



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngugi v Towett & 4 others (Civil Appeal 38 of 2019)
[2024] KECA 362 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 362 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 38 OF 2019
DK MUSINGA, F SICHALE & FA OCHIENG, JJA
MARCH 22, 2024**

BETWEEN

DAVID MAINA NGUGI APPELLANT

AND

IRENE CHEROP TOWETT 1ST RESPONDENT

WILLIAM KIBOWEN TOWETT 2ND RESPONDENT

GARAM INVESTMENT AUCTIONERS 3RD RESPONDENT

NAKURU COUNTY LAND REGISTRAR 4TH RESPONDENT

CREDIT BANK LIMITED 5TH RESPONDENT

*(Being an Appeal from the Ruling and Orders of the ELC Court at Nakuru
(Sila, J.) dated 17th May 2017 in (Nakuru ELC Case No. 385 of 2016)*

JUDGMENT

1. David Maina Ngugi, (the appellant herein), has preferred this appeal against the ruling and orders of Sila, J. dated 17th May 2017, in which he dismissed the appellant’s notice motion dated 22nd September 2016.
2. The brief facts in this appeal are as follows: vide a plaint filed in the Environment and Land Court (ELC) on 21st September 2016, the appellant commenced suit against the respondents, contending that he was the registered of owner of all that parcel of land known as Njoro/Ngata Block 1/6355 and Njoro/Ngata Block 1/6356 (hereinafter the suit property).
3. It was his case that on 23rd December 2014, he had entered into a land sale agreement of the suit property with the 1st respondent at a consideration of Kshs 3,500,000/=.



4. The appellant averred that as per clause 2 of the agreement, the 1st respondent was to pay a deposit of Kshs 500,000/= at the execution of the said agreement, with the remaining balance being payable in two instalments of Kshs 500,000/= on 14th January 2015 and the final balance being payable on or before 23rd May 2015.
5. It was a further term of the sale agreement that the title documents were to be retained by their mutual advocate until they fulfilled their obligations under the contract.
6. It was the appellant's contention that the 1st respondent only paid Kshs 200,000/= in cash and Kshs 300,000/= vide a cheque which was subsequently dishonored by the bank on account of insufficient funds, and as at the time of filing suit in the ELC, the 1st respondent was yet to clear the balance of Kshs 300,000/= in flagrant breach of the aforesaid sale agreement.
7. Subsequently, the appellant contended that he saw a newspaper advert in the "Daily Nation" on 19th September 2016, by the 3rd respondent advertising the suit property for sale by public auction, and upon close scrutiny of the advertisement he realized that the suit property was registered in the name of the 2nd respondent.
8. That, upon further enquiries from the office of the 4th respondent, he realized that there were transfer forms and consents which bore his name but were not executed by him. It is then that he realized that the suit property had been charged to the 5th respondent.
9. It is these actions that precipitated the filing of the suit in the ELC, in which the appellant subsequently filed a Notice of Motion dated 22nd September 2016, seeking inter alia, temporary injunctive relief against the respondents from trespassing, advertising, alienating and/or disposing or in any way whatsoever interfering with his quiet possession of the suit property. The application was dismissed by Sila, J. on 17th May 2017, thus provoking the instant appeal vide a Notice of Appeal dated 23rd May 2017 and Memorandum of Appeal dated 4th June 2019, in which the appellant raised the following grounds of appeal;
 - “ 1. That the learned trial judge erred in law and in fact in dismissing the appellant's application dated 22nd September 2016 and determining the matter at the interlocutory stage yet there was overwhelming evidence on record.
 2. That the learned trial judge erred in law and in fact in dismissing the appellant's application dated 22nd September 2016 and determining the matter at the interlocutory stage yet the amended plaint on record raises several triable issues which can only be determined on a full trial and evidence tested on cross examination.”
10. When the matter came up for plenary hearing on 26th September 2023, Mr. Nyanjwa, learned counsel, appeared for the 5th respondent. There was no appearance for the appellant, 1st, 2nd, 3rd and 4th respondents despite having been served with copies of the hearing notices on 4th August 2023 at 1:44pm. Mr. Nyanjwa sought to rely on his written submissions dated 20th September 2023, which he briefly highlighted in Court.
11. It was submitted for the appellant that in principle a court should not grant interim relief which amounts to a final relief, except in exceptional circumstances where the court is satisfied that such a relief should be granted, and that in such an instance, the court must record reasons for granting the relief and make clear the special circumstances for which such a relief was being granted to a party at an



interlocutory stage. For this proposition, reliance was placed on the case of *Oksana Investment Supplies Limited V Alice Wanjiru Wamwea* [2019] eKLR.

12. It was further submitted that the appellant had established a prima facie case against the respondent by indicating that they had entered into a sale agreement in which he was selling the suit property; that the 1st respondent had failed to pay the full amount as per the terms of the agreement; that it was clear that the appellant would suffer irreparable injury which could not be compensated by way of damages as he would have lost the suit property as well the unpaid amount by the respondent. Consequently, we were urged to review and or set aside the impugned ruling.
13. On the other hand, it was submitted for the 5th respondent that the decision of the trial court was made at an interlocutory stage, which called for the exercise of judicial discretion; that it is trite law that this Court would normally not interfere with the exercise of such discretion except upon well-defined parameters. For this proposition, reliance was placed on the case of *Enoka Watako Makokha V Cooperative Bank of Kenya* [2015] eKLR.
14. It was further submitted that an order of injunction could only be granted upon satisfaction and proof of the conditions for issuance of temporary injunction which were restated by this Court in the case of *Nguruman Limited V Jan Bonde Nielsen & 2 Others* [2014]eKLR; that in the instant case, the appellant had made two broad allegations as a basis for his claim in the application for injunction namely: that he did not execute the transfer documents for the transfer of the suit property, and that there was fraud on the part of the 1st and 2nd respondents. It was contended that in dismissing the application, the learned judge clearly examined the documents presented before him and concluded that the appellant had failed to establish any prima facie case.
15. It was further submitted that the appellant was charged with the duty to adduce evidence before the trial court to support his claim, a burden he failed to discharge, and that as such, the learned judge clearly applied the authority in *Giella v Cassman Brown and Co Ltd* [1973] EA 358 in dismissing the application for temporary injunction. Consequently, we were urged to dismiss the appeal.
16. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the Rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion, one way or another. This duty was reiterated in *Abok James Odera t/a A.J Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where this Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kustron (Kenya) Limited 2000 2EA 212.”
17. In our view, the only issue for our determination in this appeal is whether.... the learned judge erred in law and in fact in dismissing the appellant’s application dated 22nd September 2016 and determining the matter at the interlocutory stage.
18. The appellant’s appeal is essentially against the decision by the trial court in which it dismissed his application for injunction. It was the appellant’s case that he was the bonafide registered owner of the suit property, and that on 23rd December 2024 he entered into a sale agreement with the 1st respondent; that the 1st respondent did not fulfil his part of the bargain and subsequently he realized that the suit



property had been fraudulently transferred to the 2nd respondent; that although the transfer forms and the Land Control Board consent used to transfer the suit property bore his details, the documents were not executed by him.

19. On our part, we note that the remedy of injunction being an equitable remedy is issued at the discretion of the trial court, but the discretion must be exercised judicially. It is not to be issued as a matter of course. See *Halsbury's Laws of England* 4th Ed Vol 24 Para 953 where it is stated thus:

“On application for an injunction in aid of a plaintiff's alleged right, the Court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the Court ought in all cases to be regulated, but in no case will the Court grant an interlocutory injunction as of course.”

20. As often stated, this Court will only interfere with exercise of judicial discretion by a lower court when it is established that first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations which he should not have taken account of; fourthly, that he failed to take into account considerations which he should have taken account of, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.

See the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A. where Madan, JA. (as he then was), stated as follows:

“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.”

21. The learned trial judge while considering the appellant's application in a well-reasoned ruling stated, inter alia, as follows:

“I observe that this sale agreement was executed on 23rd December 2014. The plaintiff states that he saw the advertisement in the newspapers on 19th December 2016. It will be noted that it is two years after the sale agreement. It is not usual for a seller of a property to remain unpaid for two years without cancelling the sale agreement. The agreement itself states that the balance of the purchase price was to be paid on or before 23rd May 2015. The plaintiff has claimed that he pursued the balance but the 1st defendant kept house. That is in fact the more reason to repudiate the agreement. Any prudent seller would have seen for himself that the purchaser is never going to make good the balance and proceed to cancel the agreement. I already mentioned that the plaintiff stated that the title documents were left at the offices of an undisclosed advocate. The plaintiff has not given any information on whether or not he went to confront this advocate, whoever it may be, to inquire on how his titles were transferred to the 2nd defendant. Again, you would expect the prudent ordinary man to do so, if indeed the transfer was truly done fraudulently. Fraud is a serious thing and you would



even expect a report to be made to the police of such fraudulent transfer. None has happened in this case.

I have seen the documents of transfer annexed by the plaintiff and which the plaintiff denies executing. I see that the documents bear the name of an advocate who attested to the signature. If indeed the plaintiff did not sign the documents, you would expect him to have attempted to get answers from the advocate who attested the documents. No attempt has been shown in this case and no explanation given, as to why the plaintiff never thought of seeking out the said advocate for him to give a narrative of how come his signature appears in the documents.

In addition, I have seen the consent to transfer the suit properties to the 2nd defendant the plaintiff has not tabled any evidence that he was

not present at the Land Control Board meeting or that the consent issued is forged.

It is not hard to see why the bank is of the view that this suit may be as a result of collusion between the plaintiff and the 1st and or 2nd defendant.

From the foregoing it is apparent that I am not convinced that the plaintiff has established a prima facie case of fraud against the defendants.” (Emphasis Ours).

22. Applying the tests laid out in the *United India Insurance Case* (*supra*), can it be said that the learned judge exercised his discretion wrongly? Certainly not, for the following reasons: firstly, the learned judge found that there was no evidence of fraud against the respondents as had been contended by the appellant; secondly, the appellant’s conduct smacked of an indolent litigant and leaves a lot to be desired. Why, for example, did he not report the alleged fraud to the police to carry out investigations? Thirdly, and as was rightly pointed out by the learned judge, it was not usual for a vendor of property to remain unpaid for a period of two years and continue “sitting pretty” and take no action such as repudiating the sale agreement. Additionally, the name of the advocate where the title documents were allegedly left was not even disclosed. It is evident from the circumstances of this case that the allegations of fraud by the appellant against the respondents remained his word against theirs and was not supported by any evidence.
23. In view of the foregoing analysis, and in our considered opinion, the learned judge was right in holding and finding the appellant did not establish a prima facie case of fraud against the respondents, and he exercised his discretion properly, guided by the locus classicus case of *Geilla v Cassman Brown* (*supra*) which sets out the principles to be considered by a trial court in determining whether to issue an order of injunction or not, and we have no basis whatsoever to fault him for the finding he arrived at.
24. The contention by the appellant that the learned judge determined the matter at the interlocutory stage is clearly without basis as the learned judge was cognizant of this fact when he stated thus at paragraph 7 of the ruling:

“When a party alleges fraud, one has to table cogent evidence of the same. It is not merely enough to allege it. I am aware that I am not dealing with the case after a hearing, but the plaintiff needed to table, even at this stage of the proceedings some evidence which point at the alleged fraud.”
25. Consequently, nothing turns on this point. We think we have said enough to demonstrate why this appeal fails on all fours and must suffer one fate, which is dismissal. It is also not lost on us that during plenary hearing of the appeal, Mr. Nyanchwa for the 5th respondent informed us that the suit properties have already been transferred to third parties who are not parties to this suit, a fact that the appellant



has not refuted in his submissions nor during the hearing as he never appeared, despite being served with a copy of the hearing notice. The appellant's appeal is thus clearly dead on arrival, with no room for resuscitation.

26. The totality of our findings is that the appellant's appeal is without merit and the same is hereby dismissed with costs to the 5th respondent.

27. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

