



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, WARSAME & KIAGE, J.J.A.)

CIVIL APPEAL NO. 152 OF 2019

BETWEEN

JOSHUA ABUGA.....1ST APPELLANT
PAMELA ISENSI .....2ND APPELLANT
REBECCA MBOYA.....3RD APPELLANT
PETERSON ONDICHO .....4TH APPELLANT
FRED NYAKUNDI.....5TH APPELLANT
PETER ORARO.....6TH APPELLANT

Appealing as officials, trustees and agents of the SEVENTH DAY ADVENTIST CHURCH [MILLENIUM]

VERSUS

KELVIN KIMULU

Suing as guardian ad litem of the children at Kisii Children Home .....1ST RESPONDENT
CHILD WELFARE SOCIETY OF KENYA.....2ND RESPONDENT
CHILD WELFARE SOCIETY OF KENYA [KISII BRANCH].....3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL .....4TH RESPONDENT

(Being an Appeal from the Ruling and Orders of the Environment and Land Court at Kisii (Hon. Mr. Justice J. Mutungi) dated 13th May, 2019)

in

E.L.C. Case No. 220 of 2017)

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JUDGMENT OF THE COURT

1. This appeal arises from a decision of the Environment and Land Court (Mutungi.J) delivered on 13th May, 2019.

2. Briefly, the background is that Kisii Children’s Home that is under the administration of the 1st respondent and management of the 2nd and 3rd respondents (the Child Welfare Society of Kenya and the Child Welfare Society of Kenya [Kisii Branch] respectively) which are state corporations hence represented by the 4th respondent, the Hon. Attorney General sued the appellants who are all agents, officials or trustees of the Seventh Day Adventist Church (Millennium) by way of a plaint dated 21st November, 2017 seeking a declaration that the suit land known as LR KISII MUNICIPALITY/BLOCK 111/153 belongs to the 3rd respondent; an order of permanent injunction restraining the

respondents, their employees, agents or servants, from entering, remaining, praying, interfering whatsoever with the suit land; an order of eviction therefrom and demolition of the temporary prayer shade erected at the children's home and an order to direct the County Commissioner and OCS Kisii Police Station to enforce the orders issued by the court.

3. The respondents alleged that the 3rd respondent was the registered proprietor of the suit land having been allotted the same in 1974 to provide for and take care of children without appropriate care. In the year 2010, upon request, they granted a temporary license to the Seventh Day Adventist Church (Millennium), to construct a temporary prayer shed within the suit land with the caveat that it would be used on Saturdays only, that the prayers and related activities would not interfere with the children and that they would surrender occupation upon request. In the year 2012, the appellants began to breach the terms of the license by improving the prayer shed to make it permanent, erecting new structures without consent, creating noise that interfered with the peaceful stay of the children, lobbying county government officials to force the respondents to continue to accommodate the appellants and engaging hooligans to threaten the work of the respondents.

4. The respondents concurrently filed a Notice of Motion dated 21st November, 2017 in which they sought *inter alia*; interim orders of injunction pending the hearing and determination of the application *inter partes* restraining the defendants, employees, agents and servants from:

***“...entering remaining praying therein and interfering whatsoever with the plaintiffs’ or their agents and the children or the Child Welfare Society of Kenya – Kisii Children’s home.”***

5. The appellants opposed the application and relied on a Replying Affidavit sworn by the 4th appellant **Peterson Ondicho** dated 9th January, 2018 in which it was contended that the application was a replica of pleadings filed in Kisii CM Children Case No. 39 of 2015 which was struck out with costs for want of jurisdiction, that they have never sought accommodation from the applicant to conduct prayers and that the church obtained occupation of the unsurveyed plot presently in its occupation by way of an allotment which land is distinct from **land parcel Kisii**

**Municipality/Block 111/153.**

6. When the matter came up for hearing before the trial court, the learned Judge directed the Land Registrar and the Kisii County Surveyor to file a report delineating the boundaries of the suit land, confirm whether there had been any encroachment by the appellants and to include a sketch map showing the portions occupied by appellants and those by the respondents. The same was filed on 16th July, 2018 and in a ruling delivered on 13th May, 2019 and the learned Judge held as follows:

***“12. The report by the land registrar is clear that the Children’s Homes buildings which are in use by the children are all located on land parcel Kisii Municipality/Block 111/153... the report has identified all the plots and features bordering Kisii Municipality/Block 111/153 and there is no identification of any unsurveyed plot that abuts the suit land. The alleged letter of allotment annexed in the defendant’s replying affidavit...is incomplete. Only the first page is availed. The unsurveyed plot is not identified and no Part Development Plan (PDP) is attached to show its location. The rates demand notice...does not assist. No plot is identified and only indicates the plot is unsurveyed.***

***13. I am in the premises satisfied that the land registrar’s report conclusively establishes the plot on which the plaintiffs have their buildings and where the Children’s Home is located is land parcel Kisii Municipality/Block 111/153. It is on this parcel of land that the defendants’ temporary structure where they hold prayers is located. I adopt the report by the land registrar as establishing the fact that the plaintiffs are the rightful owners of the suit property and as such legal owners are vested with rights of ownership and use. As the Land Registrar’s report disposes of the issues in contention, I enter judgement in favour of the plaintiff in the following terms:-***

***1. That land parcel Kisii Municipality/Block 111/153 belongs to the 2nd and 3rd plaintiffs and they are entitled to its exclusive use.***

***2. That the defendants have occupied a portion of land parcel Kisii Municipality/block 111/153 as licensees of the 2nd and 3rd plaintiffs.***

***3. That the defendants have acted inconsistently with the license granted to them by staking ownership claims to the portion they were permitted to use and accordingly the license stands cancelled and/or revoked.***

***4. The defendants shall vacate the premises they occupy on the plaintiffs land and deliver vacant possession within 90 days from the date of this ruling failing which an order for the forcible eviction will issue on application of the 2nd and 3rd plaintiffs.”***

7. Aggrieved by this decision, the appellants filed seven grounds of appeal vide a memorandum of appeal dated 31st July, 2019 to wit: that the trial court failed to find that the report of the land registrar did not conform in material particulars to the order of the court; that the trial judge erred by taking into account documentary evidence which had not been admitted into evidence; that the trial judge erred in entering judgement on the main suit when what was due to be determined was the respondents’ application dated 21st November, 2017 thereby condemning the appellants unheard.

8. When the matter came up for hearing, Learned Counsel for the appellants submitted that the trial court was obliged to rule on the credibility of Land Registrar’s report before relying on it. He argued since relative locations were not indicated in the report as directed by

the court, it was impossible for the trial court to have determined the question of trespass.

9. Counsel further faulted the trial court for misapprehending the affidavit of the 3rd appellant annexed to pleadings in a previous suit wherein letters purported to show that the church sought permission from the Children's Home to put up a prayer shade. He submitted that the same had not been entered into evidence nor tested through cross examination and thus could not be relied upon by the court. Lastly, it was submitted that that affidavits in support of and in opposition to an interlocutory application for an injunction could not be the basis for determination of substantive issues and that a court ought not to delve into substantive issues whilst determining interlocutory issues

10. On their part, the respondents urged the court to note that the appellants did not file a defence and had in essence admitted liability. It was submitted that the Land Registrar's report was very clear as to the exact location of the suit land, its boundaries, its area and the buildings thereon in compliance with the orders of the court and the same concluded that the appellants were trespassers. Counsel further submitted that the trial judge acted correctly in taking into account the documents filed and that these all supported the registrar's report. Citing the ruling in ***Republic vs. County Land Registrar Kisii County & 2 Others exparte Nora Bochareri Oruochi [2018] eKLR***, counsel stated that the trial court did not err in issuing final orders as the Land Registrar's report had solved all issues raised by the parties and that the documents filed by the parties overwhelmingly supported the fact that the respondents were genuine and legal owners of the suit land and they were entitled to immediate exclusive enjoyment of suit property.

11. We have considered the record, the submissions of the parties and the law. The central question for our determination is whether the power to issue mandatory injunction orders in an interim application which are tantamount to final orders are within the discretion of a judge and whether the learned trial Judge exercised his discretion correctly.

12. In the instant matter, the trial court exercised its discretion in granting an equitable remedy and it is trite that this Court ought not to interfere with such discretionary powers unless it is demonstrated that the trial court misdirected itself and arrived at a wrong decision, that the learned Judge was manifestly wrong in the exercise of his discretion resulting in injustice and not on grounds that this court would have arrived at a decision different from that of the trial court. (see ***Jaj Super Power Cash and***

***Carry Ltd vs. Nairobi City Council and 2 Others Civil Appeal No. 111 of 2002***).

13. The test whether to grant a mandatory injunction or not was correctly stated in the case of ***Kenya Breweries Limited & Tembo Co-operative Savings and Credit Society Limited vs. Washington O. Okeyo, Civil Appeal No. 332 of 2000***, where this Court quoted excerpts from **Vol. 24**

**Halsbury's Laws of England, 4th Edn.** Paragraph 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...mandatory injunction will be granted on an interlocutory application."***

14. It is clear that in exceptional cases, therefore, the court has discretion to grant an interim relief even though it would be tantamount to granting the final relief as prayed in the suit. In such cases, there must be a very strong *prima facie* case. Where a *prima facie* case establishes 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. In ***Kamau Mucuha vs. The Ripples Ltd (Civil Application No. Nai. 186 of 1992 (unreported)***, this

Court stated:

***"A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage."***

15. In the matter before us, the trial court established that LR No. Kisii Municipality/Block 111/153 was allocated to the Child Welfare Society of Kenya vide letter of allotment from the Commissioner of Lands dated 22nd April, 2009. On the other hand, the Letter of Allotment dated 25th June, 2001 was incomplete and for an unsurveyed, unidentifiable plot. We find the Report of the Land Registrar to be clear and unequivocal as to the buildings upon LR No. Kisii Municipality/Block 111/153 and the fact that

***"[a]lso within this plot, there is a temporary structure which is being used by the Seventh Day Adventist Church, Millennium."*** The Report is clear and accurate, and we see no reason to fault the superior court for acting on it.

16. Furthermore, the trial court analysed the affidavits from both parties, the Land Registrar's report which was produced pursuant to its orders and the parties' observations on it and gave further leave for the submission of written comments.

17. In view of our assessment of the material before us, we agree that the documents filed by the parties overwhelmingly support the 2nd and 3rd respondents as owners of the suit land. The learned Judge acted on the same and exercising his discretion, came to a conclusion that mandatory orders were justified. We are therefore satisfied that the judge exercised his discretion judiciously. Accordingly, the appeal fails and is dismissed with costs to the respondents.

*Dated and Delivered at Nairobi this 18th day of December, 2020.*

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**