



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO 131 OF 2003

BIKABHAI MATHURBABHAI PATEL.....1ST APPELLANT

CYPRIAN IBURI NGARURO.....2ND APPELLANT

DR FRANK KAMUNDE MWONGERA.....3RD APPELLANT

HENRY KUTHIMA4TH APPELLANT

QUICKLINE AUCTIONEERS.....5TH APPELLANT

VS

SAMUEL NTARANGWI MBIRIGA & 7 OTHERS.....RESPONDENT

JUDGEMENT

BACKGROUND

This Appeal before me arises from the ruling of the learned trial Magistrate delivered on 28/10/2003. (Hon. N.B.K.W NYAMATE GANDAH, SRM) in Meru Law Courts. The ruling emanates from an application brought under XXXIX Rule 1 and 2 CPR (now order 40) where the applicants were seeking restraining orders against the Appellants from interfering with their businesses on plot No. Meru Municipality Block 11/50. That application was supported by an affidavit sworn by the 1st Respondent and further supported by numerous documents attached hereto. The application is opposed with a replying affidavit sworn by Cyprian Ibure on 22/9/2003.

Having considered the pleadings and the counsels submissions by counsels for the parties, the learned magistrate allowed the application on 28/10/2003. Aggrieved by the said decision, the Appellants exercised their right of Appeal on the following grounds:

1. THAT the learned Senior Resident Magistrate erred in Law and in fact allowing the Respondent 's application dated 24/9/2003 on the face of the High Court order dated 26/3/98 in Meru HCC No. 124/97 which was exhibited by the appellants as Exb. No. CIN 1 in the replying affidavit filed in opposition to the application.
2. THAT the Learned Senior Resident Magistrate erred in law and in fact in allowing the application for injunction when the Respondents case did not disclose any possibility or probability of success.
3. THAT the Senior Resident Magistrate erred in law and in fact in holding that the Respondent were not affected by the High court order dated 26/3/98 in HCC 124/97 as they were allegedly strangers and were not parties to the said suit.
4. THAT the learned Senior Resident Magistrate erred in law and in fact holding that the appellants were not entitled to distress for rent against the Respondents.
5. THAT the learned Senior Resident Magistrate erred in law and in fact in injuncting the first , second and third Appellants who are the registered proprietors of he said plot.
6. The ruling of the learned Senior Resident magistrate is against the weight of the evidence and the law.

When this matter came up for the hearing of the Appeal, the parties agreed by consent to dispose of the matter by way of written submissions. However, only the counsel for the Appellants filed their submissions on 13th June, 2017.

DECISION

I have considered the pleadings giving rise to the ruling of the learned magistrate issued on 28th October, 2003. I have also considered the arguments put forth by counsel for the Respondents and the rival submissions by counsel appearing for the Appellants. That application was brought under the current order 40 CPR seeking for injunctive orders.

From the replying affidavit sworn by CYPRIANO IBURI NGARURO and the annexures thereto particularly the order issued by Mr Justice Kasanga Mulwa(As he then was)in HCC No. 124/97, it is clear that a receiver manager namely S. K. Mburu and later Mr Henry Kuthima were appointed to collect rents in the suit property plot Number Meru Municipality/Block 11/50 until that suit is heard and determined. In a further supporting affidavit sworn on October 2003 and filed on 9/10/2003 the Respondents did not challenge the averments and the orders issued by the superior court.

The orders of the High court in HCCC No. 124/97 were clear and self-explanatory that all rent payments to be collected by an appointed receiver manager.

The respondents did not show that they have performed their obligation by paying rent to the appointed receiver manager or any other person authorized in law. Before issuing the injunction orders, the learned magistrate did not satisfy itself on the principles of injunction as set out in the *locus classicus* case of GIELLA VS CASSMAN BROWN & CO. LTD. 1973 E.A 358 as follows:

1. An Appellant must establish a prima facie case with a probability of success
2. An Applicant must demonstrate that damages is not an adequate remedy and
3. Where the court is in doubt the case may be decided on a balance of convenience.

In my view the restraining orders issued on 28/10/2003 are not guided by the principles of injunction as set out in the Giella case (supra). In the upshot, this appeal succeeds and the orders issued on 28/10/2003 are hereby set aside. The appellants shall have the costs of this Appeal. It is so ordered.

Read, delivered and signed in the open this 29th day of September 2017

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MR. E. C. CHERONO

ELC JUDGE