



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & ODEK, JJ. A)

CIVIL APPEAL NO. 97 OF 2018

BETWEEN

KENYA RAILWAYS CORPORATION.....APPELLANT

AND

1. ANNE WAMBUI GATHERU.....1st RESPONDENT

2. DAVID NDIRANGU WAMBUGU.....2nd RESPONDENT

(Being an Appeal from the Ruling and/ or Orders of the Environment and Land Court(Ochieng J.) at Kajiado Dated 19th February, 2018

in

KAJIADO ELC CASE NO. 929 OF 2017)

JUDGMENT OF THE COURT

This is an Appeal from the Ruling of *Ochieng', J.* delivered on 19th February 2018. A brief background to this appeal is that the respondents herein (*Anne Wambui Gatheru* and *David Ndirangu Wambugu*) (the then plaintiffs/applicants) filed a Notice of Motion dated 14th November, 2017 against the appellant herein, *Kenya Railways Corporation* and *China Communications Construction Company Ltd* (the then 1st and 2nd defendants/respondents respectively). The respondents sought, *inter alia* the following orders:-

“(1). ...

(2). ...

(3)An order that this court be pleased to grant an injunction restraining the Defendants/Respondents whether by themselves, their servants and/ or agents from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiffs'/Applicants' properties being Title Number Kajiado/Ntashart/263 & 265 pending the hearing and determination of this suit.

(4)An order that the Officer Commanding Ngong Police Station do enforce compliance of the orders above.

(5)An order that the costs of this application be provided for.”

The motion was supported by the 1st and 2nd respondents' affidavits sworn on the same day (14th November 2017) in which they deposed that they are the registered owners of land being Title Numbers *Kajiado/Ntashart/263* and *Kajiado/Ntashart/263* respectively; that sometime in June 2017, the appellant, through its agents, invaded their parcels of land without their permission and authority and purported to construct a public road; that the appellant has ignored all their protests, refused to vacate their land, interfered with their perimeter fences; that despite written demand and notice of intention to sue in default and complaints to the Ngong Police Station, the appellant has refused to vacate their properties. In addition, the 2nd respondent deposed that on or about 2nd October, 2017, he was approached by *China Communications Construction Company Limited*, the 2nd defendant/respondent, who issued him an offer to lease his parcel of land. This was after the then 2nd defendant/respondent had entered his property without following the process as required by law. The 1st and 2nd respondents further

averred that if the appellant and the 2nd defendant/respondent are not restrained by the Court from continuing construction work on their properties, they were bound to suffer irreparable damage.

The appellant filed a Replying Affidavit sworn by **Salome Saru Kamau**, its Assistant Land Surveyor in its Survey Department in which she deposed that according to the Registry Index Map from the Survey of Kenya authenticated by the Director of Surveys, which map is Ntashart Sheet II, the shapes, acreage and boundaries of the two suit properties are different and in fact the purported boundaries shown on the map annexed to the respondent's Affidavit are overlapping other parcels numbers 274 and 282 respectively; that the Title Deeds for **Kajiado/Ntashart/263** and **Kajiado/Ntashart/265** indicate that the properties are 4.6 hectares and 2.0 hectares respectively while the Map indicates that the properties are 2.477 hectares and 2.6911 hectares respectively; that it is a contractor who independently agrees with the land owners if he wishes to construct roads in their properties in which case the appellant is not involved; that the map showing the boundaries as per the Registry Index Map vis-a-vis the boundaries as per the map provided by the respondents are not the same; that the contractor and the 2nd defendant/respondent were to agree on the matter without the involvement of the appellant and that since they did not, the contractor abandoned the said road construction completely; that by the time the suit was filed there was no ongoing trespass as complained of by the respondents; that the respondent had not established a case against the appellant and therefore are not entitled to any orders of injunction against it, that the respondents have not demonstrated in their plaint, application and supporting affidavits how the appellant acted or has continued to act in violation of the respondents' property rights over the suit properties.

The then 2nd defendant did not file a response to the motion.

The learned Judge considered the motion and found that the respondents' case had met the threshold for granting of a temporary injunction as set out in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**. In this respect, the learned Judge first determined that the respondents had established a prima facie case with a probability of success as explained in the case of **Mrao Limited Vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**.

Secondly, guided by the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012** on the question of whether the respondents would suffer irreparable loss which could not be compensated by damages, the learned Judge found that the respondents' alleged injuries were not speculative and that they had demonstrated the harm they would suffer if the injunctive orders were not granted. Lastly, the learned Judge found that the balance of convenience tilted in favour of the respondents who had proven ownership of the suit properties and the alleged trespass by the 2nd defendant which had failed to file a response to controvert their allegations. Accordingly, the learned Judge allowed the respondents' application and directed that the parties would observe and maintain the obtaining status quo pending the hearing and determination of the suit and awarded costs of the application to the respondents.

Being aggrieved by the foregoing decision of the trial court, the appellant lodged an Appeal on grounds that the learned Judge erred in law and fact by:-

- (1) granting orders of injunction against the appellant when the respondents throughout their pleadings, evidence and submissions had not demonstrated any form of infringement of their rights perpetuated by the appellant.
- (2) granting orders of injunction against the appellant when the respondents had not satisfied any of the conditions required of them for the grant of such orders.
- (3) failing to apply clear principles of law on the facts presented before her in making her determination.
- (4) holding that the respondents had satisfied all the principles for the grant of the equitable orders of injunction against the appellant when the evidence presented by the respondent's did not satisfy any of the set principles.
- (5) failing to take into consideration the evidence, submissions and legal precedents presented by the appellant and proceeding to grant orders of injunction in total disregard of the appellant's case.
- (6) making her findings contrary to the evidence presented before the Court.

On 18th December, 2018, the appeal came before us for plenary hearing. Learned Counsel for the appellant, **Mr. Mutei** submitted that there was no evidence on record to prove the acts of trespass as regards the appellant. He pointed out that though the respondents have pleaded that the trespass was committed by the 2nd defendant, no nexus was established between the appellant and the 2nd defendant.

In opposing the appeal, Learned Counsel for the respondents, **Mr. Lempaa Suiyanka** urged us to dismiss the appeal with costs as there was trespass by the 2nd defendant who was constructing the road in the middle of the land owned by the respondents. In addition, Counsel submitted that there was no notice of compulsory acquisition issued by the Government. However, after the matter was filed in Court, the Government gazetted the intended compulsory acquisition and which process is yet to be completed.

We have considered the memorandum of appeal, the motion the subject of this appeal and the supporting affidavit thereof dated 14th November 2011, the appellant's replying affidavit dated 15th December 2017, the rival oral submissions made before us and the law.

The facts of this case are not seriously contested. The appellant vehemently denied having trespassed on the respondents parcels of land. In his submission before us **Mr. Lempaa** for the respondents contended that it is the 2nd defendant that had committed acts of trespass. In a brief rejoinder, **Mr. Mutei** submitted that there was no nexus between the appellant and the 2nd defendant. In considering the motion before her the learned Judge found as follows:

“The 1st defendant further denies being the principal of the 2nd defendant hence not responsible for the 2nd defendant’s actions. All these allegations by the 1st defendant have not been controverted by the plaintiffs.”

If this be the case, why was an order of injunction issued against the appellant who had not trespassed on the respondents’ land? We think it was preposterous to grant an order of injunction against the appellant when it was clear that the appellant had not interfered with respondents’ rights to the two parcels of land.

Further, the learned Judge was not satisfied that the respondents had proved that the two parcels of land belonged to them. In the ruling the learned Judge stated:

“The plaintiffs further do not explain where they obtained their respective maps from. I find that all these are issues best determined at a full trial and not at this juncture.”

Again, if this be the case, then it is clear that the respondents had not established a *prima facie* case with likelihood of success as against the appellant (See *Giela Vs. Cassman Brown & Co. Ltd.* (supra))

In the affidavit of **Salome Saru Kamau** sworn on 15th December, 2017, she deponed as follows:

“That I have in my possession the Registry Index Map from Survey of Kenya authenticated by the director of survey which is map number NTASHART SHEET II. In the said map the shapes, acreage and boundaries of the two suit properties are different and in fact the purported boundaries shown on the map annexed to the plaintiffs affidavit are overlapping other parcels numbers 274 and 282. A copy of the said Map is annexed hereto and marked “SSK 1”

That land parcel Number KAJIADO/NTASHART/263 from the title shows the acreage as 4.6 hectares while the map shows 2.477 hectare whereas title Number KAJIADO/NTASHART/265 on the title the acreage is shown as 2.0 hectares while the made (sic) shows the acreage as 2.6991 hectares. In the circumstances it is difficult to ascertain the boundaries and the acreage so as to determine if indeed the plaintiffs claim has merit.”

The above application was not controverted by the respondents. In our considered view, the ruling of the court dated 19th February, 2018 was not informed by the conditions precedent before the grant of an order of injunction. In any case, the respondents’ claim of trespass has been overtaken by the process of compulsory acquisition. Accordingly we set aside the orders of the Court of 19th February, 2019 against the appellant. Costs of this appeal to the appellant. As the 2nd defendant did not take part in this appeal, they are not entitled to any costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

(PROF) J. ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR