



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC APPEAL NO. 4 OF 2019

ELWAK WATER SUPPLY ASSOCIATION.....1ST APPELLANT

HASSAN OMAR & 16 OTHERS.....2ND APPELLANT

VERSUS

COUNTY GOVERNMENT OF MANDERA.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE, WATER, ENERGY, ENVIRONMENT

AND NATURAL RESOURCES.....2ND RESPONDENT

RULING

1. Coming up for consideration is an interlocutory appeal where the appellants are aggrieved by the ruling and orders of Hon. P.N Areri(SRM) dated 25th March, 2019 in which the learned Magistrate dismissed their application seeking temporary injunction worded as follows:-

“That the court be pleased to grant a temporary order of junction restraining the 1st and 2nd respondents, its agents, servants or repre atives from interfering with the suit property namely Plot No. 071 size 430 *360 H pending the hearing and determination of the application”

2. The Appellants being dissatisfied with the decision filed the instant appeal on the following grounds: -

1) **THAT** the learned magistrate erred in law and in fact finding against the appellants in total disregard of the evidence adduced before him which evidence amongst others a letter from the National Land Commission affirming and acknowledging that the suit property is private property that is owned and occupied by the appellants.

2) **THAT** the learned magistrate erred in law and in fact in ignoring the letter of allotment from the Mandera County Council allocating the suit property to the appellants more than two decades ago, and which allocation has never been reversed nor challenged.

3) **THAT** the learned Magistrate misdirected himself in law and fact by recognizing the illegal occupation and carrying out of activity of water supply to the residents surrounding the suit property. The said water supply was being conducted by the appellants until they were illegal and violently ejected from the suit property by the 1st Respondent without just compensation as in required by law.

4) **THAT** the learned magistrate erred in law and in fact by holding that loss of property cannot occasion irreparable damage to the appellants

5) **THAT** the learned magistrate erred in law and in fact by failing to recognize that on the basis of the documentary evidence placed before him, the appellants had established a prima facie case.

6) **THAT** the learned magistrate erred in law and fact in recognizing the activities being done by the appellants on the suit property without establishing how they got the said property.

7) **THAT** the learned Magistrate misdirected himself in law and in fact by ignoring the right of the appellant to property as enshrined in the Constitution.

BACKGROUND

The Appellants case

3. The 1st appellant alleges that it is a registered association under the Ministry of Gender Children and Social Development and that the 2nd Appellants are the members of the 1st Appellant. It is their position that the appellants are the registered owners of Plot No. 071 having been allotted the same through a letter Ref: CCM/PLT/GEN/VOLVI/46 dated 17th May, 1996. And that subsequently and with partnership with other stakeholders have been managing boreholes and upgraded the town piping system. In addition, they allege that they have built office block, toilets and it has also upgraded water tower capacity. It is their position that the appellants have heavily invested in supply of water to Elwak residents since 1995.

4. It is their case that the Respondents have unilaterally taken over their property Plot No. 071 and the management of water supply without compensating them. They further allege that the National Land Commission vide a letter dated 19th July, 2018 informed the Respondents that the Land in question was owned by the appellants.

5. Furthermore, the appellants are alleging that the procedure used by the Respondents to acquire the suit Property was outside the law as they were never involved and that the same infringes their right to property. In sum, they allege that if the orders sought are not granted, they risk losing their property and rendering their appeal nugatory.

The Respondent's case

6. The Respondents in response to the appeal filed a Replying Affidavit dated 14th June, 2019 and filed on 17th June, 2019 and their list of Authorities filed on 20th June, 2019 disputing the appellants' allegations. On their part they allege that Elwak Water supply was established in 1979 as a base camp for dam construction and bore hole drilling units for the Mandera Municipal Council water department to serve the unit huts occupied by the council's field staff, and that to date the percussion drilling is still on the hut.

7. In addition, they allege that the subject bore holes were drilled by the Ministry of Water in 1985 as sited by the UNCHCR to assist somali refugees and communities residing in Elwak, Lafey, Guticha and Wargadud. They denied that the appellants have been undertaking supply of water to Elwak residents, arguing that the role of supplying water under the Constitution is a devolved function under Section 11(b), Part 2 of the Fourth Schedule of the Constitution which mandates the 1st Respondent with managing water and sanitation services.

8. It is their position that the suit property is registered in favour of the Ministry of Water and the same has been reserved for supply of water to the residents of Elwak town and that the 1st Respondent is the registered owner of the suit property, in support thereof they produced a deed plan.

9. Further, the Respondents allege that the Appellants documents produced as prove of ownership are forgeries as they were not issued by Mandera Municipal Council and that at the time they were issued in 1996, Elwak did not exist as a district unit.

10. Furthermore, the Respondents allege that the appellant application is seeking an injunction against the government and that this court has no jurisdiction to grant the same under section 16 of the Government Proceedings Act. And that if this court was to find that it has the jurisdiction, then it should exercise its discretionary power by denying the sought orders as it fails to meet the grounds set under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 as the public will suffer substantial loss as the orders will stall pending water projects initiated on the suit property which is 80% complete.

11. Moreover, the Respondents allege the Instant application has been filed two months after the delivery of the impugned ruling and therefore there has been inordinate delay on the part of the appellant which is inexcusable, adding that the order dismissing the application is a negative order which cannot be stayed.

SUBMISSIONS

12. The appellants filed their written submissions dated 8th July, 2019 and filed on even date. They identified and addressed four issues, being(1) whether this court should grant the stay orders(2) who is the right owner of the suit property plot No. 071, (3)whether respondents are justified to compulsorily acquire the suit property without compensation and (4) whether in the interest of justice the court ought to issue an injunction against the Respondents.

13. On the first issue as to whether this Court should grant stay of the ruling delivered on 25th March, 2019 by Hon. P.N Areri at Mandera, the appellants submitted that their application meets the grounds envisaged under Order 42 Rule 6 sub rule which provides that no stay of execution shall be granted unless the court is satisfied that substantial loss may result and that the application has been made without unreasonable delay.

14. In regard to substantial loss, the appellants submitted that they have invested heavily in the supply of water to the residents of Elwak since the year 1996 and have managed with the help of UNCHCR to build two water tanks with capacity of 15000M and 90000m specifically to supply water to the residents in accordance with conditions of allotment.

15. Additionally, they submitted that they have built infrastructure in the property such as office block and toilets and they managed to connect over 600 households with piped water, where they have been charging Kshs.200/= per household, which moneys the submitted have been sustaining them and paying they life necessities including school fees to their children. Further, they disputed the Respondents allegations that their documents are forgeries stating they have not produced any evidence to that effect.

16. On the second issue as to who is the rightful owner of the suit property, the appellant has submitted that they were allotted the said property by the defunct Mandera Municipal Council, which position was confirmed by the National Land Commission vide a letter dated 19th July, 2018. It is their submission that they complied with the conditions of allotment and therefore they are the true owners of Plot No. 071.

17. In response to the Respondents allegations that the application was not filed within reasonable, the appellants submitted that under section 79G of the Civil Procedure Act, an appeal from subordinate court ought to be filed within 30 days and in this case they submitted their appeal was filed within the 30 days set by law.

18. In respect to the third issues raised by the Appellant as to whether the Respondents are justified to compulsorily acquire the appellants land without compensation, the appellants submitted that the Respondents action breaches Article 40 of the Constitution, section 7, 107 and 110 of the Land Act, as the Respondents in taking over the appellants land failed to follow the set procedure for compulsory acquisition of land.

19. In regard to the final issue as to whether the interest of justice favours the issuance of injunction against the Respondents, the appellants submitted that they have been divested of their land by the Respondents from their year 2016, arguing that they are the rightful owner of the suit land and if the court does not issue the sought injunction, they are likely to suffer irreparable damage if the respondents cannot be barred from interfering with their property. In this regard they rely on the following authorities of **James Wahome Ndegwa & 2 Others v Kenya Urban Roads Authority & Another (2018)Eklr** and **Mrao Limited vs First American Bank of Kenya Limited & 2 Others(2013)eklr** .

ANALYSIS AND DETERMINATION

20. In **American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1** Lord Diplock in respect to the role of the court on appeal regarding interlocutory stage such as the instant appeal on temporary injunction held that:-

“It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

21. The Court of Appeal expressed a similar view in **Mbuthia vs Jimba Credit Finance Corporation & another [1988] KLR 1** held that:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”

22. It is apparent that the appellant in this appeal has sought to address other matters that extend beyond the parameters of this appeal, he has sought this court to make a determination on the ownership of the subject land Plot No. 071, however, that is an issue to be determined upon hearing of the parties and determination of the suit on merit. The relevant issue in this appeal is on the interlocutory application regarding a temporary injunction sought by the appellant before the lower court.

23. The instant application is challenging the Learned magistrate ruling dismissing the appellant application seeking interim injunction, and therefore there is only one issue for determination, which is as to whether this Court ought to interfere with the lower court discretion dismissing the applicant application.

24. In **Mbogo and Another vs. Shah [1968] EA 93** the Court of Appeal in this regard stated thus:

“...that this Court will not interfere with the exercise of...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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

25. Similarly, the Court of Appeal also in **Carl Ronning vs Societe Naval Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1** held that the superior court will not interfere with exercise of discretion by the lower court unless satisfied that the court misdirected itself on law; or misapprehended the facts; or took account of considerations that it should not have taken into account; or failed to take account of considerations that it should have taken into account; or the decision is plainly wrong.

26. In view of the above the question before this court is as to whether the circumstances of this case warrants this court to interfere with the Lower Court exercise of its discretion. In exercising its discretion, the lower court was duty bound to consider whether the appellant met the conditions for the grant of a temporary injunction.

27. The Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004** in this regard held that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be

compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

28. Consequently, a look at the record before this court and the appellant assertions, the main issue based on the pleadings presented by the parties is who the owner of Plot is. No. 071. Each party presented their case. Therefore In keeping with the principles in ***Giella vs Cassman Brown & Co Ltd [1973] E.A 358***, all the court was required to do at that stage was to satisfy itself if either party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court was to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the appellants or with the respondents.

29. In this regard, the Court of appeal in ***Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR***, stated that:

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

30. The applicant herein has tendered documents with a view of establishing ownership of the suit property, thus driving towards establishing a prima facie case, however it is notable that a prima facie case is not sufficient on its own to warrant the grant of a temporary injunction, be as it may, the appellants in my view can be adequately compensated by way of damages and they cannot be said to suffer irreparable loss.

31. Furthermore, the appellants have submitted that they have been divested of their land by the Respondents from the year 2016, implying that the balance of convenience lies in favour of denying the orders sought, as the said property is currently in the hands of the Respondents. Their main claim in this matter is that the Respondents acting on behalf of the state exercised their power of eminent domain and took the appellants land without compensation. In sum the appellants seems to be claiming compensation and therefore in the circumstances it’s not a proper case to issue the sought injunction.

DECISION

32. In view of the fact that the Respondents have been in possession of the suit property since the year 2016, a fact admitted by the Appellants, this court therefore in exercise of its judicial discretion finds no merit in the appeal and that there is no compelling reason to disturb the lower court exercise of its discretion. The only way to serve justice to the appellants is an expedited hearing of the matter. Each party to bear its costs.

Read and delivered in the Open Court this 29th day of July, 2019.

E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Kilenyet for the Applicant
2. Respondent/Advocate – Absent
3. Court Clerk: Taib