IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 50 OF 2017

BETWEEN

SULEIMAN SALIM MWANDOGO.....APPELLANT

AND

HANNELORE MWANDOGO.....RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court at Malindi (Angote, J.) dated 3rd February, 2017 in E&LCC No. 75 of 2016)

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JUDGMENT OF THE COURT

1. The appellant and the respondent are a divorced couple who intermittently reside in Kenya and Germany. During the subsistence of their marriage, the two were joint proprietors of land described as subdivision Nos. 2331 (Orig. No. 1878/29) and 1878 (Orig. No. 937/13) Section III MN in Mtwapa *(the suit land)* and all the developments thereon in equal shares; including a three bedroom matrimonial house built by the couple and in which they resided prior to their separation in 2005. That house forms the subject of this appeal.

2. In a suit filed by the respondent at the Environment and Land Court (ELC), she averred that the parties had mutually agreed that in the event of a divorce, the appellant's share in the house shall pass onto the respondent; thereby vesting the proprietorship of the house solely upon the respondent. However, that contrary to that agreement, when the parties divorced in 2008, the appellant failed to honour the agreement and instead moved into the house with his new wife, son and house help without the respondent's consent.

3. To the respondent, the appellant's acts constituted actionable trespass; thus prompting her to file suit seeking orders *inter alia*:

> **a. A declaration that the plaintiff is the sole legal owner of the suit premises and the defendant currently holds ½ share interest in the suit property in trust for the plaintiff.**
>
> **b. An order for specific performance for the defendant to transfer ½ share interest in the suit property to the plaintiff;**
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> **c. A declaration that the defendant is a trespasser in the suit premises;**
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> **d. Consequently, an order do issue that the defendant do deliver up vacant possession of the suit premises to the plaintiff;**
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> **e. An order do issue that the OCS, Mtwapa police station do provide security during delivery up of vacant possession of the suit premises to the defendant;**

4. The appellant denied the claim through a statement of defence filed on 19th May, 2016. Contemporaneously with the suit, the respondent had also filed an application dated 30th March, 2016 for a mandatory injunction to compel the appellant and his proxy to vacate the suit premises. That application was opposed vide some grounds of opposition dated 3rd May, 2016 as well as the replying affidavit sworn on 6th June, 2016 by one Rachael Lavuno Mweni.

5. According to the appellant, the respondent's application was incompetent, defective and failed to satisfy the requirements for the grant of an interlocutory injunction. In addition, it was deposed that the agreement sought to be relied upon by the respondent was invalid, as it offended the provisions of **Article 45** of the Constitution; which the appellant contended, vests matrimonial property upon the spouses in

equal share. Further, that the agreement also offended the provisions of **Section 6** of the Matrimonial Property Act 2013; as any property acquired during the subsistence of a marriage must be shared equally upon the dissolution of the marriage. By virtue of the foregoing, the appellant asserted that the agreement was unlawful, void and unenforceable and by extension, any application premised on such an agreement ought to fail.

6. Having heard the respective submissions in respect of the application, the learned trial Judge (**Angote, J.**) delivered his Ruling thereon on 3rd February, 2017; in which he held that since the agreement between the parties was never denied, the parties are bound by the terms thereof. Accordingly, the learned Judge allowed the respondent's application and granted a mandatory injunction as prayed. That Ruling is what provoked this appeal.

7. The same is premised on four grounds, namely that the learned Judge erred by; granting a mandatory injunction which purported to evict the appellant from property that was jointly acquired by the parties herein; holding that the appellant had not denied the respondent's claim; failing to consider all the material facts prior to making his conclusion and; failing to exercise his discretion judiciously.

8. The appeal was ventilated through written submissions, with oral highlights at the hearing thereof. Appearing for the appellant was learned counsel, **Mr. Tsofwa** who began by stating that the learned Judge erred when he held that the agreement had not been denied by the appellant when infact it was denied in the statement of defence. Further, that being an interlocutory application, the court ought to have refrained from granting orders which summarily determined the entire suit. The case of **David Kamau Gakuru v. National Industrial Credit Bank Limited C.A 84 of 2001** was cited in support of this proposition. Counsel went on to state that the learned Judge also failed to exercise his discretion judiciously; since the same was done without due regard for the law and established legal principles. Elaborating further, counsel submitted that in granting the mandatory injunction, the learned Judge failed to consider **Order 40 rule 1** of the Civil Procedure Rules which requires that for the injunction to be granted, the property in question must be in danger of being wasted or destroyed; which he said, was never the case herein.

9. The appellant contended that the principles for the grant of mandatory injunctions are clearly spelt out in the cases of **Nguruman Limited v. Jan Bonde Nielsen & 2 others CA No. 77 of 2012;** as well as **Lucy Wangui Gachara v. Minudi Okemba [2015] eKLR.** As per the stated case law he said, a mandatory injunction can only be granted in the plainest and clearest of cases where a *prima facie* case has been established; the likelihood of irreparable injury demonstrated and; if in doubt, the matter must be determined on a balance of convenience. Counsel also faulted the trial Judge for failing to address his mind to the provisions of **Article 45** of the Constitution as read together with the provisions of the Matrimonial Property Act, 2013; more specifically, that there is a rebuttable presumption that matrimonial property acquired jointly during marriage shall vest upon the spouses in equal share. Further, that he failed to find that no special circumstances had been established to warrant the grant of a mandatory injunction.

10. He added that the learned Judge failed to consider the material placed before him and thereby failed to take into account relevant matters prior to making his decision; thereby granting what amounted to final orders in an interlocutory application. In other words, he contended that the learned Judge disregarded the law and all the requirements as set out in the case of **Giella v. Cassman Brown [1973] KLR 358.**

11. Opposing the appeal was learned counsel for the respondent, **Ms. Barayan** who made a preliminary objection on the ground that the appeal as filed was out of time and without leave; on that ground alone, should be dismissed with costs. As regards the merits of the appeal, counsel submitted that this was a fairly non-contentious matter which called for the grant of a mandatory injunction as ordered by the learned Judge; that by virtue of the undisputed agreement between the parties, the appellant is estopped from reneging on his word. In this regard, reliance was had on the decision in **Combe v Combe (1951) 2KB 215**.

12. Turning to whether a mandatory injunction can be issued at the interlocutory stage, counsel submitted that the same is perfectly in order if the case is clear and uncontested. In the same spirit, that contrary to the appellant's assertions, the learned Judge was not bound to determine the merits of the entire suit prior to granting the injunction. All the court needs to be satisfied about, is that a *prima facie* case has been made out; that irreparable loss is likely to occur and that damages shall not be a sufficient remedy. In this case she added, by virtue of the agreement between the parties, it was clear that the appellant was a trespasser upon the respondent's land and therefore, the orders granted by the learned Judge were warranted. Consequently, the Court was urged to dismiss the appeal with costs.

13. This being a first appeal, this Court's primary role is to re-evaluate, re-assess and reanalyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212* wherein this court held, *inter alia***, that:-**

> **"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"**

With this in mind, the issues that arise for determination in this appeal are two. Firstly, whether the Notice of Appeal should be struck out and secondly, whether the appeal has merit.

14. On the first issue, this Court was urged to find that given the Notice of Appeal was lodged out of time and without leave, there is no proper appeal before court and that the same should be struck out accordingly. Granted, an appeal should ideally be filed within 30 days of the decision appealed against. In this case, the impugned decision was rendered on 3rd February, 2017 meaning the appeal was to be lodged by the 3rd of March, 2017, subject of course to the provisions of **rule 82** of the Court of Appeal rules.

15. An appeal is deemed instituted from the moment the Notice of Appeal is lodged (See **Equity Bank Limited v West Link Mbo Limited [2013] eKLR**). The Notice of appeal in this case was to be lodged on or before 3rd March, 2017. Instead, the same was lodged on 29th May, 2017 without leave of Court. The procedure to be followed in cases of defective notices of appeal is covered under **rule 84** of this court's

rules; which provides as follows:

> ***"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***
>
> **Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal** ***or record of appeal as the case may be."***

16. In this case, it is not disputed that the Notice of Appeal was duly served upon the respondent's counsel. Equally clear is that even though the same was lodged out of time, the respondent never moved court to have it struck out within the 30 days stipulated under the proviso to **rule 84** aforesaid. As seen above, a respondent who wishes to challenge a defective notice of appeal must move timeously. He may even simply raise an objection to the Notice of Appeal (See **Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2014] eKLR**) but what is most important is that the same must be done within the 30 days set out under **rule 84**.

17. In this case, the time for the filing of an application under **rule 84** has since lapsed. To put things in better perspective, even if the respondent had filed the requisite application, but the application was belatedly filed outside the 30 days envisioned under **rule 84**, such an application would be deemed out of time and disallowed (See **Pickwell Properties Limited v Kenya Commercial Bank** [2016] eKLR**)**. A similar fate applies to any preliminary objection raised outside the 30 day window as was done herein. The respondent's objection in this regard should thus be dismissed.

18. Turning to the merits of the appeal, in a nutshell, the appellant's contention is that the mandatory injunction issued herein went against the evidence and the law; that the respondent's case failed to meet the requisites for the grant of injunctions and that in granting the orders he did, the Judge ignored the appellant's case. The principles for the grant of interlocutory injunctions were laid out in the oft cited case of ***Giella v Cassman Brown & Co Ltd*** **[1973] EA 358**. The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

19. In this case, the respondent's case was pegged on an agreement dated **19th January, 1995; which is expressed to be between the two parties herein. The pertinent part of the agreement stated as follows:**

> **'WHEREAS:**
>
> **HANNELORE RANK MWANDOGO and SULEIMAN SALIM MWANDOGO are registered as tenants in common in equal shares of land parcels being sub division number 2329 (Original Number 1878/29) Section III Mainland North and Subdivision Number 1878 (Original Number 937/13) Section III Mainland North**
>
> **IT IS AGREED BETWEEN THE PARTIES AS FOLLOWS:**
>
> **1. …**
>
> **2. …**
>
> **3. …**
>
> **4. In the event of both parties to this agreement divorcing the shares of SULEIMAN SALIM MWANDOGO in both properties shall pass to HANNELORE RANK MWANDOGO.'**

This is the document that led the learned Judge to find the respondent deserving of the mandatory injunction; especially in light of the fact that the appellant had not contested the veracity of the agreement.

20. However, in this appeal, the appellant has faulted the learned Judge for not appreciating that in the defence, all allegations regarding that agreement were denied. According to the appellant, in the face of such denial, the learned Judge ought to have left the matter to be decided in accordance with **Article 45** of the Constitution and the provisions of the Matrimonial Property Act, 2013. However, looking at the pleadings, the respondent's contentions about the agreement were first stated under paragraph 5 of her plaint; where she alleged her entitlement to the suit house by virtue of an agreement executed between the parties. In his defence the appellant addressed that allegation by merely stating as follows:

> **'The defendant denies the contents of paragraph 5 of the plaint and the plaintiff is put to strict proof thereof'** [Emphasis added]

It was perhaps in a bid to bring forth the strict proof that the respondent tabled in court a copy of the subject agreement. At the hearing, no challenge was ever made as to the veracity of the same. All that the appellant contended was that the agreement had been overridden by statutory and constitutional provisions. Given the absence of a denial that the document was genuine, the learned Judge cannot be faulted for finding that the agreement was uncontested.

21. Nonetheless, the appellant has asserted that regardless of what was contained in the agreement, the provisions of **Article 45** of the

Constitution and the Matrimonial Property Act prevail; that as per the said law, property acquired by spouses during the subsistence of marriage is owned by them in equal share and must be treated as such upon divorce. Unfortunately for the appellant, we are not persuaded by that line of argument. We say so because the Constitutional and statutory provisions cited fail to find application in the case because at the time the agreement in question was executed in 1995, neither the Constitution of Kenya, 2010 nor the Matrimonial Property Act, 2013 were in force. Consequently, the disposition of the dwelling house herein was to be solely governed by the agreement between the parties only subject to the legal regime in place at the time the agreement was executed.

22. As stated earlier, upon production, the agreement herein was never contested, by the appellant. While the respondent's counsel has sought refuge under the doctrine of promissory estoppels, we hold the view, this was entirely unnecessary since the contract herein was written, clear and uncontested. In a case where there is a clear, written, unambiguous and uncontested contract, the invocation of promissory estoppels is unnecessary. This is because, parole evidence cannot serve to contradict what is expressly stated in an uncontested contract. Indeed, according to **Odgers' Construction Of Deeds And Statutes (5thEdition) at p. 106:**

> **"Parole Evidence and written documents. It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.**
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> **As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein"**

23. Consequently, all that the Judge had to pay regard to in this case was the contents of the agreement tabled in evidence by the respondent. In light of the unequivocal expression of the parties as per the said agreement, we are satisfied that the respondent's case was clear cut and was not dented by the appellant's defence that was on record. The requirements for the grant of a mandatory injunction had been established before the trial court. We note further that in view of the validity of the said agreement, and the uncontroverted evidence that the appellant had, in total disregard of the respondent's human dignity, installed another woman and her child in the house in question, it was in order for the learned Judge to give the order of mandatory injunction.

24. A court will grant a mandatory injunction in plain, clear and obvious cases where it is evident from the circumstances and material presented to the court that the party against whom the injunction is sought is undoubtedly the wrong doer. In this case there was no dispute that the appellant had moved from the house and rented another house elsewhere for several years. There was no plausible reason why he could not wait a little longer for the matter to be resolved before deciding to take matters in his own hands as it were. The mandatory injunction was therefore only meant to restore the *status quo ante* as it was before the appellant decided to re-enter the premises in the absence of and without the consent of the respondent.

25. Orders of injunction are discretionary orders. For us to interfere with the trial court's discretion, the appellant would need to demonstrate that the learned Judge misdirected himself on some matters, and as a result arrived at a wrong decision or that the Judge misapprehended the facts; that he took into account some extraneous matters or failed to consider some relevant matters and hence arrived at the wrong decision. See **Mbogo v. Shah [1968] EA 93** cited with approval in **African Airlines International Ltd v. Eastern and Southern African Trade & Development Bank [2003] KLR 14.**

26. No demonstration has been made by the appellant to warrant this Court's interference with the trial Judge's exercise of discretion. Consequently, we find no basis for interfering with the learned Judge's Ruling. This appeal has no merit and the same is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 27th day of June, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR