



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 19 OF 2018

JAMES MOCHAMA KANISA.....APPELLANT

VERSUS

MERCY NJERI NDIRANGU.....1ST RESPONDENT

INTEGRA AUCTIONEERING (K) COMPANY.....2ND RESPONDENT

EQUITY BANK LIMITED.....3RD RESPONDENT

LAND REGISTRAR.....4TH RESPONDENT

JUDGEMENT

(Being an appeal from the ruling and order of the Senior Resident Magistrate's Court at Ngong Hon. Ogombe L. D (Ms) made on 21st November, 2018 in Ngong CMC ELC No. 55 of 2018)

Introduction

By a Memorandum of Appeal dated the 27th November, 2018, the Appellant appeals against the whole of the Ruling and Order issued on the 21st November, 2018 by the Senior Resident Magistrate's Court at Ngong. The genesis of this appeal is the Ruling and Order of the Senior Resident Magistrate Hon. Ogombe L. D (Ms) in the Ngong CMC ELC No. 55 of 2018 where she dismissed the Appellant's Application dated the 26th March, 2018 in which the Appellant had sought for the following orders:

- a. That this application be certified as urgent and service of the application be dispensed with in the first instance.
- b. The application be heard during the High Court vacation.
- c. The Honourable Court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd Defendants/ Respondents whether by themselves, their agents and/or servants from proceeding with the intended auction, sale, transfer, alienation or otherwise interfering or dealing with the property being LR No. Ngong/ Ngong/ 26044 and LR No. Ngong/ Ngong/ 26050 on 11th April, 2018 or any other date thereafter pending the hearing and determination of this application.
- d. The Court be pleased to grant a temporary injunction restraining the Defendants/ Respondents whether by themselves, their agents and/or servants from selling, transferring, alienating or otherwise interfering or dealing with the property being LR No. Ngong/ Ngong/ 26044 and LR No. Ngong/ Ngong/ 26050 pending the hearing and determination of the suit herein.
- e. The Court be pleased to grant a mandatory injunction to preserve the status quo that existed before the wrongful acts of the Respondents pending the hearing and determination of the suit herein.
- f. The costs of this application be provided for.
- g. The Honourable Court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.

The appellant being dissatisfied by the Ruling and Order filed an appeal at the Environment and Land Court of Kenya in Kajiado on 27th

November, 2018

The Memorandum of Appeal contained the following grounds;

- a. That the learned trial Magistrate erred in fact and law in finding that there existed two sets of titles a fact which was neither pleaded nor proved.
- b. That the trial Magistrate erred in fact and in law in misdirecting herself on the proper interpretation of irreparable harm by failing to note that the Appellant has built and resides on the suit property and the application before her had been provoked by the 2nd Respondent's advert in the Daily Nation of 14th March, 2018.
- c. That the learned Magistrate erred in not considering and making a proper finding on the balance of convenience.
- d. That in failing to note and appreciate that the Respondents had already commenced the process of selling the Appellant's land in a manner which would contravene the law and that the dismissal of the Appellant's application for injunction was likely to give the Respondents unjustified advantage to benefit from an illegality.
- e. That the impugned orders amounted to a final determination of a matter at an interlocutory stage, thus denying the Appellant an opportunity to be fully heard in the circumstances.

The Appellant prays that:

- a. This Appeal be allowed, the ruling and order of the subordinate court issued on 21st November, 2018 in CMC's NGONG ELC No. 55 of 2018: JAMES MOCHAMA KANISA Vs MERCY NJERI NDIRANGU & 3 OTHERS be set aside in its entirety.
- b. The Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from selling, transferring, alienating or otherwise interfering or dealing with the property being LR No. NGONG/ NGONG/ 26044 and LR No. NGONG/ NGONG/ 26050 pending the hearing and determination of the CMC's NGONG ELC NO. 55 of 2018.
- c. The main claim in suit NGONG ELC NO. 55 of 2018 be heard by a different magistrate other than Hon. Ogombe L. D (Ms).
- d. Costs of this Appeal be provided for.

The Appeal was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Magistrate erred in fact and law in finding that there existed two sets of titles a fact which was neither pleaded nor proved.
- Whether the Learned Magistrate failed to appreciate that the Appellant had met the conditions required for grant of a temporary injunction pending the hearing and determination of the lower court suit.
- Whether the Appeal is merited.

As to whether the Learned Magistrate erred in fact and law in finding that there existed two sets of titles a fact which was neither pleaded nor proved.

I note from the Ruling, the learned Magistrate stated that there existed two sets of titles to the suit properties. However, from perusal of the Supporting and Replying affidavits, including the respective annexures thereto, no party pleaded that there existed two sets of titles in respect to the suit properties. In the circumstance, I find that the Learned Magistrate indeed erred in finding that there were two sets of titles to the suit properties.

As to whether the Learned Magistrate failed to appreciate that the Appellant had met the conditions required for grant of a temporary injunction pending the hearing and determination of the lower court suit. The Appellant submitted that the Learned Magistrate disregarded the evidence in his affidavit dated the 26th March, 2018 especially on the fact that he denied transferring the suit properties to the 1st Respondent. Further, that the Court disregarded the evidence that there was a semi permanent house on the suit property which he had been referring to. He contended that the 3rd Respondent had only submitted that it is a Bank capable of repaying the Appellant in the event he succeeded. He submitted that the Court failed to direct its mind to the fact that the two charged parcels of land formed part of a series of seven parcels of land which he bought and the impugned titles were on the exact location he had built his home and the loss to be occasioned would be much greater than the loss the Bank would be occasioned. The Appellant submitted that he had established a prima facie case and relied on the cases of **Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others (2015) eKLR and Arthi Highway Developers Limited Vs West End Butchery Limited & 6 others (2015) eKLR** to buttress his argument. He further submitted that damages would not be an adequate compensation if the interlocutory injunction was not granted and balance of convenience tilted in his favour. The 3rd Respondent in opposing the Appeal submitted that the learned trial Magistrate did not misdirect herself on the proper interpretation of irreparable harm by failing to note that the Appellant had built and resided on the suit properties. It further submitted that the Appellant had

not met the conditions required for grant of a temporary injunction pending the hearing and determination of the lower court suit. The 3rd Respondent contended that the Appellant had not established any legal right in the suit properties as he is not the registered owner. Further, that the two loan facilities were not acquired fraudulently and the Chargee had recourse to exercise its statutory power of sale and sell the charged property in the event of default by the Chargor. It further submitted that the Appellant had not proved the allegations of fraud as no evidence of prosecution of the 1st Respondent had been provided. It reiterated that the Appellant had been indolent as he did not explain the action he took when he found the suit properties had been transferred to the 1st Respondent's name. It relied on the cases of **Giella V Cassman Brown & Co. Ltd (1973) EA 358**; **Nguruman Limited V Jan Bonde Nielsen & 2 Others CA No. 77 of 2012**; **Mrao Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR**; **Zebak Limited V Nadem Enterprises Limited (2016) eKLR**; **Nairobi Mary Ngaru V Family Bank Ltd & 2 others (2014) eKLR**. It reiterated that the Appeal was not merited and relied on the case of **Philes Nyokabi Kamau V Industrial & Commercial Development Corporation (2017) eKLR** to support this line of argument.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the Appellant had demonstrated a prima facie case with probability of success, I wish to make reference to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined a prima facie case to mean a case where based on the facts presented a Tribunal can conclude there exists a right that has been infringed.

From the evidence presented in the supporting affidavit in the lower court matter, it was not in dispute that the Appellant was the registered owner of the suit properties prior to the same being registered in the name of the 1st Respondent and he is still in occupation thereon. Further, that the titles to the suit properties have been charged to the 3rd Respondent by the 1st Respondent who has since defaulted in repayment of the loan and the Bank seeks to sell the charged properties. The Appellant presented evidence that the two title deeds to the suit properties were lost and he reported the matter to the Police Station. He even presented a copy of the Occurrence Book O/B 58 0F 9 /4 /16 to confirm this averment. The Appellant denied selling and or transferring the suit properties to the 1st Respondent and stated that he resided thereon with his family. The Appellant denied charging the suit properties to the 3rd Respondent and realized the same was up for sale through a Newspaper Advert in March, 2018. The 3rd Respondent presented documents confirming that the 1st Respondent indeed charged the suit properties to it, to secure a loan of Kshs. 10 million and defaulted in repayment. Further, that they had sent her all the requisite notices and instructed the 2nd Respondent to proceed with the sale of the charged properties by public auction. The Appellant contended that he will suffer irreparable harm as he resides on the suit properties with his family. In the Complaint at paragraph 17, the Appellant had pleaded fraud as against the Respondents and in his final prayers he had sought for cancellation of the titles in the name of the 1st Respondent and for the same to be reverted to him. He had stated in the application which is subject to this Appeal that he discovered the loss of his two title deeds on 28th December, 2015 and lodged a complaint with the Police who advised him to undertake a search on 12th April, 2016 that led him to discover that the 1st Respondent had been registered as owner of the suit properties. The 1st Respondent though duly served failed to enter appearance in the lower court matter nor file a response to the application which is subject to Appeal. Hence on her part, the Appellant's averments remain uncontroverted. I note the Appellant had indeed annexed copies of his title deeds and extracts of the Green Card in the supporting affidavit to confirm that he owned the suit properties and a series of other titles. On perusal of the Green Card, it is evident that the Appellant was registered owner of land parcel number Ngong/ Ngong/ 26044 on 10th December, 2004 upto 18th December, 2013 when the same was transferred to the 1st Respondent. Further, that the Appellant was registered as owner of Ngong/ Ngong/ 26050 on 13th April, 2006 upto 18th December, 2013 when the same was transferred to the 1st Respondent that in turn charged both parcels of land to the Bank on 17th February, 2014.

In the case **Viro Energy (K) Ltd -vs- Maloba Petrol station Ltd and Others.(2013) KLR**. The Judges of Appeal while citing in approval the case of **R.G. Patel -vs- Lalji Makanji (1957) EA 314** held that *“allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”*

Further, in the case of Ngugi Gichune Njogore v Co-operative Bank Ltd & another [2015] eKLR the Judge while faced with an application for injunction where there are allegations of fraud in an instance where the land had been charged observed as follows:’ How else would such allegations of fraud be proved unless by evidence during a full trial? The court ought not to conduct a mini trial at an interlocutory stage so as to establish whether or not a prima facie has been established. It is only in a full trial where each party presents its position with evidence and argument. 17. The courts finds that the plaintiff/applicant has raised issues that ought to be interrogated and in my view, a prima facie case has been established to warrant granting the order of injunction pending the hearing of the suit. I am minded that establishment of a prima facie case alone is not enough for the grant of an injunction order. The applicant must also establish that he might otherwise suffer irreparable injury which cannot be adequately compensated in damages. As I stated above, the property said to be a matrimonial home if sold would easily be compensated in damages by the Bank. 18. However, the court having made a finding that there are serious issues and allegations of fraud surrounding the whole transaction, it would be unfair to subject the applicant to anguish and suffering before the truth is established. Otherwise it is the court's finding that were it not for the fraud allegations, the court would not have hesitated to find that no irreparable damage would have been suffered by the applicant if the property was sold in realization of the Bank's security. 19. Having pronounced myself on the prima facie case and irreparable loss, the balance of probability tilts in favour of granting the injunction order.’

Based on the facts as presented, my analysis above as well as associating myself with the cited decisions, I find that where there are allegations of fraud, it raises a prima facie case and the substratum of the suit ought to be preserved pending the determination of the said suit. I disagree with the 3rd Respondent's averment that there has to be proof of prosecution of the 1st Respondent at an interlocutory stage to confirm the said allegations. I note this was an application for injunction and the parties had not presented their respective viva voce evidence before the trial Magistrate to enable her make a determination on the issue of fraud. In the circumstances, I find that the Appellant has indeed established a prima facie case to warrant the grant of an injunction and the Learned Magistrate indeed erred by failing to appreciate this fact. On the issue of irreparable harm, I wish to make reference to the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR** where the Court of Appeal in determining the said issue held as follows:’ **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.’

In the proceedings in the lower court, it was not disputed that the Appellant resides on the suit properties with his family and even the advertisement indicated there was a semi permanent house on one of the parcels of land. The 3rd Respondent insisted that the Appellant could be compensated by way of damages in the event of the sale of the suit properties. In relying on the decision cited above, I find that the Appellant would indeed suffer irreparable harm if the suit properties were sold in a public auction and his alleged injuries are not speculative. I opine that despite the subsistence of a Charge, since ownership of the suit properties was disputed and there were allegations of fraud, these issues could only have been determined once viva voce evidence was adduced. I hence find that the learned Magistrate indeed erred by failing to appreciate that the Appellant would indeed suffer irreparable harm if the injunctive reliefs were denied. On the question of balance of convenience, the same indeed tilts in favour of the Appellant as he has proved he was the initial owner of the Charged properties and reported the loss of the titles to the Police. Further, the 1st Respondent who charged the suit properties failed to controvert the Appellant’s averments that he never sold the said properties to her.

It is against the foregoing that I find the Appeal merited and will proceed to make the following final orders:

- i. This Appeal be and is hereby allowed and the ruling including order of the subordinate court issued on 21st November, 2018 in CMC’s NGONG ELC No. 55 of 2018: JAMES MOCHAMA KANISA Vs MERCY NJERI NDIRANGU & 3 OTHERS be and is hereby set aside in its entirety.
- ii. A temporary injunction be and is hereby issued restraining the Respondents whether by themselves, their agents and/or servants from selling, transferring, alienating or otherwise interfering or dealing with the property being LR No. NGONG/ NGONG/ 26044 and LR No. NGONG/ NGONG/ 26050 pending the hearing and determination of the CMC’s NGONG ELC NO. 55 of 2018.
- iii. Costs of this Appeal abide the outcome of CMC’s NGONG ELC NO. 55 of 2018.

Dated signed and delivered via email this 29th day of April 2020.

CHRISTINE OCHIENG

JUDGE