IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 15 OF 2016

BETWEEN

MWAMUNGA NYANJE & 27 OTHERS.....APPELLANTS

AND

GEORGE GATHECA KINYANJUI.....REPONDENT

(Appeal from the ruling and order of the High Court of Kenya

at Mombasa, (Omollo, J.) dated 12th February 2016

in

ELCC No. 199 of 2015)

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JUDGMENT OF THE COURT

This is an interlocutory appeal arising from the ruling and order of ***Omollo, J*** dated 12th February 2016 by which the learned judge dismissed the appellants' application for injunction to restrain the respondent from transferring, alienating or evicting the appellants from the parcel of land known as ***Plot No. Kwale/Kiwegu/Jego/15 (the suit property)***. The brief background to the application before the High Court is as follows.

At all material times the respondent, ***George Gatheca Kinyanjui***, was the registered proprietor of the suit property under the ***Registered Land Act, Cap 300*** (repealed). On 28th August 2015 the 23 appellants took out an Originating Summons (OS) in the High Court praying for, among others, a declaration that the respondent's title to the suit property had become extinguished and that they had acquired title thereto by adverse possession under ***section 17*** of the ***Limitation of Actions Act, cap 28.***

In support of the summons, the ***1st appellant, Mwamunga Nyanje***, swore an affidavit on 27th August 2015 on his behalf and that of the other appellants in which he deposed that the appellants had since 1989 been in open, peaceful, continuous and uninterrupted possession of the suit property without the respondent's consent or permission. They further averred that they had constructed houses, planted crops, reared livestock and buried their kin on the suit property. On 25th July 2015, they deposed, the respondent fraudulently duped them into signing documents, which they did not understand, pledging to vacate the

suit property in consideration of the respondent paying money to them. After signing the documents they received envelopes, the contents of which they did not know. Later, they were very surprised to find that the envelopes contained money, which they had not negotiated or asked the respondent for.

Contemporaneously with the summons, the appellants applied by motion on notice for a temporary injunction to restrain the respondent from evicting them from the suit property or selling, alienating or transferring the same.

The respondent opposed both the summons and the notice of motion by three affidavits, two of which he swore on 9th October 2015 while the third affidavit was sworn on the same date by ***Kama Abdallah Mbungo***, the chief of ***Vanga Location*** where the suit property is situated. The substance of those affidavits was that the respondent purchased and was registered the proprietor of the suit property under the repealed Registered Land Act on 13th August 2010. Upon fencing the property, 53 people, among them 17 of the appellants in this appeal who were residing in an adjacent village, invaded the suit property, built temporary structures and started cultivating the land. The respondent reported the matter to the Chief who arranged a meeting between the appellants, their advocates, ***Kituo cha Sheria*** and the respondent, to amicably resolve the problem. Ultimately the appellants agreed to move out of the suit property in consideration of compensation for their structures and crops on the suit property. On 25th July 2015 the respondent paid the appellants their respective compensation at the offices of Kituo cha Sheria after which they signed written acknowledgements, duly witnessed by their advocate, ***Mr. Sharia Nyange*** and the area Chief. Thereafter they voluntarily vacated the suit property and it was the respondent's contention that the summons was merely intended to extort more money from him. Instructively, Mr. Nyange swore an affidavit on 12th October 2015 in which he confirmed the above negotiations and payments to the appellants.

On account of the contradictory positions taken by the appellants and the respondent on whether the former were indeed in occupation of the suit property, Omollo, J. directed the Executive Officer to visit the suit property and confirm whether the appellants were indeed in occupation. The visit was conducted on 21st October 2015 in the presence of counsel for the parties. The Executive Officer found, as stated in his report dated 3rd November 2015, that save for 2 of the appellants, the others had indeed demolished their structures and left the suit property.

Finding that the appellants' physical occupation of the suit property was in serious doubt, the learned judge nevertheless held that while the appellants ***"may have a prima facie case",*** they had failed to meet ***"the other principles or (sic) irreparable loss and balance of convenience."*** Accordingly she declined to grant the injunction prayed for and dismissed the application with costs, leading to this appeal, in which the appellant impugns the ruling on 4 grounds, which in our view boil down to two issues, namely whether the learned judge erred by relying on the report of the Executive Officer and whether she determined conclusively contested issues at the interlocutory stage. By consent, the appeal was heard through written submissions.

On the first issue, the appellant submitted that the learned judge erred by relying on the untested report of the Executive Officer, which had not been seen by the parties. In the appellant's view, the site visit ought to have been conducted by the learned judge herself instead of the Executive Officer. On the second issue, it was urged that the learned judge had erred by conclusively determining that the appellants had been paid money by the respondent to vacate the suit property and further that the appellants were not living on the suit property. In the appellants' view, because the issues were contested and disputed, no final determination could be made without a full hearing, involving the calling of evidence duly tested by cross-examination. The appellant lamented that in view of the conclusions by the learned judge, there was nothing left to determine at the full hearing.

The respondent opposed the appeal, submitting that the learned judge had properly exercised her discretion in denying the appellants an order of injunction. In the respondent's view, the appellants had not established a *prima facie* case with a probability of success because there was evidence on record that they had already moved out of the suit property. As regards reliance by the learned judge on the report by

the Executive Officer, the respondent submitted that it was indeed the appellants who requested the site visit and that both parties and their advocates took part in the visit and confirmed the status on the suit property.

The better part of the respondent's submissions was dedicated to criticism of the learned judge for hearing, together with the application for injunction, a preliminary objection raised by the respondent, and failing to make a determination on the same. It was argued that the learned judge should have held that in the circumstances of the case, the appellants could not sustain a claim for adverse possession, upheld the preliminary objection, and struck out the suit. We do not think it is necessary for us to spend time on this limb of the respondent's submissions for the simple reason that the respondent did not bother to file a cross appeal as required by ***rule 93*** of the ***Court of Appeal Rules***. He was obliged by that rule to put the appellants on notice and to specify the grounds of his cross appeal and the nature of the order he proposed to ask the Court to make, so as to enable all the parties address the issue and for this Court to entertain and determine whether to interfere with the ruling on that basis. As it is, the issue has been raised from the blue, denying the appellants and opportunity to address it.

We have anxiously considered the record of appeal, the ruling by the learned judge, the grounds of appeal and the submissions by the parties. This is an interlocutory appeal, and as has been stated by this Court time and again, in this type of appeal the Court cannot express concluded views on matters which may require determination when the suit is finally heard by the trial court. (See ***BP (Kenya) Ltd v. Kisumu Market Service Station, CA No. 25 of 1992*** and ***David Kamau Gakuru v. National Industrial Credit Bank, CA No. 84 of 2001)***.

What is involved in granting or refusing an order of injunction is exercise of discretion by the trial court. An appellate Court is slow to interfere with exercise of discretion by the trial court, unless it is satisfied that the court misdirected itself or that it considered matters that it should not have considered, or failed to consider matters it should have considered, and thereby came to a wrong decision. (See ***Matiba v. Moi & 2 Others [2008] 1 KLR 670).***

We would agree with the appellants as regards the principle that in an application for injunction, the trial court is not supposed to make final determination of the dispute. That can only be done after hearing evidence, which is tested by cross-examination. In ***Nguruman Ltd v Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012*** this Court stated as follows regarding the duty of the trial court in an application for injunction:

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.***

In our view, there was sufficient evidence by way of affidavits, which the learned judge could have relied upon to dispose of the application before her without resorting to the site visit. Despite visit and the report of the Executive Officer, we are satisfied that the learned judge did not conclusively determine the issues. For example on occupation of the suit property, this is how the court expressed itself:

> ***"In analysing the pleadings filed and comparing it with observations made by the Executive Officer in his site visit, it comes out that the plaintiff's physical occupation of the suit land is in doubt." (Emphasis added).***

We think it is because of that fact that the learned judge held that the appellants had a *prima facie* case.

That however is not to suggest that on the evidence on record, the appellants were entitled to an injunction. That evidence, in the form of the affidavits sworn by the chief, Kama Abdallah Mbungo and the advocate acting for the appellants at the material time, Mr. Sharia Nyange raised serious doubt whether indeed the appellants were in occupation of the suit property so as to entitle them to the remedy of a prohibitory injunction. This is because that equitable remedy is only intended to prevent grave and irreparable damage or injury, which means an injury that is actual, substantial and demonstrable. As has been stated over time, the court will not issue an injunction, which is useless, ineffectual, or which will serve no practical purpose. (See ***Hitenkumar Amritlal v. City Council of Nairobi, CA No. 47 of 1981***). To quote once more from ***Nguruman Ltd v. Jan Bonde Nielsen & 2 Others***, ***(supra):***

> ***"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."***

Ultimately, we are satisfied that the appellants did not establish a *prima facie* case with a probability of success so as to entitle them to an injunction. Due to the sequential nature of the considerations that guide the grant or refusal of an order of injunction, it is not necessary to delve into the other considerations, the appellants having failed to jump over the first hurdle of establishing a prima facie case. This appeal has no merit and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 17th day of February, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR