IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU, & MURGOR, JJA)

CIVIL APPEAL NO. 144 OF 2018

BETWEEN

KHALID SALIM ABDULSHEIKH.................APPELLANT

VERSUS

SWALEH OMAR SAID..................................RESPONDENT

(**Being an appeal from the ruling/order of the Environment and Land Court**

at Mombasa (A. Omollo, J) dated 28*th* *September, 2018*

in ELC Case No. 347 of 2017

****

JUDGMENT OF THE COURT

Before us is an appeal from a ruling of the Environment and Land Court at Mombasa (*A. Omollo, J*) given on 28th September 2018 where the learned judge granted ***Swaleh Omar Said, the respondent*** an interlocutory injunction restraining ***Khalid Salim Abdulsheikh, the appellant*** from inter alia, collecting rent, selling by public auction, transferring or having any dealings with ***Plot Nos. MOMBASA/BLOCK XXIX/76*** and ***MOMBASA/BLOCK XVII/136*** **(**the suit properties**)** pending the hearing and determination of the suit at the trial court.

Along with the plaint***, the respondent*** had filed a Notice of Motion dated 26th September 2017 under ***order 40*** of ***the Civil Procedure Rules*** seeking a temporary order to restrain the appellant***, First Community Bank Limited*** and ***the Register of Lands***, *(the 2nd and 3rd defendants respectively*) from interfering with the suit properties pending the hearing and determination of a suit concerning an alleged theft and transfer of title documents to the suit properties. On 9th October 2017 the court issued a temporary ex-parte order in terms of the application.

In support of the motion, the respondent swore a supporting affidavit dated 26th September 2017 wherein he deposed that he was the registered owner of the suit properties, and that the appellant was his longtime friend and trusted agent whom he had tasked with collecting rent from tenants living on the suit properties; that on 5th April 2017, the 2nd defendant's agent in the company of the 3rd defendant auctioneers visited the appellant with information that the two buildings erected on the suit properties had been earmarked for auction on account of default of an unsettled loan. It was at this point, the appellant averred that he realized his title documents to the suit properties were missing from his cupboard which prompted him to conduct a search at the Lands Office where he later discovered that both titles to the suit properties had been transferred into the appellant's name. He deponed further that when he confronted the appellant and demanded that the titles be returned, he was threatened with forceful eviction, and devoid of another option, moved to court to seek orders for the grant of an interlocutory injunction to protect and eventually recover titles of the suit properties.

The appellant opposed the application and filed his defence and counterclaim together with a supporting affidavit contending that he purchased the suit properties from the respondent in the year 2010 and in respect of Plot No. MOMBASA/BLOCK XXIX/76, he had demolished and rebuilt the existing structure which he was renting out to tenants. The appellant further claimed that the respondent having sold the properties to him failed to vacate and hand over possession, thereby giving rise to the counterclaim where he sought vacant possession of the suit properties together with mesne profits from the date the suit properties were registered in his name to the determination of the suit.

In a bid to counter the respondent's injunction application, the appellant filed a notice of motion dated 4th October 2017 and amended it on 16th October 2017. In the application, he sought orders to restrain the respondent from collecting rent, harassing or otherwise interfering with

the tenants occupying the suit properties. The appellant deponed in an affidavit in support of even date that the temporary orders granted to the respondent that were based on factual misrepresentation, had allowed him to unlawfully collect rent, and harass tenants residing on the suit properties. It was finally averred that the suit was an attempt to renege on a sale that he willingly entered into.

In a ruling delivered on 28th September 2018, the learned judge allowed the respondent's motion dated 26th September 2017 and granted the temporary injunction to restrain the appellant, and the 2nd and 3rd defendants from collecting rent and from selling and transferring the suit properties. In so doing the court dismissed the appellant's amended motion dated 16th October 2017. The learned judge went on to order the respondent to file an undertaking to reimburse all rents collected to the appellant from the date of filing suit to the time it shall be concluded in the event the suit did not succeed.

Aggrieved, the appellant preferred this appeal against the decision on grounds which in summary were that; the learned judge wrongly exercised her discretion to grant an injunction in favour of the respondent who was guilty of laches and undeserving of the equitable relief sought; in granting the respondent an order that effectively enabled him to collect rent on the suit properties when he had not sought such order; in misapprehending the facts and the law by applying the "first in time first in right" principle against a title holder who had no previous reason to move the court since he held title to the suit properties and in wrongly exercising her discretion to dismiss off hand the appellant's amended motion dated 16th October, 2018.

Relying on written submissions which he highlighted, learned counsel for the appellant, ***Mr. Okanga*** submitted that despite the strong allegations that the appellant stole the titles to the suit properties from the respondent, there were no averments made to that effect in the affidavit, and neither was there anything to support the claim that the respondent, the 2nd and 3rd defendants visited him so as to warrant the injunctive orders. It was further argued that the respondent had not even prayed that he be restrained from collecting rent and consequently the trial court had granted orders in excess of the respondent's demands.

Opposing the appeal, learned counsel for the respondent, ***Mr. Gitonga,*** holding brief for Mr. Mwarandu also relied on written submissions. In highlighting them, counsel asserted that the issues raised in the application were substantive, and ought to be canvassed in the main suit; that no prejudice would be suffered by the parties given that the court had issued orders for an undertaking in the event that the respondent's suit is not successful.

As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion based on the evidence that was before the trial court. ***(See Selle & Another vs. Associated Motor Boat Co. Ltd (1968) EA 123).*** We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni vs Kenya Bus Service Ltd. (1982- 88)1 KAR 278*** and ***Kiruga vs Kiruga & Another (1988) KLR 348).***

Having considered the appeal and rival submissions, and bearing in mind the strictures attached to our mandate, we are of the view that the issues for our determination are; whether the learned judge rightly exercised her discretion to grant the injunction orders sought and whether the respondent is guilty of laches. In this regard, we also bear in mind that an appellate court will be slow to interfere with the exercise of discretion of the trial court and will only do so upon reaching the conclusion that such exercise was injudicious or capricious. (See ***Mbogo vs Shah*** **[1968] EA.**

In an application for interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant the injunction sought. In so doing the applicant must satisfy the requirements laid down in the celebrated case of ***Giella vs Cassman Brown Co. Ltd (1973) EA 358*** which are that a prima facie case with a probability of success must be established and that the applicant would suffer irreparable loss that cannot be compensated by an award of damages and where in doubt, the court will decide whether or not to grant the injunction on a balance of convenience.

Before the learned judge were two applications in respect of the suit properties, the first application was the respondent's motion which sought a temporary order of injunction to restrain the appellant and the 2nd and 3rd defendants from collecting rent, selling by public auction, transferring or having any dealings with the suit properties pending the hearing and determination of the suit. The second was the appellant's motion seeking orders to restrain the respondent from collecting rent, harassing or otherwise interfering with the tenants occupying the suit properties pending the determination of the suit.

It is apparent from the pleadings that both the appellant and the respondent have laid claim as registered owners to the suit properties. In considering whether a prima facie case had been made out, the learned judge concluded that on account of the competing claims, both parties had made out a prima facie case. But the judge declined to reach a finding on the question of ownership and instead took the view that it was a matter for determination during the trial.

This Court took a similar view in **Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) vs Sarah Nyiva Hillman & 3 others,** ***Civil Appeal 323 of 2017 [2018] eKLR*** where it observed that;

> **"It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit *evidence. As Lord Diplock* warned in American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1 "it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." This Court expressed a similar view in Mbuthia vs Jimba Credit Finance Corporation & another [1988] KLR 1 where it was held that "the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."**

Applying the guidance set out above to the instant case, since the gravamen of the dispute is concerned with who between the appellant and the respondent owned the suit properties, the learned judge cannot be faulted for having declined to address the question of ownership at this interlocutory stage.

The requirement for a prima facie case being settled, the next consideration was who between the appellant and the respondent would suffer loss. In determining this conditionality, the learned judge concluded that in view of the facts pointing to the respondent, and not the appellant being in possession of the suit properties, it was apparent that the former would suffer irreparable loss if he were to be stopped from collecting rent and was evicted from the suit properties before determination of the suit.

Once again, we would agree. Both parties having made out a prima facie case, the next question would be, who between the two stood to suffer irreparable loss. Invariably, the question of who was in possession of the suit properties would be pertinent. In discerning the averments, the learned judge concluded that the respondent was in possession and therefore stood to suffer loss.

The averments are unequivocal that the respondent was resident in one of the properties, which fact is not denied by the appellant. To this end, the appellant deponed in the affidavit in support of his motion of 4th October 2017 at paragraph 5 that, *"…As regards Msa/Block XVII/136 I purchased the same for Kes 4* million whilst the Plaintiff was resident thereon…"

At paragraph 6 he goes on to further state that;

> **"… thereafter, the Plaintiff requested to be allowed to move out after a period but has repeatedly sought indulgence to stay on. Being a longtime friend, I have granted him the indulgence, albeit begrudgingly as time has gone on…"**

The appellant having conceded that the respondent was in possession of the suit properties, it goes without saying that any interference with his possession would be prejudicial to him.

But notwithstanding the conclusions reached above, the appellant's complaint is that the court granted the respondent orders that allowed him to collect rent from the tenants, which orders he had not prayed for.

It is not in doubt that the ruling authorized the respondent to collect rent. It specified, "The plaintiff shall however file an undertaking to reimburse all rents collected to the 1st *respondent from the date of filing of the suit to the time it shall be concluded in the event that this suit does not succeed".* In so doing, did the prayers sought lend themselves to the grant of such order?

This brings us to the appellant's motion of 4th October 2017 and the amended motion of 18th October 2017. It is instructive that he too sought orders to restrain the respondent from collecting rent or interfering with tenants. Despite those prayers, the appellant did lay claim to the rent or demand to collect it. While in the respondent's affidavit in reply to the same application, the later described the appellant as his rent collector, inferring that all the rent rightfully belonged to him. Whether or not this be the case is a matter for determination by a trial court, but, having found that the respondent satisfied the condition that he stood to suffer irreparable loss if the injunction was not granted, it would of necessity follow that an order restraining the appellant from collecting rent, would place responsibility on the respondent to collect the rent. And to safeguard the interest of both parties, the learned judge could not be faulted for allowing the respondent to collect the rent on an undertaking to reimburse to the appellant with all rent collections from the date of filing of the suit to the time of its determination in the event that the suit did not succeed.

In sum, we are satisfied that the learned judge rightly exercised her discretion to grant the orders sought, and we can find no reason to interfere with that decision.

Accordingly, the appeal is unmerited and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Mombasa this 25*th* *day of July, 2019.*

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR