



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 2 OF 2018

JANE WANGARI NGENE.....APPELLANT

VERSUS

PHILIP NJUGUNA WARUTH.....1ST RESPONDENT

JULIUS KANYUGI.....2ND RESPONDENT

(Being an Appeal from the Ruling by Honourable E K Usui – SPM in Nairobi CMCC No 4995 of 2015 delivered on 7th December 2017)

JUDGMENT

1. This interlocutory appeal arises from the ruling of the Senior Principal Magistrate Court (Hon E K Usui) delivered on 7/12/2017, dismissing the appellant's application for an injunctive order. While dismissing the application, the trial court found that the appellant had failed to satisfy the criteria for grant of an interlocutory injunction. The learned trial magistrate held that, whereas the appellant had produced an agreement for sale for the suit property, dated 2013, together with a letter from the Area Location Chief and a letter from Nairobi City County Government indicating that the appellant was the owner of the suit property, the respondent had produced a lease from the City Council of Nairobi dated 27/6/2012. Aggrieved by that decision, the appellant lodged the present interlocutory appeal through a Memorandum of Appeal dated 22/1/2018 and amended on 25/1/2018.

2. The appellant raised the following grounds of appeal:

1. That the honourable learned magistrate erred in law and fact by failing to appreciate that the appellant's notice of motion application dated 23rd November 2015 met the requirements of the provisions of Order 40 rule 1 and 2 of the Civil Procedure Rules and ought to have been allowed.

2. That the honourable learned magistrate erred in law and fact by misconstruing the law and the justice of the matter in the circumstances thereof, which dictated that the suit property be secured and preserved pending the hearing and determination of the suit.

3. That the honourable learned magistrate erred in law and fact by stating that the appellant had not produced and exhibited documents to support her ownership of the suit premises when to the contrary, the appellant had annexed the following documents to her affidavit sworn on 23/11/2015 in support of the notice of motion application dated 23/11/2015;

a) Sale agreement dated 21/1/2013 between the appellant (purchaser) and the vendor Mr. John Kuria Njeri together with evidence of payment of Kshs 1,600,000/0 being the purchase price of the suit premises paid to the vendor by the appellant (purchaser).

b) A letter dated 5/8/2015 from the Nairobi City County to the Divisional Criminal Investigation Officer (DCIO) Buruburu, Nairobi, confirming that the appellant is the duly registered owner of the suit premises.

c) An Enforcement Notice from Nairobi City County ordering the demolition of the developments undertaken by the respondents in the suit premises.

In the appellant/applicant's list of documents filed in court on 24th August 2015, the appellant/applicant relied on the following additional documents in support of her case:-

a) Letter of allotment dated 9/11/1997 issued to the vendor Mr. John Kuria who sold the suit premises to the appellant.

b) Beacon certificate dated 9/11/97 issued to the said vendor, Mr. John Kuria who sold the suit premises to the appellant.

c) Rates payment receipts by the vendor, Mr. John Kuria in respect to the suit premises.

4. That the honourable learned magistrate erred in law and fact by failing to appreciate the fact that the appellant derived her title from the vendor, John Kuria Njeri, who was issued with a letter of allotment for the suit premises on 9th November 1997 much before the respondent's lease agreement issued on 27/6/2012.

5. That the honourable learned magistrate erred in law and fact by failing to appreciate that the 1st registration document that is normally issued before anything else is a letter of allotment and a lease is normally only generated after a letter of allotment has been issued and not vice versa. The respondents only exhibited a lease without the primary registration of title document that is a letter of allotment.

6. That the honourable learned magistrate erred in law and fact by failing to appreciate that by virtue of the sale agreement exhibited between the appellant (purchaser) and the vendor, Mr. John Kuria Njeri, the appellant had established sufficient interest (ownership) in the suit property and had therefore established a prima facie case.

7. That the honourable learned magistrate erred in law and fact by failing to appreciate that the custodian of the search records to the said suit property is Nairobi City County and to the extent that the said Nairobi City County had issued a letter (search record) dated 5th August 2015 confirming the appellant as the registered owner of the suit property, the same, prima facie confirmed, beyond reasonable doubt that the suit property belonged to the appellant. It was therefore a contrast and a contradiction on the part of the honourable senior principal magistrate to again find that the appellant had not established a prima facie case and had not exhibited documents to support her ownership of the suit property.

3. At the hearing, Mr. Sumba, counsel for the appellant submitted that the learned magistrate was wrong in declining to grant the injunction because the appellant had properly satisfied the criteria for grant of an interlocutory injunction in that, she had placed before the court evidence to show that she had proprietary interest in the suit property. Counsel submitted that the evidence included; a letter of allotment; beacon certificate; a sale agreement between her and one John Kuria Njeri, a letter dated 5/8/2015 from the Nairobi City County Government stating that the appellant was the owner of the suit property; and copy of an Enforcement Notice by the County Government. Counsel contended that the justice of the case dictated that the suit property be preserved pending the hearing and determination of the suit. Counsel relied on Nairobi Court of Appeal **Civil Appeal Number 273 of 2014: Hesbon Limisi v Delilah Achieng Mathews & 2 others**. The respondents did not present any submissions when this appeal came up for hearing.

4. I have considered the entire record of appeal, the appellant's grounds of appeal and counsel's submissions. The single issue for determination is whether the learned magistrate erred in the exercise of her discretion in declining to grant the injunctive orders on the ground that the respondent had leasehold documents and that the appellant had failed to prove with certainty that she owned the suit land.

5. The court is alive to the fact that this is an interlocutory appeal and the key issues in the main suit are pending determination by the trial court. When exercising interlocutory appellate jurisdiction, this court is required to exercise caution and avoid making conclusive or definitive pronouncements on key questions in the dispute because that could prejudice the parties in the trial before the subordinate court.

6. In the application leading to the impugned ruling, none of the parties presented, to the court a registered instrument of title. The appellant presented, *inter alia*, copies of sale agreement between her and John Kuria Njeri; copies of cheques of payments made to the vendor; letter dated 5/8/2015 from the chief's office – land, Nairobi City County Government; confirming that the suit property belonged to the appellant; letter of allotment dated 9/11/1997 in the name of John Kuria; Beacon Certificate in the name of John Kuria Njeri; and ground rent invoices cum receipts in the name of John Kuria. On his part, the 1st respondent presented copies of unregistered lease dated 27/6/2012, letter dated 6/7/2015 from Director of Legal Affairs in the Nairobi City County Government; and valuation report dated 15/10/2015 showing that the value of the suit property was Kshs 15,000,000.

7. In declining to grant the application, the trial court stated thus:

"I find no documents that the court can say with certainty that they prove that the plaintiff owns the land. The respondent has the leasehold documents issued by the County Lands Office. From the foregoing reasons, I do not find a prima facie case with a chance of success. If there is no evidence of ownership, then it cannot be said that the plaintiff will suffer irreparably if the orders are not allowed"

8. The lease document on which the learned magistrate rested her decision was unregistered and was in the name of Kiriko-ini Investment. Secondly, no evidence of allotment had been supplied by the respondents to demonstrate origin of their claim of title. In the circumstances, I do not think the learned magistrate properly exercised her discretion. In my view, given that none of the rival documents constituted better evidence of ownership than the other the learned magistrate should have been guided by the doctrine of balance of convenience and the need to preserve the suit property within the framework of Order 40 of the Civil Procedure Rules. She therefore erred in dismissing the application outrightly.

9. In light of the above findings, I allow the interlocutory appeal herein in the following terms:

a) **The ruling/order given on 7/12/2017 by Honourable E K Usui (SPM) in Nairobi CM CC 4955 of 2015 is hereby set aside and substituted with the preservative order hereinbelow.**

b) **Between now and the hearing and determination of Nairobi CMCC 4955 of 2015, the property subject matter of the suit shall be preserved in the sense that none of the parties to the suit shall dispose, mortgage or develop the property.**

c) Each party shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF DECEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Njuguna holding brief for Mr Sumba for the Appellant

June Nafula - Court Clerk