



**Ondatto v Mohansons Kenya Limited & 2 others (Civil Appeal
12 of 2019) [2022] KECA 370 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 370 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 12 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
FEBRUARY 18, 2022**

BETWEEN

MARY MURTAZA ONDATTO APPELLANT

AND

MOHANSONS KENYA LIMITED 1ST RESPONDENT

REGISTRAR OF LAND TITLES 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal against the Ruling of the High Court of Kenya at Mombasa (E.M. Muriithi, J.) delivered on 6th June 2017 in Mombasa Petition No. 103 of 2016 (O.S))

JUDGMENT

1. The Appellant herein, Mary Murtaza Ondatto, is aggrieved by the ruling given by the High Court (E.M. Muriithi J.) on an application filed in the said Court by Mohansons (Kenya) Limited, the 1st Respondent herein. The 1st Respondent, through a Chamber Summons dated 31st October 2012, had sought conservatory orders to bar the Appellant from taking possession or entering into occupation of L. R. No. MN/I/2149 Beach Road, Nyali registered under Title No. C. R. 14642 (hereinafter “the suit property”). The 1st Respondent also sought orders to bar the Attorney General, (the 3rd Respondent herein), from making entries in respect of the said property and/or registering any instruments dealing in the property or seeking to alter the proprietorship status from the 1st Respondent’s name.
2. The 1st Respondent, which was the Petitioner in the High Court, stated that it was the registered proprietor of the suit property, which was charged to Equatorial Commercial Bank Limited, and had been engaged in litigation with the said Bank thereto. Further, that one Cyrill Ondatto was the permitted occupant of the suit property, and that the Appellant who has not been residing at the property, unlawfully and illegally evicted the family of Mr.Cyrill Ondatto from the property on 28th



- September 2012, while claiming that the property formed part of her deceased husband's estate. The 1st Respondent also claimed that the Registrar of Land Titles, the 2nd Respondent herein, had declined to issue the official search of the said property or records for verification purposes. The 1st Respondent therefore claimed that it had a constitutional right to protection of its proprietary interest in the suit property as well as to access to information held by the State.
3. The Appellant in reply stated that she is the administrator of the estate of the deceased Linus Juma Ondatto, and while admitting that she had been residing in Canada, stated that she had intermittently stayed on the suit property while in Kenya. Further, that Mr. Cyril Ondatto, who was her brother in law, was permitted by her deceased husband to stay in the house and entrusted to take care of the property. However, that Cyril Ondatto abused the trust by losing the title documents that were left with him, and claiming that the 1st Respondent was owner of the house. The Appellant denied that the 1st Respondent was the registered proprietor of the suit property or in possession, and stated that the said Respondent had not provided any title or charge documents to support its claim. She conceded to filing the succession cause in the High Court, stating that it was done for the reason that the 1st Respondent lay claim on the suit property through illegal and irregular means.
 4. The Appellant further denied gaining access to the suit property by illegal means or evicting Mr. Cyrill Ondatto's family, and stated that she had severally entered the suit property, but has been unable to live in it due to its state of repair, and has undertaken renovations and painting of the house therein. Further, that Mr Cyrill Ondatto's family lives in Busia and not at the suit property. The Appellant produced the water bills and the electricity bill of the house on the suit property showing her late husband's name, to affirm that the suit property belonged to him.
 5. The Equatorial Commercial Bank Limited (hereinafter "the Bank"), which was joined as an interested party in the High Court, confirmed that the 1st Respondent is the proprietor of the suit property and charged the said property to the Bank by a charge dated 10th March 1997. The Bank attached a copy of the said charge and title documents to the suit property, which it confirmed were in its possession. While the Bank did not oppose the application dated 31st October 2012, it objected to the prayer that the Registrar of Titles be barred from making entries or registering instruments in respect of the suit property, since it would defeat the security held by the Bank in the event that it elected to exercise its statutory power of sale. The Appellant in a further affidavit contested the validity of the charge.
 6. Upon perusing the pleadings and submissions by the parties, the learned trial Judge in his ruling granted conservatory orders to protect the proprietary right of the 1st Respondent as the registered proprietor but subject to the chargee's interest, and granted orders barring the Appellant from taking possession or entering into occupation of the suit property. Since there was a dispute whether the Appellant was in possession of the suit property, the High Court ordered that the Appellant give vacant possession of the suit property, if she be in possession, to the 1st Respondent pending determination of the petition.
 7. The High Court also granted the orders barring the 3rd Respondent from making entries in respect of the suit property and/or registering any instruments dealing in the property or seeking to alter the proprietorship status from the 1st Respondent's name, but qualified the order in the case of the entries relate to dealings by the Bank in exercise of its statutory power of sale or in execution of a valid Decree or Order of a competent court, which the High Court allowed and noted it was at liberty to do.
 8. The Appellant being dissatisfied with the ruling proffered this Appeal. The dissatisfaction with the judgement is indicated in twelve (12) grounds the memorandum of appeal dated 15th January 2019, in which it is alleged that the trial Court made errors in two broad areas. Firstly, in the law it applied



to the dispute before it, which the Appellant claimed was a civil dispute of ownership of the subject suit property and not constitutional matter; and secondly, on the applicable principles in the grant of conservatory orders. The Appellant is asking this Court to set aside the orders made by the High Court requiring the Appellant to give vacant possession and giving the Bank the liberty to exercise its statutory power of sale, and replace them with an order for status quo to be maintained pending the hearing and determination of the 1st Respondent's petition, and an order transferring the case to the Environment and Land Court.

9. When we heard the appeal on 18th October 2021, there was no appearance for the Appellant, and we therefore relied on submissions dated 29th July 2021 filed by her advocates on record. Mr. Khagram, the learned counsel for the 1st Respondent was present, and he urged his case while referring us to his written submissions dated 19th July 2021.

10. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that;

“..... this court is not bound necessarily to accept the findings of fact

by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

11. In addition, as the present appeal is against an order made in the exercise of judicial discretion, this Court will only interfere if it is shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set out in *Mbogo & Another vs Shah* (1968) E.A. 93 at 96 as follows:-

“ An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court 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 and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

12. The Appellant, in the submissions before us, relied on the decision in *Gitarau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR for the principles governing the granting of conservatory orders laid down by the Supreme Court and the decision in *Kenya Bankers Association vs Attorney General & Another* [2018] eKLR for the proposition that in considering an application for conservatory orders, the Court is forbidden from making any definitive finding either of fact or law as that is the province of the Court that will ultimately hear the petition, and that at this stage, the first condition the applicant is required to establish a prima facie case with likelihood of success. Reliance was also placed on the definition of a prima facie case by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR.



13. The Appellant's position was that the orders sought in the High Court were in the nature of ordinary injunctions within the civil litigation realms and did not rise to the threshold of conservatory orders, and her counsel cited the decisions in *Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR* and *Anthony Miano & others vs Attorney General & others [2021] eKLR* for this proposition, and for the submissions that the principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In addition, that the ruling of the trial Court was replete with declarations of ownership, with court declaring the 1st Respondent the owner of the property even before the petition was substantively heard, therefore the trial Court was biased and this prejudiced the integrity of the entire process. Reliance was placed on the holding by the Court of Appeal in *Care Mission Kenya & 4 others vs Benta Akinyi Otieno & another T/A Deity ECD Primary School Busia (K) and Emmanuel Children Home Busia (K) [2019] eKLR* that the sanctity of a title deed cannot be determined in an interlocutory application.
14. The Appellant further submitted that the allegation that the 1st Respondent's title being obtained fraudulently was a serious allegation imputing criminality and fraud that ought to have been interrogated and not summarily dismissed on an interlocutory application. In this regard, reliance was placed on the Court of Appeal case of *Elijah Kipng'eno Arap Bii vs Peter Kipyegon Rotich & Another (2015) eKLR* for the proposition that whenever fraud is pleaded, the issue should not be summarily dismissed but upon consideration of evidence. Article 40 of the [Constitution](#) and section 26 (1) (b) of the *Land Act* were also cited in support of the position that any property interest in a title which has been obtained illegally, fraudulently, unprocedurally or through corrupt means is not protected.
15. Lastly, the Appellant submitted that conservatory orders were for preservation of the suit property, and the order for vacant possession altered the status quo, granting one party definitively substantive orders over the suit property and altering the other party's proprietary and possessory interest at an interlocutory stage before the substantive hearing.
16. Counsel for the 1st Respondent on his part submitted that there was no reply to the substantive Petition filed as required under Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and that the Appellant, in her Replying Affidavit made no allegation of the 1st Respondent's title being illegal, fraudulent or unprocedurally and corruptly obtained and no evidence was proffered to substantiate the allegations, neither can copies of electricity and water bills confer proprietary rights to the Appellant.
17. The 1st Respondent's position is that their title to the suit property had not been vitiated and the trial Judge recognized the speculative nature of the Appellant's claim, and rightly held that a registered proprietor of land is the absolute and indefeasible owner of land entitled to take proceedings against a trespasser. Further, that the trial Judge did not conclusively determine any rights save to exercise his discretion and grant conservatory relief and made the necessary orders for the ends of justice to be achieved.
18. Lastly, the 1st Respondent's counsel referred this Court to the decisions in *Mohamed Abushiri Mukullu vs Minister for Lands & Settlement & 6 Others [2015] eKLR* and *Patrick Musimba vs National Land Commission & 4 Others [2015] eKLR* on the High Court's concurrent jurisdiction to hear constitutional matters relating to the protection of bills of rights and in particular, protection of property rights. In addition, that the High Court's jurisdiction was not challenged, and the allegation that the dispute related to ownership and was not constitutional was a façade to cover up the Appellant's wrongful and illegal activities.



19. We note that the ruling by the High Court that is appealed against was on an application for conservatory orders, and not on any of the substantive claims made by the 1st Respondent or Appellant. The only issue in this appeal therefore, is whether the applicable principles for the grant of a conservatory orders were applied by the trial Court. These principles were outlined by the Supreme Court in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR*, where the Court held that:-

“[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added).

20. Various decisions of the High Court have also reiterated that a party seeking a conservatory order only requires to demonstrate that he or she has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. See in this regard the decisions in *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] eKLR* and *Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR*.
21. This was the test correctly applied by the High Court in the impugned ruling, and the Appellant’s main grievance in this respect is that the said Court in the process made definitive findings that the 1st Respondent was owner of the suit property. We have perused the said ruling, and note that the High Court, having found that the 1st Respondent was the registered proprietor of the suit property, proceeded to hold as follows:

“The petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by *Anerita Karimi Nejru v. A.G No. 1 (1979) KLR 154*. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of the Constitution. If he 2nd Respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate



of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.”

22. We find that the trial Court did not err for two reasons. Firstly, the evidence produced before it did show that the 1st Respondent was indeed the registered proprietor of the suit property and had charged it to the Equatorial Commercial Bank Limited. The Appellant on the other hand did not bring any evidence of a legal title to the suit property issued to her deceased husband, and relied on electricity and water bills, which are not documents of title, and at best only prove possession at the time they were issued. The High Court was therefore justified to find that the 1st Respondent had thereby established a prima facie case.
23. Secondly, a person seeking a conservatory order pursuant to Article 23 of the Constitution of Kenya as read with the provisions of Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 must also establish that its constitutional petition is not frivolous. The trial Court therefore also did not err in its findings that the suit was properly brought as a constitutional petition.
24. Lastly, the Appellant also claims that the status as to possession of the suit property ought not to have been disturbed at an interlocutory stage, and should subsist until the Petition is heard and determined. It is notable in this regard that both the Appellant and 1st Respondent claimed to be in possession of the suit property, and the applicable test in such a situation where there is a conflict between two private interests, in addition to establishment of a prima facie case, is the balance of convenience criterion.

In this respect, the 1st Respondent having demonstrated that it had title to the suit property, was likely to be more prejudiced if it was denied possession, as opposed to the Appellant. The High Court therefore did not err in granting the 1st Respondent possession.
25. We therefore do not find any merit in this appeal, which is hereby dismissed with costs to the 1st Respondent.
26. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU (FCIArb)

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

