IN THE COURT OF APEAL

AT MALINDI

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

CIVIL APPEAL NO. 60 OF 2019

BETWEEN

JOSEPH KALOKI

T/A ROYAL FAMILY ASSEMBLY..... APPELLANT

AND

NANCY ATIENO OUMA.....RESPONDENT

(Being an appeal from the Ruling/Orders of the Environment & Land Court at Malindi (J.O. Olola, J.) dated 14th March, 2019

in

ELC C No. 197 of 2014)

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JUDGMENT OF THE COURT

1. In its ruling, the subject of this appeal, dated and delivered on 14th March 2019, the Environment and Land Court (ELC) at Malindi (***J.O. Olola, J***.) allowed an application by notice of motion dated 15th March 2018 made by Nancy Atieno Ouma, the respondent, and ordered Joseph Kaloki t/a Royal Family Assembly, the appellant to vacate and hand over possession of the property known as Plot Nos. 508, 509, 510, 486/7 and 488 (the properties) situated in Malindi. In the same ruling, the ELC ordered the Officer Commanding Malindi Police Station to superintend compliance with the order by providing security during eviction.

2. The brief background is that the respondent is registered as owner of the properties under Indentures registered at the Land Titles Registry, Mombasa. By a letter of offer of lease dated 5th September 2012, the respondent let the properties to the appellant for a term of 5 years and 3 months commencing on 1st October 2012 on the terms therein set out. Some pertinent terms of the tenancy included stipulations that: any alteration of whatever nature e.g. electrical, masonry, plumbing, woodwork will be done after obtaining prior written authority of the landlord; the tenant is strictly to maintain the existing design and fixtures and ensure no alteration is done unless with written permission of the landlord; the tenant would use the properties for the business of *"church only"*; and that the lease may be terminated by either party on giving six months' notice.

3. Hardly a year or so into the term of the tenancy, trouble started.

On 28th November 2013, the respondent's property manager, Nairobi Homes (Msa) Limited, wrote a letter to the appellant expressing concern that the appellant was *"erecting permanent structures"* on the properties *"without the permission of the landlord"* and asked him to *"stop the unauthorized ongoing construction"*. The same letter stipulated, *"on the foregoing, we serve you with six months notice to vacate the premises you are occupying as a tenant and that the notice was effective 1st December 2013 to 30th May 2014."*

4. In his response dated 4th December 2013 addressed to the respondent's property manager, Nairobi Homes (Msa) Limited, the appellant asserted that having consulted with the respondent, it had emerged that the property manager had not consulted with the respondent and that he would continue to pay rent *"while the construction work continues uninterrupted."* An attempt by the parties to amicably resolve the matter at a meeting held on 26th March 2014 was not successful.

5. Subsequently, the property manager reminded the appellant, by a letter dated 30th April 2014, that *"the notice to vacate is expiring on 30th May 2014"* and that the appellant should *"arrange to hand over the premises in vacant possession on 31st May 2014."* It would appear that the appellant then requested for an extension of time as the property manager subsequently by a letter dated 29th August 2014 to the appellant communicated to the appellant that the landlord had rejected the request and reminded the appellant

> *"to completely clear the compound ie, any person and or buildings on our client's premises by 30th September 2014."* The stage was set for litigation.

6. On 28th October 2018, the respondent instituted suit before the High Court at Malindi seeking: a declaration that the appellant is a trespasser on the properties; a permanent injunction to restrain the appellant from trespassing on the properties and to cease any further construction or development on the properties; and an order of eviction and demolition of the building and the removal of all materials and debris on the properties. At the same time, the respondent filed an application, also dated 27th October 2014, seeking an order for temporary injunction to restrain the appellant from trespassing on the properties and to cease further construction or developments on the properties.

7. In response to the suit and to the application, the appellant filed a defence and a replying affidavit respectively in which he acknowledged the respondent's ownership of the properties and that he had entered into a tenancy agreement with her in accordance with the letter of offer of lease dated 5th September 2012. He averred that at the time of entering into the tenancy, he shared the designs and drawings of the church structure to be erected on the properties; that the respondent acquiesced in and impliedly consented to the construction and development; that allowing the reliefs the respondent was seeking would occasion the applicant, and his church adherents, undue hardship.

8. The respondent's application dated 27th October 2014 was heard before ***Angote, J.*** of the ELC who in a ruling delivered on 12th June 2015 expressed:

> ***"Considering that the plaintiff entered into a written agreement with the defendant in which he allowed the defendant to put up a church on the suit premises, and having allowed the defendant to put up a permanent structure which is almost complete, I find and the hold that pending the hearing and determination of the suit the plaintiff is estopped from demanding that the defendant should not use the said property."***

9. In the same ruling, the judge expressed that his only concern was with the magnitude of the investment the appellant was putting in the construction of the church "*on the property that does not belong to him considering that the permission to use the suit property shall expire in the year 2017*". The Judge went on to state that the status quo that should be maintained is that the defendant is in occupation of the properties and he should be allowed to utilize it pending the hearing of the suit and went ahead to dismiss the respondent's application.

10. The respondent then decided to bid her time. She waited for the term of the tenancy to expire on 31st December 2017. On 15th March 2018, she presented an application before the ELC seeking an order of mandatory injunction against the appellant to surrender the properties and hand over vacant possession. That is the application that culminated in the ruling that was delivered on 14th March 2019 the subject of this appeal.

11. The grounds on which the appellant has challenged the ruling and order of the ELC compelling him to surrender and vacate the property are set out in the memorandum of appeal and were summarized and canvassed in the appellant's written submissions filed on 21st November 2019 on which ***Miss Macrine Juaje*** learned counsel holding brief for ***Mr. Kilonzo*** for the appellant relied during the hearing of the appeal.

12.Counsel urged that a mandatory injunction should only be granted in special circumstances and in clearest of cases. In support, a decision of this Court in ***Kenya Breweries Ltd vs. Okeyo [2002] 1 EA 109*** and the English decision in ***Locabail International Finance Limited vs. Agroexport and others [1986] 1All ER 901*** were cited. It was submitted that the circumstances in this case did not warrant granting the orders; that the issues arising in this matter are complex and required a full hearing; and that by granting the orders, the court curtailed the appellant's right to be heard under Article 50 of the Constitution.

13. It was submitted that the respondent was under a duty to give a full and frank disclosure of the facts to the court when seeking relief; that the respondent failed to disclose to the court that orders had earlier been given by ***Angote, J.*** which dictated that *viva voce* evidence was required to resolve the controversy between the parties; that the respondent was therefore not entitled to the orders that she obtained. On the duty of disclosure, the case of ***Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd (1989)1 KLR 1*** was cited.

14. It was submitted further that the respondent collaborated with the appellant from the onset in the construction of permanent church structures on the properties and even contributed materials and in bringing investors to support the construction; that in those circumstances the respondent was estopped, by conduct, from seeking mandatory injunctions. Reference was made to the decision of the Court in ***Kenya National Capital Corporation Ltd vs. Albert Maria Cordeiro & another [2014] eKLR***.

15. Opposing the appeal, ***Mr. J.S. Kaburu***, learned counsel for the respondent submitted that this was indeed a proper case for the grant of mandatory injunction; that the material contained in the notice of motion and the affidavits that were before the ELC were sufficient to have the matter disposed of summarily without the need for a trial.

16. It was argued that it was not in contention that the respondent is the registered owner of the properties; and that the only basis upon which the appellant had occupied the property was as a tenant based on the terms and conditions set out in the letter of offer to lease dated 5th September 2012 which granted the appellant a term of 5 years and 3 months expiring in December 2017; that upon expiry of the term of the tenancy the appellant became a trespasser and the learned Judge properly directed his mind in granting the mandatory orders and in giving possession of the properties to the respondent considering the contractual relationship between the parties had ended; that there is no basis for this Court to interfere with the decision of the ELC; and that the orders given accord with the legal principles applicable to mandatory

injunctions.

17. Counsel submitted that the orders of the ELC have in any event been executed; that allowing the appeal would mean that the appellant would have to apply for an order of reinstatement into the properties and that the appellant would in effect be stealing a match on the respondent. In that regard reference was made to the ruling of ***Hancox, C.J***. in ***Kamau Mucuha vs. The Ripples Ltd, C. Application No. 186 of 1992 [1993] eKLR***.

18. It was submitted further that the issue of estoppel was properly addressed by the Judge and the correct determination made and there is no basis for this Court to interfere; It was submitted that parties are bound by their contract and the court cannot rewrite the same for the parties.

19. Counsel argued that there is no merit to the claim that the respondent did not make full disclosure to the court below pointing out that, on the contrary, the respondent did in her affidavit in support of the application refer to the earlier ruling of ***Angote, J.***

20. Counsel concluded by reiterating that the appeal is overtaken by events as the respondent has already enforced the orders appealed from, the appellant is no longer in possession and has no basis seeking reinstatement as the contractual term expired; and that litigation must come to an end and that this appeal should be dismissed with costs.

21. We have considered the appeal and the rival submissions. The grant or refusal of an injunction involves the exercise of judicial discretion. The circumstances in which this Court can interfere with the exercise of judicial discretion by the lower court were articulated in the well-known case of ***Mbogo and Another vs. Shah [1968] EA 93*** where the Court stated:

> ***"…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

22. Bearing that in mind, the main issue in this appeal is whether the ELC erred in granting a mandatory injunction in the circumstances of this case and whether doing so constituted an erroneous exercise of judicial discretion. In granting the mandatory injunction, the Judge expressed that he was persuaded that the tenancy had terminated by effluxion of time and that it was a proper case to summarily, as it were, grant an order of eviction. In reaching that conclusion, the Judge cautioned himself that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases. Was that a proper exercise of judicial discretion by the Judge?

23. From the onset, the following pertinent facts were not in dispute: that the respondent is the registered owner of the properties; that the basis upon which the appellant entered into possession of the properties was the letter of offer of lease dated 5th September 2012; that the term of the tenancy was 5 years and 3 months commencing 1st October 2012; that under the terms of the tenancy, the appellant was prohibited from making any alterations to the premises without the written authority of the respondent; that respondent, through her property manager, Nairobi Homes (Msa) Limited, protested to the appellant, to no avail; that immediately the respondent became aware that the appellant was constructing permanent buildings on the properties, she requested the appellant to immediately cease construction; and that despite the protest by the respondent, the appellant went ahead with the construction.

24. It was on those facts that the respondent invoked the termination clause in the tenancy agreement and by letter dated 28th November 2013 gave notice to the appellant to vacate the properties within six months followed by institution of the suit in the High Court on 28th October 2014, seeking, among other reliefs, eviction of the appellant from the properties.

25. In his defence, the appellant averred that the respondent impliedly consented to the construction; that the appellant had presented designs of the intended construction to the respondent at the time of entering into the tenancy and that the respondent acquiesced in the construction. As already indicated, the respondent's initial application for temporary injunction that was filed with the suit was declined by the court (***Angote, J.***) after which the respondent sat back and waited for the term of the tenancy to lapse by effluxion of time before presenting the application for mandatory injunction that resulted in the impugned ruling delivered by ***Olola, J.***

26. Beyond the assertion by the appellant in his replying affidavit sworn on 9th May 2018 in opposition to the respondent's application that the respondent had impliedly consented to the construction and that the respondent had in her application for mandatory injunction failed to make material disclosure, the respondent did not present any material to the court to demonstrate, either that the respondent had consented to the construction or indeed that the term of the tenancy would be extended. This is particularly pertinent bearing in mind that under the terms of the tenancy, there was an express requirement for the appellant to obtain written authority from the respondent prior to making any alterations to the premises. Nothing would have been easier than to exhibit the written authority, if any existed.

27. Given those uncontested facts and circumstances, we are unable to fault the Judge for concluding as he did, that the appellant had no basis for continuing in occupation of the properties beyond the agreed term of the tenancy. We therefore respectfully agree with the Judge when he stated:

> ***"In the circumstances of this case, I am persuaded that the contract giving rise to the relationship between the parties herein has terminated by effluxion of time and there is no reason to deny the plaintiff the prayers sought herein pending a hearing as to whether or not the defendant ought to have vacated the suit premises on 30th May 2014. The Defendant cannot demonstrate any right he has to continue occupying and/or utilizing the suit property. I am not satisfied that any purpose will be served by delaying the determination of the issues to any later stage as suggested by the defendant."***

28. As this Court stated in ***Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR*** a mandatory injunction can be granted on an interlocutory applications as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.

29. The Court also stated in ***Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR*** that:

> ***"The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."***

30. Clearly, it was foolhardy for the appellant to embark on what appears to be a massive construction of permanent church building on property that did not belong to him without seeking or obtaining written consent of the landlord as the tenancy agreement expressly demanded. We are in the circumstances unable to fault the Judge for taking the view that this is a clear case of a tenancy that has expired by effluxion of time and there was no basis for declining to grant the mandatory injunction.

31. It was also argued for the appellant that the respondent was not entitled to the relief granted by the ELC on grounds that she failed to disclose material facts, namely, that she knew of the existence of the church project and gave permission to the same and further that she failed to disclose in her application for mandatory injunction that her earlier application for interlocutory injunction had been dismissed in a ruling given by ***Angote J.*** on 27th October 2014 who ordered that the status quo should be maintained pending the hearing and determination of the suit.

32. We have already dealt with the claim by the appellant that the respondent gave permission to the construction. As indicated, the tenancy agreement required written permission for alteration of the premises. It bears repeating that nothing would have been easier than for the appellant to exhibit the written permission that the respondent allegedly gave to the construction of the church. Furthermore, the letters exhibited by the respondent demanding that the appellant should cease and desist from carrying on with the construction negate the claim that she gave permission, whether expressly or impliedly, to the construction.

33. The claim by the appellant that the respondent did not disclose to the court an earlier ruling and orders that had been made is factually incorrect. In paragraph 14 of her affidavit in support of the application for mandatory injunction, the respondent made reference to and indeed exhibited the ruling of ***Angote, J.*** given on 12th June 2015 dismissing her application of 27th October 2014. It is clear from paragraphs 12 and 13 of the impugned ruling, that the court (***Olola, J.***) was alive to the application of 27th October 2014 and the orders given on 12th June 2015. The Judge noted:

> ***"Having heard the application inter partes, the Honourable Justice O. Angote then seized of the matter declined the application and ordered that the status quo be maintained pending the hearing and determination of the suit."***

34. It is clearly incorrect therefore for the appellant to claim that the matter of the earlier application by the respondent that was dismissed by ***Angote, J.*** was hidden from and not disclosed to ***Olola, J.***

35. The appellant has not demonstrated that the learned Judge took into account matters he should not have considered, or that he failed to consider matters that he should have or that the decision is plainly wrong. We do not therefore have a basis for interfering with the exercise of discretion by the Judge.

36. This appeal fails. We accordingly dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 3rd 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