



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 13 OF 2018

NURU ABDULLA AHMED.....1ST APPELLANT

MOHAMMED HAILE JILLO.....2ND APPELLANT

VERSUS

ABDIRASHID ADAN HASSAN.....RESPONDENT

(Being an appeal against the Ruling of the Hon. Mr. Obulutsa (SPM) as read

by Honourable E. K. Usui (Mrs) on 3rd July 2015 in Nairobi CMCC

Civil Case No. 7112 of 2014 in the Chief Magistrate Court at Nairobi).

JUDGMENT

1. This interlocutory appeal arises from a ruling delivered by Hon Obulutsa (SPM) in **Nairobi Milimani CMCC No 7112 of 2014; Abdirashid Adan Hassan v Nuru Abdulla Ahmed & 2 others**. On the face of the ruling, it was signed and dated by Hon Obulutsa (SPM) on 22/6/2015 and read on his behalf by Hon Usui (SPM) on 3/7/2015. However, the formal order extracted shows that it was signed by Hon Obulutsa on 3/7/2015. The ruling was rendered in respect of a notice of motion by Nuru Abdulla Ahmed (1st appellant) dated 22/12/2014 in which the appellant herein sought the following verbatim orders:

- 1. This motion be certified as urgent, and service thereof upon the plaintiff/respondent be dispensed with in the first instance.*
- 2. Pending the hearing and determination of this motion there be a stay of execution and enforcement of the order of injunction herein issued on the 9th December 2014.*
- 3. The order of injunction herein issued on 9th December 2014 be set aside, and be entirely discharged.*
- 4. John Ndungu, the plaintiff's process server be called for cross examination on the contents of his Affidavit of service sworn herein on 1st December 2014 on his purported service of process on the defendants.*
- 5. The plaintiff's suit herein be struck out for being an abuse of court process.*
- 6. Costs be in the cause.*

2. Dissatisfied with the said ruling, the appellant brought this appeal citing the following ten (10) grounds:

- 1. The learned magistrate erred in law and in fact when he dismissed the appellants' Notice of Motion dated 22nd December 2014.*
- 2. The learned magistrate erred in law and in fact when he allowed the respondent's notice of motion dated 28th November 2014.*
- 3. The learned magistrate erred in law when he dismissed the appellants' notice of motion dated 22nd December 2014 without taking into consideration that the respondent herein had no sale agreement between himself and the deceased registered proprietor of the suit property subject of the proceedings and thereby arrived at a wrong decision.*
- 4. The learned magistrate erred in law and seriously misdirected himself when suo motu, he vacated the order of stay issued on 22nd December 2014 without considering that the 1st Appellant has been in possession of the suit property over 12 years prior to*

the respondent lodging his claim and in disregard of the pendency of Nairobi HC ELC 1054 of 2012(OS) in which the 1st appellant has lodged a claim for adverse possession of the suit property Land Reference Number 36/11/347, 8th Street Eastleigh, Nairobi.

5. The learned magistrate erred in law and seriously misdirected himself when, against all evidence, he failed to appreciate that the orders he had issued on 3rd July 2015 literally ousted the 1st appellant from the suit property which was a breach of the Giella vs Cassman Brown principles for the grant of injunctions.

6. The learned magistrate erred in law and seriously misdirected himself when, against all evidence before him, failed to appreciate the significance of the adverse possession suit pending before the High Court in Nairobi ELC No 1054 of 2013 lodged by the 1st appellant in respect of the suit property Land Reference Number 36/11/347. 8th Street, Eastleigh, Nairobi, and thereby implicitly endorsed the plaintiff's/ respondent's default in producing a superior title, which was an act entirely against the just determination of the matter.

7. The learned magistrate erred and misdirected himself in law and in fact when he castigated the 1st appellant for seeking an order for adverse possession as against the plaintiff respondent yet the plaintiff respondent did not demonstrate that a vendor who had died over 20 years ago had executed transfer forms and a sale agreement in respect of Land Reference Number 36/11/347, 8th Street, Eastleigh, yet it was perfectly within the rights of the 1st appellant to seek such relief as he sought in the high court.

8. The learned magistrate erred and misdirected himself in law and in fact when he failed to order and/or direct the plaintiff to undertake as to the appellants' damages or otherwise impose a condition on the interlocutory orders he issued. This was an unjust act of vesting in the plaintiff property that the 1st appellant has all along been in possession - Land Reference Number 36/11/347, 8th Street, Eastleigh, Nairobi.

9. The learned magistrate erred and misdirected himself in law and in fact when he laid undue emphasis on the plaintiff's alleged "purchaser" as opposed to the 1st appellant's possessory title under adverse possession, contrary to the application in exercising his discretion.

10. The learned magistrate erred and misdirected himself in law and in fact when he failed to appreciate that the suit before him was deficient and no summons to enter appearance had ever (to date) been served on the appellants.

3. The appellants sought the following verbatim orders in the appeal:

1. The order and ruling of Hon Chief Magistrate, Honourable Mr Obulutsa, read by Hon E K Usui (Mrs) at Nairobi on the 3rd day of July 2015 in Nairobi CMCC 7112 of 2014 be entirely set aside, and in lieu thereof make an order or orders appropriate in the circumstance, granting the appellants' notice of motion dated 22nd December 2014, and dismissing the respondent's notice of motion dated 28th November 2014.

2. Any other relief that this honourable court deem expedient.

3. The costs of this appeal be awarded to the appellant

4. A brief summary of the background to the appeal is necessary. Through a plaint filed on 28/11/2014, Abdirashid Adan Hassan (the **respondent**) sued Nuru Abdulla Ahmed (1st appellant), Mohammed Haile Jillo, and Ali Abdullahi Jillo (2nd appellant), contending that he was the legal owner of Plot Number 36/11/ 347 situated in Eastleigh Section 2, 8th Street, Nairobi and that the named defendants unlawfully encroached on and trespassed on the said property. Consequently, he sought a declaratory order affirming his ownership of the suit property and a permanent injunction restraining the named defendants against dealing in the suit property

5. Together with the plaint, he filed a notice of motion seeking an interlocutory injunctive order. When the application came up for inter partes hearing, the learned magistrate was satisfied that the defendants had been served but were absent and proceeded to hear the application ex parte. In a ruling dated 9/12/2014, the learned magistrate granted the application as prayed. The application leading to the impugned ruling sought, *inter alia*, the setting aside of the said ex parte orders.

6. I have examined and carefully considered the entire record of the trial court, the tenor and import of the application leading to the impugned ruling, and the tenor and import of the ruling itself. I have also carefully considered the grounds of appeal set out in the memorandum of appeal dated 3/7/2015 and the parties' rival submissions in this interlocutory appeal.

7. At pages 1 and 2 of his written submissions dated 28/8/2018, Mr Harrison Kinyanjui, counsel for the appellants, states thus:

"The ruling of the subordinate court sought to be appealed against was vacated on 29/9/2016 by the Hon Chief Magistrate Edna Nyaloti (please see Exhibit "CAN 2" annexed to the affidavit of the 1st appellant Nuru Abdulla Ahmed, sworn on 30th September 2016 and filed herein as part of the main file). Essentially then, this appeal is spent substantially but not wholly, since the essence and result of the order appealed from was the eviction of the appellants from the suit property and it is imperative to grant the relief sought for good order and a proper record"

8. The above submission has not been controverted by the respondents. The import of the above statement is that the impugned order is no longer in force.

9. What is before court for determination is an interlocutory appeal against an interlocutory order made in the course of trial in the subordinate court. The interlocutory appeal specifically sought the setting aside of the impugned interlocutory order. It is contended by the appellants that subsequent to the filing of the interlocutory appeal, the impugned interlocutory order was set aside by the subordinate court seized of the suit. In essence then, the interlocutory order which this appeal targeted has already been set aside, hence there is nothing left to be set aside or varied by this court. What purpose then does a determination in the present interlocutory appeal serve?

10. In my view, it is not necessary to make any determination on the issues raised in the present interlocutory appeal. I take this view because firstly, the order which this appeal seeks to set aside is no longer in place. Secondly, much of what has been canvassed in this interlocutory appeal go to the merits of the parties' respective cases. It would have been necessary to evaluate them and make *prima facie* pronouncements on them if the impugned order was still in place. At this point, I do not consider it appropriate to discuss the issues in this interlocutory appeal when the impugned order has been set aside and the subordinate court is seized of the same issues. A pronouncement by this court on those issues, in the circumstances may unnecessarily prejudice the parties during trial in the subordinate court.

11. The upshot is that, in light of the fact that the impugned order giving rise to this interlocutory appeal was set aside by the trial court and there is nothing remaining to be set aside through this appeal, I hereby mark this appeal as spent. This appeal shall accordingly be marked as spent and case closed. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Onkangi Advocate for the Respondent

Roselyne - Court Clerk