IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & ODEK JJ.A)

CIVIL APPEAL NO. 289 OF 2012

BETWEEN

MWANGI NGURO.....APPELLANT

AND

GIKERA MUNENE.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI ..... 2ND RESPONDENT

DISTRICT LANDS REGISTRAR NAIROBI.....3RD RESPONDENT

COMMISSIONER OF LANDS.....4TH RESPONDENT

(Being an appeal from the Judgment of the High Court at Nairobi (R.N. Nambuye, J.) (as she then was) dated 28th August, 2012

in

HCCC No. 510 of 2004)

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JUDGMENT OF THE COURT

At the heart of this dispute is a parcel of land known as Dagoretti/Kangemi/T. 436, the suit property. But there is no dispute that the appellant was issued with an allotment letter in respect of the suit property and that upon paying Kshs. 33,640/= on 6th October, 1996 to the Commissioner of Lands a certificate of lease was granted to him on 10th February, 1995 for a term of 99 years with effect from 1st October, 1994.

It is also a common factor that on 23rd October, 1996 the Commissioner of Lands received a letter from the Director of City Planning & Architecture of Nairobi City Council, the 2nd respondent, that read as follows:-

> **"RE: PLOT NO. 436 - DAGORETTI/KANGEMI**
>
> **My attention has been drawn to an allocation of the above space which is functionally a frontage/car parking servicing the existing shops.**
>
> **This is to inform you that the allocation of the said space for use other than a car park/frontage to the existing shops is not acceptable from planning point of view. To this end the council will not give planning permission for development of the space and any unauthorized construction on the same will be demolished without reference to the allottee.**
>
> **In this circumstance I would like to request your office to revoke the said allocation to prevent development which may be injurious and prejudicial to the existing physical investment".**

On 30th January, 1997 the appellant received a notification from the Commissioner which read as follows:

"RE: PLOT NO. 436 – DAGORETTI/KANGEMI

Reference is made to the allocation of the above plot to you and issuance of the Title Deed.

It has come to the notice of the Government that the plot in question is functionally a frontage/car parking servicing the existing shops. It cannot therefore be developed for the purpose it was developed (sic) **for.**

It is therefore Government intention to cancel the allocation so as to prevent development which will be injurious and prejudicial to the existing physical developments.

You are thus required to return the title for surrender purposes to avoid any inconvenience either to yourself or the existing facilities".

As a result of these threats, the appellant instituted in the High Court Civil Suit No. 645 of 1997, **Mwangi Nguro V. The Commissioner of Lands** in which he sought to be declared the lawful owner of the suit property. He also prayed that the Commissioner be restrained by an order of permanent injunction from canceling his registration as the proprietor of the suit plot. The Commissioner, having failed to attend court on the hearing day, Hayanga, J. heard the appellant and decreed that the Commissioner did not follow the provisions of the Government Lands Act, Cap. 280 and the Land Acquisition Act (both repealed) in issuing the above notice; that the title issued was conclusive evidence of ownership. He declared the respondent the lawful owner of the suit property.

As regards the prayer for permanent injunction, the Judge said;

"I do think the court (sic) **can be injuncted in the way prayed because it would amount to barring the government from performing certain statutory acts provided under Registration Act. 280, 281, etc** (sic)**".**

That decision was rendered on 9th May, 2003 and the relevance of the court's refusal, as reproduced above, to issue an order of injunction will become apparent shortly. One year later on 19th May, 2004, the 1st respondent herein, Gikera Munene, whose developed parcel of land, No. LR. Dagoretti/Kangemi S.396, is opposite or in front of the suit property filed a plaint in the High Court claiming that the suit property was a frontage to his land; that it served as a car park to customers; that as such the suit property was irregularly allocated to the appellant; that despite protests by the Nairobi City Council and the Commissioner the appellant had ignored and neglected to surrender the title for cancellation. In consequence thereof, the 1st respondent sought to restrain the City Council of Nairobi from authorizing any developments on the suit property pending the hearing and determination of the case and to restrain the appellant from dealing with the suit property in any manner that is inconsistent with its status as a frontage car park for LR. Nairobi/Dagoretti/Kangemi/396.

The 1st respondent also applied for an order of *mandamus* to compel the Commissioner and the Registrar of Lands to recall and cancel the title for the suit property, general damages, costs and interest.

In denying these claims, the appellant argued that, being a first registration, his title to the suit property was indefeasible under **section 143(1)** of the Registered Land Act.

By reason of the foregoing, the appellant counter - claimed asking the court below to dismiss the suit; issue a declaration that the suit was *res judicata* **Nairobi HCCC 645/97**; grant an order of permanent injunction restraining the respondents from interfering with his enjoyment of suit property and award to him general damages for trespass and costs.

In its consideration of the issues in controversy, the court below was persuaded that the 1st respondent's parcel of land was an inheritance from he family and agricultural land which was subsequently converted to a town plot; that the relevant allocating authorities, namely the City Council of Nairobi (the 2nd respondent) and the Commissioner, realized that the allocation of the suit property to the appellant was in error; that the 1st respondent was lawfully granted change of user from residential to commercial by the Commissioner; that the aforesaid change of user approvals were granted before the appellant was allocated the suit property; that Nairobi HCCC No.645 of 1997 was between the appellant and the Commissioner hence the suit was not *res judicata*; that the *ex parte* judgment of Hayanga, J. was clear that although **section 23** of the Registration of Titles Act protected the appellant, the Commissioner was not barred from taking the suit property back so long as the procedures to do so was followed; that by declining to grant an injunction the Judge gave the Commissioner the freedom to cancel the registration of the appellant as the proprietor of the suit land, if there was need. The learned Judge's conclusion on this point was that;

".....it is the finding of this court that the judgment in HCCC Number 645 of 1997 did not sanctity the title issued to the first defendant against interference by the defendants if so moved by a court order.....The first defendant also raised the issue of claims to his title being *res judicata* by reason of the proceedings in HCCC 645 of 1997.

.....it is the finding of this court that the first defendants plea of *res judicata* does not hold because .

....the parties in HCCC 645 of 1997 are not the same as those in the current proceedings, the parties are not litigating in the same capacity, the issues in controversy are not similar as those in HCCC NO. 645/97 related to protection of title registered in favour of the 1st defendant. The issues in controversy herein are based on the current plaintiff's plea to restrain the 1st and 2nd defendants from effecting approval of plans which would enable the 1st defendant carry out developments on the disputed plot and the competence of both courts is not in doubt."

In the end, and for the reasons aforesaid, the learned Judge granted an order of permanent and perpetual injunction to restrain the 2nd respondent from approving developments on suit property by the appellant, an order of injunction to restrain the appellant from dealing with suit property in any manner inconsistent with its status as a frontage car parking area for LR. No. Dagoretti/Kangemi/S. 396. The court also declared as null and void any plans or drawings that may have been approved by the second respondent in favour of the appellant for development of the suit property. She however dismissed the prayers for mandamus and general damages. Costs were awarded to the 1st respondent against the appellant, 2nd to 4th respondents jointly and severally.

That decision has been challenged in this appeal on 7 grounds, namely that the learned Judge erred in: restraining the appellant from developing and use of the suit property whereas the appellant holds an indefeasible title which has not been annulled or cancelled; purporting to review or vary the judgment of Hayanga, J in HCCC. No 645 of 1997 in relation to the suit property when there had been no appeal against the said judgment or an application for its review; declaring that the plans that may have been approved by the 2nd respondent in favour of the appellant as null and void when the 1st respondent had not prayed for such orders; rendering a judgment that deprived the appellant of his property which had the effect of converting the suit property for public purpose without compensation to the appellant contrary to the provisions of **Article 40(3)** of the Constitution and the Land Acquisition Act; in directing that the appellant pays costs yet the appellant was not to blame for the events leading to the filing of the suit and had received no notice of intention to sue from the 1st respondent before filing of the suit; and in dismissing the appellant's counter claim against the 1st respondent yet the appellant had an indefeasible title that had not been cancelled.

The controversy here relates to the allocation and eventual registration of the appellant as the proprietor of the suit property. The suit property, as we have noted elsewhere in this judgment is right in front of LR. Nairobi/Dagoretti/Kangemi/396, belonging to the 1st respondent and other properties.

The four substantive reliefs sought from the High Court were: an order of injunction to restrain the then City Council of Nairobi (the 2nd respondent) from authorizing any developments on the suit property; an injunction to restrain the appellant from dealing with the suit property in any manner that is inconsistent with its status as a frontage car park for LR. Nairobi/Dagoretti/Kangemi/396; an order of mandamus to compel the Commissioner and the Registrar of Lands to recall and cancel the title for the suit property; general damages; costs and interest. On the other hand, the appellant sought by way of a counterclaim the dismissal of the 1st respondent's suit; a finding that the suit was *res judicata* in view of the decision in HCCC No. 645 of 1997; an injunction to stop the 1st respondent from trespassing upon the suit property; general damages for trespass as against the 1st respondent; and costs of the counterclaim.

The power to grant an injunction is a discretionary power. In exercise of that power the court considers whether it is desirable in all the circumstances to grant injunction, having regard to the specific circumstances of each case.

Accordingly, as a rule, and as the Court has said countless times, an appellate court will not easily interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court. The Court will, however interfere with the exercise of judicial discretion by the lower court only if satisfied that the lower court has misdirected itself on the law; or misapprehended the facts; or took account of considerations that it should not have taken into account; or failed to take account of considerations that it should have taken into account; or the decision was plainly wrong. That is what the predecessor to this Court stressed in the often- cited case of **Mbogo and Another V. Shah** [1968] EA 93.

Keeping those principles in mind, and because both the 1st respondent and the appellant applied for injunction, we have to determine whether the appellant met the conditions precedent for the grant of a permanent injunction.

It is common ground that the 2nd respondent excised the suit property, granted an allotment letter to the appellant and subsequently asked the 4th respondent to issue a title deed to the appellant. This was done on 23rd October 1996. It is equally true that thereafter the 2nd respondent upon realizing that it had made a mistake sought to correct it by seeking to withdraw the allocation and requested the 4th respondent to recall the title deed; that as a matter of fact the Commissioner by a letter dated 30th January, 1997 asked the appellant to surrender the title deed for cancellation; that the appellant's reaction was to file Nairobi HCCC No. 645 of 2004; and that in an *ex parte* judgment the High Court declared him the owner of the suit property. The suit property, having been set apart for parking by members of the public was not available for alienation to the appellant or any other person.

The learned Judge took all these factors into account in the exercise of her discretion. The entities charged with allocating land having expressly admitted the error in the appellant's title they were justified in reversing their decision. In view of these uncontroverted facts, we cannot fault the Judge for being persuaded that the 1st respondent had established, on a preponderance of evidence, a legal right to use the suit property as a parking area for members of the public who frequent business premises facing the suit property; and that an injunction was the most appropriate remedy in the circumstances, being a preventive relief that aims at ensuring that one party does not harm or interfere with the rights of the other party. The appellant's right to the suit property, no doubt is protected under **section 27 and 28** of the Registered Land Act (repealed); and his registration as the proprietor of the suit property vested in him the absolute ownership of the suit property. It is, however instructive to note that by **section 32(2)** a certificate of title issued upon registration to a purchaser of land is only *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

Section143 (1) of that Act, in the same breath, recognizes that errors may occur during registration. By that section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake. That perhaps explains why Hayanga, J. in Nairobi HCCC No. 645 of 2004 declined to restrain the Commissioner from canceling the registration of the appellant as the proprietor of the suit property. The learned Judge reasoned that no injunction could issue against the Commissioner **"because it would amount to barring the Government from performing certain statutory acts provided"** under the law. As we have noted, both the Commissioner and the 2nd respondent confirmed that the allocation and subsequent registration of the suit property to the appellant was occasioned by a mistake.

Where the register is rectified as a result of any mistake in it, **section 144(1)** provides that any person suffering damage by that reason is entitled to be indemnified by the Government. The appellant has faulted the learned Judge for not awarding him compensation under **Article 40** of the Constitution and under the Land Acquisition Act. The learned Judge was not bound to consider that question as it did not form part of the pleadings or prayers in the counterclaim. Secondly, that question can only arise upon the appellant surrendering the title to the suit property. Up to the time the impugned judgment was rendered, the appellant had not complied with the many demands to surrender the title document for cancellation.

We note further that the appellant was only restrained by an order of permanent injunction from dealing with the suit property in any **"manner that is inconsistent with its status as a frontage car parking area for L.R. No. Dagoretti/Kangemi/S. 396".** The 2nd respondent was, on the other hand, restrained from authorizing development by the appellant on the suit property and that architectural plans that may have been approved by the 2nd respondent were declared null and void. The appellant's ownership of the suit property was not revoked. It is its usage that was restricted.

On whether the 1st respondent's action was *res judicata*, the Judge, after considering the provisions of **section 7** of the Civil Procedure Act concluded that;

> **"…. the doctrine of *res judicata* does not operate to shield the first defendant against claims lodged herein by reason of the orders granted in his favour in HCCC 645 of 1997."**

Applying the strictures under **section 7** aforesaid, we agree that the parties in HCCC 645 of 1997 were not the same as those in the proceedings before the learned Judge; that the parties were not litigating in the same capacity as their respective claims were different, hence the issues in controversy were not similar.

We find no error in the manner the learned Judge dealt with this question and the conclusion she reached on it.

Our view being that the appeal lacks merit, we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 8th day of March, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

…….

JUDGE OF APPEAL

OTIENO – ODEK

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR