Kiptoo v Hamadi & 292 others (Civil Appeal E034 & E036 of 2021 (Consolidated)) [2024] KECA 674 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 674 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E034 & E036 OF 2021 (CONSOLIDATED)

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JANUARY 25, 2024

BETWEEN

JOHN KIMOGUT KIPTOO ..... APPELLANT

AND

KIBWANA HAMADI ..... 1ST RESPONDENT

LAND REGISTRAR, MOMBASA COUNTY & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS & 291 OTHERS ..... 2ND RESPONDENT

(An appeal from the ruling of the Environment and Land Court at Malindi (Olola, J.) delivered on 3rd June 2021 in ELC Case No. 44 of 2020)

JUDGMENT

(An appeal from the ruling of the Environment and Land Court at Malindi (Olola, J.) delivered on 28th July 2021 on the amended application dated 14th July 2021 in ELC Case No. 44 of 2020)

1. The 1st respondent, named as Kibwana Hamadi and 291 others, commenced suit by Originating Summons (O.S) being ELC Suit No. 44 of 2020 before the Environment and Land Court (ELC) at Malindi against the appellant, John Kimogut Kiptoo and the 2nd respondent, Land Registrar Mombasa County, seeking declarations that: they are entitled to all that parcel of land known as C.R. 64260 Plot Number 9911/III/MN and Plot Number MN/III/6224 by virtue of adverse possession; that the transfer and registration of the C.R. 64260 Plot Number 9911/III/MN in the name of the appellant was done unlawfully; an order that the register in respect of C.R. 64260 Plot Number 9911/III/MN be rectified to remove entries in favour of the appellant; and an injunction compelling the appellant and his family members to vacate the said properties and to stop dealing with the said properties. The 1st respondent claims that they, their parents, and grandparents have been in possession of the said

properties since the year 1920 and acquired the properties by prescription and that the appellant had the properties unlawfully transferred to him.

2. Those claims are denied by the appellant and the 2nd respondent. We will say very little on the matter as these are interlocutory appeals and the substance of the dispute is pending hearing and determination before the ELC.

3. Alongside the O.S., the 1st respondent applied, by an application dated 23rd June 2020, for an order of temporary injunction to restrain the appellant and the 2nd respondent from entering, trespassing, developing, transferring, charging, leasing or in any way interfering with the property C.R. 64260 Plot Number 9911/III/MN. The application was supported by an affidavit sworn by Kibwana Hamadi.

4. The appellant opposed that application. He deponed in his replying affidavit that he inherited the property from his father; that his father bought it from indigenous owners over 50 years ago and had enjoyed vacant possession until his death; and that the 1st respondents had never occupied the property.

5. Prior to the institution of ELC Suit No. 44 of 2020, the 1st respondents had apparently filed an earlier suit in March 2020 against the appellant, being ELC Suit No. 26 of 2020 which they then withdrew by a notice of withdrawal filed in that suit on 24th June 2020 before filing the O.S., in ELC Suit No. 44 of 2020 on 25th June 2020.

6. On 19th August 2020, the appellant filed a motion dated 11th August 2020 before the ELC in ELC Suit No. 44 of 2020 seeking orders: for stay of further proceedings in that suit "pending payment of costs" in ELC Suit No. 26 of 2020; to be supplied with copies of the 1st respondent's identity cards and in default the suit to be struck out; that the Director of Criminal Investigations office in Kilifi do investigate the signatures annexed to the authority to plead; and an order that the court, by itself or any officer subordinate, do visit the locus in quo and a report on its status be filed in court before the hearing of 1st respondent's application.

7. The 1st respondent's application for interlocutory injunction dated 23rd June 2020 and the appellant's said application dated 11th August 2020 were heard together before J.O. Olola, J., who delivered the ruling dated 3rd June 2021 which is the subject of Malindi Civil Appeal No. E34 of 2021.

8. In that ruling, the learned Judge, in declining the prayer by the appellant to stay proceedings pending payment of costs expressed that there was no evidence that the appellant had been awarded costs in ELC Suit No. 26 of 2020 or that costs in that suit had been taxed. As regards the appellant's prayer for supply of identity cards and visit of the locus in quo, the Judge expressed that the same were premature as those are matters "that ought to be dealt with in the course of the discoveries at the pre-trial stage and/or when the suit has been listed for hearing." In effect, the appellant's application dated 11th August 2020 was unsuccessful.

9. As regards the 1st respondent's application dated 23rd June 2020, the judge expressed that from the material placed before him, the appellant was the registered proprietor of the property C.R. 64260 Plot Number 9911/III/MN and that it was not clear whether the 1st respondents were on the land at the time the appellant became registered; that it is apparent that some of the 1st respondents may be on the land; that "it is evident both" the 1st respondents and the appellant "are in occupation of parts of the suit property and have both made some developments thereon". The Judge then pronounced:

> "In the circumstances I decline to grant the orders of injunction in the manner sought by the plaintiffs. Instead, I am of the view and I hereby order that pending the hearing and determination of this suit the status quo obtaining as of today be maintained by each party

remaining on the respective portions of the land they currently occupy. There should be no sale and/or further sub-division of the land until the suit is heard and determined."

10. As already stated, that ruling, dated 3rd June 2021, is the subject of the appellant's notice of appeal dated 15th June 2021 lodged on 7th July 2021 and Civil Appeal No. E34 of 2021 in which the appellant, in his memorandum of appeal complains that the learned Judge erred in: holding that the 1st respondent had established a prima facie case; granting orders for maintenance of status quo without proof of occupation of the property of at least 12 years by the 1st respondent and on the basis that some of them may be on the property; failing to make a site visit to confirm status on occupation despite concession to the same by the 1st respondent and in holding that it was premature to do so; granting orders on basis of affidavits "signed for others who were alleged relatives" and declining to order production of identity cards; and in failing to fully consider the principles in Giella vs Cassman Brown Limited [1973] E.A 358. We will return to this appeal later in this judgment.

11. On 10th June 2021, a few days after delivery of the ruling of 3rd June 2021, the appellant was back before the ELC with a motion under certificate of urgency presented under Section 3A, 63 f of the *Civil Procedure Act*, Order 45 and Order 50 of the *Civil Procedure Rules* seeking orders that the 1st respondent be restrained from harassing, threatening, and damaging the appellant's properties on Plot Number 9911/III/MN; that for the better compliance of orders of status quo granted (on 3rd June 2021),the Director of Survey's officials Kilifi County do identify the beacons of Plot Number 9911/III/MN in the company of the Deputy Registrar of the court and identify the persons who occupy that plot and a report be filed in court; and that the OCS Kijipwa do provide security for compliance with the orders of the court and provide security to the appellant.

12. That application was placed before Munyao-Sila, J. on 15th June 2021who partially allowed it ex-parte by ordering the Director of Surveys to identify beacons in the company of the Deputy Registrar of the court and to identify the persons occupying the property and to file a report.

13. The matter was then placed before the Deputy Registrar on 17th June 2021 who set the date for site visit for 23rd June 2021 and gave directions on the logistics of carrying out that exercise.

14. On 21st June 2021, the 1st respondent applied to the court to set aside those orders and directions primarily on grounds that the court in its ruling of 3rd June 2021 had already declined the prayer for site visit as being premature; and that the appellant had concealed material facts from the court. Before that application could be heard, the Deputy Registrar visited the site on 23rd June 2021 and filed a report prompting the 1st respondent to file an amended motion dated 14th July 2021 amending the earlier application dated 21st June 2021. In addition to the prayer for the setting aside of orders and directions of 15th and 17th June 2021 respectively, the 1st respondent in the amended motion of 14th July 2021 also sought orders of stay of further proceedings and an order to expunge the report of the Deputy Registrar submitted on 5th July 2021.

15. That amended motion was placed before J. Olola, J. on 14th July 2021, who certified the same as urgent and fixed a date for hearing inter partes for 28th July 2021. At the same time, the Judge granted an order for temporary stay of further proceedings.

16. On 27th July 2021, a day before the scheduled inter partes hearing of the 1st respondent's application, the appellant filed an application dated 26th July 2021 seeking the lifting of the order for stay of proceedings made on 14th July 2021; an order to strike out an affidavit filed by Kibwana Hamadi and for him to appear in court for cross examination on his affidavit. That application was placed before

J.O. Olola, J. on 27th July 2021 who declined to make any orders on it indicating that the matter was already scheduled for hearing of an application the following day on 28th July 2021.

17. Come 28th July 2021, the record shows that Mr. Mwangunya and Mr. Nyang appeared in court before J.O. Olola, J. for the 1st respondent while Mr. Nyabena appeared for the appellant. The Judge observed that the application dated 14th July 2021 was not opposed and peremptorily allowed it as prayed. The result was that the ex-parte orders issued by Munyao-Sila, J. on 16th June 2021 and the subsequent directions by the Deputy Registrar issued on 17th June 2021 were set aside and the report of site visit by the Deputy Registrar submitted on 5th July 2021 was expunged.

18. The appellant was aggrieved by the orders made on 28th July 2021 and filed a notice of appeal dated 28th July 2021 which forms the basis of Civil Appeal No. E036 of 2021. In that regard, the appellant complains in his memorandum of appeal that the judge erred in expressing that the amended application dated 14th July 2021 was unopposed "whilst a replying affidavit had been filed on the 5th August 2021 (should be 5th July 2021)"; that the judge failed to render a reasoned ruling or to give reasons for making the orders; that the judge failed to "capture" the appellant's "submissions on the application on the 28th July 2021"; and that the judge erred in ignoring the appellant's application dated 26th July 2021 filed on 27th July 2021.

19. The two appeals, namely, Civil Appeal No. E034 of 2021 and Civil Appeal No. E036 of 2021 came up for hearing before us on 15th June 2023. The parties were represented by learned counsel. Mr. Nyabena appeared for the appellant. Mr. Nyanje Lughanje appeared for the 1st respondent. Mr. Mkala appeared for the Attorney General, the 2nd respondent. By consent, the two appeals were consolidated with Civil Appeal No. E034 of 2021 as the lead file. Mr. Nyabena and Mr. Nyanje relied on their respective written submissions which they orally highlighted.

20. Mr. Nyabena submitted that the claim by the 1st respondent is based on adverse possession; that it was not enough for the 1st respondent to claim that they are in occupation of the property but were obliged, in support of their application for injunction, to produce evidence of their occupation of the property; that no such evidence was presented and the 1st respondent did not therefore establish a prima facie case to justify the orders of status quo granted by the ELC.

21. Counsel submitted that the appellant had applied for the court to visit the property which was conceded by the 1st respondent, yet the Judge declined to grant that request; that the Judge expressed that some of the 1st respondents "may be" on the property, effectively expressing doubt, yet went ahead to grant orders of status quo injuncting the appellant from dealing with the property; and that a claim for adverse possession could not, in any event, be maintained as the title was not 12 years old. Furthermore, counsel submitted, the list of applicants/plaintiffs' authority to plead supporting the 1st respondent's action was forged to the extent that some of the 1st respondents signed for others.

22. Regarding Civil Appeal No. 36 of 2021, Mr. Nyabena submitted that as a result of the orders of status quo made by the court on 3rd June 2021, the property was invaded and property burnt down; that on account of the ambiguity of the order of status quo given on 3rd June 2021, the appellant filed the application dated 10th June 2021 to clarify what the status quo meant and on that basis, Munyao-Sila, J. granted the orders to which we have already referred.

23. Counsel referred to the procedural history that followed, as already set out above, and submitted that on 28th July 2021 when the 1st respondent's application dated 14th July 2021 was heard and allowed, he had raised issues which were not captured in the record; that although the amended application was

opposed and an affidavit in opposition filed, the Judge dealt with the matter casually and granted orders sought in a one line ruling; that the Judge thereby set aside orders that had already been complied with.

24. According to counsel for the appellant, upholding the decision of the learned judge is to uphold the law of the jungle. With that, Mr. Nyabena urged us to allow both appeals with costs to the appellant.

25. On the other hand, Mr. Nyange for the 1st respondent submitted that the learned Judge declined to grant orders of injunction but in exercise of judicial discretion ordered status quo to be maintained by each party; that the judge had powers to do so under Section 13(7) of the *Environment and Land Court Act* to protect a weaker party from its rights being violated or violated pending the finalization of the suit; that on the strength of the Supreme Court of Kenya decision in *Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, this Court should be slow to interfere with the exercise of discretion by lower court.

26. It was submitted that the suit before the ELC concerns a seriously contested parcel of land; that the matter is pending hearing and determination before the ELC where evidence of occupation will be interrogated; that at the interlocutory stage, evidence could not be gone into; and that pleadings before the ELC have since been amended and photographic evidence presented as an application dated 10th August 2021 was presented to the ELC subsequent to the impugned ruling.

27. In reference to Civil Appeal No. 36 of 2021, counsel submitted that the orders granted by Munyao-Sila, J. on 16th June 2021 were substantially antithetical to the ruling of Olola, J. of 3rd June 2021, a court of equal status; that on that basis, the 1st respondent moved the ELC by their application dated 21st June 2021 which was amended on 14th July 2021 to set those orders aside as they had not been given an opportunity to be heard before the ex parte orders were granted; that on the authority of Provincial Insurance Company E. A. Ltd vs. Mordekai Mwanza Nanda, Civil Appeal No. 179 of 1995 Kisumu, those ex parte orders were in any event a nullity and liable for setting aside as a matter of right (ex debito justitiae); that despite directions having been given on 14th July 2021 for parties to file their responses for inter partes hearing on 28th July 2021, the appellant elected not to do so and consequently the learned Judge was right in concluding that the amended application was unopposed and the Judge correctly exercised his discretion in setting aside the orders of Munyao-Sila, J on 16th June 2021.

28. Counsel went on to refer to proceedings that took place before the ELC after the impugned order of 28th July 2021 to point out that the present appeals are academic, but those matters are not the subject of the present appeals. Counsel concluded by submitting that the appellant's appeals are a continuation of his efforts to have a substantive determination of a claim in adverse possession at a preliminary stage before a substantive hearing is conducted.

29. Mr. Mkala stated that the 2nd respondent would not take a position in the appeals and would remain neutral.

30. Having considered the appeals and the submissions, we begin with Civil Appeal No. 36 of 2021. In granting the orders of status quo, the learned judge was exercising judicial discretion. We should therefore be slow to interfere. In

> United India Insurance Co. Ltd, *Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd vs. East Africa Underwriters Co Ltd* [1985] eKLR, this Court stated as follows:
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> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

31. In his consideration of the 1st respondent's application for temporary injunction in his ruling delivered on 3rd June 2021, the learned Judge was alive to the fact that the 1st respondent's claim over the property based on adverse possession, as well as the claim that the 1st respondents were in occupation of the property were contested by the appellant.

32. The Judge considered the material before him including the affidavit sworn by Kibwana Hamadi, the replying affidavit by the appellant as well as the grounds of opposition filed by the Attorney General on behalf of the 2nd respondent. He cited the decision in *Giella vs Cassman Brown Ltd* (above) before concluding that whereas it was evident that none of the 1st respondents "is registered as proprietor of the suit property" and that no court had "as yet made a determination that their rights have crystallized by dint of prescription in order for them to be issued with titles for the property", it was apparent that the parties had been embroiled in a dispute over the rights of occupation over the property with some of the 1st respondents being charged with criminal offences, and that while the appellant maintained that the 1st respondents do not occupy the property, "it is apparent that some of them may be on the land."

33. The Judge went on to state that "it is evident both the [1st respondents] and the [appellant] are in occupation of parts of the suit property and have both made some developments thereon" before pronouncing:

> " In the circumstances I decline to grant the orders of injunction in the manner sought by the plaintiffs. Instead, I am of the view and I hereby order that pending the hearing and determination of this suit the status quo obtaining as of today be maintained by each party remaining on the respective portions of the land they currently occupy. There should be no sale and or further subdivision of the land until the suit is heard and determined."

34. The appellant has complained that the Judge erred in holding that the 1st respondents "had established a prima facie case to warrant the grant of injunction" and in failing to appreciate that the 1st respondents had not proved "their occupation of the land for at least 12 years." In *Mrao Limited vs. First American Bank of Kenya Limited & 2 others* [2003] eKLR, Bosire, JA had this to say:

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

35. Bosire. JA expressed further in that case that:

> " ...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

36. In the present case, the Judge did not make a finding that the 1st respondents had established a prima facie case with a probability of success. Indeed, he impliedly rejected the prayer for temporary

injunction and instead granted orders of maintenance of status quo. And even if the Judge was satisfied that a prima facie case had been established, in keeping with the principles in Giella vs Cassman Brown Ltd he should not have stopped at that. He should have gone on to consider the question whether the 1st respondents had demonstrated that they might suffer irreparable injury if the orders that had been sought were not granted. It is a requirement that the applicant "must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages" and if the court is in doubt, the consideration of the balance of convenience should tilt in favour of the applicant.

37. We echo words of the House of Lords in *American Cyanamid Co vs. Ethicon* Ltd [1975] UKHL 1 that:

> " A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages not injury that cannot be repaired.
>
> .... The object of interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial."

38. We are satisfied that in granting the orders that he did, the learned Judge misdirected himself in law in failing to consider whether the 1st respondents had established a prima facie case with a probability of success and in failing to consider the question whether the 1st respondents had demonstrated they are likely to suffer irreparable harm unless the orders they had sought were granted.

39. We are in the circumstances entitled to interfere with the exercise of discretion by the learned Judge. We accordingly allow the appeal, and set aside, in its entirety, the ruling of the ELC delivered on 3rd June 2021.

40. Turning to Civil Appeal No. E36 of 2021, we have already set out above the appellant's grievances with the order given by the learned Judge on 28th July 2021 as set out in the memorandum of appeal. As indicated, the 1st respondent's application dated 14th July 2021 amended their earlier application dated 21st June 2021 in which the 1st respondent had applied to set aside the orders given by ex parte in favour of the appellant by Munyao-Sila, J. on 16th June 2021 and the ensuing directions of the Deputy Registrar on logistics for the site visit.

41. On 5th July 2021, in answer to the application dated 21st June 2021, the appellant filed a detailed replying affidavit he swore on 2nd July 2021 in opposition to the application. The amendment to the application dated 21st June 2021 as captured in the amended motion dated 14th July 2021 was to include a prayer for the site visit report of the Deputy Registrar to be expunged from the record. When that application of 14th July 2021 was placed before J.O. Olola, J. on the same day, the judge directed that it be served "for inter partes consideration on 28th July 2021." The record does not indicate who appeared before the learned Judge on 14th July 2021 and neither is there a record of directions having been given on that day regarding the filing of responses as learned counsel Mr. Nyanje submitted. However, on 28th July 2021 the transcript records:

> " Mr. Mwangunya: Our amended notice of motion dated 14th July 2021 coming up we have not seen anything in opposition. Mr. Nyabena: I have not respondent (sic) to the application.

Court: The application dated 14th July 2021 has not been opposed. The same is allowed as prayed."

42. Clearly, it escaped the Judge's attention that the application dated 14th July 2021 was seeking orders to amend the earlier application dated 21st June 2021 to which there was already on record a replying affidavit opposing it. Mr. Nyabena informed us from the bar that his attempts to address the Judge on the matter during the virtual hearing on that day was in vain.

43. There is no suggestion that the appellant consented to that application. The statement by the learned Judge that the application was not opposed is erroneous. There was already on record, as indicated, a lengthy affidavit by the appellant in opposition. It was incumbent upon the learned judge to consider the application, hear the parties and render a reasoned decision. That did not happen.

44. The complaint that the learned Judge handled the matter casually is well founded. Consequently, the appeal succeeds. The orders issued by the Judge on 28th July 2021 are hereby set aside and substituted with an order dismissing the 1strespondent's application dated 21st June 2021 as amended by application dated 14th July 2021.

45. As we conclude, we note from the procedural history of this matter as set out above that the parties have expended a lot of time and energy in filing applications and counterapplications before the ELC. We do not think that interlocutory applications will provide the parties with a substantive solution. We think the interests of the parties will be best served by having a substantive hearing in the matter and urge the ELC to expedite the trial.

46. The appellant will have the costs of both appeals.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR