



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU**

**ELCA NO 16 OF 2018**

**STEPHEN MWIHIA MARAGARA.....APPELLANT**

**VERSUS**

**MWANGI KAMURARA (suing as legal**

**Representative of the estate of**

**Mwangi Kamurara Mathigi (deceased).....RESPONDENT**

***(Being an appeal against the Ruling of Hon S.N Mwangi Senior Resident Magistrate at***

***Nyahururu Chief Magistrate's Court ELC No. 341 of 2018 delivered on the 29<sup>th</sup> November 2018)***

**JUDGEMENT**

1. What is before me for determination on Appeal is a matter which was heard by *Hon S.N Mwangi, Senior Resident Magistrate in the Chief Magistrate's Court at Nyahururu in Environment and Land Case No. 341 of 2018* where the learned trial Magistrate, upon considering an Application via a Notice of Motion dated the 20<sup>th</sup> September 2018 where the Respondent had sought for interim injunctive orders against the Appellant, granted the said interim orders, pending the hearing of the Application inter-parties.

2. The Appellant, being dissatisfied with the Ruling of the trial Magistrate filed the present Appeal seeking stay of execution of the said orders on the grounds raised in their Memorandum to wit;

i. That the learned trial Magistrate erred in law and in fact by finding that the Respondent by being an Administrator of the deceased estate had acquired a good title over the suit property.

ii. That the learned trial Magistrate erred in law and in fact for failing to consider the rights of the Appellant as a purchaser for value.

iii. That the learned trial Magistrate erred in law and in fact for failing to consider the fact that the Appellant has been in possession of the suit property for (fifteen) 15 years.

iv. That the learned trial Magistrate erred in law and in fact for issuing temporary injunction orders against the Appellant who is still in possession of the suit property.

v. That the learned trial Magistrate erred in law and in fact for failing to consider the rights of the Appellant for enjoyment of private property while issuing an order of temporary injunction against him.

vi. That the learned trial Magistrate erred in law and in fact for finding that the Respondent had satisfied the principles of granting temporary injunction.

vii. That the learned trial Magistrate in law and in fact for failing to put into account the existence of another suit pending before Court being Nyahururu Succession Cause No. 49 of 2017 in relation to the suit property between the parties herein.

3. The Appellant thus sought for the ruling read on the 29<sup>th</sup> November 2019 to be set aside.

4. By consent, parties sought that the Appeal herein be disposed of by way of written submissions wherein only the Appellant filed their submissions to which I shall summarize as follows:

5. The impugned ruling arose from a Notice of Motion application dated the 20<sup>th</sup> September 2018 wherein the Respondent had sought for the following reliefs;

- i. The application be certified as urgent and service of this application be dispensed with in the first instance.
- ii. The Court be pleased to grant a temporary injunction restraining the Respondent whether by himself, his agents and/ or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Title Number Nyandarua/Sabugo/85 pending the hearing and determination of this application.
- iii. The Court be pleased to grant an injunction restraining the Respondent whether by himself, his agents and/ or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Title Number Nyandarua/Sabugo/85 pending the hearing and determination of this suit.
- iv. The officer commanding Mirangine police station do enforce compliance of the orders above.
- v. The honorable Court be pleased to make such further or other orders as it may deem just and expedite in the circumstance of this case.

6. In effect thereof the Respondent had sought for the Appellant to be restrained from trespassing on wasting, constructing on, alienating or otherwise interfering or dealing with the suit property being Title Number Nyandarua/Sabugo/85 on the grounds that the same had already been distributed by Court in Nyahuru Succession Cause No. 49 of 2017 in which case the Appellant had not been listed as a beneficiary.

7. The Appellant's response had been that he had some interest on the suit property having purchased ¼ acres of the same on 10<sup>th</sup> November 2003 from the Respondent's brother one David Irungu Mwangi, land which he had already taken possession and occupation. That after he had become aware of the Succession Cause, he had filed summons for revocation of the Grant, as per the pleadings annexed to his Replying Affidavit dated the 9<sup>th</sup> October 2018. That the Court had then issued an order restraining the Respondent from evicting him and others from the suit property pending hearing and determination of the summons for the revocation of the Grant.

8. The Appellant's submission was that despite the aforesaid facts having been presented to the learned trial Magistrate, coupled with the documentary evidence, she had proceeded to allow the application and to grant the orders of injunction sought by the Respondent despite the fact that this was a clear case that did not warrant the granting of the injunction.

9. That the learned trial Magistrate did not consider all relevant aspects and issues relating to the Appellant's occupation cum possession of the suit property in her ruling dated the 29<sup>th</sup> November 2018, but had only addressed the validity of the contract of sale of land, that had been entered into between the Appellant and the Respondent's brother, in determining whether or not to grant the injunction.

10. That the Court was lost of the fact that in granting the orders as sought it would have led to the Appellant's eviction from the suit property at the interlocutory stage of the suit.

11. Reliance was placed on the decided case of **Joash Ochieng Ougo & Another vs Virginia Edith Wambui Otieno [1987] eKLR** to submit that the best orders available at the time would have been orders directing parties to maintain the status quo pending the hearing of the trial.

12. The Appellant also relied on the decided case in **Membley Park Residents Association vs The Presbyterian Foundation [2017] eKLR** to submit that the Court ought to have issued specific orders arising from the facts presented by both parties and not to find that since the Respondent had established a prima facie case, that a blanket order of injunction was warranted.

13. In his application for stay pending appeal, the Appellant herein had also demonstrated the fact that he stood to suffer substantial loss from the impugned ruling for been continually held in contempt of Court orders since he was in possession of the suit land.

14. The Appellant therefore pleaded with the Court to evaluate the matter afresh and consider the fact that he had pleaded and proved being in occupation and possession of the suit land in the preliminary proceedings and thereafter set aside the orders issued on the 29 November 2018 and replace the same with the orders of maintenance of status quo or any other appropriate orders.

#### **Determination.**

15. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

16. According to the proceedings herein, the Plaintiff/Respondent had filed his Plaint alongside an application for interim injunction hereinabove captioned, both dated the 20<sup>th</sup> September 2018. In his application by way of Notice of Motion, the Respondent had sought for interim injunctive orders against the Appellant seeking to restrain him from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the suit property known as No. Nyandarua/Sabugo/85.

17. In his response to the Application, the Defendant/Appellant vide his Replying Affidavit dated the 9<sup>th</sup> October 2018, had objected to the orders sought stating amongst other grounds that he was currently in occupation and possession of the suit land having purchased ¼ acre of the suit land from the Respondent's brother, further that having learnt that the Respondent had petitioned for distribution of the deceased's estate in Nyahururu Succession Cause No. 49 of 2017 wherein he had not been listed as a beneficiary, he had sought for a Revocation of the Grant and had obtained orders dated the 24<sup>th</sup> September 2018 restraining the Respondent from evicting him from the suit land pending the hearing and determination of the Summons for Revocation of Grant.

18. Subsequently the application for interim orders had been canvassed by way of written submissions wherein the trial learned Magistrate had delivered her ruling on the 29<sup>th</sup> November 2018 restraining the Appellant from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the suit property being Title Number Nyandarua/Sabugo/85, pending the hearing and determination of the suit.

19. Having considered the pleadings, the evidence on record and the submissions filed, it is my view that the following are the issues for determination:

- i. Whether the learned trial Magistrate erred in law and in fact in failing to consider the fact that the Appellant had been in possession of the suit property.
- ii. Whether the learned trial Magistrate erred in law and in fact by issuing a mandatory injunctive orders against the Appellant.
- iii. Whether the Appellant is entitled to orders sought.

20. On the first issue for determination, the celebrated case of **Giella vs Cassman Brown (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried( prima facie case)
- ii. Will the Applicants suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

21. The notorious case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, gives a description of what entails a prima facie case as follows:

*“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It 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 as to call for an explanation or rebuttal from the latter.”*

22. Looking at the facts of this case as submitted, the trial Court had been moved under a Certificate of Urgency, by the Respondent to issue temporary injunctive orders against the Appellant. At this stage, the trial Court was only required to determine whether or not the Applicant/Respondent was deserving of the orders sought. The Court was not required to determine the merit of the case.

23. The Respondent had in his Application demonstrated that he was the legal representative of the deceased's estate which included No. Nyandarua/Sabugo/85 the subject suit herein and that vide Nyahururu Succession Cause No. 49 of 2017 the said land had been distributed vide a confirmation of Grant dated the 22<sup>nd</sup> March 2019. That notwithstanding, the Appellant herein had trespassed on the said land and was in the process of erecting structures thereon.

24. In his response to the Application, the Defendant/Appellant vide his Replying Affidavit dated the 9<sup>th</sup> October 2018, had objected to the orders sought stating amongst other grounds that he was currently in occupation and possession of the suit land having purchased ¼ acre of the suit land from the Respondent's brother, further that having learnt that the Respondent had petitioned for distribution of the deceased's estate in Nyahururu Succession Cause No. 49 of 2017 wherein he had not been listed as a beneficiary, he had sought for a Revocation of the Grant and had obtained orders dated the 24<sup>th</sup> September 2018 restraining the Respondent from evicting him from the suit land pending the hearing and determination of the Summons for Revocation of Grant.

25. From the facts presented herein above, I find that although there had been a prima facie case established, yet since it had not been disputed that the Appellant herein was in occupation of a portion of the suit, by granting orders of injunction so sought in such a situation the same had resulted into an eviction and/or a mandatory injunction at an interlocutory stage which would be premature in the circumstance since there had been no allegation that the suit property was in any danger of being wasted, damaged, alienated or wrongfully sold so as to obstruct or delay the Respondent in the execution of any decree that may be passed in his favour.

26. Since the Appellant was in possession and/or use and occupation of the suit property, the interlocutory prohibitory injunction sought against him presupposed that the Respondent would first obtain from the Court a declaration that the Appellant was a trespasser followed by an order for his eviction.

27. The Supreme Court of India in **Dalpat Kumar & Another vs. Prahlad Singh & Others, AIR 1993 SC 276**, held that the phrases **prima facie case, irreparable loss** and **balance of convenience** are not mere rhetoric phrases for incantation; but that they were important factors to

be carefully weighed and considered in each and every case where an application for an injunction is applied for.

28. In **Locabail International Finance Ltd. vs. Agroexport [1986] 1 ALL E.R. 901, Mustil, LJ** restated the same principle thus:

*“The matter before the Court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.*

29. Back home, the Court of Appeal in **Lucy Wangui Gachara vs Minudi Okemba Lore [2015] eKLR** held as follows;

*The application that the Respondent presented before the High Court was, on the face of it, an application for a prohibitory injunction “restraining” the Appellant from doing something, engaging in certain conduct or taking certain action. But rather mischievously, the same application sought to restrain the Appellant from **occupying, living, continuing to live, or staying** on the suit property. It is not disputed that by the time the application for injunction was made, the Appellant was in possession of the suit property and had been in possession and occupation of the same for more than 10 years. To seek to stop her from occupying, living, continuing to live or to stay on the suit premises required nothing short of clear and specific prayer for a mandatory injunction. In view of the drastic nature of the remedy that the Respondent was seeking at an interlocutory stage, the Appellant was entitled to be notified in the clearest of terms that what was being sought in the application was her eviction, even before the suit was heard, from the property she was claiming to be matrimonial property. Instead, the application was made to appear as though all that it sought was to prohibit the Appellant from wasting, damaging, alienating or wrongfully selling the suit property.*

30. In **United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898, Madan, JA** (as he then was) held as follows:

*“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its 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.”*

31. As I understand from the above holding, the principle of either granting or refusing an injunction is based on the trial Court’s judicial discretion where as a rule, an appellate Court will not interfere with this discretion unless under the above captioned circumstances

32. In the present case however I find that the learned trial Magistrate failed to consider important provisions of the law as well as pleadings before her wherein she erroneously granted a mandatory injunction at the interlocutory stage in the *absence of special circumstances*.

33. I find that in the circumstances the Appeal is merited and is hereby allowed. The order of 29<sup>th</sup> November 2018 is herein set aside and substituted with an order of status quo to which parties shall maintain the status quo pending as at 29<sup>th</sup> November 2018 when the impugned Ruling was delivered. The Appellant shall have costs of the Appeal.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of September 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**