REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 42 OF 2019

CATHERINE NASIMIYU KHISA ANDGLADYS NAKHUMICHA KHISA

(Suing as the Administrators and Legal Representatives of the Estate of the

late SHADRACK KHISA NALIAKHO – DECEASED) .....APPELLANTS

VERSUS

JACOB WANGILA WANYAMA.....1ST RESPONDENT

DELIAH NAMAE WASIKE..... 2ND RESPONDENT

(An appeal from the Ruling and Orders of Hon. Mr. Mwenda E. N. – Senior Resident Magistate, In Bungoma Chief Magistrate's Court – Elc Case No. 99 Of 2019 delivered on 2nd December, 2019)

J U D G M E N T

This appeal is against the ruling of **HON E. N. MWENDA (SENIOR RESIDENT MAGISTRATE, BUNGOMA)** dated 2nd December 2019 in which he dismissed the Appellants' application for an order of temporary injunction to restrain the Respondents, whether acting by themselves, their servants, agents, contractors and/or any other person whatsoever, from constructing the storey building, remaining on, re – entering upon, trespassing upon, taking over, developing or in any other manner whatsoever interfering with the Appellants' quiet occupation, possession and enjoyment of the property known as land reference **NO EAST BUKUSU/SOUTH KANDUYI/6033** (hereinafter the suit property) pending the hearing and determination of the suit. The Appellants had also sought other reliefs which were essentially of a mandatory nature and could not have been available as granting them would have amounted to determining the suit at an interlocutory stage.

The background to the appeal is that the Appellants are the Administrators of the Estate of **SHADRACK KHISA NALIAKHO** (the deceased) the registered proprietor of the suit property while the Respondents are the proprietors of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/9332** which is adjacent to the suit property.

The Appellants filed a suit in the Subordinate Court alleging that the Respondents had encroached onto the suit property by constructing a storey building thereon. They therefore sought various remedies against the Respondents including, inter alia, an order that the Respondents give vacant possession of the suit property, damages for trespass and an order permanently injuncting the Respondents whether acting by themselves, their servants, agents, contractors and/or any other persons whatsoever, from remaining on, re – entering upon, trespassing upon, taking over, developing, selling, leasing or in any other manner howsoever from interfering with the Appellants' quiet occupation, possession and enjoyment of the suit property.

Simultaneously with the plaint, the Appellants filed a Notice of Motion premised under the provisions of **Order 40 Rules 1, 2** and **4 of the Civil Procedure Rules** and **Sections 1A, 1B and 3A of the Civil Procedure Act** seeking, inter alia, an order of temporary injunction in the terms stated above.

The basis of the application as contained in the grounds therein and the supporting affidavit of **CATHERINE NASIMIYU KHISA**, the 1st Appellant herein, was that the Respondents had encroached onto the suit property on which they were constructing a storey building. That pursuant to a request by the Officer in Charge **BUNGOMA POLICE STATION**, a survey had been carried out but without involving the Appellants and among the findings therein were that 4 metres had been hived from the suit property for purposes of a road construction which finding was not supported by evidence from the Ministry of Roads and Urban Planning. Aggrieved by that report, the Appellants sought the intervention of the County Land Registrar to ascertain the boundaries of the suit property vis – a – vis the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/9332** and among the findings made in that report dated 28th October 2019 were that the boundaries of the suit property were intact on the ground and that in constructing the storey building, the Respondent had trespassed onto the suit property.

Therefore, the Respondents were in wrongful occupation of portions of the suit property which is being misused, damaged, wasted destroyed and degraded to the detriment of the Appellants and the Estate of the deceased.

Further, that the Respondents had prevented the Appellants from accessing the suit property to erect a perimeter boundary or develop it hence the application.

In response to that Notice of Motion, **JACOB WANGILA WANYAMA** the 1st Respondent herein filed a replying affidavit dated 18th November 2019 in which he averred, inter alia, that he and the 2nd Respondent are the registered proprietors of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/ 9332** measuring **0.02 HA** on which the disputed construction is being carried out and which is adjacent to the suit property also measuring **0.02 HA**. That the suit land and the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/9332** both originated from the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/5292** which had been sub – divided to give rise to the suit property and parcels **NO EAST BUKUSU/SOUTH KANDUYI/6032**, **6034**, **6035**, **6036**, **6037** and **6033** as well as an access road measuring **0.09 HA** connecting from the initial **AMANI ROAD** and touching on the suit property among others. That the appellants had made a complaint to **BUNGOMA POLICE STATION** in July 2019 against the previous owners of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/ 9332** and it was directed that the **BUNGOMA COUNTY SURVEYOUR** establishes the location of that parcel and the suit property. The survey report was submitted showing that the suit property had been partially consumed by **AMANI ROAD** during the rehabilitation process. The Respondents later purchased the parcel **NO EAST BUKUSU/SOUTH KANDUYI/9332** and following a public participation meeting, it was agreed to expand **AMANI ROAD** from the initial 5 metres to 8 metres and subsequently, the said road was expanded to 9 metres and the 3 additional metres were hived from the suit property because the other side of the road had electric posts that would not allow expansion. He denied that the construction had encroached onto the suit property or any part thereof and since there was no conclusive determination by the Land Registrar, the parties were advised to seek legal redress. It cannot therefore be concluded that the Appellants have established a prima facie case to warrant the grant of a temporary injunction and in any event, any injury that the Appellants may suffer is capable of monetary compensation and does not amount to irreparable damage and the orders sought are drastic and would delay the construction of their building.

In a further affidavit dated 23rd November 2019, the 1st Appellant reiterated that the Respondents have trespassed onto the suit property and the Chief Officer in Charge of Roads had in his letter dated 31st October 2019 confirmed that the road rehabilitation exercise had not encroached onto the suit property. That the Land Registrars' report had confirmed that both parties are laying a claim to the same land and this is therefore not a boundary dispute. That the report by the Assistant Director Land Survey had found that the Respondents had trespassed onto the suit property and had even recommended to **NEMA** to cancel the approvals granted to the Respondents who had been represented during the survey process by two representatives.

That application for temporary injunction was placed before **HON. E. N. MWENDA (SENIOR RESIDENT MAGISTRATE)** for determination and in a ruling delivered on 2nd December 2019, the Magistrate dismissed it with costs being in the cause. That ruling precipitated this appeal.

The Appellants have raised the following thirteen (13) grounds in urging this Court to set aside the dismissal order and allow their application for a temporary injunction: -

1. The learned Magistrate erred in law and fact in dismissing the Appellants' application and declining to grant the injunctive orders sought yet he found that the Appellants had demonstrated that they had a prima facie case by adducing the title documents in proof of ownership, survey maps, survey reports from the Assistant Director Surveys and the Boundary Determination Report by the Land Registrar all of which confirmed that land Reference NO EAST BUKUSU/ SOUTH KANDUYI 6033 belonged to the deceased as represented by the Appellants.

2. The learned Magistrate erred in law and fact in dismissing the Appellants' application and declining to grant the injunctive orders yet the Appellants had demonstrated that they had a prima facie case since both the Survey Reports by the Assistant Director Surveys and the Boundary Determination Report by the Land Registrar confirmed that the Respondents had invaded, illegally occupied and trespassed on the suit property.

3. The learned Magistrate misdirected himself in law and fact in finding that the Appellants had not demonstrated that they would suffer irreparable damages yet the Appellants had adduced evidence of on – going constructions of the storey building in the suit property which activity led to deterioration, misuse, damage, waste, destruction, pollution and/or degradation of the suit property and that the Estate of the Deceased had been deprived and denied of the use and enjoyment of the suit property.

4. The learned Magistrate erred in law and fact in failing to find that there was irreparable damage caused on the land which was not capable of being compensated monetarily given that the suit property belong to part of the Estate of the Deceased and which is a subject of succession amongst the beneficiaries of the Estate and that given the unique nature and value of land subject to an on – going succession, no compensation by an award of damages would suffice for the injuries caused to the beneficiaries.

5. The learned magistrate misdirected himself in law and fact in failing to find that Appellants are the Administrators and legal Representatives of the Estate of the Deceased tasked with preserving and protecting the Estate of the Deceased from abuse, degradation, wastage in the interest of the Estate and the beneficiaries.

6. The learned Magistrate took into account considerations of which he ought not to have taken into account in finding that both parties had equal assertive rights on the land which consideration is not amongst those to be taken into account in an application of the nature filed by the Appellants in the lower Court.

7. The learned Magistrate misdirected himself on the law and fact in finding that the Appellants had moved the Court to assert ownership rights yet the Appellants had sought orders for injunctive relief pending the hearing and determination of the suit in the lower Court.

8. The Learned Magistrate erred in law and fact in failing to find that the balance of convenience tilted in favour of the Appellants who had tenants in occupancy of the suit property for about thirty (30) years prior to the invasion and trespass by the Respondents.

9. The learned Magistrate erred in law and fact in failing to find that the balance of convenience tilted in favour of the Appellants since the Boundary Determination Report by the Land Registrar and Assistant Director of Survey had concluded that the Appellants are the owners of the suit property.

10. The learned Magistrate erred in law and fact in failing to find that the balance of convenience titled in favour of preserving the suit property pending the hearing and determination of the suit in the lower Court.

11. The learned Magistrate erred in law and fact in failing to appreciate that the purpose of an injunction is to conserve or preserve the subject matter/property pending determination of a suit concerning the property.

12. The learned Magistrate erred in law and fact in failing to issue preservatory orders over the suit property pending the hearing and determination of the suit on merits.

13. The learned Magistrate erred in law and fact in failing to exercise his discretion judiciously.

The appeal was canvassed by way of written submissions which have been filed by **EBOSO & COMPANY ADVOCATES** for the Appellant and **WAKOLI & WAKOLI COMPANY ADVOCATES** for the Respondents.

I have considered the appeal, the record and submissions by counsel.

This being an interlocutory appeal, I must be cognizant of the caution in not making any conclusive findings on matters of fact which are in controversy and are still pending a determination in the trial Court. The need for this is so as not to pre–empt the trial Magistrate who will eventually hear and determine the dispute between the parties based on the facts and the law. Further, the grant or refusal of a prayer for temporary injunction is a discretionary remedy. My task is therefore to determine whether in dismissing the Appellants' application for a temporary injunction pending trial, the Magistrate properly exercised his discretion. As a rule, an Appellate Court will not usually interfere with the exercise of discretion by the trial Court except under caution circumstances. The conditions under which an Appellate Court may interfere with the exercise of discretion by a trial Court were well articulated by **MADAN JA** (as he then was) in **UNITED INDIA INSURANCE CO. LTD .V. EAST AFRICAN UNDERWRITERS (KENYA) LTD 1985 E.A 898** as follows: -

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that it's members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

In **MBOGO .V. SHAH 1968 E. A. 93, Sir CLEMENT DE LESTANG V. P** stated as follows: -

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

Sir **CHARLES NEWBOLD P**, added as follows: -

"A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole, that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

Of course, the above principles, although articulated in the Court of Appeal, apply with equal force when this Court is considering an appeal from a Magistrate's Court. This Court will therefore be guided by those principles.

What was before the trial Magistrate was an application for a temporary order of injunction pending trial. The threshold for the grant of such an order was set in the **LOCUS CLASSICUS** case of **GIELLA .V. CASSMAN BROWN LTD 1973 E.A 358** as follows: -

1. The Applicant must establish a prima facie case with a probability of success.

2. The Applicant must also show that unless the injunction is granted, he will suffer such damage or injury that cannot adequately be compensated by an award of damages.

3. Where the Court is in doubt, it will determine the application on a balance of convenience.

And as was held in **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILM SALE LTD 1986 3 ALL. E.R 772**, a fundamental principle to be considered in such an application is that the Court should take whichever cause appears to carry the lower risk of injustice if it should turn out to have been ***"wrong"***. The Court must always bear in mind the rule that the main purpose of a temporary injunction is to prevent the property in dispute from being wasted, damaged, alienated or sold pending the determination of any suit in which the rights to such property are in issue. In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A. CIVIL APPEAL NO 77 OF 2012**, the Court of Appeal citing **GIELLA .V. CASSMAN BROWN** (supra), added the following:-

> **"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.**

In my view, this appeal can be determined solely on the basis of grounds 3 and 4 wherein the Appellants fault the trial Magistrate for failing to appreciate that the on – going construction of a story building on the suit property amounted to irreparable damage that could not adequately be compensated by an award of damages. The test laid down in the case of **GIELLA .V. CASSMAN BROWN** (supra) has to be considered sequentially. Having determined that the Appellants had established a prima facie case, the trial Magistrate, and rightly so, considered the second limb which is whether or not the Appellants had demonstrated that unless the injunction was granted, they would suffer such injury that is un – likely to be adequately compensated by an award of damages. He found that the Appellants had not surmounted this limb. This is how he put it in paragraph 12 of the impugned ruling: -

> **"As to whether the applicants will suffer damage that is irreparable if the injunctive relief is not granted. The answer is in the negative. The applicants clearly are moving the Court to reassert ownership. As suggested by the report by the Land Registrar the contemplated action is for recovery of the land. Though counsel for the applicant argued that the issue of land is emotive and that it has sentimental value, I do not see that this is persuasive in the circumstances of this case. <u>Should the Court find at the end of trial that indeed the defendants have trespassed and erected a building on the applicant's land, then they will be ordered to remove the said building and return the land to it's previous condition at their own cost</u>. The applicants can be paid mesne profits for the period that the unlawful trespass will endure. This means that the applicant will not suffer irreparable damage as they will be adequately compensated by an award of costs."** Emphasis added.

Having already found that the Appellants had established a prima facie case as he did in paragraph eleven (11) of his ruling, the trial Magistrate was therefore satisfied that there was a right which had apparently been infringed by the Respondents to call for a rebuttal. A prima facie case was defined in **MRAO LTD .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 KLR 125** as follows: -

> **"In civil cases, a prima facie case is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

Bearing in mind that the Appellants' claim is the land parcel **NO EAST BUKUSU /SOUTH KANDUYI/6033** measuring 0.02 Ha, it is imperative that the said property be preserved and conserved in the state in which it was before the Respondents commenced the construction of the storey building. If however, the construction proceeds to completion and the trial Court finds in favour of the Appellants, the suit property will no longer be available to them in its original state. That will no doubt put the Appellants, and in my view even the Respondents, to substantial loss. In the case of **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra) the Court of Appeal had the following to say on the test of irreparable injury: -

> **"The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; <u>that is injury that is actual, substantial and demonstrable</u>; injury that cannot "<u>adequately</u>" but 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."** Emphasis added.

In **ERNEST MURIUKI MUNGAI .V. GICHUGU CONSTITUENCY DEVELOPMENT FUND & ANOTHER 2017 eKLR**, this Court adopted the following definition of irreparable injury from **BLACK'S LAW DICTIONARY 9TH EDITION**:-

> **"The term irreparable injury, however, is not to be taken in it's strict sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be <u>substantial</u> and <u>serious</u> – one not easily to be estimated or repaired by money – and <u>if the loss or inconvenience to the plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the defendant through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or irreparable damage as will justify a preliminary injunction</u>."** Emphasis added.

In **HALSBURYS LAWS OF ENGLAND 3RD EDITION VOL 21** page 366, irreparable injury is defined thus: -

> **"By the term irreparable injury is meant <u>injury which is substantial</u> and could never be adequately remedied or atoned for by damages, <u>not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction</u> if his rights cannot adequately be protected or vindicated by damages. <u>Even where the injury is capable of compensation in damages, an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question</u>."** Emphasis added.

In denying the Appellants the remedy sought, the trial Court took the view that should it eventually find that the Respondents had trespassed onto the suit property by erecting a building thereon, ***"<u>then they will be ordered to remove the said building and return the land to it's previous condition at their own costs</u>."*** The Respondents' counsel in support of that argument made the following submission:-

> **"<u>The fact that the Respondents are persons of means capable of returning the suit property to it's original state</u> if at the conclusion of the hearing it will be found that they were trespassing has never been challenged by the Appellants. <u>This therefore goes further to negate the Appellants' averments that they would suffer irreparable damage if orders sought are not granted</u>."** Emphasis added.

The trial Magistrate in making the above findings clearly misdirected himself in law, misapprehended the facts and took into account considerations which he should not have taken into account. Those misdirections in law and fact warrant this Court's interference with the trial Magistrate's exercise of his discretion because they resulted in a decision that was plainly wrong in the circumstances. It is of course clear from the record herein that in response to the Appellants' application for injunction, the 1st Respondent **JACOB WANGILA WANYAMA** deponed in paragraph thirty-six (36) of his replying affidavit as follows: -

> **"that we are people of means capable of fully and sufficiently compensating the plaintiffs on whatever terms if the Court will at all find that the building, we are constructing has encroached on the plaintiffs land."**

That may very well be the position. Indeed, no determination has been made on whether or not the Respondents have trespassed onto the suit property. That will be a matter for the trial Court. However, having already found that the Appellants have established a prima facie case, the trial Court must have been persuaded that there was evidence showing ***"an infringement of a right and the probability of success of the Applicants' case upon trial"*** – **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra). The Respondents cannot be heard to claim, as has been deponed by the 1st Respondent, that even if the trial Court eventually finds that they are trespassers, they are in a position to compensate the Appellants in damages and therefore the injunction should not be granted. That is not the law. In **JAJ SUPER POWER CASH AND CARRY LTD .V. NAIROBI CITY COUNCIL & OTHERS C.A CIVIL APPEAL NO 111 OF 2002**, the Court of Appeal stated that where trespass is alleged, it is no answer to an application such as this one to claim that the alleged acts of trespass can infact be compensable in damages. I am also persuaded by the words of **RINGERA J** (as he then was) when he stated in **WAITHAKA .V. INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION 2001 KLR 374** that it is not an inexorable rule that where damages can be awarded, then an injunction should not issue as that would unduly lean in favour of those rich enough to pay damages for all manner of transgressions. By making a finding that the Respondents could be ordered to remove their building if after trial it was found that they were trespasser, the trial Court fell into error by failing to consider the principle in **FILMS ROVER INTERNATIONAL LTD** (supra) of taking the route that appears to carry the lower risk of injustice if it should turn out to have been ***"wrong".*** If the Respondents are not injuncted from continuing with the construction of the storey building, the whole character of the suit property will change and should the Appellants succeed at the trial, the property will have been wasted because that is not what they intend to do with it. Wastage of property pending trial is one of the injuries that Order 40 Rule 1 of the Civil Procedure Rules is meant to prevent. It will be a greater injustice for the Appellants to succeed in their claim only to find a storey building on the suit property than it will be for the Respondents to be restrained from continuing with the construction pending the determination of the dispute over the ownership of the portion of the suit property between the parties herein. That, in my view, amounts to actual, substantial and demonstrable injury which the trial Court ought to have taken into consideration and intervened by granting the injunctive relief sought by the Appellants. In view of the contested rights over the portion of the suit property where the Respondents are undertaking the construction and having found that the Appellants had established a prima facie case, I find that the trial Magistrate erred both in law and fact by taking a rather restricted view of what amounts to irreparable loss when he stated that the Respondents could ***"be ordered to remove the said building and return the land to its previous condition at their own cost"*** and that the Appellants ***"can be paid mense profits for the period that the unlawful trespass will endure."*** It is always preferable to preserve any property in dispute until the issue of ownership is heard and finally determined. Besides, should the trial Court find in favour of the Appellants and hold that the Respondents are trespassers, that would amount to a clear transgression of the law for which, as was held in **MOHAMED .V. COMMISSIONER OF LAND & FOUR OTHERS KLR (E & L) 217**, no amount of damages can atone.

I find that this appeal is well merited and should be allowed.

Before I make final orders however, Counsel for the Respondents has made the following submission which, in my view, is important. Counsel has submitted as follows: -

> **"My Lord, the Respondents' building is already at 3rd floor though not complete and it stand being wasted away if it remains in this incomplete state and therefore need for the Respondents to secure the said building. Further, there is need to have the main suit heard and determined expeditiously and more specifically, to have a Court supervised joint survey to enable the Court reach a final and factual conclusion."**

I agree that it is equally important that even as this Court injuncts the Respondents from any further construction on the disputed portion of the suit property, it is equally important that the building be also preserved so that should the Respondents prevail at the trial, their investments shall not have been wasted by wear and tear bearing in mind the current rains. I shall therefore make appropriate orders in that regard shortly.

With regard to the submission that a Court supervised joint survey be carried out to enable the Court reach a final and factual conclusion, that is really a matter entirely within the discretion of the trial Court. It would be improper for this Court to direct that Court in that regard. It is

competent enough to make whatever direction it deems fit.

The up – shot of the above is that this appeal is allowed in the following terms: -

1. The order dismissing the Appellants' application dated 8th November 2019 in terms of prayer 3 is set aside and substituted with an order allowing the Appellants' application in terms of prayer 3 but with the following qualification: -

a. That the Respondents by themselves, their servants, agents or contractors shall be allowed to enter the suit property solely for purposes of placing a canopy or other suitable cover such as iron sheets to protect the structure from any adverse weather conditions such as rain.

2. The trial of the suit shall be expedited and determined within a period of twelve (12) months from the date of delivery of this Judgment in keeping with the provisions of Order 40 Rule 6 of the Civil Procedure Rules.

3. The Appellants are awarded costs of the appeal.

Boaz N. Olao.

J U D G E

30th September 2020.

Judgment dated, signed and delivered at **BUNGOMA** this 30th day of September 2020 by way of electronic mail in keeping with the guidelines following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

30th September 2020.