REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 18 OF 2015

DANIEL KIPKEMOI SIELE.....APPELLANT

VERSUS

KAPSASIAN PRIMARY SCHOOL & 2 OTHERS..... DEFENDANTS

JUDGMENT ON APPEAL

(Being an appeal against the decision of Honourable E. Ayuka, Resident Magistrate, Kericho, in the ruling delivered on 25 May 2015 in Kericho CMCC No. 308 of 2004)

(Appeal against decision of trial Magistrate in refusing to allow an application for injunction; principles to be applied in an application for injunction; appellant suing respondents for interference with what he considered to be his land; defendants asserting that they are on their land; controversy on boundary between the two land parcels; trial Magistrate wrong in making determinate findings on the boundary within the interlocutory application and holding that plaintiff has no prima facie case; question of the boundary being complex and not wise to have decided the same in the interlocutory application; appeal allowed; order of status quo granted pending hearing of the suit.)

This is an appeal arising out of a failure by the learned trial Magistrate to allow an application for injunction that was filed by the appellant herein, who was plaintiff in the suit Kericho CMCC No. 308 of 2014. The appellant had sought an injunction, which was rejected, hence this appeal. Before I delve into the appeal, I think it is necessary that I set out a little background on the matter that was before the learned trial Magistrate.

Through a plaint filed on 5th September 2014, in the Chief Magistrate's Court at Kericho, the appellant commenced a suit against the respondents. It was his case that he is the registered owner of the land parcel Transmara/Olosakwana B/1313. In the suit, he asked for a permanent injunction to restrain the respondents from building any structures, permanent or temporary, and/or alienating and fencing the suit property or illegally acquiring the same at the expense of the rights of the appellant. Together with the suit, the plaintiff filed an application for injunction seeking to restrain the defendants from alienating and illegally fencing off the suit property pending hearing and determination of the suit. The grounds upon which the application was made were that:-

> *(a) The plaintiff is the registered owner of the suit property.*
>
> *(b) The defendants/respondents without any colour of right and/or justifiable cause have put construction materials and have already dug up the ground meant for putting up a permanent building meant to be a part of the School on the said land of the applicant and further they are*

illegally continuing putting up structures and/or buildings on the said land.

(c) That the third respondent is threatening to arrest the applicant and he is the one instigating the first and second respondents to proceed to construct buildings on the land of the applicant and they have put up a fence illegally round the said land of the applicant.

(d) That the plaintiff/applicant has a prima facie case with high chances of success.

(e) That if the orders are not granted the plaintiff/applicant shall suffer irreparable loss.

The application was supported by the affidavit of the plaintiff. Inter alia, he deposed that the respondents intended to forcefully build a school on his land and had deposited building materials. He deposed that they own the land parcel Transmara/Olosakwana/1309 where there is already built a Primary School but that they want to build a Secondary School on his land. He deposed that he reported the matter to the Chief, who is the 3rd respondent, but he threatened to arrest him and put him in jail.

The respondents filed a Replying Affidavit, sworn by one Thomas Rop. He admitted that the plaintiff is the registered owner of the land parcel Transmara/ Olosakwana B/1313 measuring 1.58 Ha. He further deposed that the 1st respondent (The School) owns the land parcel No. 1309 measuring 9.50 Ha. He deposed that the two land parcels share a common boundary. He averred that during land adjudication, the appellant had a dispute with the 1st respondent over the portion of land that is in dispute. The Land Adjudication Officer made a decision on 9 April 1993, which decision the respondents annexed. According to the respondents, the decision was that the parent parcel No. 19 be subdivided, which was done, and that is how the two land parcels owned by the appellant and the 1st respondent came to be. Mr. Rop deposed that the boundaries remain intact as adjudicated. He deposed that the 1st respondent felt the need to put up a Secondary School and the project commenced. As far as the 1st respondent is concerned, the project is within the confines of their land parcel No. 1309. It is stated that in the month of July 2014, the appellant appears to have secretly approached the District Land Survey Office, Transmara, purporting that there was a boundary dispute. The District Land Surveyor sent a letter to the respondents that he would visit the site on 12th August 2014. The respondents however, approached the District Land Registrar who nullified the letter of the District Land Surveyor and directed that the issue of the boundary is for the Land Registrar and not District Land Surveyor. He gave notice that he would visit the site on 10th December 2014. Before that date, the appellant filed the suit before the Magistrates' Court. The position of the respondents was therefore that the construction was squarely within the land of the 1st respondent and not the land of the appellant. It was their view that the appellant was attempting to reverse the position taken during land adjudication.

Faced with the rival positions, the learned trial magistrate directed that a survey of the disputed area be done. A report by the District Land Registrar, Transmara Sub-County, was filed and the same was considered in the application for injunction.

In his ruling, the learned trial Magistrate *inter alia* held as follows :-

"The applicant has not demonstrated before this court that the respondents are undertaking developments on his portion of land as opposed to theirs/the School's portion. The respondents on the other hand have insisted that they have always kept to the confines of their parcel of land and that they are only seeking to erect structures on their portion.

A perusal of the report by the Transmara District Registrar filed in Court on the 6th May, 2012 and the annexed survey report confirms that indeed the parties have for more than a decade shared a boundary along which is grown mature sisal plants and other trees. The registrar's report is categorical that the disputed portion is within the school compound on which four (4) teacher's (sic) houses and a toilet have been in existence for long.

In the circumstances therefore, it was evident that the plaintiff has failed to satisfy the settled principle for the grant of injunctive orders. Accordingly, the application for (sic) dated 4th

September, 2014 lacks merit and is hereby dismissed with costs to the defendants."

It will be discerned from the foregoing that the basis of the learned trial Magistrate's decision was that the plaintiff failed to satisfy the settled principles for the grant of injunctive orders. Earlier in the ruling, the learned trial Magistrate had properly outlined the principles for the issue of an order of injunction by referring to the case of ***Giella vs Cassman Brown (1973) EA 358*** wherein it was stated that first an applicant needs to show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

It is apparent therefore, that the learned trial Magistrate, by stating that the appellant had failed to satisfy the conditions for the issuance of an injunction, was of opinion that the plaintiff had not established a *prima facie* case with a probability of success nor had he demonstrated that he stood to suffer irreparable loss. That is the only deduction one can make arising out of the ruling of the learned trial Magistrate.

In this appeal, the appellant has raised several grounds of appeal. To avoid repeating some obvious grammatical mistakes which I have noted in the Memorandum of Appeal as filed, I have paraphrased the grounds as follows :-

1. That the learned Trial magistrate failed to find on the evidence before the court that the appellant has met the conditions for granting an order of injunction which are set out in the case of Giella vs Cassman Brown.

2. That the learned trial Magistrate erred in law and in fact by giving orders which would affect the main suit and he overlooked the submissions filed by the appellant.

3. That the learned trial Magistrate erred in law and fact when he dismissed the application dated 4 September 2014 yet the property in dispute comprises of land legally owned by the appellant.

4. That the learned trial Magistrate erred in law and fact by ignoring the appellant's statement, his affidavits, and his documents filed in court in support of his case.

5. That the learned trial Magistrate erred in law and fact by ignoring the specific provisions of the law to reach his findings which at the end of the day will render the appellant to suffer irreparable loss and damage.

6. That the learned trial Magistrate erred in law and fact in shifting the burden of proof to the appellant.

I directed counsels to file written submissions, and both Mr. Weldon Ngetich, learned counsel for the appellant and Mr. O.M. Otieno, learned counsel for the respondents, filed their submissions.

In his submissions, Mr. Ngetich *inter alia* submitted that the appellant had in his affidavit, annexed a Title Deed, a Certificate of Official Search, and a map, which showed that his land measures 1.58 hectares. He submitted that the respondents had no right to trespass into the land of the appellant. He submitted that the trial Magistrate relied entirely on the report of the Land Registrar. He submitted that the Magistrate erred by failing to realize that the acreage of the appellant was proper and that he illegally gave part of the appellant's land to the respondents. He relied on ***Cut Tobacco vs British American Tobacco (2001) 1 EA 24*** as authority that the matter needed to go for full trial. He submitted that the trial Magistrate should have helped the parties by allowing the suit to go for full trial. He was of the view that the boundary had been determined as per the Registry Index Map (RIM) and the Magistrate should not have relied on the report of the District Land Registrar. He submitted that the appellant has a *prima facie* case with a high chance of success and the ruling should be set aside.

On his part, Mr. Otieno submitted inter alia, that the dispute was a boundary dispute and that it was

incumbent upon the appellant to have the boundary determined and fixed in accordance with the provisions of Section 18(2) of the Land Registration Act before any legal proceedings could be mounted. He relied on the case of ***Wamutu vs Kiarie (1982).*** He was of the view that the appellant's case was fatal. He submitted that the appellant was relying on a fake map and that his intention was to reverse the findings of the Land Adjudication Officer. He submitted that in undertaking the survey, pursuant to the Court Order, the District Land Registrar was exercising his powers under Section 18 of the Land Registration Act. He relied on the report as establishing the true boundary of the parties.

He further submitted that the learned trial Magistrate was exercising a discretion and relied on the case of ***Mbogo vs Shah (1968) EA 93*** and ***Giella vs Cassman Brown (1973) EA 358*** as setting out the principles for the interference of a court's discretion. He submitted that the trial Magistrate exercised his discretion judiciously while appreciating the principles applicable on an application for injunction. He submitted that the appellant did not rebut the depositions in the Replying Affidavit. He submitted that the District Land Registrar's report clearly showed the boundaries and the trial Magistrate was correct in following it. He also raised several other legal points on the issue of capacity of the 1st respondent; the fact that the 3rd respondent has been sued without the Attorney General; that the classrooms were almost complete; that the balance of convenience tilted in favour of the respondent; that the appellant did not demonstrate any injury since the land in dispute had been occupied by the respondent for decades. He closed his submissions by stating that the Court should maintain the peaceful occupation and use of the two neighbouring plots, and that any error in the map should be regularized by amendment since there is a clear old boundary separating the two properties.

I have considered the matter. The first thing to appreciate is that this is an appeal against the failure to grant an injunction. It is not an appeal against the whole suit. I therefore cannot go into the issue of whether or not the Registry Index Map should be amended or whether the parties should be allowed to live in accordance with what is believed to be old existing boundaries. Those are matters for determination after a hearing of the matter on merits. I will also avoid going into the issue of capacity of the 1st respondent or any technicalities of whether or not the AG ought to have been sued. These ought to have been directed at the trial court and dealt with there. They are not the subject matter of appeal before me. As I stated, the appeal is based on an application for injunction and all that is before me is whether or not the court erred by dismissing the said application.

I mentioned that six grounds of appeal were cited. The 6th ground is that the learned trial magistrate shifted the burden to the appellant. I do not see what issue the appellant sought to push here, for it was his application for injunction, and it rested upon him to convince the Court to accord him the injunction sought. It was his burden to discharge. Save for this 6th ground, all the rest can actually be summarized into one, that is, that the Court was wrong in dismissing the application for injunction.

As correctly pointed out by Mr. Otieno, the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously. As stated by Sir Clement De Lestang at p94, in the case of ***Mbogo v Shah*** :-

> *" I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. "*

Thus in assessing this appeal, I will not supplant myself for the learned trial Magistrate. What I need to discern is whether the learned trial Magistrate made a fundamental error which may have led to the wrong conclusion being reached.

Mr. Ngetich in his submissions, was of the opinion that the trial Magistrate was wrong in relying on the report of the District Surveyor in arriving at his decision. On my part, I see no error in this approach by the Court. The Court was faced with what it thought was a boundary dispute and I see nothing wrong in seeking the input of the District Land Registrar, or District Land Surveyor, in helping resolve the matter

that was before Court. There was nothing wrong with this and I cannot fault the trial Magistrate for asking for the report.

I have read the report. In my view, that was not a report by the Land Registrar made pursuant to the provisions of 19 of the Land Registration Act (not Section 18 as submitted by Mr. Otieno) which provision empowers the Land Registrar to fix boundaries on application. The reference to the Land Registrar was made in the exercise of the discretion and inherent jurisdiction of the Court. It was similar to the Court calling a party to adduce certain evidence deemed important in the matter. The report of the Land Registrar was therefore not binding to the Court, but the Court was to be guided by it and consider it while making a determination on the application for injunction.

In the report, the Land Registrar made certain significant findings. Among these, were that the ground occupation of both the appellant and the 1st respondent was less than what the acreages in their titles reflect. According to the appellant's title, his land measures 1.58 hectares (or 3.95 acres). On the ground, if the disputed portion is included, acreage occupied by the appellant is 1.049 hectares (or 2.62 acres). For the 1st respondent, its title shows an acreage of 9.50 hectares (or 23.75 acres). On the ground, if one is to include the disputed portion, the acreage occupied is 5.73 hectares (or 14.32 acres) and if the disputed portion is excluded, the same will be 5.22 hectares (or 13.05 acres). The Land Registrar also saw what he termed as a properly hedged boundary which in his view ought to be the boundary between the two land parcels. The learned trial Magistrate clearly deemed this hedged boundary to be the ascertained boundary between the land of the plaintiff and 1st defendant and it is for that reason that the Magistrate held the view that the plaintiff could not have demonstrated a prima facie case.

I think on this score, the learned trial Magistrate erred. What the report revealed was a complex boundary dispute. I find it difficult to hold the view that the plaintiff could not have demonstrated a prima facie case when it was apparent that his occupation on the ground was less than the acreage reflected in the title and the Registry Index Map may have supported his position. He was perfectly entitled to argue that the 1st respondent could have taken over some of his land and he had a sound argument that the construction being undertaken may well be on land that belongs to him. The question of whether this land actually fell on land that belongs to the appellant or 1st respondent, was not a question that could have been determined within the interlocutory application. It is a question that had to await a hearing on merits. Considering the facts before the court, at worst, it could only be said, following the principles in ***Giella vs Cassman Brown***, that there was a doubt as to where the boundary should be, in which case, the Court ought to have relied on the balance of convenience test. In this event, the status quo was the best order to make, so that in case the plaintiff succeeded, and it could not be said with the material before court that he had no chance of success given the controversy on where the boundary should be, he would not find the property wasted by the 1st respondent.

It should never be forgotten that when faced with an application for injunction, what the court is essentially being asked to do, is to make an order on how best the subject matter of the suit ought to be preserved pending hearing of the suit. At this stage of the proceedings, the Court is not being asked to make final pronouncements on the matter in controversy. I am unable to put it in better form that was put in the case of ***American Cyanamid Co. v. Ethicon Ltd (1975) 1 ALL ER 504*** where Lord Diplock stated as follows :-

> *"It is no part of the court's function at this state of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great objection, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (Wakefield v Duke of Buccleuch). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*

The test of the relative strength of the case of the parties is of course an element to consider in making the decision of how the subject matter ought to be preserved, and at times the court has to make a preliminary assessment of the case of the parties. But in this instance, the matter was deeply contested, and as I mentioned earlier, at worst, the balance of convenience test ought to have been used, given the fact that the litigation was complex. In my view, the learned trial Magistrate proceeded as if he were determining the suit rather than an application for injunction and on that, with respect, he misdirected himself.

The approach taken by the learned trial Magistrate is not too dissimilar with that taken by the learned High Court Judge in the case of ***Cut Tobacco vs British American Tobacco (K) Ltd*** cited by Mr. Ngetich. In the matter, the Court was faced with an application for injunction on a passing off action where the facts were in contest. While ruling on the application, the learned Judge made some various determinations of fact. On appeal, the Court of Appeal held that this was erroneous and was of the view that the learned judge *"went too far in deciding a temporary injunction application as the issue before him was of fact or facts and deciding such an issue in an interlocutory application may and does hamstring the trial court."* (at p29).

It is the same scenario in our case; the learned trial Magistrate went too far in making the determination that the boundary was as demonstrated by the Land Registrar, which was a contested question of fact that could only be decided after a full hearing. He in essence usurped the functions of a trial court and in doing so, he arrived at a wrong finding. I therefore find it necessary to interfere with the manner in which the learned trial Magistrate exercised his discretion and set aside the ruling in issue.

In place of the order dismissing the application for injunction, I order that pending the hearing and determination of the suit, there be no construction on the disputed site. The status quo prevailing before the construction commenced should be maintained until the matter is disposed of.

I allow this appeal with costs.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

<u>In the presence of;</u>

1. Mr. Weldon Ngetich for the Appellant.

2. Mr. Joshua Mutai holding brief for Mr. O.M.Otieno for Respondents.

3. Mr. Kenei- court assistant