



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 206 of 2009

DAVID KIEMA MBITHUKA.....APPELLANT

VERSUS

ALICE KEMUNTO KENGERE.....RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling of Honourable R. Ondieki delivered on 16th October 2009 in CMCC 3471 of 2007. The ruling emanates from an application dated 4th June, 2009 by which the Appellant /Plaintiff sought :

- Stay of execution of a court order dated 22nd May 2009
- Review of the said court order; and
- Setting aside of the mandatory order directing the Appellant to reconstruct the demolished house of the Defendant/Respondent.

2. The court order of 22nd May 2009 that was sought to be stayed, as aforesaid, had the following effect/ordered as follows:

1. **An injunction issued restraining the Plaintiff or his agents from selling, interfering with, digging upon or pouring construction material on Plot NO. MN/VI 3794.**
2. **An injunction issued restraining the Plaintiff or his agents from removing materials of the house structure and walls they had demolished under a court order of 16th March, 2009.**
3. **A mandatory injunction, not prayed for, requiring the Plaintiff to construct the demolished house or pay the Defendant its equivalent value within fourteen (14) days from the date of the ruling.**

3. It is this order of 22nd May, 2009, that the Plaintiff/Appellant sought to stay and review by their application of 4th June, 2009. The lower court (Honourable Ondieki) heard that application and dismissed it in his Ruling of 16th October, 2009. As such, the orders above still stand and are the subject of this appeal. The last order, granting a mandatory injunction is especially impugned.

4. There are eight (8) grounds of appeal. Six of them, grounds (Nos. 2 - 5 and 8), relate directly to the mandatory injunction issued by the court *suo moto* despite there being no prayer sought by the Defendant/Respondent. Prayers 1 and 7 contest the Honourable Magistrate's failure to review and set aside his Ruling of 22nd May, 2009; and in ignoring the Appellant's replying affidavit.

5. Grounds 2 – 6 and 8 as earlier noted, impugn the Honourable Magistrate's Ruling of 22nd May 2009 as an error in law:

a) In granting an order which was never prayed for, hence an error on the face of the record.

b) In failing to set aside the prayer for mandatory injunction which had not been prayed for by Defendant applicant.

c) In moving *suo moto* thus denying the Appellant a right to be heard.

d) In moving *suo moto* and failing to appreciate the rules of natural justice, thus condemning the Appellant unheard.

e) In misapprehending the facts and failing to appreciate that at the time the application of 24th March, 2009 was filed, execution was already complete, thus one party could not steal a match against the other as he held.

f) In failing to appreciate the principles governing the grant of mandatory injunctions as enunciated in the case of Belle Mansion Ltd Vs Yaya Towers Ltd HCCC NO. 2225 of 1992

6. Only one prayer is sought by the Appellant, as follows:

“That the Ruling of the court below be set aside and be substituted by an order Reviewing and setting aside his Ruling dated 22nd May 2009 as for as it grants an order for mandatory injunction.”

7. The Respondent submitted that the demolished premises included a 3 bedroom house surrounded by a wall. The genesis of the matter was that the Plaintiff filed a suit on 11th December 2007 seeking an injunction to restrain the Defendant from construction on the suit property or trespassing thereon. By its *ex parte* Judgment dated 14th November 2008 the court had found for the plaintiff after there was no representation for the defense despite proof of service. The court issued an injunction against the Defendant (See page 17 – 18 Record of Appeal).

8. Pursuant to the Judgment, the Plaintiff obtained a warrant dated 16/3/2009 putting the Plaintiff/Applicant in possession and removing the Defendant and any materials brought onto the suit property by her (See page 49 Record of appeal). Defendant argues that the warrant issued stretched too far as it was not in consonance with the Judgment which merely granted Plaintiff an injunction restraining the Defendant from developing the suit property. However, the Plaintiff had gone ahead and demolished a 3 roomed house of the Defendant, on the strength of the Warrant. I observe that the Warrant did not permit demolition.

9. Thus the Defendant sought a variation of the court order and warrant, under urgency. The court on 24th March granted the Defendant an interim injunction pending *interpartes* hearing.

During the hearing on 19th May 2009 the Defendant sought, *inter alia* to set aside the dismissed application to set aside the Judgment of 16th March, 2009, and also sought an interim injunction.

10. In my view, the court lost control of the suit and allowed the parties to file application after application instead of seeking to hear and resolve the substantive matter on its merits. This has still not been done despite the suit having been filed in 2007.

11. When the court issued the Ruling of 22nd May, 2009 it granted the mandatory injunction invoking its power under Section 3A. The Honourable Magistrate stated: (at page 27 Record of Appeal)

“I shall under Section 3A issue mandatory injunction against the Plaintiff to construct the demolished house or pay the Defendant its equivalent value within fourteen (14) days. My argument here is based on the decision in Belle Mason case”.

12. The Honourable magistrate appears to have forgotten, in the confusion of the applications being thrown forward at him, that the Plaintiff, in paragraph 3 of his plaint had claimed ownership of the suit property and a Judgment had been issued, albeit *ex parte* for want of representation, in plaintiff's favour. No defence having been filed, strictly speaking there was and remains only the Plaintiff's claim on record.

13. In granting the mandatory injunction which had not been sought, the Honourable Magistrate had said:

“On the issue of injunction I shall approach it from Section 3A of the Civil Procedure Act, cap 21. As earlier said, the house was not supposed to be demolished. Only building materials and party coral wall were supposed to be removed. The Respondent exceeded the orders issued to him. I shall under Section 3A issue mandatory injunction against the Plaintiff to construct the demolished house or pay Defendant its equivalent value within fourteen (14) days from the date of this ruling. My argument is based on the decision in Nairobi HCCC NO. 2225 of 1992 Belle Maision Ltd Vs Yaya Towers Ltd.”

14. The Honourable Magistrate exercised his power *suo moto* under section 3A Civil Procedure Act. That section provides:

“ 3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

It is not surprising that the Honourable Magistrate took the course that he did. The orders he had issued to the Appellant were specific; only materials were to be removed and partly constructed coral walls were to be demolished. The Appellant had, however, taken the law into his hands and gone on to demolish the house. This was in excess of the orders, and an illegality, committed in pretence of executing lawful orders. But the order itself had also given the Appellant vacant possession of the suit property and the bailiff ordered to put the plaintiff in possession. This was recognition of his right over and ownership of the suit premises. The order could, however, also carry the suggestion, implicit in it, that the Appellant was the legally recognized owner, and could do with the suit premises as he chose.

15. A mandatory injunction may be given in circumstances:

- that are exceptional and in the clearest cases – **Canadia Pacific Railway Vs Gaud** [1949]2KB at 249, or

- Where a party has taken the law into his own hands to steal a match **Muchuha Vs Ripples** [1990 – 1994] 1EA 388 CAK

The following statement in the case of **Locabail International Finance Ltd Vs Agro export**[1986] I All ER 901 was considered in **Mwangi Vs Braeburn** [2004] 196 (CAK):

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

16. I think that, in this case, the invocation of section 3A by the Honourable Magistrate to remedy what he felt was an excess use of the orders he had granted the Appellant, was hasty. This is particularly so because, firstly, there having been no request for it, he could not feel any greater injustice than a party itself felt; and secondly, Section 3A requires the exercise of the courts inherent powers to achieve the ends of justice and prevent abuse of the court's process. The application of 24th March, 2009 had not sought any orders along these lines.

17. It now remains for me to pronounce myself on the appeal in respect of the Ruling and the next steps forward. I take into account that the real or substantial dispute between the parties concerns ownership of the suit property, claimed by both parties. There is a plaint on record, but no defence. The respondent's position contained in her Affidavit deponed on 17th December, 2007. The dispute disclosed appears to be quite complex. The suit was filed in 2007 but so far, after five years, only interlocutory applications have proceeded, and the substance of the suit has been shunted to the fringes. Further, there is indication from the Respondent's Affidavit that this suit may be intricately connected to HCCC NO. 84 of 2002 Raphael Muli & Others Vs Kenya Ports Authority.

18. Taking all the above matters into account and in exercise of my powers under Sections 1A, 1B and 3A Civil Procedure Act, I think the ends of justice will be best served by restraining all parties from taking any actions on the suit property. I therefore issue the following orders:

1. **The mandatory injunction issued by the lower court is hereby stayed pending determination of the suit.**
2. **The *status quo* on the property at the date hereof be maintained. No party shall develop, dispose off or take any action in relation to the suit property until further orders of the court.**
3. **The Defendant/Respondent is granted leave to file and serve its Defence within fourteen days from the date hereof.**
4. **The Plaintiff Applicant is granted leave to file and serve a reply to the defence within ten (10) days from the date hereof.**
5. **The parties shall complete pretrial procedures and the Plaintiff shall within sixty (60) days from the date hereof set the suit down for hearing. In the meantime, prior to that date, the parties shall file and serve bundles of their respective documents in support of their cases, including lists of witnesses and witness statements, and agree issues for determination ready for the commencement of the substantive hearing.**
6. **If, after the filing of all pleadings, the learned Magistrate takes the view that this suit and HCCC 84 of 2002 are intractably related, leave is granted to transfer this suit to the High Court prior to his commencing a full hearing on its merits**
7. **The lower court do enforce the time frames herein, and expedite the hearing of the substantive suit on its merits.**
8. **Given the circumstances that have developed herein, I order that the costs of this appeal be costs in the cause.**

Orders accordingly.

Dated, signed and delivered this 6th day of September, 2012.

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)