IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 21 OF 2018

BETWEEN

1. **MARTIN CHIPONDA**
2. **SHIDA CHARO**
3. **DALU CHIGAMBA MUNGA**
4. **EPHRAIM KITSAO BAYA**
5. **KAZUNGU KATANA..APPELLANTS**

AND

1. **BANDARI INVESTMENT COMPANY LIMITED**
2. **NATIONAL POLICE SERVICE**
3. **REGIONAL CORDINATOR, COAST**
4. **HON. ATTORNEY GENERAL**
5. **COUNTY GOVERNMENT OF MOMBASA**
6. **ORIOLE INVESTMENT LIMITED................RESPONDENTS**

(Being an appeal against the Order of the Environmental and Land Court at Mombasa (Omollo, J.) given on 19th December, 2017

in

E&LC Const. Petition No. 15 of 2017)

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JUDGMENT OF THE COURT

[1] This appeal impugns the interim orders given on 19th December, 2017, issued in favour of the 1st respondent in respect of land described as LR Plot No. Subdivision No. 817 (Original No. 324/2 Section II MN) - *the suit land*. Even though the orders were ostensibly aimed at preserving the subject matter, the appellants are of the view that they only served to unlawfully bestow possession of the suit land upon the 1st respondent and that by their nature, such orders should not have been granted prior to an *inter parties* hearing of the application. It is on that premise that the appellants have presented this appeal.

[2] The background of the matter is that the 1st respondent moved the trial court vide a Constitutional Petition which sought declaratory as well as conservatory orders against the appellants and some 13 other individuals in respect of the suit land. In her claim, the 1 st respondent

termed the appellants as trespassers and squatters who had persistently and violently taken occupation of the suit land, which allegedly belonged to the 1st respondent. Consequently, she averred that her agents were continually harassed by the squatters and rendered unable to execute any construction works on site, thus necessitating her filing suit as aforesaid.

[3] Contemporaneously with the Petition, the 1st respondent also took out a motion on notice, dated 18th December, 2017, wherein she sought the following orders:

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> **1. …..*(spent).***
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> ***2. That pending the hearing and determination of this petition;***
>
> > ***a) This Honourable court be pleased to allow the petitioner to continue with the construction of a perimeter wall round Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN as allowed by the 4th respondent through permit No. P/2016/499 and leave a gate for the 6th -23rd respondents to access their structures therein.***
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> > ***b) This Honourable court be pleased to issue an order of Judicial review in the form of orders of mandamus compelling the 1st, 2nd and 3rd respondents to provide the 5th respondent Oriole Investment Limited or such other contractors appointed by the Petitioner with sufficient uniformed and armed police officers while constructing the perimeter wall on Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN and in securing the perimeter wall from demolition.***
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> > ***c) This Honourable court be pleased to issue an order of injunction restraining the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd operating as Kaguta Self Help group, Nguu Tatu Self Help group and others all other invaders currently occupying Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN from interfering with the construction of the perimeter wall, demolishing the perimeter wall, sub dividing, selling, constructing or in any other manner whatsoever dealing with Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN except for purposes of accessing their structures.***
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> > ***3. That the filing of this petition, this notice of motion and order issued hereunder be served upon the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd operating as Kaguta Self Help group, Nguu Tatu Self Help group and others all other invaders (sic) currently occupying Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN by way of advertisement in the Daily Nation newspaper once or as the court may direct.***
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> > ***4. That cost of this application be provided with (sic).”***

[4] Having been brought, under certificate of urgency, the matter was placed before the duty Judge on 4th December, 2017 who upon perusal, certified the same as urgent and granted prayers 2(a), 2(b), 2(c) and 3 above. The matter was then slated for mention on 19th December, 2017; when the court would make further orders and directions. Come the mention date, the appellants’ learned counsel **Mr. Kimani** opposed the subsisting interim orders on the basis that they interfered with the appellants’ rights to occupy the land. He argued that allowing such orders to stand would not only render the entire petition nugatory, but would be tantamount to condemning the appellants unheard. He also pointed out that the appellants had also filed an application seeking to stay the proceedings and that on the whole, it was in the best interests of justice that *status quo* be preserved. In line with this, counsel submitted that the appellants were amenable to giving a list, detailing all the current occupants on the land, as well as an undertaking not to allow any further encroachment on the parcel by new entrants.

[5] Unconvinced of the efficacy of Mr. Kimani’s suggestion, the 1st respondent’s counsel **Mr. Mutugi** reiterated that the orders as they were provided the most equitable solution. He added that the execution of the court orders through construction of the perimeter wall would not prejudice the appellants, since their occupation of the land would not be interfered with in any manner. To the contrary, the perimeter wall notwithstanding, all the occupants to the land would continue to have unfettered access thereto. According to the 1st respondent, the purpose of the interim orders was simply prevention of any additional invaders onto the land.

[6] In her ruling on the issue, the learned Judge affirmed the subsisting interim orders issued in favour of the 1st respondent on 4th December, 2017. While so doing, the Judge however made a slight variation to those orders; in the sense that the perimeter wall set to be constructed by the 1st respondent was restricted to a height of two feet from the ground. This was to enable the boundaries to be ascertained and for a census of the occupants to done. Further to this, the construction was required to have due regard to any existing structures belonging to the appellants. Additionally, the appellants were ordered to see to it that no new invasions took place and no new structures were constructed at their behest.

[7] Irked by that order, the appellants have lodged the present appeal, in which they contend that the learned Judge erred; by granting conclusive orders on a date when the matter was only slated for mention, which orders effectively put the 1st respondent in possession of the suit land before the matter was fully heard; by granting interlocutory relief which substantially disposed of the entire suit prior to trial; by granting conclusive orders at an interlocutory stage without a formal recorded finding that the case before court was plain and undefended; by attaching little significance to the pending application for stay of proceedings filed by the appellants and lastly; by varying the orders issued on 4th December, 2017 to allow for a census to be carried out yet no order for census of the respondents and/or trespassers had been sought in the matter.

[8] The appeal was ventilated through written submissions with oral highlights at the hearing. Appearing for the appellants, learned counsel

Mr. Kimani submitted that the learned Judge erred by issuing the impugned orders on a date when the matter was only meant for mention. Counsel asserted that under **Order 36 rule 1** of the **Civil Procedure Rules**, vacant possession cannot be decreed at an interlocutory stage but must await the final determination of the suit. In the present case, he said, the net effect of the orders was the unlawful dispossession of the appellants whilst placing the 1st respondent at an unfair advantage. He contended that it was wrong for the Judge to make such conclusive orders *suo motu,* more so in a disputed matter. Citing the decisions in **Heywoods case [1963] 1 WLR 975, Manchester Corporation v. Connolly [1970] Ch. 420** as well as **Bradford Metropolitan City Counsel v. Brown [1986] 84 LGR 731**, counsel reiterated that where the interlocutory relief is likely to substantially dispose of the suit, the same can only be granted in clear cut and undisputed cases; which was not the case herein.

[9] According to the appellants, the interlocutory relief sought was also obviated by the fact that there was pending litigation over the possessory and proprietary interests to the suit land. In this regard, counsel alluded to some two previous cases between the parties over the suit land as well as the pending application for stay of proceedings in the present suit. Consequently, he argued that the matter was not ripe for interim orders and that the Judge erred in failing to conclude as much. Further, that the intimation that a census shall be carried out was without basis as the same was neither raised nor sought in the pleadings.

[10] Opposing the appeal **Mr. Munyithya,** learned counsel for the 1st respondent began by submitting that nothing was placed before the learned trial Judge to show that there were other pending proceedings between the parties as alleged by the appellants. If at all there was pending litigation he said, the same related to land abutting the suit property and does not touch on the suit land. Further to this, the 1st respondent was a stranger to such litigation and the same has no bearing on the present proceedings. Counsel was emphatic that the construction of the wall as mandated by the trial court would visit no prejudice upon the appellants; as the said wall would only be two feet high and would not interfere with the appellants' access to the land. He rebutted the assertion that the trial Judge had granted possession of the suit land to the respondent and stated that the decision in the Manchester case was inapplicable to the present set of circumstances, because the appellants herein were not trespassers but invaders.

[11] More importantly, he said, the appellants had not contested the acquisition of the suit land by the respondent. Equally, it was clear, from their defence, the appellants had no valid claim to the land. Citing the decision in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014] eKLR;** counsel argued that conservatory orders are meant to facilitate orderly functioning of public agencies and uphold the adjudicatory authority of the court. Unlike interlocutory injunctions, they are granted on the basis of 'inherent merit' of a case and are not dependent on issues such as proof of irreparable harm or high probability of success. As regards the propriety of the census, counsel submitted that given the violent background that this matter has had; and in view of the fact that none of the parties could agree on exactly how many squatters had invaded the land, the trial court properly exercised its discretion in ordering the census.

[12] In conclusion, counsel stated that no party should be allowed to benefit from their criminal activities. He stated that notwithstanding the subsisting court orders, the appellants and other squatters had even demolished the perimeter wall and carted away the construction materials. Counsel submitted that this had necessitated the filing of contempt proceedings which are still pending determination and that given the appellants' propensity for violence; it was only fair and just that the orders of 19th December, 2017 be upheld.

[13] Appearing for the 2nd, 3rd and 4th respondents was **Mr. Wachira**, who aligned himself with Mr. Munyithya's submissions and prayed for the dismissal of the appeal with costs.

[14] This being an interlocutory appeal where the suit is still pending full hearing and determination on merits before the Environment and Land Court, this court must refrain from making any conclusive or definitive findings on the matters in dispute to avoid prejudging or prejudicing the pending suit. (See ***David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA No. 84 of 2001)***.

It is also to be remembered, that in granting or refusing an injunction, the trial court exercises judicial discretion. As a rule, an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court.

[15] The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited and were well articulated by ***Madan, JA*** in ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898,*** as follows:

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

(See also ***Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125)***

[16] The issue for determination herein is whether the orders issued on 19th December, 2017 were properly issued and whether they conclusively determined the suit at an interlocutory stage. It bears repeating that when the matter first came up before the duty Judge *ex parte* on 4th December, 2017 the same was certified urgent and in a ruling of even date, the respondent was granted prayers 2(a), 2(b), 2(c) and 3 of his application. For clarity, the prayers so granted were in the following terms:

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> ***2. That pending the hearing and determination of this petition;***

a) This Honourable court be pleased to allow the petitioner to continue with the construction of a perimeter wall round Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN as allowed by the 4th respondent through permit No. P/2016/499 and leave a gate for the 6th -23rd respondents to access their structures therein.

b) This Honourable court be pleased to issue an order of Judicial review in the form of orders of mandamus compelling the 1st, 2nd and 3rd respondents to provide the 5th respondent Oriole Investment Limited or such other contractors appointed by the Petitioner with sufficient uniformed and armed police officers while constructing the perimeter wall on Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN and in securing the perimeter wall from demolition.

c) This Honourable court be pleased to issue an order of injunction restraining the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd (sic) operating as Kaguta Self Help group, Nguu Tatu Self Help group and others all other invaders (sic) currently occupying Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN from interfering with the construction of the perimeter wall, demolishing the perimeter wall, sub dividing, selling, constructing or in any other manner whatsoever dealing with Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN except for purposes of accessing their structures.

3. That the filing of this petition, this notice of motion and order issued hereunder be served (sic) upon the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd (sic) operating as Kaguta Self Help group, Nguu Tatu Self Help group and others all other invaders (sic) currently occupying Plot LR Subdivision No. 817 (Original Number 324/2 Section II/MN by way of advertisement in the Daily Nation newspaper once or as the court may direct."

This order of 4th December, 2017 *(the initial order)* was subsequently served upon the appellants and no appeal emanated from it. It was this order that was later reiterated by the impugned ruling of 19th December, 2017 save that in the latter ruling, the learned Judge also directed that a census of the residents be conducted and also specified a maximum height for the perimeter wall under construction.

[17] For this appeal to succeed, the appellants must convince this Court that the learned Judge exercised his discretion wrongly as to warrant this Court's interference. From the grounds of appeal and submissions by counsel, the gist of the appellant's complaint is that not only were the orders undeserved, but that they were conclusive orders prematurely granted on a date when the matter was only scheduled for mention. On the other hand, the respondent's counsel is of the view that these were not interlocutory but rather, conservative orders; and as such, could be granted *ex parte* in the interests of the greater public good, given the acrimonious nature of the dispute.

[18] To further the argument that these were conclusive orders with far reaching effect, the appellants have drawn the attention of this Court to other pending proceedings in relation to the suit land, namely Mombasa SRMCC 1686 of 2016, in which the 1st respondent had been granted eviction orders which were later quashed in Mombasa Judicial Review No. 7 of 2017. However, according to the 1st respondent's supporting affidavit, sworn by Ken Tobias Sungu on 1st December, 2017 and to which the pleadings cited by the appellants are annexed, it is deposed that the multiplicity of suits was borne of the squatters' persistent introduction of even more squatters onto the land. These other proceedings can hardly be a bar to the appellants' quest for conservatory orders.

[19] As earlier stated, the power of a court in an application for an interlocutory injunction is discretionary. The Court of Appeal may only interfere with the exercise of a court's judicial discretion within the parameters set out in the Shah Mbogo case and the Mrao case (supra) which we have rehashed earlier in this judgment. Though the appellants contend that they were dispossessed, the impugned orders in this case only allowed for construction of a portion of the perimeter wall. Even though it is common ground that the appellants are still in occupation, the impugned orders never directed that any evictions be carried out. If anything, the 1st respondent was to grant unfettered access to the appellants whilst also ensuring non-interference with any existing structures belonging to the appellants. Therefore, the contention that the learned Judge issued conclusive orders that conferred possession of the land onto the 1st respondent, fails.

[20] Did the Judge consider extraneous matters in arriving at its decision? The parties are in agreement that this has been a highly acrimonious matter. The 1st respondent contended that the appellants have been involved in introducing new squatters every other day; thus escalating tensions even further. The efforts of the trial court appear to us to have simply been aimed at maintaining the status quo. We say so because in the end, none of the feuding parties has been accorded possession of the land to the exclusion of the other.

[21] Lastly, as regards the contentions that the Judge misdirected himself by ordering a census to be done, it is readily apparent to this Court that when the parties appeared before the trial court on 19th December, 2017, this issue was raised and in response thereto, counsel for the appellants stated as follows:

"I have spoken to my instructing client and he has agreed that they can convene a committee and file an undertaking to file a list of individuals on the land, and that there shall be no new entrants as we will use reasonable force to protect the suit premises. I will supply the list written the same as the undertaking. This will ensure equality of terms. I beg these directions to prevent bloodshed under section 1A of the Civil Procedure Act"

If learned counsel for the appellants had already acquiesced to the conducting of the census and had even indicated the appellant's willingness to spearhead the exercise, why would the appellants now turn around and fault the trial Judge for ordering the census? In the face of that undertaking, we are of the view that this ground of appeal too, should fail.

[22] In conclusion therefore, from the foregoing analysis, it is crystal clear that the learned Judge exercised his discretion judiciously as mandated by law after considering all the circumstances of the matter before him. We are also satisfied that the appellants have not demonstrated that they have suffered any prejudice whatsoever following the orders in question. No basis has been laid for us to interfere with the learned Judge's exercise of discretion. We hold the firm view that this appeal is totally devoid of merit. We dismiss it with costs to

the 1st respondent.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

M.K. KOOME

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR