



REPUBLIC OF KENYA



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**Magondu v Koech & 3 others (Civil Appeal 140 of 2019)
[2022] KECA 642 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 642 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 140 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 13, 2022**

BETWEEN

ALICE WAMBUI MAGONDU APPELLANT

AND

JOEL KIPKURUI ARAP KOECH 1ST RESPONDENT

**DEPARTMENT OF LAND ADJUDICATION & SETTLEMENT ,
KWALE 2ND RESPONDENT**

LAND REGISTRAR, KWALE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Being an Appeal arising from the Ruling of the Environment and Land Court at Mombasa by the Honourable Justice C. K. Yano dated 9th July 2018) in Civil Suit no 131 of 2017)

JUDGMENT

1. This appeal arises from a ruling dated 9th July 2018 by the Environment and Land Court (ELC) at Mombasa (Yano J.) in Civil Suit No 131 of 2017 on an application filed therein dated 20th June 2017 by Joel Kipkurui Arap Koech, the 1st Respondent herein. The ELC in the said ruling granted an injunction in favour of the 1st Respondent as against the Appellant and the 2nd to 4th Respondents. The background to the appeal is that the 1st Respondent filed a suit stating that he was the beneficial owner of the land parcel Kwale/Shimoni/168 (“the suit property”), after being allocated the same in 1991, and was aggrieved with the fact that Appellant was registered as the owner of the suit property. The 1st Respondent in the said suit challenged the said registration and sought orders that the court declares the impugned registration as unlawful and fraudulently obtained; that the register be rectified to cancel the registration of the Appellant; that the Appellant be restrained from interfering with the



- suit property and that the Appellant and 2nd to 4th Respondents indemnify the 1st Respondent for the market value of the suit property.
2. In the meantime, the 1st Respondent filed the application dated 20th June 2017 that is the subject of the impugned ruling, where he sought an injunction pending the hearing of the suit, to restrain the Appellant and 2nd to 4th Respondents from dealing with the suit property, and an order directing the 2nd and 3rd Respondents to furnish him with duly certified copies of all documents in register and parcel files for the said property, as well as costs.
 3. The Appellant filed a replying affidavit and grounds of opposition dated 1st September 2017 in the ELC, opposing the said application. The Appellant's case was that she was the first registered owner of the suit property having lawfully acquired the ownership of the said property after the 3rd Respondent conducted a survey on the suit property in 2004, allocated her the suit property which she accepted, paid the necessary charges and the process of the transfer began. The Appellant contended that upon payment of the requisite charges, transfer documents were prepared by the Ministry of Lands and she was issued with a title Deed. She denied participating in the alleged fraud and that after demarcation and issuance of title deed, she took over the suit property and began development on it and charged the property to Agricultural Finance Corporation for a facility of Kshs 200,000/- in 2015. Therefore, that she was entitled to the quiet possession of the suit property as the rightful owner.
 4. The 2nd, 3rd and 4th Respondents did not participate in the hearing of the said application, which was heard by way of written submissions. After considering the parties' submissions, the ELC found that the 1st Respondent had established that he has a right over the suit property therefore he has a prima facie case. On the irreparable damage aspect, the Court found that the alienation of the suit property could not be quantified in damages; that the balance of convenience would tilt in favour of the 1st Respondent. The Court thereby granted an order for a temporary injunction "in terms of prayer 3 of the Notice of Motion dated 20th June 2017.
 5. The Appellant being aggrieved by the said decision, lodged a Memorandum of Appeal dated 15th October 2019, in which she raised twelve (12) grounds of appeal on the findings made by the ELC, which was condensed into one broad area, namely; that the learned trial Judge erred in law and fact by ordering status quo to be maintained on one hand and by granting prayer 3 evicting the Appellant from the suit property at an interlocutory stage on the other hand. This is also the main issue that arises for determination in this appeal.
 6. As this is a first appeal from the decision of the ELC, 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 an appeal to this Court is by way of retrial, and the principles upon which this court acts in such an appeal are that it 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 to follow the trial judge's findings of fact if it appears either that they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.
 7. 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”

8. The appeal was heard on 22nd February 2022, with learned counsel Mr. Mutugi appearing for the Appellant, and learned counsel Mr. Mwandeje appearing for the 2nd 3rd and 4th Respondents. Counsel for the 1st Respondent was not present, although served with the hearing notice and did not file any submissions. Ms Mutugi urged his case based on written submissions dated 21st September 2021, and Mr. Mwandeje submitted orally and did not file any written submissions.
9. The Appellant in her submissions dated 21st September 2021, faulted the learned trial Judge for granting ambiguous orders and failing to appreciate the consequence of granting prayer 3 as prayed, and submitted that the prayer in form and effect was a mandatory order which had the effect of evicting the Appellant from the suit property. Further, that it was irregular for the trial Judge to issue a ruling that had the effect of a final disposition of the suit in favour of the 1st Respondent by granting prayer 3 without fully appreciating the effect. She placed reliance on the case of *Kenya Electricity Transmission Company Limited v Agnes Ongadi* [2018] eKLR for the proposition that the duty of the Court at the interlocutory stage was to assess the strength of each party’s case without determination of the dispute on the merits and render its decision judicially.
10. Mr. Mwandeje on his part submitted that the ELC took into consideration the fact that both parties were claiming ownership of the suit property, which is an issue that can only be determined at full trial. Further that the trial Judge properly applied the principles in the case of *Giella vs Cassman Brown*, and addressed himself to the evidence presented before him.
11. The principles that apply to the granting an injunction are set out in the case of *Giella vs Cassman Brown & Co., Ltd.* [1973] E.A. 358 at p. 360 as follows :-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience “

12. Also see the decisions in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *Nguruman Limited vs Jan Bonde Nielsen & 2 others* CA No 77 of 2012. We have perused the impugned ruling and note that the trial Judge found as follows:

“ 14. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiff has established a prima facie case with a probability of success against the Defendants.

In my view, it is clear that the plaintiff has shown his right over the Suit Property. As regards irreparable damage, I take the view that should the suit land be alienated, the Plaintiff will have lost what he regards as his land and which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiff in order to safeguard the subject matter of the suit pending hearing and determination.”



13. While it is evident that the trial Judge did consider the principles that apply in the grant of temporary injunctions as stated in *Giella vs Cassman Brown* [supra], we are of the view that the trial Judge failed to properly apply his mind and the said principles in relation to the prayers sought by the 1st Respondent. The order by the trial Judge was in this regard as follows:

“I find merit in the application. Accordingly, I grant the order for temporary injunction in terms of prayer 3 of the Notice of Motion dated 20th June 2017. Considering the circumstances of this case, I order that the costs of the application shall be in the cause.”

14. Prayer 3 of the 1st Respondent’s Notice of Motion dated 20th June 2017 was in this regard worded as follows:

“A temporary prohibitory injunction to restraining the Defendants by themselves, their servants and agents from selling, transferring, transmitting, charging, issuing title or making any entry in respect of Kwale/ Shimoni/168 situate in Kwale County and from entering, constructing, cultivating, remaining on or otherwise interfering with the 1st Respondents title and quite possession of the property “

15. The word “temporary” is defined in Black’s Law Dictionary Ninth Edition at page 1602 as “lasting for a time only, existing or continuing for a limited time, transitory” while a prohibitory injunction is defined in at page 855 as “a court order commanding or preventing an action” and a prohibitory injunction as “an injunction that forbids or restrains an act”. The orders as granted by the trial Judge had no temporal limits, and neither was the latter part of the said order supported by the evidence and facts, as the 1st Respondent did not in his supporting affidavit to the application plead to having been put in possession of, or being in actual possession of the suit property. The trial Judge in this regard failed to specify how the rights demonstrated by the 1st Respondent entitled him to the temporary injunctions he sought.

16. The result is that the trial Judge consequently exercised his discretion wrongly and injudiciously by in effect granting a final prohibitory and mandatory injunction without any legal or factual basis. We therefore find this appeal to be merited for this reason.

17. This Court has power in this regard under Rule 31 of the *Court of Appeal Rules* of 2010 to vary the decision of the trial Court. We accordingly set aside the orders granted on 9th July 2018 by the ELC in Mombasa ELC Civil Suit No. 131 of 2017, and in their place order that the status quo obtaining as at 9th July 2018 with respect to the property known as Kwale/Shimoni/168 be preserved, pending the hearing and determination of the 1st Respondent’s suit in Mombasa ELC Civil Suit No. 131 of 2017. The costs of the 1st Respondents application dated 20th June 2018 filed in the ELC shall abide the outcome of the suit in the ELC, and given the circumstances giving rise to this appeal, we shall not make any order as to the costs of the appeal.

18. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA



.....
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

Judgment – MSA Civil Appeal No 140 of 2019

