



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OUKO, J.J.A)

CIVIL APPEAL NO. 23 OF 2015

TWIGA ESTATE SQUATTERS SOCIETY.....APPELLANT

AND

THE MUNICIPAL COUNCIL OF RUIRU.....1<sup>ST</sup> RESPONDENT

MBOI KAMITI FARMERSCO. LTD.....2<sup>ND</sup> RESPONDENT

WILLIAM CHEGE.....3<sup>RD</sup> RESPONDENT

JOSEPH WORU NG'ANG'A.....4<sup>TH</sup> RESPONDENT

GEORGE MWANGI IRUNGU.....5<sup>TH</sup> RESPONDENT

SIMON CHARAGU KIMANI.....6<sup>TH</sup> RESPONDENT

JOSEPH MITHIGANI KARIUKI.....7<sup>TH</sup> RESPONDENT

JACKSON WILFRED MAINGI.....8<sup>TH</sup> RESPONDENT

JOHN KINGE.....9<sup>TH</sup> RESPONDENT

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

*(J. M. Mutungi, J.) delivered on 24<sup>th</sup> November, 2014*

in

H. C. ELC No. 57 of 2012)

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JUDGMENT OF THE COURT

On 21<sup>st</sup> November 2014, the Land & Environmental Court Division of the High Court delivered its ruling from which this appeal emanates. The court dismissed an application by the appellant in which it sought to be enjoined in a suit in which the respondents had obtained orders to evict the appellant from land parcel numbers 9312, 9313 and 3760 which collectively form Twiga Estate Farm “the suit property”, situate North of Ruiru Township, Thika Town. At the time of filing the application seeking to be enjoined, the appellant whose members allegedly number about 4000 squatters, had been evicted from the suit property on 20<sup>th</sup> December 2012 pursuant to consent orders recorded in **ELC Civil Case No. 57 of 2012** “the ELC Case” between the 1<sup>st</sup> respondent, who was the plaintiff, and 2<sup>nd</sup> to 9<sup>th</sup> respondents as the defendants. In that suit, the 1<sup>st</sup> respondent had sued the 2<sup>nd</sup> respondent as the 1<sup>st</sup> defendant. It also had sued the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents in their capacities as the then registered officials of **Twiga Estate Squatters**. The 7<sup>th</sup> to 9<sup>th</sup> respondents were former employees of the 2<sup>nd</sup> respondent who resided in the suit property.

In the suit, the 1<sup>st</sup> respondent averred that it was the registered owner of the suit property. The gist of the 1<sup>st</sup> respondent's complaint was that the respondents had put up structures and buildings on the suit property without first having sought and obtained prior consent from it. It therefore sought a declaration that the structures built on the suit property were illegal; an injunction to bar the respondents from further construction without first having obtained approval from it; a mandatory injunction directing the respondents to demolish the structures erected on the suit property and in the alternative, a mandatory injunction allowing it to demolish the structures erected thereon. The suit was subsequently compromised through a consent reached by all the respondents and recorded in court on 13<sup>th</sup> February, 2012.

The effect of the consent order was that the respondents were restrained through injunction from constructing or building on the suit property and were granted a 21 day period to remove their structures. Failure to do so, the 1<sup>st</sup> respondent was granted permission to demolish and evict the respondents there from. Pursuant to that consent, the 2<sup>nd</sup> to 9<sup>th</sup> respondents were evicted from the suit property on 20<sup>th</sup> December 2012. Subsequently, the appellant filed an application dated 22<sup>nd</sup> April 2013, the subject of this appeal, seeking to be enjoined in the suit as an interested party and also for orders to set aside, vary and or review the consent orders aforesaid. It also sought to restrain the 2<sup>nd</sup> respondent from dealing, in any manner whatsoever, with the suit property pending final determination of the application. The application was premised on the main ground that the 2<sup>nd</sup> to 9<sup>th</sup> respondents conspired to file a 'friendly' suit against each other in which they then proceeded to enter into a consent order to evict its members and alienate the suit property. It also deposed that the appellant's members had occupied the suit property since the 1950s and had built various structures thereon. The appellant accused the 2<sup>nd</sup> respondent of committing perjury and interfering with the administration of justice by falsely claiming that the members of the Twiga Men and Women Group were in possession of the suit property while they had knowledge that it was its members who were in actual possession of the suit property. It denied that the parties sued by the 1<sup>st</sup> respondent were squatters or had any interest in the suit property and alleged that they were in fact the 2<sup>nd</sup> respondent's employees and or agents. It also alleged that it had not been informed of the existence of the ELC case. Accordingly, the consent orders could not be enforced against it or its members for that matter since they were not parties to the suit nor represented in arriving at the consent.

In response to the application, the 2<sup>nd</sup> respondent's main contention was that the application was incompetent and ought to be struck out on account of being *res judicata*. It deposed that that the appellant had filed previous suits seeking to lay claim to the suit property, all of which had been dismissed. Further, that the appellant could not lay claim to the suit property through adverse possession since it only came into existence in 2011 when it was registered. It claimed to have acquired the suit property in 2004 and there were no prior or pending claims on the suit property. It conceded that the defendants in the suit were its employees who were housed in the suit property but who had consented to vacate/relocate upon being given a 21 day notice. It denied the allegations of fraud against it and in turn accused the appellant of conning members of the public of their money under the pretext that it was in a position to allocate them pieces or parcels of land in the suit property.

In consideration of the above set of circumstances, **Mutungi J.** found that the appellant as the proposed interested party had been a party in various previous suits, notably **HCCC No. 781 of 2014**, **HCCC No. 487 of 2010** and **HCCC No. 170 of 2010** involving the suit property albeit under varying **Twiga Estate** names. The learned Judge further found that the appellant was only registered as a society in 2011 and its members previously belonged to other groups variously described as **Twiga Men & Women Group**, **Twiga Estate Squatters** and **Twiga Squatters Estate** which were not separate and distinct from it. In conclusion, the Judge held that to allow the appellant to be enjoined in the suit would be to sanction flagrant abuse of the court process as there would be nothing to prevent a faction of the same group, under any of the several names, from making a similar application.

Challenging those findings, the appellant lodged this appeal complaining that the Judge erred in failing; to allow joinder in the ELC case which denied it an opportunity to defend its interests and occasioned a miscarriage of justice; further that failure to allow the joinder infringed on its constitutional right to access justice under Article 48 of the Constitution. It contended that the consent order entered into amounted to a gross abuse of the court process as it was intended to execute against the appellant who was not a party to the suit. It also complained that the learned Judge failed to find that there was a conspiracy and fraud in filing a friendly suit between the respondents and then purport to enter into a fraudulent consent. According to the appellant, the Judge should have allowed the joinder where it would have had an opportunity to demonstrate that it was not a party or represented in the ELC case so as to participate or be bound by the consent of 13<sup>th</sup> February 2012.

The 1<sup>st</sup> respondent filed grounds of opposition to the appeal contending that the appeal was incompetent, bad in law and an abuse of the court process. Further that the ruling the subject of this appeal was well founded in law.

Following court's directions, the appeal was canvassed by way of written submissions with limited oral highlights. In its written submissions, the appellant infers suspicion at the speed at which the consent orders were reached by the parties in line with its averments that the parties conspired to file a 'friendly' suit. Friendly, in the sense that the respondents had devised a method of obtaining court orders between themselves to evict its members. It gave an example of **ELC Civil Suit No.170 of 2010 Mbo-i-Kamiti Farmers Co. Ltd v Simon Charagu Kimani & 4 Others**, where in similar fashion as in the present suit, a consent order had been entered, ostensibly on behalf of its members to vacate the suit property. It termed the court proceedings in the ELC case as a ruse by the parties to evict its members.

According to the appellant, the court should, on a balance of probabilities, have exercised its discretion in its favour and allowed joinder. It submitted that the issue whether its members were the same as those in the other suits ought to have been canvassed in the suit as it was a factual issue requiring evidence to be adduced. It reiterated its averments that the 2<sup>nd</sup> to 9<sup>th</sup> respondents were fraudsters who had filed suits pretending or purporting to represent the appellant and then proceeded to compromise those suits on behalf of its members to enable the 2<sup>nd</sup> respondent to comfortably raise defence of *res judicata*. It cited the cases of **Civicon Limited v Kivuwatt Limited & 2 Others [2015] eKLR** and **JMK v Mwai & Another, Civil Appeal No. 15 of 2015** for the proposition that the law required any person who may be affected by a decision to be heard. The appellant concluded by alleging violation of its constitutional rights under Articles 48 and 50 of the Constitution. It maintained that the court should have disregarded the procedural technicalities in determining its application as provided for in Article 159 (2) (d) of the Constitution.

In its submissions, the 2<sup>nd</sup> respondent maintained that it was the registered proprietor of the suit property and the appellant was a squatter with no legal claim to the same. It termed the appellant's members as members of the public who had been hoodwinked by the appellant into

paying sums of money under the false pretence that they would be allocated portions of the suit property. That having done so, it was in the appellant's officials' interest to sustain a myriad of cases involving the suit property so as to give excuses to members that funds collected were nonrefundable. This fact of collecting funds from the **unwitting** public is what led to the appellant to be charged in **Criminal Case No. 662 of 2010** in the Chief Magistrates Court at Nyeri. Though it admitted that some of the respondents were its former employees being housed on the suit property, it denied that, that alone entitled them to have proprietary rights in the suit property. It also remained categorical that the defendants it had sued were the right defendants from whom it sought relief. It further denied that there was any sinister motive as alleged in compromising the suit.

According to the 2<sup>nd</sup> respondent, the issue in this appeal was whether the Judge properly exercised his discretion and there was no indication that the learned Judge failed to consider any of the issues raised. Lastly, the respondent pointed out that the appellant had a pending case in the High Court (**HCCC No. 149 of 2011 (O.S)**) in which it was claiming the suit property through adverse possession.

The 3<sup>rd</sup> to 8<sup>th</sup> respondents filed joint written submissions. They admitted to have been the 2<sup>nd</sup> respondent's employees residing in the suit property and had no proprietary rights in the property. They maintained that the Judge had properly exercised his discretion in refusing joinder for the reasons given and on a balance of probabilities.

In refusing to allow joinder of the appellant, the learned Judge was exercising judicial discretion. The principles upon which this Court will interfere with the discretionary powers exercised by a single Judge are well settled. This Court will only interfere with such discretion as was espoused in the case of **Mbogo v Shah (1968) EA 93** where it was stated as follows;

***"...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....."***

See also **Patel v EA Cargo Handling Services Ltd (1974) EA 75**; **Python Waweru Maina v Thuka Mugiria (1983) eKLR**.

However, judicial discretion is exercised within certain parameters and reasons for such exercise given. In **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others (2014) eKLR**, the Supreme Court stated as follows;

***"Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically."***

In considering whether the Judge exercised his discretionary powers judiciously, this Court ought also to bear in mind the holding in **Matiba v Moi & 2 Others (2008) 1 KLR 670**, where this Court stated that;

***"The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision"***.

It is therefore not open to this Court to interfere with the exercise of the Judge's discretion merely because it would have come to a different conclusion given a chance.

It must be demonstrated that the Judge misdirected himself in accordance with the holding in **Mbogo v Shah** (supra).

The basis or the reason for the learned Judge refusal to exercise his discretion in the appellant's favour, are stated in the ruling; that the appellant had previously brought suits touching on the suit property under various names and style, which were however not separate and or distinct. The Judge held that allowing the appellant to be enjoined in the suit would amount to sanctioning flagrant abuse of the court process as there would be nothing to prevent another faction of the same group, under any of the several names from making a similar application. The appellant has not demonstrated that in reaching those conclusions, the Judge exercised his discretion erroneously so as to warrant this Court's interference. The same was based on evidence which has not been challenged or controverted by the appellant. The Judge noted as follows;

***"The proposed interested parties acknowledged the existence of various suits namely: HC ELC. No. 170 of 2010 where the 1<sup>st</sup> Defendant, Mboi-Kamiti farmers Company Limited had sued the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in the instant suit under the Group name of Twiga Men and Women Group, HCCC NO. ELC 149 of 2011 (O.S) filed by the proposed interested parties where Mboi-Kamiti Farmers Company Ltd is a defendant and Constitutional Petition NO. 144 of 2012."***

In the exercise of discretion, the conduct of a party seeking such an exercise has to be viewed, and interrogated. Accordingly, the learned Judge was bound to consider the conduct of the appellant in the past and the myriad of cases it had filed against the 2<sup>nd</sup> respondent over the suit properties and the consequences thereof. The Judge cannot therefore be faulted for referring to the aforesaid cases and reaching the conclusion that in allowing the joinder, he would be aiding the appellant in its continued abuse of the court process.

The upshot is that this appeal fails and is dismissed with costs.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of April, 2018.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**