IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 89 OF 2018

BETWEEN

CELESTINE ANN KING.....1ST APPELLANT

CELESTINE ANNA VON MOLTKE.....2ND APPELLANT

MICHAELA NINA CARMICHAEL.....3RD APPELLANT

SUSAN GERALDINE KNOTT.....4TH APPELLANT

ANTHONY BASIL MITTON.....5TH APPELLANT

AND

SAID HASSAN MWATSUMIRO.....1ST RESPONDENT

MSHENGA VUYAA RUGA.....2ND RESPONDENT

FATUMA O. ZONGA.....3RD RESPONDENT

OMAR H. KITENGELEE.....4TH RESPONDENT

MOHAMED HASSAN VYONI.....5TH RESPONDENT

DISTRICT LANDS REGISTRAR, KWALE.....6TH RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court of Kenya at Mombasa (Komingoi, J. and delivered by Omollo, J.) on 13th June 2018

in

ELC Case No. 367 of 2017

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JUDGMENT OF THE COURT

The appellants, ***Celestine Ann King, Celestine Anna Von Moltke, Michaela Nina Carmichael, Susan Geraldina Knott*** and ***Anthony Basil Mitton*** are aggrieved by the decision of the Environment and Land Court which declined to grant an injunction against ***the 1st to 5th respondents, Said Hassan Mwatsumiri, Mshenga Vuyaa Ruga, Fatuma O. Zonga, Omar H. Kitengele*** and ***Mohamed Hassan Vyoni*** to restrain them from selling or disposing of the land that the appellants occupied, that is *Kwale/Diani Beach Block/76 (the disputed parcel)*.

The appellants' case is that they are the registered owners of the disputed parcel they inherited from their mother, Mrs. Nina Mitton. As proof of ownership of the disputed parcel, they attached a copy of the Certificate of Lease over the disputed parcel which they hold in their

possession. It was further averred that sometime in April 2017 they discovered that the 6th respondent had fraudulently and irregularly issued a Certificate of Lease to the 1st to 5th respondents, that is *Title No. Kwale/Diani Beach Block 248*, being the remainder of *Title No. Kwale/Diani Beach Block/76*.

It was averred that it had come to their knowledge and attention that the 1st to 5th respondents were in the process of selling and transferring the disputed parcel to third parties which had prompted them to file a suit against them, and simultaneously with that suit, they filed a Notice of Motion dated 12th October 2017 seeking orders to restrain the 1st to 5th respondents, their agents employees and servants from selling, transferring, disposing of, or interfering with the disputed parcel. The motion was supported by the grounds in the affidavit of the 1st appellant sworn on 12th October 2019.

In an affidavit in reply, the 2nd respondent deponed that they were the registered proprietors of *Title No. Kwale/Diani Beach Block/248*, a copy of which was annexed to the affidavit; that on 4th July 2001, they were issued with a letter of allotment in respect of the disputed parcel and thereafter issued with the Certificate of title; that they did not acquire the disputed parcel fraudulently, irregularly or illegally.

Upon considering the application, the affidavits and the parties' submissions, the learned judge (Komingoi, J.) declined to grant the injunction order sought for reasons that the appellants had not established a *prima facie* case, and had not proved that the respondents had been fraudulent in acquiring the title to *Plot No. 248*.

The appellants were aggrieved by the trial court's decision, and filed this appeal on the grounds that despite the appellants holding an existing unchallenged title in respect of the disputed parcel, and being in possession and occupation thereof, the learned judge wrongly concluded that the appellants had not established a prima facie case; that the learned judge wrongly found that the title deed to the disputed parcel that is, *Kwale/Diani Beach Block/76* had not only ceased to exist, but had also been surrendered to the Government of Kenya, which was contrary to the undisputed facts that were before the court;

Further, that the learned judge failed to take into account relevant factors and took into account extraneous factors when she failed to appreciate that the appellants' title to the disputed parcel was first in time as against the respondents' title, and found that the appellants had not discharged the burden of proof to warrant the injunction order sought; that the learned judge fell into error when she sought to make definitive findings of fact in an interlocutory application, when she reached a finding that the appellants had failed to prove fraud and illegality on the part of the respondents and by holding that the appellants had neglected to join the Government to the proceedings, yet the Registrar of Titles was a party to the suit; that the learned judge wrongly issued final orders in an interlocutory application, and finally that the learned judge failed to appreciate that the appellants' right to property under ***Article 40*** of the ***Constitution*** was violated.

Mr. Paul Njuguna, learned counsel for the appellants, filed written submissions and informed us that he would be relying upon them in their entirety. Orally highlighting the submissions, counsel submitted that what was before the trial court was an interlocutory application where the appellant sought to obtain an injunction to restrain the respondents from disposing of the suit property; that the dispute between the appellants and the respondents is over the disputed parcel to which the 1st to 5th respondents claim to be the registered proprietors; that the respondents had sought an order of eviction of the appellants who are in occupation of the land parcel. It was counsel's submission that the dispute turns on the irregular manner in which the District Lands Registrar, Kwale, the 6th respondent issued the title of the appellants' land to the respondents, yet the appellants' title remains in existence; that the appellants' title was issued in 2001, while the respondents' title was issued in 2006. It was further argued that the District Land Surveyor has specified that the two titles relate to the same parcel of land, yet the court failed to appreciate that a *prima facie* case had been made out, and fell into error when it made definitive findings of fact in an interlocutory application.

Mr. Abuobakar, learned counsel for the respondents, also relied on their written submissions. Highlighting the submissions, counsel stated that the parcels of land are not the same; *that Kwale/Diani Beach Block/76* was compulsorily acquired; that a portion had become a public road, and thereafter *Kwale/Diani Beach Block/76* ceased to exist; that the appellants had the burden of proving their case which they failed to. Counsel further argued that the findings of fact by the trial court have not been faulted, and that the court properly exercised its discretion in declining to grant an injunction; that for this Court to interfere with such exercise of discretion, it must be shown that the trial court acted injudiciously, which has not been demonstrated.

We have considered the parties' submissions, the record, and the law, and the questions that yield themselves for determination in this appeal is, whether in arriving at the impugned decision to decline the injunction orders sought, did the learned judge misdirect herself in law? Did she misapprehend the facts or take into account extraneous considerations or fail to take into account relevant considerations? Or was her decision plainly wrong?

So as to determine whether or not to grant the injunction sought, the learned judge was exercising discretionary powers. That being the case, this Court can only interfere with such exercise of discretion under certain well defined principles succinctly set out in the case of ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125***, where this Court held inter alia as follows:-

> ***"2. The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:***
>
> ***(a) The Judge misdirected himself on law; or***
>
> ***(b) That he misapprehended the facts; or***
>
> ***(c) That he took account of considerations of which he should not have taken account; or***
>
> ***(d) That he failed to take account of consideration of which he should have taken account; or***

(e) That his decision, albeit a discretionary one, was plainly wrong."

Since what was before the trial court was an injunction application, in deciding whether or not it should be granted, the court is required to satisfy itself that the principles as laid down in the case of ***Giella vs Cassman Brown Limited [1973] EA*** 358 have been met. These are;

"1. That an applicant must show a prima facie case with a probability of success.

2. That an 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".

Beginning with whether a *prima facie* case was made out, the learned judge concluded thus;

"It is safe to say that following the compulsory acquisition and the resultant new numbers Plot No. 76 ceased to exist. It did not exist in 2001. On the other hand, there exists a certificate of Title in favour of the 1st, 2nd, 3rd, 4th and 5th, Defendant/ Respondents.

The Plaintiffs/Applicants have claimed the same was irregular, illegal and fraudulent but they have put forward no evidence to confirm this. In the absence of any proof that the1st, 2nd, 3rd, 4th and 5th, Defendant/ Respondents committed any fraud in order to obtain registration, then I find that the Plaintiffs/Applicants have failed to establish a prima facie case with a probability of success at the trial."

As seen from the brief facts, the dispute between the appellants and the respondents is over a parcel of land which the appellants claim was fraudulently allocated to the respondents. In seeking to demonstrate their ownership of the land, the appellants aver that they are the bona fide registered owners of the disputed parcel, evidenced by Title *No. Kwale/Diani Beach Block/76* in 2001 which they inherited from their mother who purchased it from one, Mrs. Bianca Lusso; that they had lived there peacefully and quietly enjoying the disputed parcel, until the 1st to 5th respondents claimed to hold *Title No. Kwale/Diani Beach Block /248* over the disputed parcel. They claim that though *Title No. Kwale/Diani Beach Block/76* was subdivided into two parcels namely, *Title No. Kwale/Diani Beach Block /248 and 249,* they did not at any time surrender *Title No. Kwale/Diani Beach Block/76*, which title they continue to hold to date. Furthermore, a search in the Land registry showed that Mrs. Nina Mitten is the registered proprietor of Title *No. Kwale/Diani Beach Block/76.*

On the other hand, the respondents' claim is that they are the registered proprietors of *Title No. Kwale/Diani Beach Block/248* which was allocated to them, and that the portion of land to which it relates is not the same as the parcel of land owned by the appellants.

What becomes clear from the assertions by either side is that this dispute is concerned with two competing proprietary interests over a parcel of land. And in claiming that the disputed parcel belongs to them, the respondents were seeking to dispose of the disputed parcel to third parties. Though it is tempting at this stage of the proceedings, for a court to seek to determine whose title takes precedence over the other, in the case of ***American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1*** Lord Diplock issued a word of caution thus;

"it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Similar sentiments were expressed by this court in ***Central Bank of Kenya & Another vs Uhuru Highway Development Ltd & 4 Others [2000] eKLR*** *that;*

"In this case, the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application of an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

……

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. Those are matters to be dealt with at the trial."

In this case, the learned judge sought to determine who between the two parties owned the disputed parcel, and concluded definitively that, *"…It is safe to say that following the compulsory acquisition and the resultant new numbers Plot No. 76 ceased to exist. It did not exist in 2001…"* and *"On the other hand there exists a certificate of Title in favour of the 1st, 2nd, 3rd, 4th and 5th, Defendant/ Respondents. The Plaintiffs/Applicants have claimed the same was irregular, illegal and fraudulent but they have put forward no evidence to confirm this. In the absence of any proof that the1st, 2nd, 3rd, 4th and 5th, Defendant/ Respondents committed any fraud in order to obtain registration, then I find that the Plaintiffs/Applicants have failed to establish a prima facie case…"*

There was no basis for the learned judge to make findings of fact at this stage of the proceedings in view of the competing evidence of both parties which had yet to be tested during the trial. What the learned judge ought to have done was to satisfy herself of the parties competing interest in the disputed parcel, which in our view was sufficiently established by the existence of the two rival titles, and the matter ought then to have been left there to await the substantive trial.

On the question of whether the appellants stood to suffer loss, it is averred that they are in occupation of the disputed parcel. In addressing this requirement, it is significant that, though the respondents claim to have title to the disputed parcel, it is also their case that their title did not appertain to the same land parcel. If indeed that was the case, it is apparent that documentary evidence on ownership of the disputed parcel, and its location are matters that are yet to be ascertained. It stands to reason that the appellants would suffer extreme loss if they were evicted, only for the court to later establish that the parcel of land claimed by the respondents was an entirely different parcel, or that it did not even exist at all. Clearly, on this account alone, the balance of convenience tilted in the appellant's favour.

Consequently, all factors considered, the order that lends itself to be granted in this case is for maintenance of the status quo pending hearing and determination of the suit in the trial court. Ultimately, we find that the learned judge took into account matters that she ought not to have taken into account, and went beyond her mandate, and in so doing improperly exercised her discretion. We therefore find it necessary to interfere with that decision.

In the result, the appeal succeeds. The ruling and orders of the court dated 13th June 2018 are hereby set aside and substituted with an order allowing prayer 3 of the appellants' Notice of Motion dated 12th October 2017 with costs to the appellants.

It is so ordered.

DATED and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR