REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 15 OF 2018

JAMES THENDU GITAU……..……..1ST APPELLANT

RAPHAEL KINUTHIA KAMAU……..2ND APPELLANT

VERSUS

JOHN NGINGA MAGECHA……...…….……RESPONDENT

(Being an Appeal from Ruling of Hon. L.M Wachira (Mrs) Senior Principal Magistrate delivered on 23rd May 2018 in ELC No. 8 of 2018, - Gatundu)

JUDGMENT

Vide a **Memorandum of Appeal** dated **13th June 2018,** the Appellants filed the instant Appeal against the Respondent seeking for orders that;

1. ***That the ruling delivered on 23rd May 2018 be set aside.***

2. ***The Appellant's Application dated 2nd April 2018 be allowed as prayed.***

3. ***Any other or such further relief as the Court may deem fit to grant.***

4. ***Costs of this Appeal be borne by the Respondent.***

The Appellants herein **were** the Plaintiffs/Applicants in **ELC Case No.8 of 2018** at **Gatundu Chief Magistrate Court**. The Respondent herein **John Nginga Magecha,** was the Defendant/Respondent in the above stated suit. The Plaintiffs/Appellants had via a Notice of Motion Application dated **2nd April 2018,** sought for the following orders against the Defendant (Respondent) herein:-

a) THAT a temporary injunction be and is hereby issued against the Defendant, his agents, servants and or anybody else claiming under him from entering into, trespassing, cultivating, excavating building materials, digging, charging, leasing, selling and or in any other manner interfering with land parcels No.Ngenda/Wamawangi/904, Ngenda/Wamwangi/903 pending the hearing and determination of the suit.

b) The costs of the Application be provided for.

c) That the costs of the Application be provided for.

The Application was premised on the grounds that the Plaintiffs/ Appellants were the registered owners of the suit properties. That around the **24th March 2018**, they learnt that the Defendant/Respondent had been trespassing into the suit properties and unlawfully excavating building materials from the suit properties and that the 1st Plaintiff(Appellant) reported the matter to the Police and though Defendant(Respondent) was arrested, he claimed ownership and vowed to continue excavating stones. That his actions were degrading the suit properties and they stand to suffer loss and damage..

In his **Supporting Affidavit** sworn on **2nd April 2018**, **James Thendu Gitau,** the 1st Plaintiff(Appellant) reiterated the contents of the grounds on the face of the Application and averred that the Defendant had filed for **Summons** for Revocation of Grant in High Court, **Succession Cause No.852 of 2015** at Muranga, but that the same has never been prosecuted. He further averred that they stand to suffer irreparable loss if the Defendant's actions were allowed to continue and sought for preservatory orders pending the hearing of the matter as the Respondent would not suffer any prejudice.

The Application was opposed and the Defendant/Respondent filed a **Replying Affidavit** sworn on **12th April 2018,** and averred that the suit properties emanated from **L.R Ngenda/Wamwangi/627,** which was registered in the joint names of **Margaret Njeri Mwangi** (deceased) and **Peter Kamau Kuria(deceased)** and whose estates were subject to the Succession proceedings in **Gatundu SPM Succession Cause No.43 of 2012 a**nd **44 of 2012** respectively. He averred that in acquiring the grants of letters of administration intestate and the Confirmation of Grant, the Applicants denied him the rightful share of the estate of the deceased persons. It was his contention that the certificates were suspect as they misled the court which led him to file revocation proceedings pending before Court. He averred that he has been advised by his Advocate that the Application as filed is bad in law, unmeritious and an abuse of the court process and should therefore be dismissed.

The 1st Plaintiff/Appellant filed a further affidavit and averred that the 2nd Plaintiff/Appellant is a son of **Peter Kamau Kuria** (deceased) and a grandson to **Margaret Njeri Mwangi**(deceased). He averred that the two were registered owners of **L.R Ngenda/Wamwangi/627**. He averred that the said Margaret had one son the 2nd Plaintiff's/Appellant's father and that the 2nd Plaintiff/Appellant petitioned for grants of letters of administration and the same were confirmed vide **Succession Cause 44 of 2012, Gatundu** and **Succession Cause No. 43 of 2012.** It was his contention that the Defendant/Respondent is not a beneficiary of the Estate of the deceaseds and he was only invited to witness the sale transaction hence the reason he openly stated before Court that he had no problem with the proposed mode of distribution.

It was further averred that the Defendant resides on **parcel L.R 304** where he has constructed a house. That the 2nd Plaintiff acted in person and the person who assisted him to prepare summons for confirmation of grant inadvertently stated that the Defendant is a nephew to the deceased.

The Defendant/Respondent **Joseph Nginga Magecha** swore a **Supplementary Affidavit** dated **18th May 2018,** and averred that together with the Applicants he attended the Ruiru Location Chief's office on **24th September 2012,** and they were issued with a letter in order to file the two succession causes. That the Applicants in Form P & A 5 indicated the survivors who included the three of them. He averred that the two confirmed grants issued on **26th June 2014,** are contradictory as in cause **43 of 2012,** the grants directs that the land parcel **L.R 627** be share equally amongst the two Applicants, while in **Succession Cause No. 44 of 2012**, the grant directs that the same goes to the 1st Plaintiff. He further averred that the two titles issued are suspect and contradict the grants, hence the reason he sought for the revocation of the grants. It was his contention that he has been on the land for a period of 30 years using the land and hence he is entitled to two acres out of the Estate but that the Applicants/Appellants have deprived him of his land.

The Application was canvassed by way of written submissions and parties filed their respective written submissions. Thereafter the trial Magistrate delivered her determination on **23rd May 2018,** and dismissed the Plaintiff's (Appellant's) Application and held that:-

> ***"In conclusion, my finding is that the Plaintiffs have not been able to establish that they are entitled to the orders of injunction sought. The Application dated 2nd April 2018 is therefore dismissed. The costs of the Application shall abide the outcome of the main suit."***

The Appellants herein were aggrieved by the above determination and sought to challenge the said determination through the **Memorandum of Appeal,** filed in Court on **14th June 2018**. They sought to set aside the Ruling of the lower court given on **23rd May 2018,** and the application dated **2nd April 2018**,be allowed together with costs.

The grounds upon which the Appellant has sought for the Appeal to be allowed are as follows:

> ***1. The trial Magistrate erred in Law and fact in failing to appreciate that the Appellants application dated 2nd April 2018 met the threshold from granting temporary injunction.***
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> ***2. The trial Magistrate erred in law and in fact in failing to appreciate the proprietary rights conferred to administrators and or heirs of the Estate of a deceased person and in view of Section 26(1) of the Land Registration Act No.3 of 2012.***
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> ***3. The trial Magistrate erred in law and in fact in considering extraneous matter thus arriving at a wrong conclusion.***
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> ***4. The trial Magistrate erred in law and in fact in granting the Respondent leave to file a supplementary affidavit after the Appellants had filed and served written submissions.***
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> ***5. The trial Magistrate erred in law and in fact in failing to expunge the supplementary affidavit filed on 16th April 2018 and on the main application thus denied the appellants chance to file a further affidavit and submissions.***
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> ***6. The trial magistrate erred in law and in fact in failing to appreciate that excavation work causes permanent damage to the suit lands.***
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> ***7. The trial Magistrate erred in law and in fact in consideration the merits of the suit at interlocutory stage thus aiming to a wrong decision.***
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> ***8. The trial Magistrate erred in law and in fact in failing to preserve the suit lands. pending the hearing and determination of the suit and or alleged summons for revocation of grant for the benefit of the parties.***
>
> ***9. The trial Magistrate erred in law and in fact in totally ignoring the Appellant's affidavits and submissions and instead went on her own frolic to argue in her ruling the Respondents case.***

10.The trial magistrate erred in law in ruling against the weight of the evidence tendered.

The Appeal was canvassed by way of written submissions and the Appellants through the Law Firm of **Millimo, Muthomi & Co. Advocates** filed their submissions on **22nd November 2019,** and submitted as the registered proprietors of the suit lands , they are vested with rights over them as upon registration the title vested upon them with absolute rights and they thus have a valid claim. It was further submitted that in her Ruling, the trial magistrate decided issues that needed to be heard and determined on merit and not at the interlocutory stage. They relied on provisions of law and decided cases. It was thus submitted that the Appellants had established a *prima facie* case.

It was further submitted that the learned Magistrate failed to appreciate that excavation works cause permanent damage to the land and will degrade the said parcel leading to lose of value and therefore failing to appreciate that they are likely to suffer loss and damage. It was their further submissions that the trial magistrate erred in finding that the balance of convenience titled in favour of the Respondents. Further that the appeal is competent and raises cogent grounds and the Court was urged to allow it.

The Respondent through the Law Firm of **Njoroge Ndungu & Co. Advocates** filed his written submissions on **9th March 2020,** and submitted that the learned Magistrate decision to dismiss the Application was well considered as the Court was satisfied that the thresholds as stipulated in **Giella…Vs…. Cassman Brown (1973) EA 358** had not been met. It was further submitted that a Court exercising its appellate powers shall not interfere with the discretion of a Court of competent jurisdiction. That it is clear from the record of appeal and the impugned ruling that the learned trial magistrate did not misdirect herself and that the merits of the case were left to the Court dealing with the issue of the fraudulent registration of the subject lands and the Court's considerations were only limited to whether the Appellants demonstrated a *prima facie* case. It was therefore their submissions that the Appellants did not meet a *prima facie* case and the Appeal was not merited. The Court was urged to dismiss the Appeal.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the grounds of Appeal and submissions by the parties herein. The court herein is called upon to make a determination of this Appeal filed by the Appellants as provided by **Section 78** of the **Civil Procedure Act,** wherein the court is called upon to analyze the whole evidence ,evaluate, assess, weigh, investigate and scrutinize it and give its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses. Therefore, it must give allowance for that and the findings of the trial court must be given due deference unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of **Selle …Vs…Associated Mobi Boat Co (1968) EA 123**:-

> ***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).***

Further the court will only interfere with the discretion of the trial court

where it is shown that such discretion was exercised contrary to the law and that the trial court misapprehended the applicable law and failed to take into account the relevant facts or take into account an irrelevant fact or that on the fact and law as are known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Company Ltd…Vs…Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995**):-where the Court held that;

> ***"…..and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong"***

The court has now carefully considered the grounds of Appeal, the written submissions and the proceedings and Ruling of the trial court. The court too has considered the applicable law and finds that the issues for determination are;

1. Whether the Court erred in holding and granting leave to the Respondent to file a Supplementary Affidavit .

2. Whether the learned Trial Magistrate erred in law by dismissing the Appellant's Application dated 2nd April 2018.

1. Whether the Court erred in holding granting leave to the Respondent to file a Supplementary Affidavit

It is the Appellants contention that the Court should not have granted leave to the Respondent to file a supplementary affidavit after he had already filed his submissions. The Court having gone through the proceedings and the ruling of the trial Court notes that the Appellants had been given an opportunity to file a further affidavit, but they failed to do so in the first instant. However, the Appellants filed a further affidavit together with her submissions. In the Court's considered view, that would only enable the Respondent to file the supplementary affidavit after service and therefore allowing the same in the Court's considered view was therefore proper.

2. Whether the learned Trial Magistrate erred in law by dismissing the Appellant's Application dated 2nd April 2018

The Appellants have appealed against the Lower Court's decision that dismissed their Application seeking for interlocutory orders of

injunction in order to preserve the suit properties. It is their contention that the learned trial magistrate erred in law and in fact in failing to appreciate that the Application, met the threshold for grant of interlocutory injunction, failed to appreciate the proprietary rights conferred to the Administrators of a deceased's estate, considered extraneous matter thereby arriving at a wrong conclusion and thereby failed to preserved the suit properties. The Principles of grant of interlocutory orders are set out ***Giella…Vs… Cassman Brown & Co. Ltd 1973 EA 358***, and also captured in the case of ***Kibutiri…Vs…Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR***, where the Court held that:-

> ***"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420."***

With the said Principles in mind, the Court has now carefully perused the Ruling and renders itself as follows; In its ruling the trial Court acknowledged the above set out principles and set to juxtapose them. In deciding whether the Appellants had established a prima facie case, the trial Court acknowledged that the Appellants were the registered owners of the suit properties. The Court further noted that the Respondents had questioned the process through which the Appellants had acquired proprietorship.

Further the Court went on to discuss how the Respondent had demonstrated that the titles were acquired through fraud. The Court however cautioned itself on the need to discuss the said issues but in the end found that the Appellants did not have a *prima facie* case based on the fact that Respondents seemed to have an arguable case on the fact that he was disinherited. In its Ruling, the trial Court against cautioned itself against making a finding at that point and found that there was need to await the decision as to whether the grants stand in law.

However from the Ruling itself, in this Court's considered view, the fact that swayed the Court to find that the Plaintiffs did not have a prima facie case is the fact that their title was being challenged by the Respondent and therefore in the Court's opinion the Respondent had an arguable case .In the case of ***Moses C Muhia Njoroge & 2 others…Vs….Jane W Lesaloi & 5 others,*** where the Court cited the Court of Appeal decision in the case of

Mrao Ltd….Vs…..First American Bank of Kenya, held that:-

> ***"A prima facie case in civil application includes but not confined to a genuine and arguable case. It is a case on the material presented to a court, tribunal properly directing itself it will conclude there exists a right which has apparently been infringe by the opposite party as to call for an explanation or rebuttal from the later"***

Kenleb Cons Ltd…Vs….New Gatitu Station & Another, where the Court held that:-

> ***'..to succeed in an application for injunction ,an applicant must not only make a full and frank disclosure of relevant facts to the just determination of the Application but must also show he has a right legal or equitable which requires protection by injunction."***

It is not in doubt that the Appellants are the registered owners of the suit properties. ***Section 26 (1)*** *of the* ***Land Registration Act*** *provides that;*

> ***"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***
>
> > ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
> >
> > ***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

It would therefore mean that ***prima-faciely****, the Appellants are the absolute and indefeasible owners of the suit properties . Though the learned trial Court acknowledged this in her ruling, the Court went on to further consider other factors which in the Court's considered view were a keen to determining the merits of the case and disputed facts which ought not have been considered at this stage. See the case of See the case of* ***Airland Tours and Travel Ltd…Vs…National Industrial Credit Bank, Milimani HCCC No.1234 of 2003****,* where the Court held that:-

> ***"In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".***

Section 26 of the **Land Registration Act** provides for the instances in which a proprietor's title to land can be impugned. In this case, the Appellants are the registered proprietors of the suit properties. In the Court's considered view, the trial Court ought to have considered whether he Appellants have an arguable case or whether their interests were likely to have been infringed upon. Therefore this Court finds and holds that the trial Court considered irrelevant facts and arrived at a wrong conclusion. The Appellants being the registered owners and having averred that their rights had been infringed upon would therefore mean that they had an arguable case with chances of success at the trial and consequently, they established a *prima facie* case.

The second limb that the Court considered was with regard to irreparable loss. The trial Court noted that the Respondent had been in occupation of the suit property. The Court further noted that the Appellants had not disclosed whether or not they are in possession. Therefore the trial Court concluded that since the Respondent was in possession and had even sought the Court's permission to cultivate the land, then by the Appellants asking the Court to restrain the Respondent from using the suit property was to establish a new state of things. The Court further concluded that the Appellants could be compensated by way of costs if the Court was to rule in their favour.

However this Court notes that the Appellants had indicated that the Respondent was excavating rocks from the suitland and therefore degrading the said land. This Court concurs with the assertions of the Appellants, while status quo would mean that the Respondent would continue with occupation of the land since he was in occupation, there is no doubt that his acts of excavation would most definitely degrade the land and in this case the same would make the Appellants suffer irreparable loss which loss cannot be compensated by way of damages. Even if damages could compensate the Appellants, this should not be a bar for them to preserve the suit property by way of an injunction. See the case of **Niaz Mohammed Janmohammed …Vs…Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-

> ***"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought".***

On the third limb, if the Court is in doubt, it should determine the case on the balance of convenience . However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the *status quo* and the *status quo* herein is directing the Respondent to desist from carrying out any dealings with the suit properties that will lead to the degradation and wastage until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondent's allegedly unlawful actions. See the case of **Agnes Adhiambo Ojwang....Vs....Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

> ***"the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act".***

Having now carefully considered the available evidence, having evaluated it and coming to its own independent decision, this court finds and holds that the trial Magistrate did **err** and misapprehended the fact and evidence on record and thus arrived at a wrong finding. However, the Court notes that the possession by the Respondent has not been disputed. Furthermore maintaining the *status quo* order would mean that he remains in possession, but he is barred from carrying out activities that would degrade the land

Consequently, the court finds that the Appeal is merited and it is allowed and the Court makes the following order;

> ***a) THAT a temporary injunction be and is hereby issued against the Respondent, his agents, servants and or anybody else claiming under him from excavating building materials, digging, charging, leasing, selling and or in any other manner interfering with land parcels No Ngenda/Wamawangi/904, Ngenda/ Wamwangi/903 that would lead to their degradation pending the hearing and determination of the suit.***
>
> ***b) The Respondent is however allowed entry to continue in occupation and cultivation of the suit properties.***

The upshot of the foregoing is that the Ruling of the lower court dated **23rd May 2018,** is upset, set aside and replaced with the above orders. The end result is that the appeal is partially allowed entirely with costs to the Appellants.

Judgment Accordingly.

It is so ordered.

Dated, signed and Delivered at Thika this 4th day of June 2020

L. GACHERU

JUDGE

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of;

No consent for the 1st Appellant

No consent for the 2nd Appellant

M/s Njoroge Ndungu advocates for the Respondent

L. GACHERU

JUDGE