



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 134 of 1994

1. JOHN GITONGA KIHARA
2. MARY WANJIKU MBUGUA
3. OLONGIDA OLE NGILORITI
4. MICHENI MUSA

BARAKA MINING LIMITED.....APPELLANTS

AND

KASIGAU RANCHING (D.A.) LIMITED.....
.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at (Hon. Mr. Justice N. Dugdale) delivered on 11th day of April, 1994

IN

H.C.C.C. NO. 5936 OF 1993)

JUDGMENT OF THE COURT

This is an appeal by the defendants against the grant by the superior court (Dugdale J), of an interlocutory injunction on the 11th day of April, 1994 restraining them from entering on to the plaintiff's land until final determination of the suit.

The plaintiff was at all material times and is the registered owner of all the piece of land known as L.R. 12180 Situated at Kasigau measuring about 35,600 acres or thereabout (the property) which was due for sale to pay off a loan owed by the plaintiff to Agricultural Finance Corporation amounting to over Shs.9m but the same could not be sold unless the defendants were stopped from carrying on their activities on the property: Otherwise the plaintiff stood to suffer irreparable loss because its land and other assets may be sold. Despite the fact that the defendants were informed of the impending sale and had been asked to stop trespassing they persisted in doing so. Hence the plaintiff filed the suit in the superior court and claimed an injunction. The application for interlocutory injunction made by the plaintiff was heard fully by the Judge who was satisfied that the plaintiff established a prima facie case with a reasonable probability of success and that the plaintiff would suffer irreparable loss unless the injunction was granted.

The learned Judge was of the view that the evidence showed no arguable case for the defendants. Having considered the evidences ourselves and the submissions of Mr. Odero on behalf of the appellants we are satisfied that there was no defence to reckon with. In our judgment no defence was put forward sufficient to show that there was any relevant issue to be tried. Prima facie the plaintiff is entitled to an injunction to restrain trespass on its land. The defendants had been granted a licence which had expired and there was no evidence of any renewal of such licence. Upon the plaintiff withholding his consent the defendants were clearly trespassers. The law is, we believe, quite properly laid down in the passage in SALMOND ON TORTS 17TH Edn., at p.74;

“Under a bare licence no interest in property passes:

the licensee is simply not a trespasser. A licence of this kind may be either gratuitous or contained in a contract for valuable consideration: in either case at Common law it was revocable at the will of the licensor and was therefore no justification for any act done in exercise of it after revocation. This was laid down in WOOD V. LEADBITTER and emphatically reaffirmed by the Court of Appeal in THOMPSON V. PARKIf, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law trespasser or other wrongdoer..... A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term.”

In the circumstances and, the rule making decision of GIELA –VS- CASSMAN BROWN & CO. LTD 1973 EA 358 having been cited to him, the Judge granted the application for the injunction. The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.

Since the grant of the injunction is discretionary this court would not normally interfere with the exercise of that discretion. The circumstances in which this court will disturb the exercise of a discretion of a trial judge were stated by the Court of Appeal for East Africa, in the case of MBOGO –VS- SHAH (1968) E.A. 93. In his judgment Sir Clement de Lestang V.P. said at page 94:-

“I think it is well settled that this court will not interfere with the exercise of its discretion by 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 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.”

Applying these principles to the present case we are not persuaded that the learned Judge was wrong or had in any way misdirected himself or acted on matters on which he should not have acted upon or that he failed to take into consideration matters which he should have taken into consideration. Having carefully considered the material before us we are satisfied that this is not one of those cases where we would interfere with the exercise of discretion by the judge. We are satisfied that having regard to the circumstances of the case he was plainly right.

Accordingly and, for the reasons above stated, the appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 13th day of November, 1995.

J.M. GACHUHI

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR