



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 26 OF 2017

JAPHETH SOMBE MUTUNDU.....APPELLANT

VERSUS

NANCY KANENE MANUNDU.....RESPONDENT

(Being an Appeal from the Ruling of Principal Magistrate's Court at Kithimani in Civil Case No. 288 of 2015 delivered on 16th December, 2015 by Hon. G. Shikwe – RM)

JUDGMENT

1. This Appeal is in respect to the Ruling of Hon. Shikwe in Kithimani PMCC No. 288 of 2015 delivered on 16th December, 2015. In the said Ruling, the learned Magistrate allowed the Respondent's Application for injunction dated 16th October, 2015.

2. In his Memorandum of Appeal, the Appellant averred that the learned Magistrate erred in law and fact when he granted injunctive order over land known as Yatta/Mathingau/2386 pending the hearing of the suit; that the learned Magistrate erred when he held that the Respondent had a prima facie case with chances of success and that the learned Magistrate erred when he made a finding that the mandatory provisions of the law could only be canvassed and determined at trial. The Appeal is seeking for setting aside of the Ruling of 16th December, 2015 and for the dismissal of entire suit.

3. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that when he responded to the Respondent's Application dated 16th November, 2013 and in his Defence, he raised serious points of law, which included the want of Grant of Letters of Administration to the Estate of the late Mutundu Mbugua Muthengi and the non-compliance with the provisions of Section 38(1) of the Land Act, Section 36(1) of the Land Registration Act and Section 45 of the Law of Succession Act on the part of the Respondent.

4. Counsel submitted that the legal points that the Appellant raised ought to have determined both the Notice of Motion and the main suit and that those preliminary points of law were never determined by the learned Magistrate.

5. In her submissions, the Respondent's advocate submitted that the Respondent's husband was the Appellant's nephew; that both the Appellant and the Respondent's husband settled on the suit land which was registered in the name of the Appellant's father and that Respondent's late husband was buried on the suit land when he died in the year 2015.

6. According to the Respondent's counsel, the suit in the lower court was filed by the Respondent when the Appellant started harassing her after the demise of her husband and that the Appellant is not the registered proprietor of the suit land.

7. The Respondent's counsel submitted that the Agreement that the Respondent relied upon in the lower court was signed in 1986; that the Land Act was not in force then and that the points raised by the Appellant are not pure points of law.

The Respondent's counsel submitted that there was no dispute that the Appellant lived on the suit land and that the Respondent established a prima facie case with chances of success in the lower court. The Appellant filed a Reply to the Respondent's submissions which I have considered. I have also considered the authorities that were filed by both advocates.

9. The suit in the lower court was commenced by the Respondent by way of a Plaint dated 13th October, 2015. In the Plaint, the Respondent alleged that after the death of her husband, the Appellant, who is her late husband's uncle, started harassing her and

threatening to evict her from her matrimonial home which is on the suit land. The Respondent sought for a permanent injunction restraining the Appellant from interfering with her access, use and possession of the suit land. The Respondent filed an Amended Plaint on 6th October, 2015 which is the same day that she filed the Amended Notice of Motion dated 6th November, 2015.

10. In the Amended Notice of Motion dated 6th November, 2015, the Respondent prayed for the following reliefs:

- a. ***That the Respondent, his agent and/or servants be restrained from interfering in any manner with the Applicant's access, possession and use of her matrimonial home situated in part of L.R No. Yatta/Mathingau/2386 pending the hearing and determination of this suit.***

b. That costs of this Application be provided for.

11. The Application was premised on the grounds that the Respondent buried her late husband on the suit land; that she has been living on the suit land without any problems until sometimes in November, 2014 when the Appellant started claiming that she was not a lawful wife of the deceased and that the issues that the court was to determine was whether the disputed plot is the Respondent's matrimonial home or not.

12. In his Replying Affidavit, the Appellant deponed that the Respondent was never married to his late nephew; that his late nephew was buried on his late father's land; that it is his nephew's mother who put up a house for his late nephew and that the house put up by her sister (*the mother to his nephew*) has never been a matrimonial home for the Respondent.

13. The Appellant finally deponed that the alleged purchase of the suit land by the Respondent's late husband was never reduced into writing and that the Respondent's attempt to alienate his father's land is unlawful. While allowing the Respondent's Application for injunction, the learned Magistrate held as follows:

“The only question in my mind right now is suppose the Applicant is proven right at the end of the hearing, will she be adequately compensated by an award of damages. The answer must be in the negative since she claims the portion of land as matrimonial property where she has lived with her departed spouse who is now buried there.”

14. The trial court went further to hold that the Applicant has a prima facie case with a probability of success. In the said Ruling, the learned Magistrate observed, and correctly so, that the principles for granting of interlocutory orders have been set out in the ***Giella Versus Cassman Brown case***, which are: The Applicant has to establish a prima facie case with a probability of success; where an award of damages cannot adequately compensate the Applicant; and when in doubt of the two principles, then the court has to consider the balance of convenience.

15. The learned Magistrate, while applying the above principles, exercised his unfettered discretion and allowed the Respondent's Application. In the case of ***Mbogo & Another vs. Shah (1968) EA 93 at page 95***, the Court of Appeal held as follows:

“... a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifested from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice.”

16. The above principle is applicable in the matter before me. The evidence that was before the trial court showed that the Respondent had been living on the suit land with the Appellant's nephew as a husband and wife. Until the Appellant's nephew died in the year 2015, the Appellant had never attempted to evict the Respondent and her husband from the suit land.

17. The Respondent produced in the lower court a copy of a handwritten Agreement showing that her late husband purchased the suit land on 26th May, 1986. Considering that the Sale Agreement is for 26th May, 1986, the provisions of Section 38(1) of the Land Act which requires that all transactions in respect to land must be in writing and witnessed does not apply. Indeed, the amendments that were made in the year 2003 to Section 3(3) of the Law of Contract Act are not applicable to the said contract.

18. To the extent that the Respondent claimed that she was married to the Appellant's nephew and that she has always lived on the suit land, the learned Magistrate was entitled to hold that she will suffer irreparable injury that cannot be compensated by damages if the Application is not allowed.

19. Indeed, considering that the Respondent was in possession of a purported Agreement in respect to the suit land, and in view of the fact that customary trust is one of the overriding interests over land (*See Section 28*) which the Respondent can invoke, I find and hold that the Respondent had established a prima facie case with chances of success.

20. For those reasons, I dismiss the Appellant's Appeal with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE