**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**ELC APPEAL NO. 4 OF 2019**

**ELWAK WATER SUPPLY ASSOCIATION.....1ST APPELLANT**

**HASSAN OMAR & 16 OTHERS.....2ND APPELLANT**

**VERSUS**

**COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE, WATER,**

**ENERGY, ENVIRONMENT AND NATURAL RESOURCES.....2ND RESPONDENT**

(Being an appeal from the ruling delivered in Mandera SRM ELC No. 3 of 2018 on 25th March, 2019 by the Honourable P. N. Ireri Senior Resident Magistrate)

**JUDGEMENT**

**Introduction**

**1.** The Instant appeal before the court is an interlocutory appeal against the ruling and orders of Hon. P.N Areri (SRM) dated 25th March, 2019 in which the learned Magistrate dismissed the appellants' application seeking temporary injunction pending the hearing and determination of their suit. The grounds of appeal are as follows.

1) **THAT** the learned magistrate erred in law and in fact finding against the appellants in total disregard of the evidence adduced before him which evidence amongst others a letter from the National Land Commission affirming and acknowledging that the suit property is private property that is owned and occupied by the appellants.

2) **THAT** the learned magistrate erred in law and in fact in ignoring the letter of allotment from the Mandera County Council allocating the suit property to the appellants more than two decades ago, and which allocation has never been reversed nor challenged.

3) **THAT** the learned Magistrate misdirected himself in law and fact by recognizing the illegal occupation and carrying out of activity of water supply to the residents surrounding the suit property. The said water supply was being conducted by the appellants until they were illegal and violently ejected from the suit property by the 1st Respondent without just compensation as in required by law.

4) **THAT** the learned magistrate erred in law and in fact by holding that loss of property cannot occasion irreparable damage to the appellants

5) **THAT** the learned magistrate erred in law and in fact by failing to recognize that on the basis of the documentary evidence placed before him, the appellants had established a prima facie case.

6) **THAT** the learned magistrate erred in law and fact in recognizing the activities being done by the appellants on the suit property without establishing how they got the said property.

**7) THAT** the learned Magistrate misdirected himself in law and in fact by ignoring the right of the appellant to property as enshrined in the Constitution**.**

2. Parties agreed to dispose of the appeal by way of written submissions. Both filed their respective submissions. The appellants written submissions are dated 17th October, 2019 and filed on 18th October, 2019, whereas the Respondents submissions are dated 22nd November, 2019 and filed on even date.

**The Appellants case**

3. The 1st Appellant allege that it is a registered association under the Ministry of Gender Children and Social Development and that the 2nd Appellants are the members of the 1st Appellant. It is their position that the appellants are the registered owners of Plot No. 071 having been allotted the same through a letter Ref: CCM/PLT/GEN/VOLVI/46 dated 17th May, 1996. And that subsequently and with partnership with other stakeholders have been managing boreholes and upgraded the town piping system. In addition, they allege that they have built office block, toilets and it has also upgraded water tower capacity. It is their position that the appellants have heavily invested in supply of water to Elwak residents since 1995.

4. It is their case that the Respondents have unilaterally taken over their property Plot No. 071 and the management of water supply without compensating them. They further allege that the National Land Commission vide a letter dated 19th July, 2018 informed the Respondents that the Land in question was owned by the appellants.

5. Furthermore, the appellants are alleging that the procedure used by the Respondents to acquire the suit Property was outside the law as they were never involved and that the same infringes their right to property.

**Submissions**

6. Vide their filed submissions, the appellants identified three issues for determination. The first one on who is the rightful owner of the suit property. In this regard the appellant submitted that they were allotted the said property by the defunct Mandera Municipal Council, which position was confirmed by the National Land Commission vide a letter dated 19th July, 2018. It is their submission that they complied with the conditions of allotment and therefore they are the true owners of Plot No. 071.

7. The second issue addressed by the appellants is as to whether the Respondents are justified to compulsorily acquire the appellants land without compensation, the appellants submitted that the Respondents action breaches Article 40 of the Constitution, section 7, 107 and 110 of the Land Act, as the Respondents in taking over the appellants land failed to follow the set procedure for compulsory acquisition of land.

8. The final issue addressed by the appellants is as to whether the appellants stand to suffer loss from the un-procedural acquisition from the Respondents. The appellants submitted that they have been divested of their land by the Respondents from the year 2016, arguing that they are the rightful owners of the suit land and that they will suffer substantial loss, in that the investment they have made totaling Kshs. 25,008,000/= will go to waste, and that the investment has been the source of lively and therefore further exposing them to immense irreparable loss.

9. They prayed the court to allow the appeal and order for compensation of the appellants submitting that they have adduced cogent and sufficient to prove that the respondents are in total disregard of the law in compulsorily acquiring the appellant's alleged property.

**Respondent's case**

10. The Respondent on their part allege that Elwak Water supply was established in 1979 as a base camp for dam construction and bore hole drilling units for the Mandera Municipal Council water department to serve the unit huts occupied by the council's field staff, and that to date the percussion drilling is still on the hut.

11. In addition, they allege that the subject bore holes were drilled by the Ministry of Water in 1985 as sited by the UNCHCR to assist somali refugees and communities residing in Elwak, Lafey, Guticha and Wargadud. They denied that the appellants have been undertaking supply of water to Elwak residents, arguing that the role of supplying water under the Constitution is a devolved function under Section 11(b), Part 2 of the Fourth Schedule of the Constitution which mandates the 1st Respondent with managing water and sanitation services.

12. It is their position that the suit property is registered in favour of the Ministry of Water and the same has been reserved for supply of water to the residents of Elwak town and that the 1st Respondent is the registered owner of the suit property, in support thereof they produced a deed plan.

13. Further, the Respondents allege that the Appellants documents produced as prove of ownership are forgeries as they were not issued by Mandera Municipal Council and that at the time they were issued in 1996, Elwak did not exist as a district unit.

**Submissions**

14. The Respondents in their submissions stated that before the court is an interlocutory appeal and the hearing of the main suit is yet to commence and urged the court to refrain from delving on issues which might arise from the main suit.

15. It is their submissions that it is trite that an appellate court should not readily interfere with the exercise of the discretion of the trial magistrate in granting of interlocutory injunction where the discretion is exercised judicially as was established in the case of **Mbogo vs Shah[1968] EA 93** where it was held:-

> **"a court should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice"**

16. It is their case that the learned magistrate exercised his discretion judicially herein and that the appellants did not meet the legal threshold for grant of the sought interlocutory injunction, in that they did not establish a prima facie case with probability of success, failed to show that they would suffer irreparable loss not compensated by damages and finally establish that the balance of convenience favoured them. In this regard they submitted that the appellants did not meet the conditions for grant of temporary injunction set in the case of **Giella vs Cassman Brown & Co Ltd[1973] EA 385, Mrao Limited vs First American Bank Limited[2003] KLR** and **Order 40 rule 1 of the Civil Procedure Rules, 2010.**

**17.** In regard to the first principle which is the establishment of a prima facie case, they submitted that the appellants did not produce a legally recognized ownership documents for the suit property and that a letter of allotment produced does not confer ownership of land, and that pursuant to section 23(1) of the Registration of Title Act (repealed) it is only a certificate of title that confers an absolute and indefeasible right to own the suit property as proprietor. In this they relied in the case of **A.C.K, St. Monica Parish Dandora vs City Council of Nairobi [2013]eklr.**

**18.** Further, they submitted that the appellants did not demonstrate or provide any evidence to demonstrate the irreparable damages that would be occasioned if the orders sought were not issued. They relied in the case of **Franklin Kamathi vs Housing Finance Company of Kenya Limited [2019] eKLR.**

19. In respect to grounds 1, 2, 3 and 6 of the Memorandum of Appeal where the appellants allege that the learned magistrate disregarded the evidence on record, they submitted that the argument lacks merit submitting that the same was analyzed and considered, as the supply of water is the constitutional mandate of the Respondent and therefore issuing an injunction would be a travesty of justice.

20. In response to ground 7 of the appellants' memorandum of appeal where the appellant contend that the learned magistrate ignored their right to property enshrined under Article 40 of the Constitution, they submitted that where there is conflict between private and public interest, the balance of convenience tilts in favour of safeguarding the public interest. They relied in the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 others vs Kenya Highways Authority [2014] eKLR.**

21. In sum it is their submissions that the appellants have failed to demonstrate that the learned magistrate improperly exercise his discretion in declining to grant the temporary injunction as contained in his ruling of 23rd October, 2018.

**Analysis and determination**

22. I have carefully considered the appellants appeal, the parties' respective positions and submissions. It is clear to me that the appellants' in this appeal addressed other matters that extend beyond the parameters of this appeal, they are seeking this court to make a determination on the ownership of the subject land Plot No. 071, however, that is an issue to be determined upon hearing of the parties and determination of the suit on merit. The relevant issue in this appeal is on the interlocutory application regarding a temporary injunction sought by the appellant before the lower court, in which they sought the following order: -

> **"That the court be pleased to grant a temporary order of junction restraining the 1st and 2nd respondents, its agents, servants or representatives from interfering with the suit property namely Plot No. 071 size 430 *360 H pending the hearing and determination of the application"**

23. Therefore the instant application is challenging the Learned magistrate ruling dismissing the appellant application seeking the above interim injunction, and therefore there is only one issue for determination, which is as to whether this Court ought to interfere with the lower court discretion dismissing the applicants application.

24. Indeed, and as noted by the Respondents, the instant appeal is an interlocutory appeal and the main issue for determination is as to whether the learned magistrate in his ruling declining to issue the sought injunctions exercised his discretion judicially or not to call for this court interference.

25. In **American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1** Lord Diplock in respect to the role of the court on appeal regarding interlocutory stage such as the instant appeal on temporary injunction held that: -

> **"it is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."**

26. The Court of Appeal expressed a similar view in ***Mbuthia vs Jimba Credit Finance Corporation & another [1988] KLR 1*** held that: -

> ***"the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."***

27. **In Mbogo and Another vs. Shah [1968] EA 93** the Court of Appeal in this regard stated thus:

> **"…that this Court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

28. Similarly, the Court of Appeal also in **Carl Ronning vs Societe Naval Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR** 1held that the superior court will not interfere with exercise of discretion by the lower court unless satisfied that the court misdirected itself on law; or misapprehended the facts; or took account of considerations that it should not have taken into account; or failed to take account of considerations that it should have taken into account; or the decision is plainly wrong.

29. In view of the above the question before this court is as to whether the circumstances of this case warrant this court to interfere with the Lower Court exercise of its discretion. In exercising its discretion, the lower court was duty bound to consider whether the appellant met the conditions for the grant of a temporary injunction.

*30.* The Court of Appeal in ***Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004*** *in this regard held that:*

> ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."***

31. Taking cognizance of the above legal principles and applying the ***Giella vs Cassman Brown & Co Ltd [1973] E.A 354*** principles. It is clear to me that what the court is required to do at the interlocutory stage is to satisfy itself if either party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. And finally if in doubt, the court is to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the applicants or with the respondents.

32. In this regard, the Court of appeal in ***Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR,*** stated 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."***

33. Applying the above principles, it is trite that for a party to establish prima facie case in ownership of land dispute, the certificate of title is key as provided for under section 23 of the Land Registration Act. In this case the appellants did provide any certificate of title but only presented an allotment letter, which in my view is not sufficient. Additionally, damages can also be adequate in case they succeed in their suit.

34. Further, it is not disputed that the appellants have been divested of the suit land by the Respondents from the year 2016, implying that the balance of convenience lies in favour of denying the orders sought, as the said property is currently in the hands of the Respondents. Their main claim in this matter is that the Respondents acting on behalf of the state exercised their power of eminent domain and took the appellants land without compensation. In sum the appellants are claiming compensation herein and seem not to be keen on pursuing their interlocutory appeal in its strict sense and therefore the appeal as it is cannot succeed.

**Conclusion**

35. The upshot of the foregoing is that I find that there is no merit in this appeal and I therefore dismiss the same with no orders as to costs.

**Read, delivered and signed in the Open Court this 25th day of June, 2020.**

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**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Mr. Issa appearing together with Sharon Lipwo for Respondent.

2. Appellant/Advocate : Absent

3. Fardowsa, Court Assistant : Present