



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GITHINJI & SICHALE, JJ. A)

CIVIL APPEAL NO. 297 OF 2018

BETWEEN

NUH ABDILLE HASSAN.....APPELLANT

AND

HALIMA MAHMOOD ALI.....RESPONDENT

AMAL PLAZA LIMITED.....1<sup>ST</sup> INTERESTED PARTY

CENTRE STAR LIMITED.....2<sup>ND</sup> PROPOSED INTERESTED PARTY

HUSSEIN HASSAN BOOD.....3<sup>RD</sup> PROPOSED INTERESTED PARTY

*(Being an appeal from the Ruling and Order of the High Court of Kenya*

*at Nairobi (Environment and Land Court) (Okong'o, J.) dated the 7<sup>th</sup> day of March, 2018*

AND

CIVIL APPEAL NO 312 OF 2018

BETWEEN

CENTRE STAR LIMITED.....1<sup>ST</sup> APPELLANT

HUSSEIN HASSAN BOOD.....2<sup>ND</sup> APPELLANT

AND

HALIMA MAHMOOD ALI.....1<sup>ST</sup> RESPONDENT

AMAL PLAZA LIMITED.....2<sup>ND</sup> RESPONDENT

NUH ABDILLE HASSAN.....3<sup>RD</sup> RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi*

*(Environment and Land Court) (Bor, J.) dated the 14<sup>th</sup> day of March, 2018 in ELC Cause No. 775 of 2017)*

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JUDGMENT OF THE COURT

[1] The first appeal, that is, **Civil Appeal No. 297 of 2018** is against the *ex parte* order of the Environment and Land Court (ELC) made by **S. Okongo, J.** on 7<sup>th</sup> March, 2018. The second appeal, that is, **Civil Appeal No. 312 of 2018** is also against the order of ELC made by **K. Bor, J.** in the same suit on 14<sup>th</sup> March, 2018 essentially extending the aforesaid *ex parte* orders made by **Okongo, J.** The two appeals were heard one immediately after the other. It is expedient to determine the two appeals together and this judgment therefore relates to both.

[2] On 22<sup>nd</sup> December, 2017, **Halima Mahmood Ali (Halima)** filed a suit against **Amal Plaza Limited (Amal)**. She averred that she was the beneficial and equitable owner of Plot No. 36/46/VII Eastleigh registered in the name of **Hawa Hassan Mohamud** (suit property), and that on 20<sup>th</sup> December, 2012 Amal without permission or justification blocked access to her property causing loss and damage to her tenants. She sought a permanent injunction to restrain Amal from blocking the access road and a mandatory injunction to compel it to restore the access road.

[3] **Halima** contemporaneously filed a notice of motion dated the same day seeking an interlocutory injunction to restrain Amal from blocking the access doors. The court ordered the application to be served for hearing *inter partes* on 22<sup>nd</sup> January, 2018. On that date, the application was adjourned for hearing *inter partes* on 9<sup>th</sup> April, 2018. In the meantime, the court granted a temporary injunction restraining the defendant from blocking access by Halima's tenants to the suit property. By an application dated 30<sup>th</sup> January, 2018, Halima claimed that the temporary injunction was disobeyed and sought an order that a notice to show cause why contempt proceedings should not commence be issued to the Amal's Managing Director. The application was eventually fixed for hearing on 18<sup>th</sup> April, 2018.

[4] On 9<sup>th</sup> February, 2018, **Nuh Abdille Hassan (Hassan)** filed **Civil Case No. 800 of 2018** against Halima in the Chief Magistrate's court, Milimani for vacant possession of the suit property claiming that Halima's occupation of the suit property was in breach of a lease agreement and joint venture agreement. Hassan also filed an application in that suit for eviction of Halima pending the hearing of the suit, and on 13<sup>th</sup> February, 2018, the subordinate court issued an *ex parte* eviction order which was executed on 23<sup>rd</sup> February, 2018 and Halima's tenants were evicted.

[5] On 5<sup>th</sup> March, 2018, Halima filed a notice of motion in the ELC under certificate of urgency seeking various reliefs against the defendant and three "*proposed defendants*" namely; **Center Star Limited (Star Ltd)**, **Hassan** and **Hussein Hassan Bood (Bood)**. The orders sought included grant of leave to join the three as defendants in the suit; leave to amend the plaint in terms of the annexed draft amended plaint; and quashing of orders issued on 15<sup>th</sup> February, 2018 by the Chief Magistrate; and stay of proceedings in the subordinate court. The certificate of urgency and the application were placed before **Okongo J.** in chambers on 7<sup>th</sup> March, 2018 and after perusing the documents, the learned Judge certified the application as urgent and granted *ex parte* orders:

(i) staying civil suit No. 800 of 2018;

(ii) restraining Amal in the ELC suit and the proposed three defendants from selling the goodwill, leasing, letting, licensing or alienating Halima's shops erected on the suit property;

(iii) compelling by mandatory injunction Amal and the proposed three defendants to vacate the shops which were occupied by Halima prior to forceful eviction erected on the suit property;

(v) restraining Amal and the proposed three defendants from interfering with Halima and her tenants' occupation and possession of the suit property.

The court ordered that the application be mentioned before Bor, J on 14<sup>th</sup> March 2018 for directions and further orders.

On 14<sup>th</sup> March, 2018, **Bor, J** fixed the application for hearing *inter partes* on 19<sup>th</sup> April, 2018 and extended the orders granted on 7<sup>th</sup> March, 2018 until 19<sup>th</sup> April, 2018. The orders of 7<sup>th</sup> March, 2018 and 14<sup>th</sup> March, 2018 are the subject matter of Civil Appeals Nos 297 of 2018 and 312 of 2018, respectively.

[6] By an application dated 19<sup>th</sup> March, 2018, Halima sought orders *inter alia*, that two directors of Amal; Yusufu Ibrahim, a director of Centre Star Limited, Hassan and Bood be punished for contempt of orders of 7<sup>th</sup> March, 2018 and issued on 8<sup>th</sup> March, 2018. On his part, Hassan filed an application dated 20<sup>th</sup> March, 2018 for an order that the dispute be referred to arbitration in accordance with provisions of a joint venture agreement dated 10<sup>th</sup> November, 2014. Further, Hassan and Bood filed an application dated 16<sup>th</sup> April, 2018 for stay of proceedings pending appeal, or alternatively, pending determination of the question whether or not they are proper parties in the suit. On 19<sup>th</sup> April, 2018, **Okongo, J.** directed that Halima's applications for committal for contempt dated 30<sup>th</sup> January, 2018 and 19<sup>th</sup> March, 2018 be heard first and that directions be given on the other pending application after the determination of Halima's applications. The court embarked on the hearing of the contempt applications. However, on 6<sup>th</sup> July, 2018, this Court on application by Hassan stayed the proceedings pending the hearing and determination of an intended appeal. Further, on 20<sup>th</sup> July, 2018, this Court on application of Star Limited and Bood, granted a stay of execution of the orders of 14<sup>th</sup> March, 2018 and a stay of the proceedings in the ELC suit.

[7] The grounds of appeal in **Civil Appeal No. 297 of 2018** are, *inter alia*, that the learned Judge erred in law in granting orders against the appellant when he was not a party to the suit; in granting mandatory injunction contrary to laid down principles; and in condemning the appellant without affording him an opportunity to be heard. **Mrs. Wambugu** for the appellant relied on the written submissions and the list of authorities.

The appeal is supported by **D. Anzala**, learned counsel for Amal and **Mr. Masore Nyang'au**, learned counsel for Centre Star Limited and Bood. The appeal is opposed by Halima who is represented by **Mr. Andrew Wadabwa** who filed written submissions and list of authorities.

[8] In **Civil Appeal No. 312 of 2018**, the order of **Bor J**, extending *ex parte* orders is assailed on the grounds, among others, that the learned Judge erred in law and in fact in extending orders which had lapsed due to failure to serve; in extending orders against a non-party; in making the appellants parties to the suit before the application to join them was canvassed and granted; by failing to appreciate that the appellants were not in possession of the suit property, and, in failing to consider the monumental prejudice the order could have on the appellants. **Mr. Nyang'au** for the two appellants relied on the written submissions and list of authorities. **Mr. Wandabwa** for Halima also filed written submissions and list of authorities. The appeal was supported by **Ms. Wambugu** and **Mr. Anzala**.

[10] We have considered the grounds of appeal, the submissions of the respective counsel and authorities. The appellant in Civil Appeal No. 297 of 2018, Hassan was not a party to the suit filed by Halima on 22<sup>nd</sup> December, 2017. The defendant in the suit is Amal. The cause of action against Amal states that as an owner of a building adjacent to the suit property, it granted an access way to Halima's building in January 2016, which it later unlawfully blocked. On 10<sup>th</sup> December, 2017 Halima sought an injunction to restrain Amal from blocking the access way and a mandatory injunction to compel Amal to restore the access way.

[11] By the application dated 5<sup>th</sup> March, 2018, Halima sought leave to amend the plaint to join Centre Star Limited, Hassan and Bood as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively and other orders. The application and the supporting affidavit show that Halima intended to bring a new cause of action namely; a breach of joint venture agreement between Halima and Hassan by which Hassan allegedly financed and constructed a shopping mall on the suit property and the parties agreed to share the shops, stores and offices by the agreed ratio. The supporting affidavit alleges that there were other agreements between Halima and Centre Star Ltd., the contractor; Amal, the owner of an adjacent building and Bood, the land agent who was to sell the shops, stores and offices on commission basis upon completion.

The affidavit further shows that after the completion of the shopping mall, disputes arose on the sharing of the shops, access to the building and accounts. We have spelt out in paragraph [5] above the orders sought in the application and the orders granted by **Okongo, J** on 7<sup>th</sup> March, 2018.

[12] By the time the application was filed and the impugned orders made, there was no suit by Halima against Hassan, Centre Star Limited and Bood on which the application could be anchored. Indeed, the application sought leave to amend the plaint and join them as parties. That application has not been heard to date. Indeed, the application referred to the three as "*proposed defendants*". It is clear from Order 40 of the Civil Procedure Rules, that interlocutory orders can only be made in a pending suit and against a party to a suit. The granting of interlocutory orders against a person or persons who is or are not parties to a suit is not a mere procedural irregularity. Rather, it is a jurisdictional question. We find that the learned Judge had no jurisdiction to grant interlocutory orders against persons who are not parties to the suit. The *ex parte* orders of 7<sup>th</sup> March, 2019 are therefore invalid.

[13] Furthermore, the record of the proceedings shows that the orders of 7<sup>th</sup> March, 2018 were made in chambers in the absence of the counsel for the applicant (Halima). It is apparent that what was before the court was a certificate of urgency and that the application was before the court for certifying the notice of motion as urgent or otherwise. Nevertheless, the court made drastic orders including granting a mandatory injunction compelling the defendant in the suit and three proposed defendants to vacate some shops.

[14] A mandatory injunction at an interlocutory stage is granted for compelling reasons. It is rare to grant a mandatory injunction, *ex parte* and summarily. Halima raised numerous factual matters on the breach of the joint venture agreement and other agreements. The case of the proposed defendants was not known. In the premises, it is clear that the discretion of the court was not exercised judicially in granting injunctive orders including mandatory injunctions summarily.

[15] The appellant in **Civil Appeal No. 312 of 2018** claims that the order extended by **Bor, J** on 14<sup>th</sup> March, 2018 had expired. By **Order 40 rule 4(2)** "*An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of partes or by the order of the Court for a period not exceeding fourteen days*".

**Order 40, rule 4(3)** provides that where an *ex parte* injunction is granted the order, application and pleadings should be served within three days and in default of service, the injunction automatically lapses. The proceedings of 14<sup>th</sup> March, 2018 show that although there was a complaint of lack of service, the issue was not resolved by the court. However, it is clear from the order of 14<sup>th</sup> March, 2018 that the interim orders granted on 7<sup>th</sup> March, 2018 were extended until 19<sup>th</sup> April, 2018, which is more than the 14 days stipulated in **Order 40 Rule 4(2)**. That breach of rules makes the order invalid from inception. It is also clear from the proceedings that the *ex parte* orders were not extended on 19<sup>th</sup> April, 2018 and thus, expired by effluxion of time. Furthermore, since the court had no jurisdiction as we have found, to grant the orders of 7<sup>th</sup> March 2018, there were no valid orders which could be extended.

[16] Those findings are sufficient to dispose of the two appeals. However, it is pertinent to observe that by the time Civil Appeal No. 297 of 2018 and Civil Appeal No. 312 of 2018 were lodged on 22<sup>nd</sup> August 2018 and 30<sup>th</sup> August, 2018 respectively, the impugned orders had expired by effluxion of time. Moreover, the *ex parte* injunction granted on 22<sup>nd</sup> January 2018 appeared to have expired on 9<sup>th</sup> April 2018. It seems that the appeals were prosecuted only because by the applications dated 19<sup>th</sup> March, 2018, and 30<sup>th</sup> January, 2018, Halima seeks to enforce the *ex parte* orders of 22<sup>nd</sup> January, 2018 and 7<sup>th</sup> March, 2018 by contempt proceedings. Those applications are based on expired orders. The two injunction applications brought by Halima have not been heard *inter partes*. The application for joinder of three proposed defendants has also not been heard. It is clear that the parties have been pre-occupied by *ex parte* orders. In our view, in order to give effect to the overriding objection of civil proceedings – that is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes, it is necessary that Halima's substantive application dated 5<sup>th</sup> March, 2018 should be heard as a matter of priority. The determination of the application will be a big step towards resolving the underlying dispute.

[17] In the result, the two appeals are allowed. The impugned orders dated 7<sup>th</sup> March, 2018 and 14<sup>th</sup> March, 2018 are set aside. As the court had no jurisdiction to grant or extend the orders, we make no order as regards the costs of the appeal and each party shall bear its, his or her own costs of the appeal. The trial court shall hear and determine the application dated 5<sup>th</sup> March, 2018 on priority basis.

Dated and delivered at Nairobi this 6<sup>th</sup> day of December, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**