



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL NO. 1 OF 2017**

**(Formerly Kisii High Court Civil Appeal NO. 1 OF 2007)**

**THE AGA KHAN FOUNDATION.....APPELLANT**

**-VERSUS-**

**NURBANU MADATALI SHIVJI JAMAL.....RESPONDENT**

***(Being an appeal from Ruling and Order dated 26<sup>th</sup> January 2006 by Honourable C.A S Mutai, Senior Resident Magistrate (as he then was) in Homa-Bay Senior Resident Magistrate's court Civil Suit Number 7 of 2006 delivered on 24 September, 2008.)***

**JUDGMENT**

**A. Introduction**

1. On 27<sup>th</sup> January 2006, one Nurbanu Madatali Shivji Jamal (the respondent herein) originated a suit by way of a plaint of even date and amended on 24<sup>th</sup> February 2006 at the trial court to contest the Appellant's move to sell LR NO. 1432/7 (Hereinafter referred to as "the suit land"). It is her case that she is entitled to the suit land in equity since it had been apportioned and registered in the name of Appellant by her (respondent's) father –in law, Shivji Jamal Chandani (Chandani herein) to be used as a Mosque. The respondent further argues that the intended alienation of the suit land by the Appellant would render her together with the rest of her family members and Ismailia faithfuls without a mosque or any other place for prayer.

2. The respondent asserts that the suit land is registered in the Appellant's name as a lessee only. That the respondent has been paying rents, rates and other outgoings to the relevant authority. So, she is seeking a declaration, a permanent prohibitory injunction, costs of the suit land other alternative relief against the Appellant.

3. Simultaneously filed with the plaint, was the chamber summons application of even date under certificate of urgency. The said application is the subject of this appeal. In the application, the respondent sought the following orders:-

**a) "That the Honourable court be pleased to issue an interim order of temporary interlocutory injunction pending the hearing of this application inter-partes and for that purpose, the court to dispense with the appearance of the defendant in the first instance.**

**b) The Honourable Court be thereafter pleased to issue an order of temporary injunction to restrain the defendant or anybody deriving power or title through him from alienating the land reference No. 1432/7 or any property thereon until this suit is heard and finalized.**

**c) The costs of this application be costs in the cause."**

4. On 24<sup>th</sup> September, 2008, the trial court allowed the said application thus precipitating this appeal.

**The Appellant's Case**

5. The Appellant's grounds of Appeal in the memorandum of appeal dated 16<sup>th</sup> October 2008 and filed in court on 21<sup>st</sup> October 2008 are as hereunder;

**1. "THAT the Respondent had absolutely no Locus Standi in the matter and, hence the learned magistrate erred grossly in ruling in her favour without considering this cardinal factor. Rather, he should have dismissed the application and even the suit.**

2. ***THAT*** the principles relating to application for injunctions were sadly overlooked by the magistrate at the time of writing his ruling.

3. ***THAT*** the learned magistrate misdirected himself in taking a lackadaisical attitude towards the application for injunction.

4. ***THAT*** the ruling offends all the basic tenets of law, formulated and cemented by statutory law, equity and further grounded by relevant authorities.”

6. In its submissions, dated 9<sup>th</sup> September 2019 and filed on 16<sup>th</sup> September 2019, the Appellant made reference to the Replying Affidavit of Noor Sharif where it was denied that the suit land was purchased by Chandani from Rahim Jivraj. It was also submitted that the suit land is a distinct and separate entity from **L.R 1432/11** which was purchased the Chandani. That by an indenture made on 20<sup>th</sup> June 1911, the suit land was demised to his Highness Sir Sultan Mahammed Shah Aga Khan by King George V and from then on became the lessee. That subsequent to his death, the suit land was transmitted to the Present His Highness Shah Karim Alhussein Aga Khan through a Deed of Assent and was registered on 4<sup>th</sup> February 1963. The parcel was subsequently assigned to His Highness Shah Karim Alhussein by a Deed of Gift.

7. The Appellant argued that the Respondent had no locus standi in regard to the suit land. That as such, the trial magistrate erred in fact and in law when he held that the Respondent had religious and sentimental attachment to the land.

8. Further attack was made on the trial Court’s misapplication of the principles for granting of an injunction. The Appellant submitted that the Respondent did not satisfy the minimum threshold set out in the locus-classicus case of **Giella -vs- Cassman Brown & Co. Ltd, [1973] EA 358**, which requires that the applicant must show prima facie case with a probability of success and the likely occurrence of irreparable injury that cannot be compensated by damages. The appellant further implored the court to be guided by the Court of Appeal decision in **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others [2014] eKLR**, where the court echoed with approval the principles in **Giella -vs- Cassman Brown (supra)** as the pillars of granting of an order of injunction, interlocutory or permanent. The Court of Appeal held that the principles have to be applied as separate, distinct and logical hurdles. The Appellant further made reference to the Court of Appeal decision in **Mrao Limited -vs- First American Bank of Kenya Limited [2003] KLR** where it was held that;-

This position was crystallized in the decision in **Selle & another vs. Associated Motor Boat Co Limited & others (1968) EA 123** where the duty of the first appellate court was set out, inter alia,

**‘I ..... that this court is not bound necessarily to accept the findings of fact by the court below. .... appeal ..... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings ..... (Abdul Hammed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 270).’**

16. The Court of Appeal in **Vivo Energy Kenya Limited –vs- Maloba Petrol Station Limited & 3 others [2015] eKLR**, stated as follows:

**‘The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion ..... unless we are satisfied that the discretion has not been exercised judicially. In United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] EA 898, Madan JA (as he then was), aptly explained the essence of this approach ..... at page 908:**

17. Similarly, in the case of **Sergeant -v- Patel [1949], 16 EACA 63**, the Court of Appeal made the following observation regarding the grant of interim injunctions;

**“First the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially”**

18. In **Mrao Limited case (supra)**, the Court of Appeal did define **“a prima facie case”** in civil cases. It is well settled that in order to be granted injunctive orders, the applicant must establish the three principles established in the Case of **Giella -vs- Cassman Brown & Co. Ltd (Supra)**. It is also evident that its exercise is a discretion of a court which ought not to be disturbed by the appellate court if it was exercised judiciously.

19. In the instant case, the Appellant contends in page two (2) paragraph five (5) of the submissions that the suit land herein is separate and distinct from the one that the Respondent claims was bought by Chandani. However, gleaned from the Complaint, the Chamber Summons application and Affidavits thereof, it is evident that what is contested by the respondent at the trial Court is the suit land. It is noted, too, that in paragraph 9 (a) of the Appellant’s Statement of Defence, the Appellant denies the fact that the suit land was acquired by Chandani. In essence, the Appellant’s narrative has since mutated from the allegation that the suit land was not owned by Chandani and that it is a separate and distinct entity from the one owned by the Respondents.

20. This court’s standpoint is that the trial Court issued injunctive orders in order to protect and preserve the suit property pending the determination of the suit. The religious attachment of the land to the suit land as alleged by the Respondent, cannot be downplayed and trivialized as not falling within the purview of irreparable compensable damages. Additionally, the inability of the Appellant to consistently demonstrate that the suit land is a separate entity from what the Respondent got injunctive orders, lends this court to the probable conclusion that the Respondent has a prima facie case.

21. It is not lost on this court that the issues in dispute in this suit have a Constitutional bearing under **Article 32 (1), (2) and (3)** of the Bill of Rights which provides that;

**“32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.**

**(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.**

**(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion.**

22. I endorse the dicta in **Mwangi and another- vs- Mwangi (1986) KLR 328** that this dispute, can be disposed of quickly as land is an extremely important aspect of the lives of ordinary people in society. Therefore if the interlocutory orders are lifted, it is my considered assessment that this court would run a higher risk of injustice; see the **decision of Hoffman, J** in the case of **Films Role International Ltd –vs- Cannon Film Sales Ltd (1986) ALLER 772**. On the ground of balance of convenience, I do hold that the circumstances of the case tilt in favour of the Respondent.

23. In the end, having regard to the totality of the circumstances of this case, I do find that the requirements for the granting of interlocutory injunction were satisfied and that the trial court exercised its discretion judiciously in granting the same.

24. Thus, I hereby make the following final orders;

**a) The Instant appeal initiated by way of the memorandum of Appeal dated 16<sup>th</sup> October 2018, is devoid of merit and is hereby disallowed hence the Ruling and Order of the trial court delivered on 24<sup>th</sup> June 2008 be and is hereby upheld in its entirety.**

**b) In view of the age of this matter, I direct that the suit in the trial Court namely Homa-Bay SRMCC No. 7 of 2006 be heard on priority and marathon basis in the spirit of Article 159 (2) (b) of the Constitution of Kenya,2010. The suit be mentioned before the Senior Principal Magistrate, Homa-Bay Law Courts for urgent directions on 7<sup>th</sup> November,2019 and the original file be returned to that court accordingly.**

**c) Costs of the instant appeal to be borne by the Appellant.**

**Delivered, SIGNED and Dated in open court at Migori this 31<sup>st</sup> Day of OCTOBER, 2019.**

**G.M.A ONG'ONDO**

**JUDGE**

**In presence of :**

Mr. Kisera learned counsel holding brief for G.S. Okoth learned counsel for the respondent

Tom Maurice – Court Assistant