REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 01 OF 2019

JOSPHAT KINYUA KAJUI.....APPELLANT

VERSUS

STEPHEN KANYARU M'IMPWI.....RESPONDENT

JUDGMENT

(Being an appeal from the ruling delivered in Marimanti SPM CC No. 21 of 2018 on 6th December, 2018 by the Honourable P. M. Maina, Senior Principal Magistrate)

1. The Memorandum of Appeal in this appeal states as follows:

MEMORANDUM OF APPEAL

(Being an appeal from the ruling delivered in Marimanti SPMCC No. 21 of 2018 on 6th December, 2018 by the honourable P. M. Maina, Senior Principal Magistrate)

The above named appellant being dissatisfied with the said ruling appeals against the same to this honourable court on the grounds that;

1. The learned magistrate erred in law and fact in finding that the respondent had established a prima facie case against the appellant.

2. The learned magistrate erred in law and fact in finding that the respondent was entitled to an order of temporary injunction notwithstanding the appellant's continued and uninterrupted possession of the suit land.

3. The learned magistrate erred in law and fact in failing to find that the balance of convenience titled against the grant of an order of injunction.

4. The learned magistrate erred in law and fact in failing to first consider the preliminary objection raised to the hearing of the application for orders of injunction.

Reasons wherefore the appellant prays that this appeal be allowed with costs and orders that the respondent's application dated 28th June, 2018 filed in the lower court be dismissed with costs.

Dated at Meru this 8th day of January, 2019

2. The appeal was canvassed by way of written submissions.

3. The appellant's written submissions are reproduced herebelow in full without any alterations whatsoever, including correction of spelling or any other mistakes, if there are any;

SUBMISSIONS BY THE APPELLANT

Your lordship, by the memorandum of appeal dated 8th July, 2019 the appellant has challenged the interim orders of injunction issued against him in Marimanti SPMCC NO.21 OF 2018 on five grounds.

It was the appellant's case in the lower court that he was in possession of land parcel No. THARAKA/MARIMANTI/761 which fact was well within the knowledge of the respondent. The respondent admitted as much in his pleadings. He merely alleged that the

appellant entered his land in the year 2017. The objection proceedings provided by the parties showed that the respondent had never taken possession of the property even though he was awarded the same. There was evidence that the appellant had been in continuous possession of the land right from the time of adjudication.

Since the respondent knew that the appellant was in possession of the suit land he ought to have moved the court for an order of his eviction therefrom. The respondent does not seek orders of eviction in the main suit. He has all along been aware of the appellant's occupation of the land stretching back to the land adjudication process.

A final determination of ownership of the suit land in favour of the respondent was made in appeal No. 3 of 1993 and the right of appeal granted to the parties was not exercised by either of them. The award then became final and the respondent was legally bound to institute any proceedings for recovery of his land from intruders within the limits set out in the limitation of Actions Act. He all along knew that the appellant was in possession of the land but did not asserts his right to possess the land. He belatedly went to court in 2018 principally to prevent the burial of one of the sons of the appellant on the land. His claim is clearly time barred under the provisions of section 7 of the limitation of Actions Act, cap 22 of the laws of Kenya.

The status quo regarding the suit land was brought to the attention of the lower court and the court ought to have considered the same in making a decision on the application. The same should have been ordered to prevail pending the hearing and determination of the main suit.

We urge your lordship to find that orders of injunction granted by the lower court were not merited and order that this appeal be allowed with orders that the status quo prevailing prior to the filing of this suit be maintained pending the hearing and determination of the suit.

We are guided by the decision in environment and land case No. 817 of 2012.

We so humbly pray, your lordship.

DATED AT MERU THIS 23RD DAY OF MAY, 2019

GATARI RINGERA & COMPANY

ADVOCATES FOR THE APPELLANT

4. The Respondent's written submissions are reproduced in full herebelow without any alterations whatsoever, including corrections of spellings or any other mistakes, if any exist:

RESPONDENT'S SUBMISSIONS

BACKGROUND

This is an appeal from the ruling delivered by Hon. P. N. Maina, SPM in an application filed on 28th June 2019 by the Respondent herein in Marimanti SPMCC No.21 of 2018 seeking interlocutory injunctions against the appellant. The Learned Magistrate granted an interlocutory injunction restraining the appellant by himself, his agents, servants, representatives and anybody else claiming interest through him from entering into, working on, remaining on or doing any other act of interference with L.R. No. Tharaka/Marimanti/761 (the suit land). Aggrieved by the decision, the appellant filed this appeal in a Memorandum of Appeal dated 8th January 2019, challenging the interim orders of injunction issued against him on four grounds:

1. That the Learned Magistrate erred in law and fact in finding that the respondent had established a prima facie case against the appellant

2. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to an order of temporary injunction notwithstanding the appellant's continued and uninterrupted possession of the suit land

3. That the Learned Magistrate erred in law and in fact in failing to find that the balance of convenience titled against the grant of an order of injunction

4. That the Learned Magistrate erred in law and in fact in failing to consider the preliminary objection raised to the hearing of the application for orders of injunction.

On 8th May 2019 when the matter was coming up for mention to confirm filing and service of supplementary record of appeal, parties took directions that the appeal be disposed by way of written submissions and it is by these directions that we herewith wish to tender our submissions for and on behalf of the Respondent.

ANALYSIS AND LEGAL PRINCIPLES APPLICABLE

The main issue for determination my Lord, as summed from the grounds put forward in the Memorandum of Appeal, is whether the Learned Senior Principal Magistrate properly addressed himself to the law when granting the Respondent's application for temporary injunction. The

power of the court to grant an order for an interlocutory injunction is discretionary. The Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) Eklr*** reiterated its decision in ***Carl Ronning v Societe Navale Chaugers Delmas Vieljeux (The Francois Vieljeux) (1984) KLR,*** that an appellate court may only interfere with the exercise of judicial discretion if satisfied either;

a. The judge misdirected himself on law, or

b. That he misapprehended the facts, or

c. That he took account of considerations of which he should not have taken into an account, or

d. That he failed to take account of consideration of which he should have taken an account, or

e. That his decision, albeit discretionary one, was plainly wrong

The appellant herein has to show that the Learned Magistrate failed to consider or properly apply the legal principles applicable for the grant of an order of an interlocutory injunction. The principles were clearly spelt out in the celebrated case of ***Giella v Cassman Brown & Co. Ltd (1973) E.A 358*** and require that an applicant seeking an order for an interlocutory injunction must establish:

1. That the applicant has a prima facie case with a probability of success;

2. That if the temporary injunction is not granted the applicant stands to suffer irreparable harm for which damages would not be an adequate remedy; and

3. ***If in doubt, the court will decided the application on the balance of convenience***

Guided by the above principles, and having read the Memorandum of Appeal and the written submissions filed by the Appellant, we wish to submit on the requirements of the law on the following critical points:

1. Whether the Learned Magistrate erred in law and fact in finding that the respondent had established a prima facie case against the appellant

2. Whether the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to an order of temporary injunction notwithstanding the appellant's continued and uninterrupted possession of the suit land

3. Whether the Respondent demonstrated that he would suffer irreparable loss if an order for injunction was not granted

4. Whether the Learned Magistrate erred in law and in fact in failing to find that the balance of convenience titled against the grant of an order of injunction

5.Whether the Learned Magistrate erred in law and in fact in failing to consider the preliminary objection raised to the hearing of the application for orders of injunction.

Whether the Learned Magistrate Erred in Law and in Fact in finding that the Respondent had established a Prima Facie Case against the Appellant

The appellant contends that the Learned Magistrate erred in law and fact in finding that the respondent had established a prima facie case against the appellant. However, the appellant in his submissions did not address this ground of appeal to establish how the Learned Magistrate erred in reaching this finding; neither did he attempt to show that the Respondent had not established a prima facie case with a probability of success.

In ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (Supra)*** the Court of Appeal defined a prima facie case as follows:

"So what is a prima facie case" I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

The respondent's case is that the appellant has trespassed upon his land parcel No. Tharaka/Marimanti/761 and interfered with the respondent's use and access to the land. The respondent annexed a certificate of official search in his list of documents to the plaint and in the application for injunction showing that he is the registered owner of the suit property. Being a first registration, the respondent, by virtue of Section 27 of the Registered Land Act has absolute ownership/title to the property. This was illustrated in ***Gio-Fo Investment Limited V Martini Charo Masha Mwanduka& 4 Others (2006) eKLR,*** where the Court held;

"That registration by dint of Section 27 of the Registered Land Act vested absolute ownership of the suit land in the plaintiff. The defendants, on the other hand have not shown any registerable interest in the suit property. Nothing has been annexed to their replying affidavit to suggest that their father had been allocated the land or even when such allocation took place. For the above reasons I am persuaded that the plaintiff has demonstrated that it has a prima facie case with a probability of success at the trial."

The appellant in paragraphs 3 and 4 of his statement of defence dated 18th April 2018 contained in the supplementary record of appeal denies that the Respondent is the registered owner of the suit land and claims to be the sole lawful owner and proprietor of the suit land, having gathered and been in occupation thereof for several decades. He has not attached any evidence to show that he gathered and was allocated the suit land.

At paragraph 5 of his replying affidavit sworn on 9th July 2018 contained in the record of appeal, the appellant claims that he is not aware of the respondent's alleged parcel of land No. Tharaka/Marimanti/761. He thereafter at paragraph 7 says that he subdivided the original parcels number Tharaka/Marimanti/755 into 755, 761 and 762 and does not know how the respondent got to be registered as the owner of land parcel No. 761. He then states at paragraph 9 that Tharaka/Marimanti/761 must have been fraudulently curved out of his land parcel No. Tharaka/Marimanti/755. These are very contradictory statements in which the appellant denies knowledge of the suit land and thereafter claims ownership of the same. At paragraph 14 of the same affidavit the appellant states that there has not been any claim and/or clan committee case or land adjudication case on his parcel of land No. 755 but at the same time annexes proceedings of Appeal case No. 3 of 1993 before the Minister where the said land parcel no. 755 was subject of the appeal.

It is also important to note that although the appellant had in his pleadings denied that the respondent is the registered owner of the suit land, in his submissions to this appeal filed in this court on 27th May 2019, he admits that the respondent is the registered owner of the suit property and only claims possession. Clearly, my Lord, the appellant's pleadings are riddled with outright lies, misinformation and misrepresentation facts.

Moreover, although the appellant claims that the suit land belongs to him and was fraudulently registered in the name of the respondent, the appellant did not file any counterclaim in his pleadings thereon. Instead, the appellant admits to using the suit land as the alleged lawful owner. It is surprising that a suit was filed against the appellant in respect of a parcel of land to which he claims to have lawful ownership, yet he felt no need to file a counterclaim to secure his interest in the suit land.

It is clear that the appellant never filed a counterclaim because he has no interest to protect in the suit property and he acknowledges the fact that the respondent is the rightful owner thereof. The claim for possession raised in his submissions is an afterthought by the appellant after realizing that he has no reasonable and arguable ground to challenge the grant of the injunction.

In brief my Lord, the appellant admits to using the suit property with full knowledge that the same registered in the name of the respondent without the respondent's consent and this amounts to trespass upon the respondent's land. Guided by the definition of a prima facie case spelt out by the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (Supra)***,the respondent established a prima facie case with a probability of success because it is clear that, being the registered owner, the respondent's rights over the suit property have been infringed by the appellant and this warrants an explanation or rebuttal of the issue by the appellant in full trial.

It is our submission that the Learned Magistrate properly examined the pleadings and the evidence tendered by the parties and was right in finding that the respondent had established a prima facie case with the probability of success.

Whether the Learned Magistrate Erred in Law and in Fact in finding that theRespondent was entitled to an Order of Temporary Injunction notwithstanding the Appellant's Continued and Uninterrupted Possession of the Suit Land

The appellant contends that he has been in continuous and uninterrupted possession of the suit land. This is the only ground of appeal addressed by the appellant in his submissions. We wish to point out that this is an issue that goes to the merits of the case. It would be premature to talk about the continued and uninterrupted possession of the suit land at this interlocutory stage because the matter is yet to be heard and determined on merit. Be that as it may, we wish to respond to the allegation and submit that the respondent had been in quiet use and possession of the suit land for years until 2017 when the appellant interfered by entering therein and clearing bushes. The respondent annexed exhibits marked 'SKM 5A" and "SKM 5B" in his application for injunction to show the acts of trespass by the appellant.

The appellant in his submissions herein referred to objection proceedings provided by the parties showing that the respondent has never taken possession of the property even though he was awarded the same. My Lord, the said objection proceedings are proceedings of Objection No. 67 of 1992 and the subject matter therein was a boundary dispute and not ownership/possession of the suit land. Clearly, the appellant is attempting to mislead this Honourable Court. The decision in the said proceedings was made on 20th May 1993. The respondent exercised his right of appeal in Appeal Case No. 3 of 1993 in which a decision was made on 12th February 2004.

If the appellant had been in continuous use and possession of the suit land as claimed, then he would have filed a counterclaim when the suit for trespass was filed against him but he did not do so. The appellant also never filed a claim for adverse possession. This clearly shows that he has no claim or registerable interest over the suit land.

The appellant contends that the respondent should have moved to court for an order of eviction and further that the respondent does not seek orders of eviction in the main suit. The respondent did not seek and does not seek orders of eviction because he is in possession of the suit land and not the appellant. The appellant cannot be evicted when he has not been in possession and occupation of the land. The appellant entered the land in 2017 thus necessitating the suit for trespass that was filed by the respondent. The respondent annexed a letter dated 16/10/2017 from the area chief as exhibit marked "SKM 6" showing that a report was made to the area chief in 2017 when the dispute arose.

The appellant relies on the decision in ***Abma Investments v Sarah Tumno (2012) eKLR*** to justify his claim that he has been in possession of the land. The circumstances in the ***Abma Investments*** case are distinguishable from the circumstances in the present case. In the said decision, the defendant therein had been in occupation of the suit land for 35 years hence the court found that it was fair that the defendant do continue to occupy the suit land pending the hearing and determination of the suit land. In the present suit, the appellant has not been in occupation of the suit land.

My Lord, it is our humble submission the appellant has not in any way sought to protect his alleged interest in the suit property and the

Learned Magistrate, based on the facts and evidence filed by the parties, was well-guided in finding that the respondent was entitled to an order of temporary injunction.

Whether the Respondent demonstrated that he would suffer Irreparable Loss if an Order for Injunction was not granted

The second legal principle for grant of temporary injunction is that the applicant must show that he stands to suffer irreparable loss if the orders sought are not granted. This requirement was not challenged by the appellant in his grounds of Appeal but we submit that the respondent proved that he stood to suffer irreparable loss if the order for injunction sought was not granted. The respondent is a peasant farmer who has been engaging in farming activities on the suit land as his means of livelihood for years until 2017 when the appellant interfered with the respondent's land. The respondent reported the matter as soon as possible to the area chief because he knew that he would suffer loss if the activities by the appellant were not stopped. The respondent annexed exhibit's marked "SKM 5A and SKM 5B" to show the appellant's acts of trespass as well as the letter from the area chief marked "SKM 6".

The appellant trespassed on the respondent's land and this interfered with the respondent's quiet use and possession of his land. Being a peasant farmer depending on farming as a means of livelihood, the respondent would suffer irreparable loss if the appellant was not restrained from denying the respondent use of his land. The respondent made attempts to protect his interest in the suit land without delay because he was aware that he would suffer loss if the said acts of the appellant were not stopped.

Whether the Learned Magistrate Erred in Law and in Fact in failing to find that the Balance of Convenience Titled against the Grant of an Order of Injunction

The last legal principle laid in ***Giella v Cassman Brown(Supra)*** requires that where the court is in doubt, in deciding whether to grant an interlocutory injunction or not, it should consider, on the facts of the case, whether the balance of convenience lies with the applicant or the respondent. The respondent has been in continuous use and possession of the land since conclusion of the objection proceedings and registration as the owner of the suit land. This quiet possession was interrupted by the appellant in 2017 when he entered the suit land and started committing acts of destruction. The respondent tried to settle the dispute amicably by involving the area chief but the appellant ignored the same. As shown above, the appellant took no steps to protect his alleged interest in the suit property. In the circumstances, the balance of convenience dictated that the respondent continues in possession and use of the suit land until the main suit is determined. It was therefore only fair to issue a temporary injunction restraining the appellant from interfering with the respondent's use of the suit land.

My Lord, the appellant in his submissions filed herein admits that a final determination of ownership of the suit land was made in appeal no. 3 of 1993 in favour of the respondent and none of the parties exercised the right of appeal. Clearly, the decision was in favour of the respondent and the only party who was under an obligation to exercise the right of appeal was the aggrieved party, that is, the appellant. The appellant, however, chose not to exercises this right of appeal.

The claim brought by the respondent to prevent burial of the appellant's son on the suit land was a claim to prevent an act of trespass and not a claim for the recovery of land. The said claim was well within the time limits of the Limitation of Actions Act Cap 22 of the Laws of Kenya. The appellant, instead of addressing the grounds of appeal raised in the Memorandum of Appeal, is calling this Court to delve into the merits of the main suit, and this will pre-empt the issues that need to be addressed during the hearing of the suit.

The appellant admits that a decision concerning the suit land was made against him and in favour of the respondent. He is admitting to violating orders of the court. My Lord, he who comes to equity must come with clean hands. The appellant was aware of the respondent's interest in the suit land by virtue of his absolute proprietorship but admits trespassing to the suit property. The appellant seeks a remedy that will enable him trample on the respondent's rights to his land and therefore does not deserve to be aided by this court.

We humble submit that the Learned Magistrate properly considered the facts of the case and the evidence of the parties and was properly guided in finding that the balance of convenience lied with the respondent and not the appellant and hence it was right and just to in the circumstances to grant the application.

Whether the Learned Magistrate Erred in Law and in Fact in failing to consider the Preliminary Objection raised to the Hearing of the Application for Orders of Injunction

This ground of appeal was not addressed by the appellant in his written submissions filed herein. However, we wish to submit that on 20th September 2018, the trial court noted that the appellant had filed a Preliminary Objection dated 24th August 2018 and on 27th September 2018 the court directed that the appellant's Preliminary Objection be dispensed off by way of written submissions. On 15th October 2018 when the matter was coming up for hearing, counsel for the appellant made an oral application to withdraw the Preliminary Objection and the application was allowed. There was therefore no need for the court to consider the appellant's Preliminary Objection because the same was withdrawn by the appellant before hearing.

We submit that the Learned Magistrate was right in not considering the Preliminary Objection raised by the appellant. There was no Preliminary Objection to consider because the same stood withdrawn.

CONCLUSION

Your Lordship, it is the court's decision to issue an order of temporary injunction that is the subject of this appeal and being a discretionary decision, it is only right, fair, just and in accordance with the law that this Honourable Court restricts itself only to issues relating to the said decision and ruling of the court, without going into the merits of the suit, so as not to pre-empt the issues that need to be addressed during the hearing of the suit.

The appellant, in his submissions filed herein, chose not to address the grounds of appeal raised in the Memorandum of Appeal but to address the Court on other issues of possession, use and recovery of the suit land. The appellant challenged merits of suit under the Limitations of Actions Act. These are substantial issues to be determined in the main suit and it is only fair and just that the same be addressed during the hearing of the main suit.

The main issue for determination my Lord, being an appeal against an order for temporary injunction, which is a discretionary decision, is whether the Learned Senior Principal Magistrate properly addressed himself to the law when granting the Respondent's application for temporary injunction. My Lord, it has been well-illustrated herein above that the legal principles laid down in ***Giella v Cassman Brown & Co. Ltd(Supra)*** for the grant of orders of interlocutory injunctions were correctly applied.The respondent proved that he had a prima facie case against the appellant with a probability of success. He also proved that he stood to suffer irreparable loss if the orders for temporary injunction were not granted and that the balance of convenience dictated that the application be granted in favour of the respondent. Rightly said, the Learned Magistrate properly and judiciously exercised his judicial discretion in granting the temporary injunction sought and it would only be right, fair and just for this Honourable Court not to interfere with the same.

Your Lordship, it is our considered opinion and we so submit that the Learned Magistrate was right and properly addressed himself to the law, did not in any way misapprehend the facts of the case and took account of considerations of which he should have taken into an account in finding that the respondent had satisfied the requisite ingredients for the grant of the interlocutory injunction sought.

In the upshot, Your Lordship, we urge this Honourable Court to consider these submissions and find that the Appeal is unmerited and the same be dismissed with costs to the respondent.

We have attached the following for the court's consideration.

a) ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR***

b) ***Gio-fo Investment Limited v Martin Charo Masha Mwanduka& 4 Others (2006) eKLR***

DATED AT MERU THIS 14TH DAY OF JUNE, 2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE RESPONDENT

5. I have carefully considered the pleadings and the legal authorities proffered or cited by the parties in support of their diametrically incongruent assertions. Regarding the authorities proffered by the parties, I do not find it necessary to regurgitate them as the principles they espouse have been elaborated upon in their written submissions which have been reproduced in full in the earlier part of this judgment. I have fully taken into account those authorities. However, I hasten to add that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

6. This being a first appeal, this court is entitled to look into the totality of the pleadings and filings in the lower court and then come up with its own conclusions upon which it should predicate its decision.

7. Having perused the pleadings and the ruling delivered by the lower court, I find that the Honourable Magistrate in erudite detail considered the circumstances under which prohibitory injunctive orders and mandatory injunctive orders were merited. I find no ground for this court to overturn his reasoning. In his ruling he makes a finding predicated upon the pleadings available to him that the appellant had recently trespassed upon the respondents' land. He however, also rightly, I opine, refused to grant an order for exhumation of the body of the appellants deceased son, William Mucheru Kinyua. I opine that a definitive resolution of this dispute can only be arrived at by way of the hearing and determination of this suit.

8. In the circumstances, I find that this appeal lacks merit.

9. Ipso facto, this appeal is hereby dismissed with costs to be in the main cause.

10. Orders accordingly.

Delivered in open Court at Chuka this **21st day of November, 2019** in the presence of:

CA: Ndegwa

Njeru Ithiga h/b Gatari Ringera for the Appellant

Njeru Ithiga h/b Murango Mwenda for the Respondent

P. M. NJOROGE,

JUDGE.