing to appreciate that interlocutory injunctions can be properly granted even where liability is yet to be ascertained.

8. The appeal was canvassed through written submissions. It was argued for the appellant that having shown that he was the registered proprietor, **sections 24 (b) and 26 of the Land Registration Act** required that his title not be subject to challenge and that the court recognizes his proprietorship rights. As such, the appellant had met the test required to sustain an application for interlocutory injunction and that in particular, a prima facie case had been established. The cases of **Aikman v Muchoki [1984] KLR 353** and **Simon Sossion v Kiango General Supplies Limited [2010] eKLR** were cited to support those arguments. It was further argued that the respondents had breached the law by their refusal to surrender the certificate of lease and collecting rent from the suit property. That the respondents cannot be allowed to continue doing so simply because they can pay damages. The appellant further relied on the case of **Waithaka v Industrial and Commercial Development Corporation [2001] eKLR**. The appellant therefore urged the court to allow the appeal with costs.

9. For the respondents, it was argued that the ruling of the subordinate court followed jurisprudence on interlocutory injunctions and that the learned magistrate's analysis of facts cannot be faulted. The respondents further contended that the appellant had not made any claim against the respondent for over four years and only reacted by lodging the counterclaim and the application upon being sued by the respondents. It was additionally argued that the appellant has kept the suit pending in the subordinate court through this appeal. Accordingly, the respondents urged the court to dismiss the appeal with costs.

10. I have considered the grounds of the appeal and the respective submissions of parties. The application before the subordinate court sought discretionary orders largely in the nature of injunctions. The principles applicable when considering an appeal against an order made in exercise of discretion were reiterated by the Court of Appeal as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**:

Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion.

11. This court ought not therefore to interfere with the exercise of discretion by the learned magistrate unless I am convinced that his decision is manifestly wrong due to some misdirection, or failure to take into consideration relevant matter or because he considered irrelevant matters and hence reached a wrong conclusion, or because there is clear abuse of his discretion.

12. A perusal of the prayers sought in the application shows that the appellant sought the very same orders that he is seeking in the counterclaim. Caution must be exercised before granting orders that end up determining a suit at the interlocutory stage. The Court of Appeal reiterated the principles applicable in such a scenario in the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** as follows:

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....

... We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

13. I have reviewed the material that was before the subordinate court and I have not discerned any special circumstances that would warrant granting such orders as were sought at the interlocutory stage. Instead, what was before the court was an ordinary claim that ought to run its course to conclusion by way of calling and cross-examination of witnesses followed by judgment. The learned magistrate was therefore right in not granting prayers 3, 4, 6 and 10 of the application, all of which sought orders that would finally determine those aspects of the counterclaim. I further note that under prayer 8 of the application, the appellant sought injunctive orders against Century Feeds Ltd and Farm Treasures Enterprises, entities that were not parties to the suit before the court. It is axiomatic that orders cannot be issued against persons who have not been given an opportunity to be heard.

14. The principles applicable when considering an application for an interlocutory injunction were restated in the **Nguruman Limited** case (supra) thus:

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, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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.

... 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.

15. The appellant had argued that he was the registered proprietor of the suit property and that he bought it at a public auction. The sale agreement which he exhibited shows that the purchase price at the auction was KShs 4.7 million. However, the bankers cheques that he annexed as proof of payment do not even add up to half the said amount. Further, the mere fact that the appellant is the registered proprietor of the suit property is not a guarantee that an interlocutory injunction issues to him. His title was under challenge in the plaint filed by the respondents. In such circumstances, he could not simply wave the very same title before the court and expect an injunction to issue. See **Munyu Maina v Hiram Gathiha Maina** [2013] eKLR.

16. Although the learned magistrate did not expressly lay out or analyse the test in Giella and the principles applicable when dealing with an application in which orders that may end up determining a suit at the interlocutory stage are sought, the conclusion he reached and the general outcome of the application was the correct one. The entire application was for dismissal.

17. It is unfortunate that the suit in the subordinate court has been unnecessarily kept pending for 6 years owing to this appeal which in any case was on an interlocutory issue. Parties should now move quickly to have the suit heard and concluded.

18. In view of the foregoing discourse, I find no merit in this appeal and dismiss it with costs to the respondents.

Dated, signed and delivered in open court at Nakuru this 5th day of March 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Moenga holding brief for Mr Kanai for the appellant

No appearance for the respondents

Court Assistants: Beatrice & Lotkomoi