REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL NO.132 OF 2014

GEORGE WACHIRA IRAGU & 14 OTHERS…....PLAITNIFF

VERSUS

FRANCIS NJOROGE GATHURU.....RESPONDENT

JUDGMENT ON APPEAL

(Appeal on grant of an injunction; principles to be applied in application for injunction; injunction being discretionary remedy; order for appellants to move out of property pending hearing of the suit; whether this was proper; respondent being owner of property; court convinced that appellants have no claim; no reason to disturb the holding; appeal dismissed)

1. This appeal arises from the grant of an order of injunction issued in favour of the respondent, who was plaintiff in the case Nakuru CMCC No 673 of 2014. In the said case, the respondent, as plaintiff, filed suit by way of plaint, through which he pleaded that he is the owner of the land parcel Nakuru Municipality Block 5/347. He purchased this parcel of land on 6 August 2010 from one James Macharia Kanyi (Kanyi). The said Kanyi had rented out the premises to one Gideon Kimani (Kimani) who was operating a motor garage. The plaintiff gave notice to Kimani but he did not move out, which prompted the plaintiff to file a suit in this court, being Nakuru ELC No. 514 of 2013. The suit was compromised by way of consent through which the said Kimani agreed to move out of the premises. However the defendants, who the plaintiff claims were operating under the licence granted to Kimani, failed to move out. It is this which prompted the plaintiff to file the suit before the subordinate court. In the case, the plaintiff sought against the appellants, orders of permanent injunction; a declaration that the suit property belongs to him; an order of eviction; and damages for trespass and loss of use.

2. Together with the suit, the respondent filed an application for injunction. The substantive prayers in the said application were for orders :-

> *(i) That pending the hearing and determination of this suit, there be an order of temporary injunction restraining the defendants/respondents from entering, remaining and or carrying out their business on Nakuru Municipality Block 5/347.*
>
> *(ii) That there be orders restraining the defendants/respondents from re-entering LR No. Nakuru Municipality Block 5/ 347.*

These were prayers (c) and (d) of the application.

3. The appellants entered appearance, filed a statement of defence and a replying affidavit to oppose the

application. They averred that they are on the suit property operating a garage but not under the licence of Gideon Kimani. They also attacked the title of the respondent and stated that they have been on the suit property for over 12 years and therefore that they have acquired rights by prescription. They were of the opinion that the consent entered between the respondent and Kimani in ELC No. 514 of 2013 was dubious.

4. The application was heard by the learned trial magistrate, Kombo SPM, and in a ruling delivered on 5 September 2014, he was of the opinion that the applicant has demonstrated a prima facie case against the appellants. He granted prayers (c) and (d) of the application. In addition he barred the respondent from carrying out any development on the land until the suit is heard and determined.

5. It is this order that has aggrieved the appellants and which prompted them to file this appeal.

6. The Memorandum of Appeal has 5 grounds but in a nutshell, I can see that the main ground of appeal is that the appellants are of the view that the learned magistrate erred by in fact granting a mandatory injunction which order was not asked for. It is also stated that the trial magistrate erred by not finding that the appellants had a legitimate claim of an overriding interest. It is averred that the trial magistrate erred by misapprehending the principles of granting an interlocutory injunction, and principles of granting of mandatory injunctions and made a ruling that was a cocktail of both jurisdictions. In the appeal they want an order dismissing the application for injunction.

7. In his submissions, Mr. Githui for the appellants, inter alia submitted that the orders sought were prohibitory in nature and sought to have the appellants restrained from conducting business on the land but what was issued was in effect a mandatory order which restrained the appellants from entering the land and running their business therein. He submitted that in this regard, the court issued an order that was not asked for. He submitted that the applicant wanted an interlocutory prohibitory injunction but the court proceeded to issue what was effectively a mandatory injunction. He submitted that the rules are strict when it comes to mandatory injunctions and he quoted the **Halsbury's Laws of England, 4th Edition page 948**, which inter alia states that a mandatory injunction ought not to be granted in an interlocutory application in absence of special circumstances. He also referred to the cases off **Locabail International Finance Limited vs Agroexport & Others (1986) 1 All ER 901** and **Kenya Breweries vs Okeyo (2002) 1 EA 109**. He further submitted that the defendants were entitled to an overriding interest as they were in actual occupation of the property in accordance with Section 30 (g) of the Land Act.

8. Ms. Nancy Njoroge for the respondent, submitted that the appellants have no arguable appeal as they have not demonstrated any right or claim over the suit property. She submitted that the appellants are under a licence held by Kimani and that they are trespasssers having no proprietary right over the property. She submitted that they are not tenants, do not have a licence from the local authority and are not making payment to the owner of the land or the local authority. She submitted that on a balance of convenience, it is the respondent who stands to lose. She also submitted that the appellants have not furnished any security for the due performance of the decree and that if they are serious, they ought to deposit a sum equivalent to the current value of the property. She relied on the case of **Scott & Another vs Kago & 2 Others (1987) KLR 503**. I have actually not seen the relevance of this authority as the issue therein was stay of execution pending appeal to the Court of Appeal.

9. I have considered the matter herein and the submissions of counsel.

10. The application that the trial magistrate dealt with was an application for injunction sought pursuant to the provisions of Order 40 Rule 1 . An order of injunction is a discretionary remedy and it is trite law that a court will only interfere with the exercise of a discretion in exceptional circumstances. The test therefore is not whether I would have held differently if I was hearing the matter. The point was put across succinctly in the case of ***Mbogo v Shah (1968) EA 93*** where it was stated as follows by Sir Charles Newbold P, at page 96 :-

> *"… a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is*

satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

11. The same point was also emphasized in the case of ***The Despina Pontikos*** *(1975) EA 38* at page 57 where it was stated that :-

"…the issue of an injunction is an exercise of discretion and it is well established that this court will only interfere with the exercise of his discretion by the trial judge in exceptional circumstances, though it will not hesitate to do so if the exercise of the discretion has been based on any wrong principles"

12. What I really need to determine is whether the trial magistrate applied the wrong principles when dealing with the application for injunction and whether in the circumstances, he reached a conclusion which would not have been arrived at if the correct principles were applied. The starting point is to appreciate under what law the order of injunction was applied for and granted.

13. The order of injunction sought was an interlocutory injunction under Order 40 which provides as follows :-

Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

14. The principles applicable to an application of this nature were laid down in the case of ***Giella vs Cassman Brown*** (1973) EA 358. In essence an applicant needs to demonstrate a prima facie case with a probability of success, demonstrate that he stands to suffer substantial loss, and if the court is in doubt, it will decide the application on a balance of convenience.

15. In our case, the trial magistrate was of the opinion that he was dealing with a case of a mandatory interlocutory injunction, which in his view could not fall under Order 40, and he reasoned that an interlocutory mandatory injunction could only lie under Section 3A of the Civil Procedure Act, which is the general section that allows the court to issue any orders deemed fit in the circumstances of the case. He pronounced himself as follows :-

"This being the case then it follows that I would not be able to grant the prayers sought under Order 40, which does not provide for mandatory injunction. A mandatory injunction would ordinarily lie to be granted under Section 3A of the Civil Procedure Act, which provides for inherent jurisdiction of the court. The question in this application then is whether the applicant has made out a case of a temporary mandatory injunction. The threshold for granting this nature of injunction is quite high and presupposes the existence of impregnable case on the part of the applicant. I find in this application that the applicant has demonstrated on a prima facie basis, his title to the suit land. Although the respondents question the propriety of the applicant's title, by

alleging fraud in the manner it was acquired, there is nothing in their affidavit to place this contention on…"

16. I do not quite agree that a mandatory injunction cannot be issued under Order 40, for it will be seen that the court when dealing with an Order 40 Rule 1 application, has power to make orders that can restrain or stay an action so as to prevent the wasting, damaging, alienating, sale, removal or disposition of the property, as the court thinks fit. These are wide ranging powers which powers may include the order that informs one to refrain from certain property or hand over certain property for the duration of the case. It needs to be appreciated that what the court is essentially being asked to do when dealing with an Order 40 Rule 1 application, is to find the best way in which the subject matter of the suit may be preserved. The court has wide discretion and is not necessarily tied to either granting or denying the orders as drawn, and may indeed deviate, of course within certain parameters, and modify such prayers, if it is of the view that the order that it is primed to grant, is what in the circumstances, it feels is the fit one to grant. A mandatory injunction can therefore be given within the parameters of Order 40 Rule 1 if the court is of the view that this is the best order to give in the circumstances of the case. I find it difficult to hold that any mandatory injunction granted is outside the purview of Order 40 Rule 1.

17. On that aspect I respectfully do not agree with the trial magistrate.

18. That said, I do not think that the trial magistrate proceeded on the wrong principles. He did address his mind as to whether a prima facie case has been established and was of the view that the respondent has demonstrated one. The trial magistrate considered that the respondent holds title to the suit property, and that save for the allegations made by the appellants that the respondent wrongfully acquired title to the land, they really had not made any claim to the suit property. The court did not therefore see the reason why the respondent should be deprived of the use of his land as the case is going on, while at the end of the day, the appellants were not making any claim for the same. I am aware that the appellants claimed to have overriding interests based on possession, but I do not think that the mere fact that one is in possession, without having set out any claim, entitles one to state that he should not be moved out, solely because of the fact of possession alone. Neither can I bring myself to state that simply because one is in possession of a property then an order of injunction, requiring him to move out of the property, as the case was in this instance, cannot be issued.

19. That to me would be an extremely dangerous precedent, for it would mean that all that a person needs to do, is enter into possession of property, even if wrongfully, and despite having no claim over the land, or even where he has a claim that does not look sustainable, assert that because he is in possession, an order of injunction requiring him to vacate the land pending hearing of the suit cannot be issued. It would mean that a trespasser will be protected pending hearing and determination of the suit which would be repulsive to any sense of justice. It is of course different where the person in possession has a sustainable claim over the land, or at least demonstrates that he has an arguable case over the same property, which then must be tried alongside the case of the plaintiff. It is in such instances that the balance of convenience may come into play. But where there is absolutely no claim, one cannot fault the court for requiring the defendant to vacate the suit premises and hand the same over to the plaintiff for the duration of the suit. There is absolutely nothing wrong in doing that, even if at times, it may call for the eviction of the person in possession.

20. That is precisely what the court did in our circumstances. The court felt that the plaintiff had demonstrated an overwhelming case with a high chance of success and the appellants had not laid any claim over the subject property. I cannot find fault in the conclusion that the trial magistrate reached, that in the circumstances, the order that fitted the case, was for the appellants to hand over possession of the property to the respondent. In addition to finding that the plaintiff had demonstrated a prima facie case, the court was of the view that damages would not be an adequate remedy. I really do not see how it can be said that the trial magistrate proceeded on the wrong principles.

21. It should also be understood that the order was an interlocutory order, not a final order. If the appellants feel that they have a claim over the property, they can pursue it, only that in this instance, they will have to pursue it while being outside the suit land. The issuance of the injunction does not prejudice

any claim that they may have over the land.

22. I therefore do not see any substance in this appeal and it is hereby dismissed with costs. The order that will prevail as the suit is being heard is therefore the order of 5 September 2014 issued by the trial magistrate.

23. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 6th day of October 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU

In presence of : -

Mr Mwalo holding brief for Mr Githui for appellants

Ms. Nancy Njoroge present for respondent

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU