



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 25 OF 2019

DELMONTE KENYA LIMITED.....APPELLANT

VS

MISHACK KIBE MUIRURI.....1ST RESPONDENT

PATRICK KIBE KIGURU.....2ND RESPONDENT

KEVIN KAMAU WANJIRU.....3RD RESPONDENT

JOSEPH NJOROGE.....4TH RESPONDENT

(as representatives of Gatanga Quarry Owners Sacco)

COUNTY GOVERNMENT OF MURANGA.....5TH RESPONDENT

(Being an Appeal from the Ruling of the Hon E Mutunga SRM in MCLE No 26 of 2019 at Kandara)

RULING

1. This is an Appeal arising from the ruling of the Hon Mutunga SRM, Kandara in MCLE No 26 of 2019.
2. On the 17/7/19 the 1st – 4th Respondents filed sought orders restraining the 5th Respondent by way of interim injunction from interfering and restricting their quarrying activities along KAKUZI/MITUBIRI/CHANIA river pending the hearing and determination of the suit.
3. On even date the Court sitting at Kandara granted the said orders pending the interpartes hearing of the application on the 25/7/19. Come the 25/7/19 the orders were confirmed exparte as follows:

“That an order of injunction be and is hereby issued against the Defendant /Respondent by itself, servants, agents or any authority restrained by this Court from interfering restricting or in any way dealing with the quarrying happening along KAKUZI/MITUBIRI/CHANIA river by the Plaintiffs pending the hearing and determination of this suit.”
4. On the 8/8/19 the Appellant filed a defence and counterclaim as well as a Notice of Motion seeking orders interalia of stay of orders dated the 25/7/19, interim injunction restraining the 1st -4th Respondents from entering occupying and carrying out quarrying activities on its Land Reference No 12157 and or interfering with its quiet enjoyment of the said land in Gatanga sub county and setting aside the orders of the Court granted on the 25/7/19 in its entirety.
5. Upon hearing the parties on the Notice of Motion the Court pronounced its ruling on the 24/9/19 disallowing the application.
6. Aggrieved with the decision of the lower bench the Appellant preferred this Appeal on 22 grounds summarized as follows:
 - a. The trial magistrate failed to consider the evidence in the Affidavits that were filed by the Appellant.
 - b. That the trial magistrate erred in law in holding that the Appellants title was not conclusive evidence of title.
 - c. That the Court failed to give weight to the uncontroverted evidence of the surveyor.

- d. That the Court did not consider the incompetence of the Respondent's suit despite the issue being apparent on the pleadings and the submissions.
- e. That the Court erred in failing to consider the prayers seeking to set aside the *ex parte* orders.
- f. That the Court failed to address the issue of concealment of material facts on the part of the Respondents.
- g. That there was misapprehension of the test applicable in determining applications for interlocutory injunctions.
- h. That the Court erred in giving a ruling that condemned the Appellant without a hearing.

7. The Appellant sought the following prayers on Appeal;

- a. The Appeal be allowed
- b. The Ruling and/or Order of the Senior Resident Magistrate's Court of Kenya at Kandara (the Hon. Mr. Mutunga) dated and delivered on 24/9/2019 be set aside.
- c. An Order be made allowing the Appellant's Notice of Motion dated 8/8/2019.
- d. Costs and incidentals in the Senior Resident's Magistrate's Court case and in this Appeal be awarded to the Appellant, together with interest thereon at Court rates for such period as this Honourable Court may direct.
- e. The Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

8. On the 6/7/2020 the parties through their learned Counsels on record elected to canvass the Appeal by way of written submissions.

9. The Appellant filed its written submissions on the 4/8/2020 while the Respondents did not file any by the time of writing the ruling.

10. The Appellant submitted that the Court failed to consider its evidence as contained in the supporting and supplementary affidavits of its Legal Officer and further ignored the evidence of the surveyor despite it having been adduced so much so that the body of the ruling of the Learned SRM did not include the Appellants evidence.

11. With respect to grounds 2, 3 & 4 the Appellant submitted that it adduced a copy of the title of the suit land coupled with a report of an expert, Martin Ngono Wamaya, a surveyor to show that it is the owner of the suit land and enjoys proprietary rights protected under section 24 and 25 of the Registered Land Act. That in the face of this evidence the learned Magistrate ignored the title and disregarded the principles of land proprietorship as set out in the law and precedents which were duly presented before the Court.

12. Further the Appellant submitted that the 1st -4th Respondents in their reply to the application mounted new arguments geared towards challenging the title of the Appellant while the same were not included in the plaint. It argued that the case of the 1st - 4th Respondents revolved around the quarrying activities in unsurveyed land along the MITUBIRI/CHANIA /THIKA river while it submits the said Respondents were quarrying on LR No 12157 belonging to the Appellant. So that the real question before the Court is whether the quarry activities were on unsurveyed land (read public) or the land of the Appellant. The Appellant submitted that the new arguments cannot be allowed on Appeal.

13. It argued that it holds a valid title in the suit land and that the Court misapprehended the law with respect to the title ownership and in particular the use of the words grants and certificate of title.

14. It is the case of the Appellant that the Court failed to give due weight to the uncontroverted evidence of its witness, the surveyor with the consequence that the said Court arrived at a decision in stark contrast to the evidence placed before him. In further submissions the Appellant argued that an expert evidence can only be challenged through the evidence of another witness and not otherwise. See the case of **Dick Omondi Ndiewo T/A Ditech Engineering Service Vs Cell Care Electronics (2015) eklr.**

15. With respect to the ground that the Court failed to consider the incompetence of the suit, the Appellants submitted that the suit in Court was incompetent on account that the 1st -3rd Respondents sued as Gatanga Quarry owners Sacco while they presented a registration document in the name of Gatanga Quarry Owners Savings Credit Cooperative Society Limited raising the issue whether the suit was a representative suit within the meaning of the Order 1 Rule 8 of the Civil Procedure Rules. Having failed to comply with the said provision, the Appellants argued that the 1st -3rd Respondents can only bring the suit on their own behalf and cannot rely on the documents issued to entities which no nexus nor have established any.

16. The Appellant further submitted that the Court failed to set aside the *ex parte* orders issued on 29/7/2019 despite the Court having been addressed on it.

17. On concealment of material facts the Appellant relied on the case of **Bahadurali Ebrahim Shamji Vs Al Noor Jamal & 2 Others CA 210 OF 1997** where the Court held that;

“It is perfectly well settled that a person who makes an *ex parte* application to the Court - that is to say, in the absence of the person

who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it.... and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement ..."

18. With respect to grounds Nos 9-22 of the Memorandum of Appeal the Appellant submitted that despite adducing evidence on the title the Court failed to hold that the Appellant has established a prima facie case and failed to grant the application. That the learned magistrate failed to appreciate that there was irreparable harm on the suit land. That the decision left the Appellant without a remedy contrary to the principles of equity that states that equity would not suffer a wrong without a remedy.

19. In addition, the Appellant argued that in disregarding the evidence of the Appellant the Court condemned the Appellant unheard in the manner in which ex parte orders were granted and even after pointing out to the Court the glaring concealment of material facts.

20. This being a first Appeal, the Court has the primary mandate to assess and evaluate the facts and evidence and is at liberty to come up with its own conclusions. The Court is also minded of the fact that the nature of the orders sought before the lower Court are within the category of orders that are granted in the exercise of judicial discretion. The Court may only set the orders aside where there is sufficient material as set out in the case of **Mbogo & Another vs Shah [1968] EA** where, Sir Clement de Lestang, V.P. at page 94 stated thus;

"I think it is well settled that a Court will not interfere with the exercise of discretion of 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 it should not have acted or it failed to take into consideration that which it should have taken into consideration and in so doing arrived at the wrong conclusion."

21. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an 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 would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide the application on a balance of convenience.

22. The Court of Appeal in **Mrao vs first American Bank of Kenya ltd & two others C.A. No. 39 OF 2002 (2003 eK.L.R)** defined a prima facie case in the following terms;

"A prima facie case in a civil application include 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".

23. The Appellants case is that they are the registered owners of the suit land for which the 1st-4th Respondents were allegedly carrying out quarrying activities. The 1st -4th Respondents in their suit claimed that their quarrying activities were confined to an unsurveyed land along the Chania river. That their activities were approved by the 5th Respondent initially before it ordered suspension as well as the National Environment Management Authority.

24. I have reviewed the record and it is clear that the Appellants presented a copy of the title of the suit land in which it is registered as owner of the suit land. Coupled with that is the affidavit of the Surveyor namely Martin Ngono Macharia who described the boundaries of the land of the appellant and confirmed that the 1st -4th Respondents had entered into the Appellants land claiming that it is unsurveyed public land.

25. Section 26 of the Registration of Lands Act states that the certificate of title issued by the Registrarshall be taken by all Courts that the person named therein is the absolute indefeasible owner. I am satisfied that the Learned Magistrate misdirected himself when he held that the grant held by the Appellants is not conclusive evidence of ownership. I say so because at this stage the Court is not required to look at proof of any facts but whether there is a prima facie case.

26. It is also borne of the record that the 5th Respondent withdrew its approval on the 12/7/19 and asked the 1st - 4th Respondents to stop the quarrying activities. No reasons were advanced for this action but perhaps on realization that the land was not public land.

27. The Court finds that the Appellant had established a prima facie case.

28. Evidence was led that the Appellant suffered damage as a result of the quarrying activities on the land. From the photographs adduced in evidence it is clear that the earth had been excavated and trees and vegetation removed. Uncontroverted evidence was led by the Appellant that the land is being used for purposes of growing pineapples and the continued quarry activities are inconsistent with the use of the land in addition to the destruction of biodiversity along the river chania. That the injury to the suit land is irreparable and no amount of damages can compensate it. That the activities have the effect of irretrievably altering the character of the land so as to make it unfit for agricultural purposes.

29. The question as to whether the damage on the land was caused by the Respondents is for the trial Court. It is sufficient for the Court to be persuaded that the damage on the land is such that cannot be compensated with an award of damages.

30. Finally, as the Court is not in doubt, the balance of convenience tilts in the Court allowing the injunction.

31. As to whether the Court should set aside the ex parte orders given by the Court on the 29/7/19? These orders were expressed as follows;

“That an order of injunction BE and is HEREBY ISSUED against the Defendant/Respondent either by itself, servants, agents or any authority restrained by this Court from interfering, restricting of in any way dealing with quarrying happening along KAKUZI/MITUBIRI/CHANIA river by the Plaintiff areas pending hearing and determination of this suit”.

32. It follows that the above orders were given against the 5th Respondent prior to the Appellant being enjoined to the suit.

33. The *ex parte* orders were contemplated and issued pending the hearing and determination of the suit. The Appellant has argued that the said orders were granted on the basis of concealment of material facts by the 1st -4th Respondents. That they misled the Court that the land was public unsurveyed land. That this was done against the background of a meeting held on the 14/7/19 and 23/7/19 involving the Respondents (Plaintiffs then), the Defendants and the County officials where the issue of title ownership was discussed and even copies of title documents presented.

34. In the case of **Brink's - MAT Ltd v Elcombe [1988] 3 All E.R. 188** it was held that;

"In considering whether there has been relevant non -disclosure and what consequence the Court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these Appeals appear to me to include the following. (i) The duty of the Applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the Applicant or his legal advisers. (iii) The Applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the Applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the Defendant, and (c) the degree of legitimate urgency and the time available for the making of inquiries. (v) If material non -disclosure is established the Court will be astute to ensure that a Plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the Applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the Applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.

A *locus poenitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non -disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms: "

... when the whole of the facts, including that of the original non -disclosure, are before it, (the Court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

35. Going by the above decision, the Court finds that the concealment of the particulars of the land the 1st -4th Respondents were quarrying on was material and they ought to have made a frank and fair disclosure to the Court given that by this date the Respondents were in receipt of the suspension order of the 5th Respondent directing them to stop all quarry activities on the land. See letter dated the 12/7/2019 from the 5th Respondent.

36. In view of the decision of the Court at para 27-30 and the reasons adduced above justice will be served when the said *ex parte* orders are set aside.

37. As regards the question whether the suit in the lower Court is incompetent, the Appellant has argued that the suit is incompetent for want of compliance with Order 1 Rule 8 of the Civil Procedure Rules. I am hesitant to reach a determination on the issue at the infancy stage of the trial. It is best left to the trial Court.

38. From the totality of the review of the evidence in the Record of Appeal and the lower Court record it is the finding of the Court that the Learned Magistrate misapplied and misdirected himself to the evidence and the law with respect to the grant of injunction *inter alia*. Having said that I find no evidence of bias or wrong doing on the part of the Learned Magistrate to warrant an order directing that the suit in the lower Court be heard by another Magistrate other than the Hon E Mutunga as prayed by the Appellant. The Appellant has not made any allegation of wrong doing by the Learned Magistrate in so far as dispensation of justice or likelihood of it is concerned.

39. In the upshot the Appeal has merit and I make the following orders;

a. The Appeal is allowed.

b. That pending hearing and determination of the suit, an Injunction Order do issue restraining the Plaintiffs, their agents, servants, employees or any other person claiming under them from entering, occupying, using, carrying out any rock drilling, rock blasting, rock extraction or quarry mining operations in the Parcel of Land known as Land Reference Number 12157 situated in Gatanga Sub County or in any other manner interfering with the 2nd Defendant's quite possession and enjoyment of Land Reference Number 12157 situated in Gatanga Sub County.

c. That the Orders given by the Honourable Ms. Mutunga on 25/7/2019 and issued on 29/7/2019 be and are hereby set aside in their

entirety.

d. That the Officer Commanding Ithanga Police Station (OCS, Ithanga) to enforce the Orders of the Court herein.

40. Costs of the suit in the Senior Resident's Magistrate's Court case and in this Appeal be awarded to the Appellant.

41. **It is so ordered.**

DATED, SIGNED & DELIVERED ONLINE AT MURANGA THIS 17TH DAY OF DECEMBER 2020.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Thuo for the Appellants

Ms Wanyino HB for Mr Ngiringa for the 1st – 4th Respondents

5th Respondents – Absent

Njeri and Kuyiki, Court Assistants