IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED JJ. A.)

CIVIL APPEAL NO. 41 OF 2016

BETWEEN

SUSAN MBEKE KASOME & 872 OTHERS.....APPELLANTS

AND

NJIRU AGERIA DEVELOPMENT LTD.....RESPONDENT

***(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mary Gitumbi, J.), dated 5th June, 2015* in**

Nairobi Milimani Elc Civil Suit No. 607 of 2013)

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JUDGMENT OF THE COURT

[1] Litigation leading to this appeal was commenced through an originating summons dated 26th August, 2013 filed by the appellants. The originating summons was brought under **Order XXXVII Rule 7** of the former edition of the **Civil Procedure Rules** as read with **sections 7, 17,** and **38** of the **Limitation** of **Action's Act**, and **sections 59** and **61** of the **Registration** of **Titles Act**. The orders sought in the summons included a declaration that the appellants had been in possession of land parcel No LR 13468 Nairobi *(herein suit property)* for a period of over 12 years and therefore the title of the respondent to the suit property had been extinguished by virtue of section 17 of the Limitation of Action's Act. The appellants also sought an order of injunction restraining the respondent from interfering with the appellants' peaceful possession and occupation of the suit property. The appellants' contention was that they had been in occupation of the suit property with the knowledge but without the consent of the respondent since 1994, and have remained in continuous and uninterrupted occupation for a period of more than 12 years.

[2] By a replying affidavit sworn by the chairman of the respondent, Waweru Kiratu (Kiratu), the respondent denied the appellants' assertions and maintained that it is the registered proprietor of the suit property and has been in possession of the suit property. Kiratu swore that the appellants have never been in occupation of the suit property and that their attempts to illegally enter the suit property were repulsed by the respondent. It was further averred that the appellant's suit was bad in law, incompetent and misconceived.

[3] On 26th June, 2014 the respondent moved the court by way of a notice of motion dated 20th June, 2014, in which it sought an order of interlocutory injunction restraining the appellants from cutting stones, entering wasting or in any way interfering with the suit property pending the hearing and determination of the appellants' originating summons. The motion was anchored on several grounds. Of importance was the allegation that it had become impossible for the respondent to enjoy peaceful and quiet possession of the suit property due to the appellants' illegal invasion of the suit property; that the invasion was creating tension between the parties and was a threat to peace and stability; and that the respondent stood to suffer irreparable loss due to the appellants illegal quarrying activities.

[4] The appellants responded to the notice of motion through grounds of opposition dated 27th June, 2014 in which the appellant contended that the respondent's right of ownership to the suit property had lapsed through operation of the law; that the appellants' had acquired overriding interests on the suit property having been in open, peaceful and uninterrupted occupation of the suit property for a period of about 20 years; and that the respondent's application was fatally defective, not having been premised on any substantive suit.

[5] The respondent's motion was certified as urgent on the same day it was filed. It was listed for hearing on 10th July, 2014 but when the matter came up there was no appearance for the appellants. The court then directed that the motion be heard by way of written submissions to be filed and exchanged by the parties. In the interim period the court allowed prayer 2 of the motion, and issued interim orders restraining the

appellants from cutting stone, selling, alienating, entering, wasting, or in any way interfering with the suit property pending the hearing and determination of the motion. Subsequently, the parties filed and exchanged written submissions in which each party urged the court to find in his favour.

[6] On 11th November 2014, the parties appeared before the learned judge and confirmed that the submissions had been duly filed. The ruling was however not delivered until 5th June 2015. In the meantime, the court had directed the OCPD Kayole to assist in the enforcement of the interim orders. In her judgment, the learned judge found in favour of the respondent and allowed the motion for restraining orders against the appellants.

[7] The appellants have lodged this appeal raising 8 grounds against the judgment of the learned judge. Essentially the appellants fault the learned judge for finding that the respondent had demonstrated a prima facie case when the respondent had not filed any suit or lodged any claim upon which his application for interlocutory orders could be anchored; and for granting orders that are permanent in nature such that there is nothing left to be heard in the substantive suit.

[8] Hearing of the appeal proceeded by way of written submissions that were duly highlighted by counsel. For the appellant it was submitted that the order of interlocutory injunction was granted in clear violation of the conditions set out in ***Giella v Cassman Brown & Co. Ltd. 1973 EA 358***; and that by failing to file its own independent suit, the respondent failed to establish or prove any prima facie case with a probability of success. It was maintained that the learned Judge erred in allowing the respondent's application for injunctive relief contrary to the express provisions of the law.

[9] On its part, the respondent relied on ***Giella v Cassman Brown & Co. Limited*** *(supra);* and ***Mrao v First American Bank of Kenya Limited & 3 others (2003) KLR 125;*** for its submission that the court had powers to grant the injunctive relief to protect a party from actual invasion or threat of invasion; that the respondent demonstrated that it was the rightful owner of the suit property; that the appellants were mere intruders benefitting from the suit property through violent means; that the appellants were carrying out activities that were harmful to the land and environment; that if not stopped the activities could have destroyed the land and rendered the whole suit nugatory; that the appellant's claim to possession was unsupported by evidence; and that the interim relief that was granted was premised on the applicant's originating summons, to preserve the status quo pending the determination of the originating summons.

[10] We have carefully considered this appeal and the respective submissions made before us by counsel. This being a first appeal this Court has a duty to take cognizance of the fact that what was before the learned judge was an interlocutory application determined on the basis of affidavit evidence. The duty of this Court is therefore to re-examine and analyze the affidavits, and the submissions made before the learned judge in light of the law applicable, with a view to determining whether the learned judge properly exercised her discretion in granting the interlocutory orders.

[11] We have already summarized the facts as averred in the affidavit as well as the submissions made by counsel for each party. What was before the learned judge was an application for an interlocutory order pending the hearing of the originating summons. As rightly pointed out by counsel, the law in that regard is clear having been long stated in the now notorious case of ***Giella v Cassman Brown*** *(Supra)* and reiterated in various other decisions of this Court.

[12] Therefore, the issue before the learned judge was whether the respondent who was the applicant for the interlocutory order, had satisfied the three conditions set out in ***Giella v Cassman Brown*** *(Supra).* Contrary to the submissions that were made by the appellants' counsel that the respondent's motion was defective, as it was not anchored on any suit, it did not matter that the respondent had not filed any suit or counterclaim, as the motion was anchored on the respondent's defence that it had raised in the reply to the originating summons.

[13] In determining this issue the learned judge stated in her judgment as follows:

> ***"Does the defendant applicant have a genuine and arguable case? The Defendant/Applicant's case is that it is the registered proprietor of the suit property upon which some of its shareholders reside. Their further case is that the Plaintiffs/Respondent's have never lived on the suit property but are mere trespassers thereon where they excavate murram and stones for sale to unsuspecting members of the public. It is the Defendant/Applicant's case that the Plaintiff/Respondent have gained access to the suit property through use of force, violence and intimidation. In response to this the Plaintiff/Respondent did not dispute these facts. In fact the Plaintiff/Respondent did not dispute the assertion by the Defendant applicant that it is the duly registered proprietor of the suit property. However the Plaintiff/Respondent argue that the ownership rights of the Defendant/Applicant have been extinguished by operation of law and that the Plaintiff/Respondent have acquired the same by way of adverse possession having resided and occupied the same for a period now exceeding 20 years peacefully, openly, and uninterrupted."***

[14] Looking at the originating summons filed by the appellants, and the affidavit in reply filed by the respondent in the High Court, it is evident that the issue of the respondent being the registered proprietor was not an issue in dispute. That fact was conceded by the appellants hence the claim for adverse possession. In the case of ***Wambugu vs Njuguna (1983) KLR 173,*** this Court stated that:

> ***"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it".***

[15] Thus, the issue in dispute which was to be determined after the hearing of the originating summons, was not the question of apparent ownership of the suit property by virtue of registration, but whether appellants through acts which were inconsistent with the respondents enjoyment of the suit property, had dispossessed the respondent who is the registered owner of the suit property, and if so whether the appellant's had been in peaceful, open, and uninterrupted occupation of the suit property for a period of at least 12 years as to justify a declaration that the title of the registered owner has been extinguished by law, and that the appellants had acquired the suit property by way of adverse possession. It was therefore premature at the interlocutory stage for the learned judge to address or determine these issues.

[16] However, in his judgment the learned judge stated as follows:

> ***"While the plaintiff has filed this suit by way of Amended Originating Summons dated 26th August, 2013, it is too early for them to claim that they have acquired ownership rights over the suit property, by way of adverse possession. Further, the plaintiff/ Applicants cannot claim that the title over the suit property held by the Defendant/Applicant has been extinguished by operation of law. That is not the true position at this interlocutory stage of these proceedings. That position can only be determined after this court has fully heard and determined this case. ……***
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> ***As matters stand right now, only the Defendant/Applicant has been able to authoritatively convince this court that it is the registered proprietor of the suit property. They have produced a copy of their certificate of title and this position has not been contested by the Plaintiffs. On their part the plaintiffs have not been able to convince this court that they have any sustainable competing claim over the suit property even by way of adverse possession. They have not demonstrated that they have been in occupation of the suit property for any period of time. I take it that they are mere trespassers."***

[17] With due respect, the learned judge erred, firstly in making definitive findings at this interlocutory stage that the appellants had no sustainable competing claim over the suit property even by way of adverse possession; and that the appellants had not demonstrated that they have been in possession of the suit property for any period of time. These definitive findings, which were prejudicial to the appellants, were made without the benefit of hearing the main suit. Secondly, the learned judge addressed the wrong question, that is, the issue of ownership, and not the issue of dispossession. We reiterate what this Court stated in ***Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR*:**

> ***"At the interlocutory stage the appellant was of course not called upon or expected to prove those matters conclusively. As this Court stated in PATTNI V. ALI & 2 OTHERS CA No. 354 OF 2004 (UR183/04), in interlocutory applications, the orders that are sought do not decide the rights and obligations of the parties but are merely meant to keep matters in status quo pending such determination. And in***
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> ***NGURUMAN LTD V. JAN BONDE NIELSEN & 2 OTHERS (supra), this Court reiterated that in determining whether a prima facie case has been established, the court is not supposed to hold a mini trial or to examine the case closely with finality."***

[18] The following definition of a *prima facie* case by Bosire JA in ***Mrao Ltd V First American Bank of Kenya & 2 others (2003) eKLR*** is instructive:

> ***So what is a "prima facie case" I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.***

[19] In determining the respondent's motion the learned judge missed the interlocutory issue, which at this stage was not whether the respondent was the registered owner of the suit property, a matter that was in any case not in dispute. The interlocutory issue was whether the respondent had established a *prima facie case* as alleged in his motion that the appellants had severally forcefully gained possession of the suit property, and were selling stones and murram from the suit property, thereby interfering with the quiet enjoyment of the respondent, and threatening peace and stability. These are the facts that would have demonstrated that there existed a right by the respondent that has apparently been infringed so as to call for an explanation from the appellants. However, the violation of the respondent's right could only arise if the respondent had not been dispossessed of the suit property, and the appellants were either not in possession of the suit property, or were in possession of the suit property but no rights to adverse possession had crystalized as to extinguish the respondent's title to the suit property. These issues could only be determined at the full trial.

[20] Indeed, the issue regarding who had the occupation and possession of the suit property being a matter already before the court, the learned judge could not make any findings on this issue without trespassing onto the jurisdiction of the trial court in determining the competing claims that were subject of the Originating summons. As it is, the effect of the order made by the learned judge although couched as an interlocutory order had the effect of having the appellants evicted from the suit property on the guise of restraining them from *"entering, wasting or in any way interfering with the suit property"*. The Order was quite prejudicial to the appellants as the issue of occupation and possession is crucial in a claim for adverse possession.

[21] We come to the conclusion that the learned judge erred in prematurely addressing and making definitive findings on matters that ought to be for determination during the trial of the appellant's suit. By so doing, the learned judge improperly exercised her discretion in granting the order of interlocutory injunction in favour of the respondent. Accordingly, we allow this appeal, set aside the ruling and orders made by the learned judge, and direct that the suit be listed for substantive hearing of the Originating summons. We award the appellants costs of this appeal.

Dated and delivered at Nairobi this 2nd day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR