



Athi Paper Mills Limited v Dakawou Transport Limited (Civil Appeal 19 of 2018) [2022] KECA 1153 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1153 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 19 OF 2018
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
OCTOBER 21, 2022**

BETWEEN

ATHI PAPER MILLS LIMITED APPELLANT

AND

DAKAWOU TRANSPORT LIMITED RESPONDENT

(An appeal against the entire decision in the Ruling and the Order in the Environment and Land Division at Milimani, Nairobi (Gacheru, J.) dated 14th July 2017 in H.C.C.C. No. 214 of 2016)

JUDGMENT

1. By an application dated March 3, 2016, the appellant sought an interlocutory injunction to restrain the respondent and/or any other third parties by themselves and/or their servants from entering upon, occupying, developing, selling or transferring a parcel of land known as L.R No. 337/1208 (“the suit property”) located in Mavoko Township measuring 3.18 hectares or thereabout pending hearing and determination of the suit it had filed against the respondent.
2. In an affidavit sworn by Mohammed Parvez Ismael, a director of the appellant, it was averred that the appellant is the legal owner of the suit property; that the appellant and the respondent entered into a sale agreement in respect of the suit property at an agreed consideration of Kshs.16,500,000/=; that the respondent paid a deposit of Kshs.1,650,000/=; that the agreed contractual period was 120 days; that the respondent failed to pay the balance of the purchase price within the said period of time and the appellant repudiated the sale; that, despite the non- payment of the balance of the purchase price, the respondent had fraudulently registered the suit property in its name.
3. The appellant further stated that the suit property was in danger of being sold and transferred to a third party; that the respondent has no known assets or fixed abode or place of business apart from the suit property, and, therefore, unless the interlocutory orders sought are granted, the appellant would suffer irreparable loss.



4. The application was opposed by the respondent. In an affidavit sworn by Ahmed Abulle Noor, a director of the respondent, he stated, inter alia, that the respondent is the bonafide registered owner of the suit property; that the respondent purchased the suit property from the appellant at an agreed purchase price of Kshs.16,500,000/=; that the respondent paid a deposit of Kshs.1,650,000/= and made a further payment of Kshs.6,850,000/=; that the appellant voluntarily signed the transfer documents of the suit property and gave unreserved and unqualified consent for registration of the same in favour of the respondent.
5. The respondent further stated that it was ready and willing to pay the balance of the purchase price, but that one of the directors of the appellant told the respondent not to make any further payment because there were wrangles amongst the appellant's directors; that the appellant was in lawful possession and occupation of the suit property, and that, in any event, the issue of its occupation had been conclusively settled in another suit, Machakos HCCC NO. 214 of 2010 (hereinafter referred to as "the Machakos matter").
6. The respondent denied that it intends to sell and or dispose of the suit property; that it is a corporate entity dealing with petroleum products and logistics with a turnover of over 1 Billion Kenya shillings, and was willing and able to settle the balance of the purchase price. For those reasons, the respondent urged the trial court to find that the appellant had failed to establish the grounds for grant of an interlocutory injunction and dismiss the application with costs.
7. In its ruling, the trial court held that the appellant's application had not satisfied the principles for grant of an interlocutory injunction as set out in *Giella v. Cassman Brown* [1973] EA 358; that there was *prima facie* evidence that the respondent was the registered owner of the suit property; that the respondent being the registered owner of the suit property, its rights were protected under sections 24 and 25 of the [Land Registration Act](#), and that whether such registration was without approval and/or consent of the appellant could only be determined after a full hearing of the suit.
8. The learned judge further observed that the appellant had not disclosed the existence of the Machakos matter in which an order was issued on December 14, 2010 granting rights of occupation of the suit property to the plaintiff therein, (Oil City Limited), and restraining the appellant from interfering with the suit property in any manner whatsoever.
9. Dismissing the application, the trial court held that the appellant had not established a *prima facie* case with a probability of success. Consequently, there was no need to consider the other conditions that an applicant is required to satisfy for grant of an interlocutory injunction as held by this Court in *Kenya Commercial Finance Company Limited v. Afraba Education Society* [2001] 1EA 87, that:

“The conditions in the case of *Giella v. Cassman Brown* for granting of temporary injunction are sequential, so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”
10. Being aggrieved by that decision, the appellant preferred this appeal contending, *inter alia*, that the learned judge misapprehended the facts; failed to take into account considerations which she ought to have taken into account; exercised her discretion wrongly thus occasioning miscarriage of justice; and in holding that the appellant had failed to establish a *prima facie* case with a probability of success.
11. The parties filed their respective submissions and, when the appeal came up for hearing on June 6, 2022, Mr. Taib, Senior Counsel, was in attendance for the appellant, but there was no appearance for the respondent despite service of a hearing notice upon its advocates. Mr. Taib briefly highlighted the appellant's submissions, which he otherwise sought to rely upon.



12. We have carefully considered the record of appeal as well as the submissions on record. This is an interlocutory appeal, and the main suit is still pending before the trial court. We must therefore be guarded in our findings, lest we pre-empt the trial or embarrass the judge who shall hear the suit. In our view, the substantive issue for our determination is whether the learned judge exercised her discretion appropriately in arriving at the conclusion that the appellant had not established a *prima facie* case with a likelihood of success.
13. It is not in dispute that the appellant and the respondent entered into a sale agreement and that the respondent paid a deposit of Kshs.1,650,000/= and a further sum of Kshs.6,850,000/=. The learned trial judge also established that there was no contention that the respondent did not pay the balance of the purchase price. She however found that the appellant did not challenge the respondent's contention that one of the appellant's directors told the respondent not to pay the balance of the purchase price because there were wrangles between the directors of the appellant.
14. But of greater importance is the fact that, as at the date of filing the suit, the appellant was the registered owner of the suit property. There was prima facie evidence that the appellant had signed the transfer documents in favour of the respondent. In the circumstances, the learned judge found that she could not injunct the respondent from the use of its own property; and taking into consideration the aforesaid facts, she held, and in our view rightly so, that the appellant had not established a *prima facie* case.
15. In *Yellow Horse Inns limited v. Nduachi Company & 2 Others* [2017] eKLR, this Court held that: "If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there."
16. We are not satisfied that the learned judge exercised her discretion injudiciously. In our view, taking into consideration that the suit property had long been registered in the respondent's name before the application for interlocutory injunction was filed, the learned judge cannot be faulted for finding that the appellant had not established a *prima facie* case with a likelihood of success.
17. Having arrived at this conclusion, it would be superfluous to consider the other grounds of appeal. This appeal is without merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

