REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 48 OF 2014

(An appeal from the Ruling and or order of C.M. Maundu SPM in Maua PMCC No. 252 of 2011 read on 3/12/2014)

BERNARD KIBE KIGUCHWA (*Suing as the Legal*

Representative of the Estate of the late

STEPHEN KAGUCHWA KIBE) ……..…APPELLANT

VERSUS

JOSEPH KOBIA NGUTHARI ……...1ST RESPONDENT

HON. ATTORNEY GENERAL……..2ND RESPONDENT

JUDGMENT

1. This appeal arises out of an order made by the Magistrate's court on **2/12/14** allowing the 1st respondent's application dated **24th September 2014** which had sought an order of temporary injunction restraining the appellant and anyone acting at his behest from destroying property, evicting and/or in any way whatsoever interfering with the user and possession of **Parcel Number 177 Lower Athiru Gaiti B Adjudication Section** pending the hearing and determination of the suit.

2. The appellant being dissatisfied with the decision of the Magistrate allowing the 1st respondent's application, filed a memorandum of appeal dated **17/12/2014** in which he raised the following grounds:-

1. That the Learned Trial Magistrate erred in law and in fact in failing to analyze the facts presented before court in his ruling therefore coming to wrong decision thus a miscarriage of justice was occasioned.

2. That the learned Trial Magistrate erred in law in in failing to put into consideration that the appellant was in occupation of the suit land even before the commencement of the suit.

3. That the learned Trial Magistrate erred in law in failing to consider the response of the plaintiff to the said application when actually it's the appellant who had sued the respondent in the lower court thus occasioning a miscarriage of justice.

4. That the learned Trial Magistrate erred in law and in fact in granting orders that were final and substantial in nature against the appellant who was the plaintiff in the lower court in absence of a counter claim by the defendant therein.

5. That the learned Trial Magistrate erred in law and in fact in granting orders that were prejudicial to the appellant.

6. That the Learned Trial Magistrate erred in law and in fact in giving orders that was unwarranted because the respondent never met the threshold and the principals required for granting an injunction.

7. That the Learned Trial Magistrate erred in law and in fact in giving orders against the appellant that were final and substantive in nature that would lead to eviction of the appellant from the suit land.

8. That the weight of evidence was in favour of the plaintiff.

3. The appellant prays for the appeal to be allowed, the ruling/order read on **3rd December, 2014** be set aside with costs to the appellant.

Submissions of the Parties

4. The appellant filed his submissions in the appeal on **9th August, 2018**. I have perused through the record and found no submissions filed on behalf of the respondents.

5. I have considered the filed submissions.

Determination

Issues for Determination

6. In summary, the grounds put forward by the appellant, in my view, translate into the following issues for determination in this matter:

> ***(a) Whether the learned magistrate failed to properly analyze the facts and by so doing misled himself into ruling against the weight of the evidence.***
>
> ***(b) Whether the learned Trial Magistrate erred in law and in fact in granting orders that were final and substantive in nature, and which would lead to eviction of the appellant against the appellant in absence of a counter claim by the defendant therein.***
>
> ***(c) Whether the respondent met the threshold required for granting an injunction.***

(a) Whether the learned magistrate failed to properly analyze the facts and by so doing misled himself into ruling against the weight of the evidence

7. In his application dated **24/9/2014** before the trial court the 1st respondent stated that he is the owner of the suit land; that he has always been in exclusive quiet and peaceful enjoyment of the suit land, and that the appellant and his agents had began interfering with the suit property without any legal justification.

8. In his supporting affidavit the 1st respondent exhibited as **JKN1** a copy of his letter of confirmation of ownership dated **11/9/2013**, a copy of an agreement dated between him and one Stephen Kibe Kaguchwa **(JKN2)** copies of police order to arrest **(JKN3)** and agricultural officer's damage reports (**JKN5** and **JKN6** respectively.)

9. The 1st respondent deponed that he purchased the land in **2007** and took immediate possession and planted *miraa* and avocado trees and subsistence crops thereon; that he has built a house and a store on the land and also installed piped water; that Stephen Kibe Kaguchwa had filed an application for injunction against him which was dismissed upon the court finding that the 1st respondent is in possession of the suit land; that the appellant took over the case upon the demise of Stephen Kaguchwa Kibe and he started threatening the 1st respondent and his workers against utilizing the land and by the use of goons caused malicious damage to the 1st respondent's property, and that the appellant had tried to fence off the suit land and demolish the 1st appellant's property thereon. And the threats and damage had been reported to the police,

10. The appellant had opposed the application vide his replying affidavit dated **3/10/2014** and further replying Affidavit dated **23/10/2014**.

11. In his replying affidavit filed on **3/10/2014** the appellant deponed that **parcel number 177** is different from parcel number 116 which appeared to be the subject matter of the agreement the 1st respondent exhibited as **JKN1**.

12. The appellant accused the 1st respondent of being evasive in his pleadings as to which plot he was in occupation of. He averred that though the Maua District Land Adjudication Office had written **JKN2**, he had a letter from the Kindani Location Chief dated **26/9/2014,** whose office is **300** metres from the suit land, confirming that the appellant was in peaceful occupation or possession of **plot number 116.**

13. It is necessary to examine briefly what the appellant's and the respondents' respective cases in the pleadings before the trial court were.

14. The appellant's case in the plaint before the lower court is that the sale agreement between the 1st respondent and his father was not honoured by the former who failed to pay the full consideration as agreed, and that in **2011** the 1st defendant colluded with the 2nd defendant to fraudulently, illegally and arbitrarily excise and transfer **3** acres from **Plot No. 116** despite that breach. He sought that excision and transfer to be declared illegal by the trial court and an order re-transferring the land back to him, an injunction and costs of the suit.

15. The 1st respondent filed a defence which was a general denial of the claim on **30/11/2011** which he amended on the **8/9/2014**, to include a counterclaim against the appellant. In the counterclaim the 1st respondent alleged interference with his occupation of **Plot No. 177** and sought an injunction against the appellant.

16. The 2nd respondent filed a defence dated **30/4/2014,** denying the claim. However in that defense, no intimation was made as to the number of the plot occupied by either the appellant or the 1st respondent.

17. In the appellant's reply to defence and defence to counterclaim filed on **3rd October 2014** the appellant averred that: his late father never transferred Plot No. 177 to the 1st respondent; that there was fraud; that Plot No. 116 is distinct from 177; that all the developments on

Plot No. 116 belong to the appellant and the 1st respondent has never been given possession. He also claimed that criminal proceedings had been maliciously instituted against him to frustrate him.

18. An examination of the record shows that the 1st respondent's position is that Plot No. 177 was excised from Plot No. 116 and that the two now share a boundary.

19. The 1st respondent avers that the appellant occupies Plot No. 116 while he has been in occupation of Plot No. 177. The appellant's position is that he occupies the entire plot of 1.5 acres and Plot No. 177 does not exist on the ground. He alleges that the 1st respondent organized a gang that went to attempt to evict the appellant and applied for the court to visit the site.

20. In respect of the earlier application by the deceased in the suit the appellant's counsel submitted that it merely sought restrictive orders and that due to the hostilities on the ground the 1st respondent could not reach the land. He averred that Plot No. 177 came up in the month of September 2014 after the suit was filed and defence filed, and that is why it was never included in the original defence.

21. The appellant referred the court to the consent of the land adjudication officer which referred to Plot No. 116 and maintained that the only land in existence was Plot No. 116. The date of the allocation of the number may not be consequential because what matters is that as at the time of the filing of the plaint on 3/11/2011, the appellant acknowledged that the 1st respondent had caused the 2nd respondent to fraudulently excise 3 acres from Plot No. 116 and caused it to be registered in his own name.

22. The parties are therefore in dispute over three acres. The ruling of the court dated **1/8/2012** in this matter found that the 1st respondent was in possession and that indeed the agreement stipulated that he was to take possession upon its execution.

23. When the court visited the site on **19/11/2014** it observed that the entire land was cultivated, that there was a small timber house on the land.

24. It noted down that the appellant admitted that the 1st respondent owned the timber house but that in **2013** he had evicted the 1st respondent and he was now in occupation of the land and the house.

25. The court confirmed that the appellant is in occupation of the house. The admitted eviction took place after the ruling of the court. The trial court noted as much in its ruling dated 1/12/14.

26. It is clear by now that, whether he had effected any developments on the suit land, the 1st respondent was not in occupation thereof by the time the orders of the court appealed from in this appeal. This court expresses its abysmal deprecation of the fact that the eviction was effected during the pendency of the suit but it was eviction all the same and the 1st respondent lost possession of the suit land.

27. The trial court's observation was that the eviction was unlawful as it was not sanctioned by the court, and directed the appellant to immediately cede possession of the land parcel No. 177 "to the defendants".

28. I am of the view that the ruling of the magistrate considered all relevant evidence, including the presence of the appellant on the land and the dispossession of the 1st respondent. He can not be faulted in his analysis.

29. All that is now required is to determine if he came to the right conclusion when he allowed the application on the basis that the appellant's action of eviction of the 1st respondent took place during the pendency of the suit and that his actions were unlawful as they were not sanctioned by the court. Further, whether his order that the plaintiff should cede plot number 177 to the 1st respondent was proper in the circumstances.

30. In my view, there were no orders prohibiting any eviction by the time the 1st respondent was evicted and the accomplished eviction was not made the subject of the 1st respondent's application that gave rise to the impugned orders. It also matters to me not whether the eviction issued during the pendency of the suit.

31. Though the court observed that possession was to be allowed the 1st respondent on execution of the agreement, the agreement must have had other clauses whose interplay and full import this court can not put into consideration at this interlocutory stage.

32. In my view there could be other ways of effecting a remedy under an agreement made between the parties and speculation is not necessary at this stage while evidence in the matter has not been taken.

33. In my view the magistrate appreciated all the relevant facts but made a decision that was against the weight of the evidence on the record.

(b) Whether the learned Trial Magistrate erred in law and in fact in granting orders that were final and substantive in nature, and which would lead to eviction of the appellant against the appellant in absence of a counterclaim by the defendant therein.

34. The counterclaim was filed on the 12/9/2014 while the ruling of the magistrate was read on 2/12/2014. The appellant's reply to the defence and counterclaim was filed on 3/10/2014. There is therefore no truth in the appellant's allegation in the above ground that the orders were issued in the absence of a counterclaim.

35. Concerning this issue I have analysed the plaint and the defence. The plaint seeks declarations that the excision of the 3 acres from the plaintiff's land is fraudulent and illegal. It also seeks an injunction restraining the respondents from trespassing entering into or interfering in any manner with the suit land.

36. In this case the court has established that the 1st respondent was in possession before he was evicted. The current plaintiff is not acting on his own instincts but is furthering a suit filed by his late father who knew of the extent of his dealings with the 1st respondent first hand.

37. In my view the orders that the magistrate gave were obviously not final in nature in relation the first prayer of declaration. They would also only affect the second prayer in the plaint and the first prayer in the counterclaim (for injunction against the appellant) if the 1st respondent had never been in possession of the land in the first place. Without prejudice to my findings in respect of the first issue hereinabove, there would have been a suit pending to be determined even after the orders were made. This ground must therefore fail on both limbs.

(c) Whether the respondent met the threshold required for granting an injunction

38. It has already been indicated that there were no orders halting the eviction of the 1st respondent from the suit land by the time he was evicted. However he lost possession of the suit land before the application that gave rise to the impugned orders was filed.

39. The 1st respondent must have known that based on the fact that the he was not in possession of the suit land any longer, by whatever means he had lost possession, had an uphill task of establishing that he deserved an injunction as prayed in his application.

40. He went around this problem by concealing the fact that he had been evicted. His application was therefore defective ab initio first, for want of disclosure of the accomplished eviction, and second, for want of prayers in his application that would have specifically addressed that eviction.

41. How could an eviction be injuncted when it had already happened? How could possession and user of the suit property be deemed to be peaceful while the 1st respondent no longer has such possession? How could destruction of property be prohibited while it had already happened? Of course these appear harsh questions to enquire of a party who is looking up to this court for some form of relief, but the law is that the threshold for the grant of injunction must be achieved before any order of injunction may be granted.

42. The 1st respondent tried to bolt the stable after the horse had bolted. He did not deserve the orders sought as he had not attained the threshold. The court established all the relevant facts of dispossession but nevertheless granted him the orders, and that must be reversed in this appeal.

43. In the final analysis I find that the appellant's appeal is successful and I allow it. The ruling and order of the magistrate in read on 3rd December 2014 is hereby set aside and the 1st respondent's application dated in that suit is dismissed with costs. The 1st and 2nd respondents shall also bear the costs of this appeal.

Dated, signed and **delivered** at **Meru** this **1st** day of **March, 2019.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE