



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 198 OF 2015

(CORAM: OUKO (P), KARANJA & OKWENGU, J.J.A)

BETWEEN

ZACHARIA SOMI NG'ANG'A.....APPELLANT

AND

FRANCIS MWANGI NJUGUNA.....1ST RESPONDENT

MARGARET WANGECHI NJUGUNA.....2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (**Joyce Khaminwa, J.**) dated the 19th day of October, 2009

in

H.C.C.C. No. 82 of 2009)

JUDGMENT OF THE COURT

1. By a plaint dated 3rd February, 2009, **Francis Mwangi Njuguna** and **Margaret Wangechi Njuguna**, (the 1st and 2nd respondents before us), sued **Zacharia Somi Ng'ang'a** (the appellant), seeking orders as follows:

- (i) **an injunction restraining the defendant by himself, his servants and/or agents or through any other person or authority from dealing with the suit land being Nairobi Block 72/1026;**
- (ii) **an order that the defendant be evicted from the suit land being Nairobi Block 72/1026;**
- (iii) **general damages for unlawful occupation;**
- (iv) **costs of the suit;**
- (v) **any other relief deemed just and expedient.**

2. In their plaint, the respondents claimed that they bought the suit land at a public auction held on 22nd January, 2004 at a price of Kshs. 2.5million; and that although they transferred the suit land into their names on 4th January, 2007, the appellant refused to move from the suit land and has continued to occupy the same, thereby rendering the suit necessary.

3. Filed simultaneously with the plaint was a chamber summons brought under **Order XXXIX rules (1), (2) and (3)** of the Civil Procedure Rules and **Sections 3 and 3A** of the Civil Procedure Act, in which the respondents sought an order of temporary injunction

'restraining the defendant by himself, his servants and/or his agents or through any other person from wasting or dealing in any manner with the suit land' pending the hearing and determination of the suit; and an order that the defendant be ***'evicted forthwith'*** from the suit land. The application was anchored on the grounds that the respondents were the registered owners of the suit land, which they had bought at a public auction and that the appellant's suit challenging the auction sale in High Court Civil Case No. 62/2006 was dismissed; and that the appellant had refused to move out of the suit land despite several demands.

4. On 19th October, 2009, following the hearing of the chamber summons, the High Court (**Khaminwa, J**) delivered a ruling in which she found that the respondents were entitled to possession of the suit land which they had purchased, and were therefore entitled to an injunction against the appellant as well as an order of eviction. The High Court therefore granted the order of injunction and stated the following regarding the prayer for eviction order:

“Regarding the issue of eviction, it is my view that the applicants are entitled to eviction order as prayed and I order that the defendant shall vacate the applicants’ property on or before the expiration of 30 days from today.”

5. The appellant is aggrieved by the ruling of the High Court and has lodged an appeal in which she has raised 8 grounds, contending *inter alia*, that the learned Judge erred in law and fact: in finding that the issues raised by the appellant in the High Court were *res judicata*; in failing to appreciate that the appellant’s suit HCCC No. 62/2004 was struck out due to lack of summons to enter appearance; and that the issues that were raised by the appellant have never been finally determined by any court.

6. In addition the appellant faulted the learned Judge for failing to properly appreciate or apply the principles relating to orders of mandatory injunction; failing to appreciate that the High Court could order rectification of the register as long as the registration is not a first registration and fraud is alleged and proved; failing to make a determination on the issue of fraud; and ordering the eviction of the appellant at interlocutory stage thereby prematurely determining the suit.

7. During the hearing of the appeal, the appellant was represented by **Mr. Samuel Aduda**, while the respondents were represented by **Mr. Ruiru Njoroge** who was holding brief for **Dr. Kariuki Muigwa**.

8. In urging the Court to allow the appeal, Mr. Aduda pointed out that the reliefs that were sought by the respondents in the plaint were identical with the prayers that were sought in the chamber summons. In faulting the learned judge for granting the order of eviction which was a final order at interlocutory stage, Mr. Aduda cited **Olive Mwihaki Mugenda & Anor vs Okiya Omtatah Okoiti & 4 others, [2016] eKLR**. Counsel submitted that such an order could only be granted in exceptional circumstances, but that there were no such circumstances obtaining before the learned Judge, that could justify the issuance of the order. In addition, Mr. Aduda submitted that the appellant had raised an issue concerning the propriety of the auction sale, and this was an issue that could only be fully interrogated during the hearing of the suit.

9. **Mr. Ruiru** opposed the appeal urging the Court to affirm the judgment of the lower court, as the respondents were the registered owner of the suit land. Mr. Ruiru relied on **Cheruiyot vs. Bartiony [1988] eKLR**, for the proposition that Section 27 of the Registered Land Act, provides that a person who is registered as a proprietor of land is the absolute owner of that land and therefore the respondents had the right to possession of the suit land. Mr. Ruiru submitted that the appellant had not raised any counterclaim to the respondents’ suit, and that the suit that the appellant had earlier filed was dismissed and an application seeking to review the order of dismissal was also dismissed, and therefore there was nothing upon which the appellant’s claim to the land could be anchored.

Counsel for the respondents therefore urged the Court to dismiss the appeal.

10. We have carefully considered this appeal, the submissions made before us and the authorities cited. It is clear from the record that what was before the learned Judge was an interlocutory application under **Order XXXIX** of the former edition of the Civil Procedure Rules (now **Order 40, rule 1 & 2** of the current edition of the Civil Procedure Rules, revised edition 2012 (2010)). The Order gives the Court powers to grant temporary injunctions or interlocutory orders. In accordance with rule 1, such orders are intended to avert the wasting or damage or alienation or removal or dispossession of property subject of a suit, pending the hearing and final disposal of the suit.

11. The appellant also moved the Court under **Sections 3 and 3A** of the Civil Procedure Act. **Section 3** preserves the special powers or jurisdiction conferred on the court by any other law, whilst **Section 3A** gives the court inherent powers to make any orders so as to meet the ends of justice or to prevent the abuse of the process of the court.

12. In this case, the learned Judge, granted the prayer for injunction which, as worded in the chamber summons, restrained the appellants from wasting, or dealing in any manner with the suit land. **Black’s law Dictionary 10th edition** at page 483 defines “**dealing**” as the ‘**activity of buying, selling or doing business with people**’. It is not disputed that the appellant was in possession of the suit land. Therefore, the order restraining him from “wasting or dealing in any manner” with the suit land, did not include restraining him from entering the suit land nor did it restrain his own occupation. The order restrained the appellant from engaging in any activity on the suit land that involved the buying or selling, or any such activity that would prejudice the interest of the respondents during the pendency of the suit. Given the facts that were before the learned Judge, we cannot fault the Judge for issuing the order of interlocutory injunction, as it was necessary to protect the respondents’ interests.

13. What is of concern is the order of eviction that was granted by the learned Judge against the appellant, ordering him to vacate the suit land within 30 days. In effect, that meant that the order issued by the court went beyond an interlocutory order. It was a the final order that was sought by the respondents in the plaint. The issue is whether the learned Judge was right in granting the order of eviction which amounted to a mandatory injunction at that interlocutory stage.

14. In **Kenya Breweries Limited & anor. vs Washington Okeyo [2002] eKLR**, this Court adopted the test for granting a mandatory injunction as stated in volume 24, Halsbury’s Laws of England, 4th Edition para 948 as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application.”

15. In Alex Wainaina t/a John Commercial Agencies vs Johnson Mwangi Wanjihia [2015] eKLR, this Court having examined the principles to be applied in mandatory injunctions had this to say:

“These principles have received full approval by the courts in this country, including:- Belle Maison Limited Vs. Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) , Ripples Limited Vs. Kamau Mucuha H.C.C.C. No. 4522 of 1992 per Mwera, J. and Magnate Ventures Limited vs Eng. Kenya Limited [2009] KLR 538 which summarized the principles thus:

(i) A mandatory injunction need not to be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was:-

(a) Clear and one which the court thought it ought to be decided at once, or

(b) If the act done was a simple and summary one which could be easily remedied.

(c) Or if the defendant attempted to steal a march on the plaintiff.

(ii) The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances.’

The consistent reiteration of those principles by the courts is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution.”

16. The order granted by the learned Judge ordering the appellant to vacate the property within 30 days, was in effect a mandatory injunction that once executed, would be difficult to reverse as the possession was given without any strings attached. We have considered whether the learned Judge properly exercised her discretion and caution in granting the order of eviction. As each case depends on its own peculiar circumstances, we must consider whether there were exceptional circumstances and whether in the circumstances obtaining before the learned Judge, it was appropriate to issue an order of eviction by way of a mandatory injunction.

17. It is evident that the respondents had a title to the suit land, having bought the suit land from a public auction. The attempts of the appellant who was the previous registered owner of the suit land, to challenge the auction sale were not successful as the suit that the appellant had filed was dismissed for want of prosecution. This notwithstanding, the appellant raised a defence to the respondents’ suit challenging the propriety of the auction sale. **Order XXXIX** only empowered the court to grant temporary orders in anticipation that the matter would proceed to hearing, so that the issues raised in the pleading are finally determined once and for all.

18. In granting the order of eviction, the learned judge stated *inter alia*, as follows:

“On the issue of eviction I am convinced that the plaintiffs are entitled to the possession of the property they have purchased. They were registered as proprietors on 4th January, 2007 and the defendant has not been able to cancel the sale. It is the applicants who are suffering not the defendant.

This declares (sic) that any claims by the defendant is res judicata and the plaintiffs have demonstrated prima facie case. Damages as a remedy cannot compensate the plaintiffs, and in any case, the defendant had no money to pay the Chargee and will not have any funds to compensate the plaintiffs. I am of the view that the applicants are entitled to injunction as sought and I do grant the same.

Regarding the issue of eviction, it is my view that the applicants are entitled to eviction order as prayed and I order that the plaintiff shall vacate the applicants’ property on or before the expiration of 30 days from today.”

19. From the ruling, the learned Judge has not identified any exceptional circumstances that justified the granting of the order of eviction at an interlocutory stage. Moreover, the order sought by the respondents in the chamber summons was an order of eviction. Reading the ruling of the learned Judge, one gets the impression that the learned Judge formed the opinion that the appellant did not have any defence to the respondents’ suit, so that without categorically stating so, the learned Judge appeared to have been of the view that the respondents’ case was clear and ought to be decided at once. In effect, the orders of the learned Judge amounted to the court summarily determining the respondents’ suit by making determinative and prejudicial findings that led to the conclusion that the appellant had no defence to the respondents’ suit.

20. Such a conclusion could only have been made under **Order XXXV, rule 1 & 2** of the former edition of the Civil Procedure Rules that provided for a summary procedure for recovery of land where the defendant does not have a proper defence. Section 3A that provides for the exercise of inherent powers, only comes to aid the court where there is no specific provision. In this regard, we would distinguish Kamau Mucuha v Ripples Limited, Civil Application No. 186 of 1992 (NAI 77/1992) UR where the Court of Appeal upheld the order of Mwera, J. granting an order of mandatory injunction reinstating an applicant who had been evicted from the suit premises back into the suit premises, as that order was necessary to maintain the *status quo ante* by protecting a tenant who had been illegally evicted from the premises.

21. Where there are clear provisions in law for eviction as provided under Order 35, a Judge cannot purport to exercise inherent powers to grant an order of eviction. The court ought to be moved under the appropriate provisions. Consequently, the trial court misdirected itself in issuing the order of eviction, as the application before the court was not an application for summary judgment nor was it appropriate for the issuance of a mandatory injunction in the nature of an eviction order. In addition, the court ought not to have made any definitive findings

that had the effect of prematurely determining the suit at interlocutory stage.

22. We find that the learned Judge did not properly exercise her discretion in granting the order for the eviction of the appellant as she misdirected herself in treating the respondents' notice of motion as an application for summary judgment. This had the effect of denying the appellant an opportunity to have his defence fully ventilated at a full hearing. The order of injunction restraining the appellant's from interfering with or in any way dealing with the suit land, would have sufficiently protected the interests of the respondents. In any case the respondents had the option of applying for summary judgment.

23. We come to the conclusion that this is an appropriate matter for our intervention. We set aside the ruling of the learned Judge to the extent of setting aside the order of eviction and the definitive premature findings made by the court. We uphold the order of interlocutory injunction restraining the appellant from wasting or dealing in any manner with the suit land, pending the hearing and determination of the suit. We award the appellant the costs of this appeal.

Those shall be the orders of the Court.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR