



**Kimmetto & another v Yano (Civil Appeal E015 of 2022)
[2024] KEELC 1599 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
CIVIL APPEAL E015 OF 2022**

**L WAITHAKA, J
MARCH 8, 2024**

BETWEEN

JULIUS KIMMETTO 1ST APPELLANT

DAVID KIPLAGAT AYABEI 2ND APPELLANT

AND

FRANCIS YANO RESPONDENT

*(Being an Appeal from the ruling of Hon. C. A. Kutwa SPM in
Iten ELC No. E024 of 2022 delivered on 21st September 2022)*

JUDGMENT

Background

1. By a plaint dated 13th July 2022, the respondent herein instituted a suit in the lower court to wit Iten SPMCC ELC Case No. E024 of 2022 seeking judgments against the defendants, jointly and severally for:-
 - a. An order declaring that he, the plaintiff, is the legal owner/allotee of plot No.2 located in Lobot Trading Centre, Marakwet West Subcounty
 - b. An order of permanent injunction against the defendants restraining them from interfering in any manner with his (the plaintiff's) possession and occupation of plot No.2 located in Lobot Trading Centre, Marakwet West Sub county;
 - c. An order of eviction directed to the defendants to vacate on their own from the suit plot centre;
 - d. Costs of the suit;
 - e. Any other remedy that the court may deem appropriate to grant.



2. Simultaneously with the plaint, the plaintiff/respondent filed a notice of motion of an even date seeking an order of temporary injunction to restrain the defendants/appellants from establishing and/or further constructing a petrol station, developing or interfering in any manner with plot No. 2 located in Lobot Trading Centre pending the hearing and determination of the application and the suit.
3. The application was premised on the grounds that the plaintiff/respondent is the registered owner of the suit plot, that the plaintiff/respondent had not sold the suit plot to the 1st defendant/appellant as claimed by the defendants/ appellants; that the purported acquisition of the suit plot by the defendants/appellants is a product of fraud and that the defendants/appellants are trespassers in the suit plot.
4. In reply to the application, the 1st defendant/appellant deponed that he acquired the suit plot by way of purchase from the plaintiff/respondent; that he had been in possession of the suit plot since 2002; that he has developed the suit plot by constructing shops and rental houses which he has leased to tenants; that he sold a portion of the suit plot which he had not developed to the 2nd defendant/appellant on 6th May 2021; that upon purchasing a portion of the suit plot from him, the 2nd defendant/appellant put up a petrol filling station which he had been operating since that time; that in early 2022, the plaintiff/respondent claimed that the 2nd defendant/ appellant had encroached on his land leading to a meeting being convened by community elders to hear and determine the plaintiff/respondent's claim and that the dispute was determined in his favour.
5. Concerning a letter from the Town Administrator, dated 12th July 2022, showing that the plot in question is No. 2 as opposed to No.1 as indicated in his sale agreement, the 1st defendant/appellant states that at the time the plot was sold to him, it was plot No.1.
6. The 1st defendant/appellant contended that the plaintiff/ respondent could not rely on the issue of plot number to defeat his claim as the plot he (the plaintiff/respondent) sold to him, was pointed out to him and that upon taking possession of the plot, the plaintiff/respondent did not raise any objection that he was occupying the wrong plot.
7. The 1st defendant/appellant further contended that the plaintiff/applicant's claim was statutorily time barred.
8. According to the 1st defendant/appellant, the temporary injunction sought could not issue against him because:-
 - a. He had been in occupation and use of the suit plot since 2002;
 - b. He had tenants occupying the premises within the suit land;
 - c. The tenants are not parties to the suit;
 - d. An order of injunction against them would amount to constructive order of eviction;
 - e. The plaintiff/respondent had been aware of their presence for a while and had never moved the court.
9. The 1st defendants/appellant urged the court to find that the plaintiff/respondent was guilty of inordinate delay.
10. In reply and opposition to the application, the 2nd defendant/appellant, through the affidavit he swore in response to the application, inter alia deponed that he bought a portion of the suit plot from the 1st defendant/ appellant, that upon purchase of the portion, he took possession and put up a petrol



filling station; that he enjoyed possession and use of the portion he bought until March 2022 when the plaintiff/respondent began claiming that he had occupied his land; that the matter was referred to elders who heard the plaintiff/respondent's case and found it lacking in merits; that in May 2022, the plaintiff/respondent, through his agents, created a breach of peace by causing to be filled up a pit latrine he was constructing on the suit plot; that he reported the incident at Kapsowar Police Station for investigation and that it is after the plaintiff/respondent was summoned by the police to answer to the complaint he lodged, when the plaintiff/respondent filed the suit hereto.

11. Terming the plaintiff/respondent's actions to have been in bad faith and intended to dodge criminal justice, the 2nd defendant/appellant deponed that he had been in possession of the suit plot for over a year without the plaintiff/respondent raising any issue.
12. The 2nd defendant/appellant contended that the orders sought could not issue against him as, if granted, they would amount to an eviction order disguised as an interlocutory injunction.
13. The plaintiff/respondent did not file a supplementary or further affidavit to response to issues of fact raised in the defendants/appellants' responses.
14. Upon considering the cases urged by the parties to the application, the learned trial magistrate found in favour of the plaintiff/respondent. In so doing, he inter alia, stated/held:-

“...In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st and 2nd defendants do not deny that but contend that the 1st defendant has legal right over the suit land, whereas the plaintiff/applicant challenges such a right contending that he is in possession and he is the registered owner of the suit land. ...The plaintiff has shown that he is the one who is in possession and the suit property is registered in his name. The elders therefore had no legal capacity to award the suit land to the respondents.

The onus of proof to rebut this prima facie position shifts to the 1st respondent to show through documents that he bought the land from the plaintiff.....

The plaintiff has demonstrated through production of documents that he is in possession and that the suit land may be wasted. I find that if injunction pending hearing and determination of this suit is denied, the plaintiff/applicant shall risk losing the suit property and thus infringing his right to property before a full hearing and determination of the suit.....

I have considered and weighed the conflicting parties interest as regards the balance of convenience....I have in considering the application for the plaintiff/ applicant on the strength of the documents submitted to the court found that the applicant has a stronger case unlike the respondents. In view of the above, the plaintiff/applicant stands to suffer greater harm if the application for injunction is dismissed. The 2nd respondent, on the other hand, will suffer no harm if the injunction is granted.

I do therefore allow the motion dated 13th July, 2022 with costs to the plaintiff.”

Appeal

15. Aggrieved by the decision of the trial magistrate, the defendants/appellants appealed to this court on the grounds that the learned trial magistrate erred by:-
 - i. Finding that the plaintiff/respondent had established a prima facie case against them;



- ii. Finding that the plaintiff/respondent was entitled to an order of temporary injunction notwithstanding the defendants'/appellants' continued and uninterrupted possession of the suit land for over 20 years;
 - iii. Finding that the plaintiff/respondent was entitled to an order of temporary injunction notwithstanding the defendants'/appellants' overwhelming evidence demonstrating that the defendants/appellants are the bona fide proprietors for valuable consideration who had been in possession and use of the suit property for over 20 years;
 - iv. Finding that the balance of convenience tilted in favour of the plaintiff/respondent despite the defendants/ appellants having substantially demonstrated that they have legitimate and arguable claim for interests;
 - v. Finding that the balance of convenience tilted against them yet they discharged their contractual obligations by paying full purchase price as agreed;
 - vi. Failing to consider the preliminary objection they had raised before hearing the application for orders of injunction;
 - vii. Disregarding their response to the issues raised in the application;
 - viii. Failing to determine the question as to who is in actual possession of the suit land and/or that the developments, structures and/or properties on the suit land belong to them and had been in existence for several years.
16. The plaintiffs/respondents pray that the appeal be allowed with costs and the plaintiff/respondent's application dated 13th July 2022 filed in the lower court be dismissed with costs.
17. Pursuant to directions given on 8th November 2023 the appeal was disposed off by way of written submissions.

Submissions

Appellants/Applicants Submissions

18. In their submissions filed on 11th December 2023, the appellants have given an overview of the cases urged by the parties and submit that the main issue for determination is whether the learned trial magistrate properly addressed himself to the law when granting the plaintiff/respondent's application for interlocutory injunction.
19. Concerning that issue, the defendants/appellants have made reference to the cases of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (2003)e KLR and the case of *Giella vs. Cassman Brown & Co. Ltd* (1978)EA 358 and submitted that the learned trial magistrate misdirected himself when he improperly exercised his discretion in granting the interlocutory injunction complained of.
20. The defendants/appellants maintain that the learned trial magistrate improperly applied the principles established in *Giella vs. Cassman Brown supra* and failed to consider and evaluate the relevant material placed before him thereby reaching a wrong decision.
21. According to the defendants/appellants the plaintiff/respondent did not establish a prima facie case as he did not tender any evidence in support of his allegations.
22. The learned trial magistrate is said to have failed to consider the defendants'/appellants' replying affidavits which rebutted the plaintiff/respondent's allegations. In this regard, it is pointed out that



- the 1st defendant /appellant deponed that he bought the suit plot from the plaintiff/respondent for valuable consideration and that he had been in occupation which disposition was not taken into account by the trial magistrate.
23. Maintaining that the facts presented before the trial court showed that the defendants/appellants were in occupation of the suit land, the defendants/appellants fault the learned trial magistrate for granting orders that amounted to eviction or mandatory injunction at an interlocutory stage.
 24. The learned trial magistrate is also faulted for determining that the suit property was in danger of being wasted, damaged, alienated or wrongfully sold so as to obstruct or delay the plaintiff/respondent in the execution of any decree that may be passed in his favour when there was no such allegation or evidence tendered by the plaintiff/respondent.
 25. Based on the decisions in the cases of Dalpat Kumar & Another vs. Prahlad Singh & Others, AIR 1993 SC 276; Locabaill International Finance Ltd vs. Agroexport 1986) 1 ALL E.R 901 and Lucy Wangui Gachara vs. Minudi Okemba Lore 2015) e KLR, where the principles that undergird granting of a mandatory injunction are espoused, it is submitted that the learned trial magistrate failed to consider important provisions of the law as well as pleadings before him and as a result erroneously granted a mandatory injunction at the interlocutory stage when there were no special circumstances warranting granting such an order.
 26. The respondent did not file submissions but filed a reply to the memorandum of appeal.

Respondent's Reply.

27. On whether he established a prima facie case, the plaintiff/respondent states that he produced a letter from the County Government of Elgeyo Marakwet showing that he had an existing right that was being infringed upon.
28. Based on the case of Moses C. Muhia Njoroge & 2 others v. Jane W. Lesaloi & 5 others (2014)e KLR, where a prima facie case in civil application was defined and the case of American Cynamid Co. V. Ethicom Limited (1975) A AER where the test for granting of an interlocutory injunction was set down, the plaintiff/respondent reiterates that he met the threshold for being granted an interlocutory injunction under Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules, 2010.
29. On the issue of balance of convenience, the plaintiff/respondent makes reference to the case of Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another (2019) e KLR, where the phrase balance of convenience was distilled and submits that in the circumstances of this case the balance of convenience tilted in his favour.

Analysis and determination

30. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
31. The pleadings and affidavit evidence adduced before the lower court shows that it is the defendants/respondents who were in actual control and possession of the suit property. The circumstances upon which the defendants /respondents gained possession and control of the suit property is in contention



- as the plaintiff /respondent claims that they are trespassers in the suit property. On their part, the defendants/appellants claim that they are in possession as of right as they purchased the suit property from the plaintiff/respondent (1st defendant/appellant) or the person who purchased it from the plaintiff/respondent (2nd defendant/applicant).
32. It is noted that the contention by the defendants /appellants that they were the ones in actual possession of the suit property and that their possession of the suit property was on account of a sale transaction between the plaintiff/respondent and the defendant/appellant and a subsequent sale agreement between the 1st defendant /appellant and the 2nd defendant/appellant and that the defendants/appellants had being in use and occupation of the suit property for a long period before the dispute between the plaintiff/respondent and defendants (particularly the 2nd defendant/appellant) arose, is uncontroverted as the plaintiff/respondent did not file a further affidavit to deny or controvert those allegations.
 33. Arising from the uncontroverted fact that it is the defendants/appellants who were in actual possession and use of the suit property, it is the considered view of this court that the application turned on who was in actual possession and use of the suit property, the duration of use and possession and activities of the defendants on the suit property as opposed to the fact that the plaintiff /respondent had ownership documents to the suit property.
 34. Since the question as to whether or not the defendants/appellants' occupation of the suit property was the question to be determined by the trial court, having considering the cases urged by the parties on merit, the order that commended itself in the circumstances of this case was an order of maintenance of status quo.
 35. By allowing the application, the learned trial magistrate technically ordered eviction of the defendants/ appellants' from the suit plot when the circumstances did not call or warrant such a drastic action.
 36. The upshot of the foregoing is that the appeal has merit and is allowed to the extent that the order of injunction issued against the defendant/appellants is substituted with an order for maintenance of the status quo that obtained at the time the application was filed.
 37. Orders accordingly

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 8TH DAY OF MARCH, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the absence of:-

N/A for the appellants/defendants

N/A for the respondent/plaintiff

Court Asst.: Christine

