



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & GATEMBU JJA)

CIVIL APPEAL NO. 323 OF 2017

BETWEEN

THOMAS MUMO MAINGEY

*(Suing on his own behalf and*

*On behalf of the Franciscans of Our Lady*

*Of Good Counsel Sisters Registered Trustees, David Masika, Evergreen Crops Limited*

*Waridi Farm Limited, Daniel Mutisya Ndonye and*

*Valley Brook Capital Limited).....APPELLANTS*

AND

SARAH NYIVA HILLMAN.....1<sup>ST</sup> RESPONDENT

PAULINE KAMUBA MAINGEY.....2<sup>ND</sup> RESPONDENT

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

DIRECTOR OF SURVEYS.....4<sup>TH</sup> RESPONDENT

*(Being an appeal from the Ruling and Order of the Environment and Land*

*Court of Kenya at Machakos (Angote, J) dated 13<sup>th</sup> July, 2017*

in

ELC CAUSE NO. 113 OF 2015)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling of the Environment and Land Court at Machakos (A. O. Angote, J) given on 13<sup>th</sup> July 2017 dismissing the appellants application for interlocutory injunction to restrain the respondents from interfering with the use of a road, claimed to be a public road, and allowing an application by the 1<sup>st</sup> to 3<sup>rd</sup> respondents restraining the appellants from using the road.

Background

2. The appellant, the 1<sup>st</sup> to 3<sup>rd</sup> respondents are all beneficiaries of the estate of the late Paul Maingey (the deceased). The appellant, the 1<sup>st</sup>

and 2<sup>nd</sup> respondents are the children of the deceased while the 3<sup>rd</sup> respondent is the husband of their late sister Miriam Maingey Daher.

3. The appellant, who was an administrator of the estate of the deceased, contends in the suit pending before the ELC at Machakos, that when their father, the deceased, became registered as the owner of a property known as Land Reference Number 1338/4 in 1970, there was in existence a road, known as 39 Quarry Road, traversing across that property that was in use by the owners of the adjacent properties and which road provided access to their properties from Nairobi-Mombasa Road, near Athi River Bridge.

4. The appellant asserts in his plaint that in accordance with the deceased's testamentary wishes, the said property was subdivided and the subdivisions transmitted to the beneficiaries of the deceased. Subdivision numbers L.R.No. 1338/90, 1338/93, 1338/91, and 1338/92, were transferred to the appellant, the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent respectively. According to the appellant, 39 Quarry Road was duly noted in the sub-division plan that resulted in those parcels. However, when the Director of Surveys, the 4<sup>th</sup> respondent, issued Deed Plans with respect to L.R.No. 1338/93, 1338/91, and 1338/92 that were registered in the names of the 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively, there was an error by the Director of Surveys in omitting to include therein the access road, 39 Quarry Road.

5. It is the appellant's case that the 1<sup>st</sup> respondent wrongfully purported to close 39 Quarry Road with the result that the socio-cultural environment of Mavoko Sub County will be negatively affected and many users of the said road adversely affected. The appellant seeks in the suit before the ELC, a declaration that he and the other proprietors of adjacent properties have a right of way over 39 Quarry Road; a declaration that the 1<sup>st</sup> to 3<sup>rd</sup> respondents are not entitled to block or obstruct the same; a permanent injunction to restrain the 1<sup>st</sup> to 3<sup>rd</sup> respondents from interfering with the use of the said road; and an order directing the 4<sup>th</sup> respondent to rectify the Deed Plans in respect of L.R.No. 1338/93, 1338/91, and 1338/92 in order to reflect the said road. In support of the suit, the appellant filed extensive witness statements asserting the adverse effect the closure of the road was having on those affected.

6. Alongside the plaint, the appellant filed a notice of motion application dated 9<sup>th</sup> April 2015 under Order 40 of the Civil Procedure Rules seeking a temporary order to restrain the 1<sup>st</sup> to 3<sup>rd</sup> respondents from interfering with the use of the said road pending the hearing and determination of the suit. On 9<sup>th</sup> April 2015, the court issued a temporary ex parte order in terms of the application and subsequently on 15<sup>th</sup> April 2015 the court issued an order directing the OCPD Athi River Police Station to assist in enforcement of the order given on 9<sup>th</sup> April 2015 "to the end that the public road known as 39 Quarry Road is opened to the public to enjoy unrestricted right of way..."

7. The application was opposed. The 1<sup>st</sup> to 3<sup>rd</sup> respondents filed grounds of opposition contending that the application was an abuse of the process of the court and that the appellant was guilty of non-disclosure of material facts and had gone to court with unclean hands. The 1<sup>st</sup> respondent filed a replying affidavit maintaining that there was no public road from the onset of the acquisition of the property by the deceased; that the appellant had no mandate as executor of the estate of the deceased to create a "through-road" in the subdivisions; that indeed the 4<sup>th</sup> respondent confirmed that there is no public road and that 39 Quarry Road only exists as a private road.

8. In their detailed statement of defence, the 1<sup>st</sup> to 3<sup>rd</sup> respondents denied that there was in existence a public road when the deceased acquired the property in 1970; that the appellant had no mandate, as the executor of the estate of the deceased, to purport to create a "through-road" trespassing on the 1<sup>st</sup> to 3<sup>rd</sup> respondents properties and an attempt to do so would not be legal as it would amount to unlawful and unprocedural encroachment into private properties; that the 4<sup>th</sup> respondent has indeed confirmed that there is no public road passing through the 1<sup>st</sup> to 3<sup>rd</sup> respondents' properties; that there are no errors in their Deed Plans; that 39 Quarry Road is private, as opposed to a public road over which the 1<sup>st</sup> to 3<sup>rd</sup> respondents installed a road barrier to control unlawful trespass; that whenever the appellant and beneficiaries of his land have used 39 Quarry Road, the 1<sup>st</sup> to 3<sup>rd</sup> respondents would charge them some levy to maintain the road. The 1<sup>st</sup> to 3<sup>rd</sup> respondents prayed for the dismissal of the appellant's suit and for mesne profits.

9. The 1<sup>st</sup> to 3<sup>rd</sup> respondents filed a preliminary objection dated 4<sup>th</sup> December 2015 contending that the court had no jurisdiction to hear and determine the matter and that the temporary orders issued on 9<sup>th</sup> April 2015 that had since been extended were null and void. On 30<sup>th</sup> June 2016, the 1<sup>st</sup> to 3<sup>rd</sup> respondents filed a notice of motion application seeking orders for the appellants suit to be struck out; for the orders given on 9<sup>th</sup> April 2015 to be discharged; and for an order to permanently restrain the appellant from interfering with the private road, 39 Quarry Road and the 1<sup>st</sup> to 3<sup>rd</sup> respondents' properties since their actions amount to trespass.

10. That motion was supported by an affidavit and further affidavit sworn by the 1<sup>st</sup> respondent. The appellant filed a replying affidavit in opposition. Both parties produced as exhibits documents in support of the respective cases. The advocates for both parties then filed their respective written submissions on the basis of which the learned Judge rendered the impugned ruling date 13<sup>th</sup> July 2017 in which he dismissed the appellant's application dated 9<sup>th</sup> April 2015 and allowed the 1<sup>st</sup> to 3<sup>rd</sup> respondents' application dated 19<sup>th</sup> June 2016 in terms that:

***"(a) The plaintiff and his servants be restrained from interfering or using the road known as "39 Quarry Road" pending the***

*hearing and determination of the suit.*

*(b) The OCPD Athi River Police Station to enforce the order of this court.*

*(c) The Plaintiff to pay for the costs of the Application.*

*(d) The suit to be set down for pre-trial directions and hearing.”*

11. Aggrieved, the appellants lodged this appeal.

#### **The appeal and submissions by counsel**

12. Although the appellant has set out 13 grounds of appeal in the memorandum of appeal, the essence of the complaints is that the learned Judge erred in making a final determination on an interlocutory application; that the Judge wrongly determined that 39 Quarry Road is a private road and ordered its immediate closure without properly considering all the material before him and without the benefit of a full hearing; that the Judge disregarded the legal principles governing applications for injunctions and wrongly exercised his discretion in making the orders that he did.

13. Learned counsel for the appellants, Mr. Makambo, relied on the appellant's written submissions which he highlighted. He submitted that it is not in dispute that 39 Quarry Road has existed from time immemorial; that the 1<sup>st</sup> to 3<sup>rd</sup> respondents wrongly claim that they are entitled to its private use and have wrongly erected barriers and charged toll fees for its use by others; that on the material presented before the Judge, the appellants established a case within the principles in *Giella vs Cassman Brown [1973] EA 358* and the court should have allowed the application; that prima facie, the appellant established an absolute and indefeasible right of way that had been peacefully and openly been enjoyed without interruption for over 20 years. In support, counsel referred to the decisions in *Benina Ndugwa Kunyuma and 4 others vs National Land Commission [2015] eKLR* and *Healey vs Hawkins (1968) 3 ALL E R* and *Diment vs N H Foot Ltd [1974] 2 All E R.*

14. Counsel argued that the question whether there exists a public right of way over 39 Quarry Road is a triable question for determination at the trial and the judge erred in making a determination that the same is a private road based on contested and untested affidavit evidence. In doing so, counsel argued, the court went far beyond its proper role in making a final determination. Regarding the proper approach the court should take in such a matter, counsel cited the decision in *Mbutia vs Jimba Credit Finance Corporation & another [1988]KLR.*

15. According to counsel, the appellants had also demonstrated that they would suffer irreparable harm by way of commercial losses, inconvenience to schools and home owners if the road was to remain closed and if interim protection against closure was not granted and further that the balance of convenience favoured the granting of the interim reliefs sought by the appellant.

16. Turning to the order granted by the court in favour of the 1<sup>st</sup> to 3<sup>rd</sup> respondents for the closure of the road, counsel argued that the same was in the nature of a temporary mandatory injunction; that the order was granted without regard to the legal principles that should inform the granting of such an order; that no special circumstances were shown to justify the granting of the order particularly at an interlocutory stage. Relying on decisions of this Court including the case of *Kenya Breweries Ltd vs Okeyo [2002] EA 109*, counsel stressed that a mandatory injunction should not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases. Furthermore, it was argued, the respondents do not have a counterclaim against the appellants on the basis of which the orders sought could be founded.

17. Opposing the appeal, learned counsel for the 1<sup>st</sup> to 3<sup>rd</sup> respondents, Mr. Liko, who also relied on written submissions which he highlighted, asserted that the orders granted by the Judge are not final mandatory orders as claimed by the appellant; that what the Judge issued was a restraining order pending the hearing and determination of the suit; that the court was within its powers under Order 40 of the Civil Procedure Rules in granting orders at the instance of respondents; that the Judge properly exercised his judicial discretion and his powers under Section 63 of the Civil Procedure Act and there is no basis for this Court to interfere.

18. According to counsel, the appellants did not make out a prima facie case before the lower court to show that 39 Quarry Road is a public road; that under the Public Roads and Roads of Access Act, Cap 399, no material was presented to support the appellant's claim; that there was overwhelming evidence, including communication from the National Land Commission that was presented before the Judge demonstrating that 39 Quarry Road is a private one, as opposed to a public road; that the Judge carefully considered the material presented and did not misapprehend the facts; that no material was presented by the appellants to show when the alleged 20 year period begun to run so as to justify the claim for the right of way; and that the claim for an easement is indeed inconsistent with the claim of a public road.

19. Counsel concluded by urging that the appellants had approached the court without clean hands; that they failed to disclose that there exists alternative access routes, namely 30 M and 20 M public roads that they can use to access their properties.

#### **Analysis and determination**

20. We have considered the appeal and the rival submissions. The determination of the two applications that were before the lower COURT on the basis of which the impugned ruling was delivered involved the exercise of judicial discretion by the court. Accordingly, this Court does not, as held in *Carl Ronning vs Societe Naval Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1*, interfere with exercise of discretion by the lower court unless satisfied that the court misdirected itself on law; or misapprehended the facts; or took

account of considerations that it should not have taken into account; or failed to take account of considerations that it should have taken into account; or the decision is plainly wrong. The predecessor to this Court in the case of **Mbogo and Another vs. Shah [1968] EA 93** stated:

***“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

21. Keeping those principles in mind, the question we have to determine in this appeal is whether this is a proper case for us to interfere with the exercise of discretion by the Judge. In exercising its discretion, the court was duty bound to consider whether either party met the conditions for the grant of a temporary injunction. As this Court stated in the case of **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004:**

***“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”***

22. Based on the pleadings presented by the parties before the lower court, the main issue in controversy between the parties would seem to be whether 39 Quarry Road is a public road or private road. Each party presented substantial material by way of affidavits and exhibits in support of their respective positions on that question. In keeping with the principles in **Giella vs Cassman Brown & Co Ltd [1973] E.A 358**, all the court was required to do at that stage was to satisfy itself if either party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court was to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the appellants or with the respondents.

23. 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 **Mbutia 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.”

24. Expounding on the principles in **Giella vs Cassman Brown & Co Ltd** (supra), this Court, in the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR**, stated that:

***“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”***

25. Each party had in their respective applications that were before the court sought to restrain the other from asserting claims over 39 Quarry Road. The relative strengths of each party’s case could not be determined, for purposes of the first two principles in **Giella vs Cassman Brown & Co Ltd** (supra), on the basis of the contested affidavit evidence. In other words, whether 39 Quarry Road is public or a private road is a matter for determination by the trial court. It therefore fell on the Judge to consider the matter on a balance of convenience. In our view, the balance of convenience tilted in favour of the appellants „by holding things where they were? in view of the fact that it was the respondents who precipitated matters by restricting the use of 39 Quarry Road. We are therefore satisfied that the appellants made out a case for a temporary injunction to restrain the 1st to 3rd respondents from restricting the use of 39 Quarry Road pending the hearing and determination of the suit.

26. The result is that the appeal succeeds. The ruling and orders of the court dated 13<sup>th</sup> July 2017 are hereby set aside and substituted with an order allowing prayer 3 of the appellants notice of motion dated 9<sup>th</sup> April 2015. The application by the 1<sup>st</sup> to 3<sup>rd</sup> respondents dated 19<sup>th</sup> June 2016 is hereby dismissed.

27. Considering that the main protagonists in the litigation are members of the same family, we direct that each party shall bear its own costs of the applications in the High Court and of this appeal.

Orders accordingly.

*Dated and delivered at Nairobi this this 4<sup>th</sup> day of May, 2018.*

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**