



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 12 OF 2019

BETWEEN

CARE MISSION KENYA 1st APPELLANT

ODDVA STEN LINKAS..... 2nd APPELLANT

RITA WAHLBERG 3rd APPELLANT

WENCHE LUDVIGSEN 4th APPELLANT

HAKON BORGEN 5th APPELLANT

VERSUS

BENTA AKINYI OTIENO 1st RESPONDENT

REVERENED PETER OGOLA..... 2nd RESPONDENT

t/a DEITY ECD PRIMARY SCHOOL BUSIA (K)

and EMMANUEL CHILDREN HOME BUSIA (K)

(Being an appeal from the ruling of the High Court Kenya at Busia, (Kaniaru, J.) delivered on 16th January 2019

in

Busia ELC Case No. 18 of 2018)

JUDGMENT OF THE COURT

1. This is an interlocutory appeal against a ruling delivered on 16th January 2019 where the Environment and Land Court at Busia declined to issue an order for accounts and further declined to issue an injunction restraining the respondents from dealing with land parcels LR Bukhayo/Mundika/9903 and LR Bukhayo/Mundika/7812, 7813 and 10245 (hereinafter referred to as the suit properties).

2. The appellants and the respondents are engrossed in a tussle over ownership and management of two institutions namely Deity ECD Primary School and Emmanuel Children's Home in Busia - Kenya. The tussle has degenerated into disputed ownership of land parcels LR Bukhayo/Mundika/9903 upon which the Primary School is located and LR Bukhayo/Mundika/7812, 7813 and 10245 upon which the Emmanuel Children's Home is located.

3. Presently, the 1st appellant is the registered proprietor of the suit properties in dispute. The contested facts as alleged by the appellants are that the respondents are tenants on the suit properties on which the primary school and the children's home are located. That despite the 1st appellant being the registered proprietor of the properties, the respondents have refused to sign a tenancy agreement binding them to pay rent for use of the properties.

4. On their part, the respondents contend that whereas the 1st appellant is the registered proprietor of the properties, the title deeds were stolen by the appellants who thereafter fraudulently and illegally procured registration of the properties in the name of the 1st appellant. The respondents further contend that the appellants are sponsors of the primary school and the children's home and not owners or proprietors the two institutions.

5. Founded on these contested facts, the appellants filed a Notice of Motion dated 15th August 2018 seeking several orders from the court to wit:

(i) That the court be pleased to order the respondents to furnish detailed annual accounts of Deity ECD Primary School Busia (K) and Emmanuel Children's Home Busia (K).

(ii) That the respondents be ordered to forthwith execute the lease agreement and pay rent to the appellants from 2008 to date.

(iii) That the County Police Commander, Busia, be ordered to supervise the orders of the court.

(iv)

(v) The respondents, their relatives, associates, agents or anybody else be restrained from managing ECD Primary School and Emmanuel Children's Home until the hearing and determination of the suit.

6. Upon hearing the Motion, the learned judge dismissed the application and declined to grant any of the orders sought. In dismissing the application, the judge expressed himself as follows:

27. Giella's case (ante) also requires demonstration of irreparable loss. None has been shown in this case. If anything, the loss alleged seems clearly quantifiable in monetary terms and the respondents are not shown as incapable of paying.

28.....

29. In the context of this matter, it is also necessary to consider the operational effects of a temporary restraining order if granted. The applicants seek to restrain the respondents from managing the two institutions on the land. These are institutions that largely handle or house children. One is a school; the other is a children's home. The applicants have not suggested an alternative or different kind of management team to be put in place if the current one is restrained.....

30. The court must take care. The law enjoins that in the circumstances such as these, the best interests of the children are paramount. Issuing a temporary restraining order as prayed without putting in place suitable measures to ensure continuity in the children's welfare is to act rashly and irresponsibly. The best interest of the children in these two institutions are better served by declining to issue an order that will interrupt or imperil their welfare.

31. Given what I have said so far, it is clear that the application herein is one for dismissal. Its merits have not been demonstrated.... I now hereby dismiss the entire application with costs.

7. Aggrieved by the dismissal of their application, the appellants have proffered the instant interlocutory appeal citing the following grounds:

(i) The judge made a fundamental error in failing to rule on plain evidence on record that a prima facie case had been established with high chances of success that the appellants are owner of land parcels LR Bukhayo/Mundika/9903 upon which the Primary School is located and LR Bukhayo/Mundika/7812, 7813 and 10245 upon which the Emmanuel Childrens Home is located.

(ii) The judge erred and misdirected himself in holding that the appellants had not established a prima facie case to warrant the grant of the injunctive orders sought.

(iii) The judge erred and misdirected himself in failing to appreciate the provisions of Order 20 Rule 1 of the Civil Procedure Act and Rules where the relief sought included a taking of accounts.

(iv) The judge erred in failing to address the injuries, losses and damages that are being caused by the respondents in managing the two institutions contrary to Section 27 of the Basic Education Act No. 14 of 2014; i.e. that the role of the sponsor shall be representation in the school management committees and the Board of Management and the judge erred in failing to appreciate he had excluded the appellants by the impugned ruling.

(v) The judge erred in failing to appreciate that under **Article 65 of the Constitution**, the appellants are entitled to hold land as lessees being non-citizens and hence the respondents are trespassers.

(vi) The judge erred in relying on extraneous issues.

(vii) That the language, form and content of paragraph 25 of the impugned ruling is contemptuous and unbecoming.

8. At the hearing of this appeal, learned counsel Mr. Wachakana appeared for the appellants. Learned counsel Mr. O. M. Wanyama appeared for the respondents.

APPELLANT'S SUBMISSIONS

9. Counsel for the appellant submitted that the judge erred and misdirected himself in failing to consider and address his mind to the issue of accounts. That the judge did not look at the merits of the application for accounts. That the gravamen of the instant appeal is the issue of accounts. That the appellants have spent approximately Ksh.6.4 million on the two institutions as donors and benefactors yet the respondents have failed to render any accounts for the monies received to run the two institutions.

10. Counsel further submitted that other than accounts, the appellant produced title documents which showed the 1st appellant as the registered proprietor of the suit properties. That production of the title documents was prima facie evidence of ownership. That the judge ignored this prima facie evidence in declining to grant the injunctive orders sought. That in the interest of justice, the trial court should have issued interim orders to preserve the suit property.

11. It was further submitted that the judge erred and ignored the mandatory provisions of **Section 25 (1) and 26 (1) of the Land Registration Act** thereby occasioning a miscarriage of justice. That the impugned ruling made a final finding on the proprietorship of the title documents held by the appellants without paying due regard to the provisions of **Articles 40 and 65 (1) and (2) of the Constitution** on land owned by foreigners. That the judge erred in going into the merits of triable issues at an interlocutory stage.

RESPONDENT'S SUBMISSIONS

12. Counsel for respondent in opposing the instant appeal submitted that the judge did not err in declining to grant the orders sought in the Notice of Motion. That the orders sought in the Motion are similar to the final orders sought in the plaint and such final orders cannot be determined and granted by way of affidavit evidence and without trial. That the respondent's pleaded in their defence that the appellant's title deed to the suit properties was acquired fraudulently. That fraud cannot be determined by way of affidavit but through trial. That the judge did not err in dismissing the application to enable a full trial to be conducted in this matter.

ANALYSIS and DETERMINATION

13. As stated above, this is an interlocutory appeal. The main suit between the parties is pending for trial before the ELC court. There are two salient issues for consideration in this appeal. The first is whether the learned judge erred in declining to grant the injunctive orders sought by the appellant. The second is whether the judge erred in failing to order accounts to be rendered by the respondents.

14. The law on grant of injunctive orders is well settled. In **Giella v. Cassman Brown & Co. Ltd [1973] E.A 360**, it was held: -

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

15. In this matter, the appellants contend that the judge erred in failing to grant the injunctive orders prayed for in the Notice of Motion. In the ruling, the judge cited the case of **Giella -v- Cassman Brown & Co. Ltd (supra)** as the guiding pillar in his determination whether or not to grant the restraining orders sought by the appellants. In considering the issue, the learned judge expressed himself as follows:

19. The first requirement would require the court to look at the case as filed and give a thought to its possible merits. In this matter, the appellants are said to be foreigners. Their claim is based on ownership....

20. The applicants are said to be non-Kenyans. If they are trustees of the 1st applicant – Care Mission Kenya - then the 1st applicant is an entity whose trustees are non-Kenyans....

24. It is clear from all the foregoing that the applicants, being foreigners, cannot validly and legally hold title deeds issued in Kenya as instruments of ownership. And such of the title deeds that they may hold are not documents of true and genuine ownership.....

16. We have considered the foregoing statement and observations made by the learned judge. With due respect, the judge erred in delving into the merits of the title documents held by the appellants. The sanctity of a title deed cannot be determined in an interlocutory application, the more so, when fraud in its acquisition has been alleged. Further, in an interlocutory application, a court must restrain itself in pronouncing on the merits of the case and issuing final orders. To this extent, we find the learned judge erred in law in declaring at an interlocutory stage that the appellants' title documents were not genuine. The merits of the case and or the genuineness of the appellants' title document are matters to be canvassed and determined during trial in the main suit. We hereby set aside the finding and holding by the learned judge that the title deeds that the appellants may hold are not documents of true and genuine ownership.

17. As to whether the judge erred in declining to issue the injunctive orders sought, we have examined the Notice of Motion dated 15th August 2018 and the grounds and affidavit in support thereof. The prayer for the injunctive relief is one of the prayers sought in the plaint dated 15th March 2018. The judge in the impugned ruling correctly appreciated that the orders sought in the application are final orders. The judge correctly posed the question that when the same prayers as sought in the plaint are brought in an interlocutory application, what will be left for determination in the main suit? In answering the question, the judge properly stated that the move to ask for the same prayers in the application is wrong.

18. In principle, a court should not grant interim relief which amounts to a final relief except in exceptional circumstances where the court is satisfied that such relief should be granted. In such an instance, the court must record reasons for granting the relief and make clear what were the special circumstances for which such a relief was being granted to a party at an interlocutory stage. (See **Oksana Investment**

Supplies Ltd -v- Alice Wanjiru Wamwea [2019] eKLR; Civil Case E121 of 2018).

19. Guided by the principle that a final order should not be granted at an interlocutory stage, we find that the learned judge did not err in declining to grant the injunctive orders sought in the Motion.

20. In this matter, the appellant faults the learned judge for failing to issue an order compelling the respondents to render accounts for the two institutions. In support for the prayer for accounts, the appellants averred that they are sponsors to the two institutions and had spent over Ksh. 6.4 million towards the running of the institutions.

21. In opposing the application for accounts, the respondent through a replying affidavit deposed by Ms. Benter Akinyi Otieno dated 12th October 2018 stated that the appellants only came to assist the two institutions through sponsorship and they cannot by virtue of the money collected in trust become proprietors of the suit properties and force themselves into the direct management of the institutions. That the appellants are not investors in the two institutions but sponsors.

22. We have considered the contested facts in support of and in opposition to the granting of an order of accounts. It is not disputed that the appellants have spent money on the two institutions as sponsors. What is in dispute is whether by virtue of sponsoring the two institutions the appellants are entitled to accounts and management of the institutions. This is a triable issue that cannot be determined in an interlocutory application. It is our considered view there is no evidence on record prima facie establishing that the appellants have a right to accounts. In an action for accounts, an applicant must first establish the legal right and entitlement to receive accounts. In this matter, we are not satisfied that the appellants at this interlocutory stage have established their right to receive accounts in relation to the two institutions.

23. Finally, in an application for injunctive orders, public interest is one of the considerations to be taken into account. The Supreme Court in **Gatirau Peter Munya –v – Dickson Mwenda Kithinji & 2 others, [2014] eKLR** stated that conservatory orders should be granted bearing in mind public interest, constitutional values and the proportionate magnitudes and priority levels attributed to the relevant causes. In this matter, we take cognizance that the two institutions in contestation are a primary school and a children’s home. The learned judge properly considered that the two institutions are a primary school and children’s home and came to a determination that the welfare of the children is paramount. On our part, we are satisfied and convinced of the soundness of the reasoning by the judge and we come to the conclusion that in public interest, and in the interest of the children, the learned judge did not err in declining to grant the orders sought.

24. The upshot of the foregoing is that this appeal substantively has no merit and is hereby dismissed. Noting that the appellant was partially successful on the issue of genuineness of its title, we order that each party to bear its own costs at the court below and in this appeal.

Dated and delivered at Kisumu this 31st day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR