



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 48 OF 2016

BETWEEN

HASSAN BABAKAR OSMAN.....APPELLANT

(suing as a lawful donee of His Royal Highness

The Prince of the Kingdom of Saudi Arabia,

SULTAN BIN NASSER ABDUL AZIZ AL SAUD)

AND

ARAFCO AGRICULTURAL INTERGRATION COMPANY LIMITED.....RESPONDENT

(Appeal from the ruling and orders of the Land and Environment Court sitting at Malindi

(Angote, J.) delivered on 13th day of May, 2016

in

Environment and Land Court Case No. 218 of 2015)

JUDGMENT OF THE COURT

By a ruling delivered on 13th May, 2016, **Angote, J.**, allowed with costs, an application filed by the respondent whilst dismissing equally with costs, two applications filed by the appellant. The facts leading up to this state of affairs are that on 19th November, 2015, the respondent filed suit in the Malindi Environment and Land Court (ELC) against the appellant, seeking the following orders:-

“1. A permanent injunction restraining the defendant, his agents, servants, employees and/or anyone acting under his instructions from leasing, cultivating, entering into any dealings with third parties, trespassing into it, harassing, intimidating the plaintiff’s officers, his agents, employees and/or servants and/or interfering with the suit property, title number Galana Ranch /block 1/1;

2. An order of eviction of the defendant from the suit property;

3. An order directing the area Officer Commanding Station (OCS) and the County Commander to assist the plaintiff's officers in the implementation of the order Nos. (1) and (2) above;

4. Costs of this suit together with interest thereon; and

5. Any further or other relief that this honourable court deems fit to grant.”

Contemporaneously with the suit, the respondent took out a motion on notice, seeking temporary injunctive relief in terms of the plaint, which we have set out above.

The respondent's motion was certified urgent on 1st December 2015, and temporary orders issued in terms of the first prayer pending the hearing and determination of the application *inter partes*. The application was then fixed for *inter partes* hearing on 23rd February, 2016. However, upon getting wind of the motion and the temporary orders aforesaid, through the newspapers, the appellant filed an application of its own, dated 21st January, 2016, seeking to have the temporary orders aforesaid varied, discharged or set aside and the order by the Registrar of Companies purporting to determine the lawful shareholders and directors of the respondent also set aside. While the two applications were still pending, the appellant filed yet another application dated 21st March, 2016 in which the court temporarily stayed the earlier orders of temporary injunction. Before **Angote, J.** it was agreed that the three motions be argued and disposed of together by way of written submissions and oral highlights.

The respondent is a limited liability company incorporated in Kenya. Its case as presented before the trial court was that it was a majority shareholder in a company known as Milestone Developers Limited, whose managing director was one, **Nuh Abdulwahab Mohammed**, the deponent of the respondent's affidavits. According to Mr. Nuh, a memorandum of understanding “*the MOU*” dated 3rd August, 2010, was executed between the respondent and a prospective business partner, Sultan Bin Nasser Bin Abdulaziz Al-Saud (“*the Sultan*”), wherein it was agreed that the Sultan would inject some financial capital into the respondent to the tune of USD216,000,000 within 90 days, to enable the respondent undertake a project in Galana Ranch/block 1/1 (“*the property*”). In consideration thereof, the Sultan would become the holder of 900 out of the 1,000 shares in the respondent, which shares were immediately transferred upon execution of the MOU. It was also a term of the agreement that should the Sultan default in injecting the said capital as agreed, he would forthwith forfeit the shares and the same would revert to the respondent. To this end, some undated share transfer forms were executed on behalf of the Sultan, to be lodged with the company registry in the event of his default. At all times material to the suit, the Sultan acted through the appellant, to whom he had donated a power of attorney.

It was on the foregoing premise, that on 28th September, 2010, the respondent leased the property, comprising of 100,000 acres of land from the Agricultural Development Corporation (ADC) for a term of 16 years. However, contrary to the MOU, the respondent contended, the Sultan failed to inject the capital as agreed and instead appeared determined on interfering with the respondent's peaceful enjoyment of the property, thus necessitating, the suit and the application for injunctive orders.

On the other hand, the appellant's story was that he was the majority shareholder of the respondent, having incorporated it on 17th September, 2010 and that Milestone Developers Limited was unknown to him. As such, the appellant disowned the share transfer forms relied upon by the respondent, terming them forgeries fabricated by Mr. Nuh to unlawfully deprive the appellant of his shares. Further, that the MOU alluded to by the respondent was non-existent, as the only MOU in place was one entered into between the Sultan and Mr. Nuh, in which the Sultan agreed to sell to Mr. Nuh 60 shares at USD 300,000. In addition, that contrary to the respondent's assertion, it was the Sultan who leased the suit premises.

Upon a consideration of the applications before him, Angote, J. found that a *prima facie* case had been made out and granted the orders sought by the respondent, pending the hearing and determination of the main suit, thereby rendering the appellant's two applications otiose, which he proceeded to dismiss. This ruling has been impugned on grounds that the learned judge erred in granting orders which amounted to

mandatory injunction which had not been sought by the respondent, granting eviction orders prior to a full hearing of the suit, which orders had in any event, not been sought, granting temporary injunction yet the requisites for the grant of such orders had not been met, conclusively determining the suit at an interlocutory stage, dealing with a matter whose jurisdiction lay with the Commercial and Admiralty Division of the High Court, holding that the shareholding of the appellant company lay with one Mr. Nuh Abdulwahab Mohammed whilst ignoring the evidence led to prove that the same was fraudulently acquired, failing to find that the majority shareholder, was with the Sultan, failing to give regard to the doctrine of *lis pendens* and the provisions of **Section 52** of the Indian Transfer of Property Act, abandoning his role as an impartial arbiter and instead allowing documents not supported by the pleadings to be “smuggled” into the proceedings by holding that the appellant’s preliminary objection could not be sustained for want of notice, failing to recognize that the appellant was in possession of the property, and lastly, in awarding costs to the respondent in respect of a suit premised on forgery and a non-starter.

The sole issue for determination in this appeal in our view is whether a *prima facie* case was made out to warrant the grant of an order of temporary injunction; whether in dismissing the application the learned judge properly exercised his discretion. The requisites for the grant of interlocutory injunctions have been stated times without number, having been aptly captured in the oft-cited case of **Giella v Cassman Brown & Company Limited [1973] E.A. 358** where it was held that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In the present case, the appellant has mainly impugned the trial court’s ruling on the basis that no *prima facie* case had been established to warrant the grant of the orders of injunction. That on the flipside, the appellant’s case, that he was the legitimate majority shareholder in the respondent was never considered, given that the CR 12 forms from the Registrar of Companies produced by the respondent were a forgery. In addition, that the orders issued including eviction were not only a mandatory injunction but were also never sought and could in any event not issue at an interlocutory stage.

At this point, it is pertinent to point out that while both parties seem to have relied on a host of documents in their respective affidavits before the trial court, only one document has been included in the record of appeal; the same being the document examiner’s report relied upon by the appellant. Key documents such as the MOU, the lease, CR 12 forms, Power of Attorney, payment receipt statements of account and correspondence do not form part of the record. Being cognisant of this, the appellant sought leave to file a supplementary record of appeal to remedy his omission. However, despite that leave being granted, no supplementary record of appeal had been filed by the time the appeal was canvassed before us.

In the absence of a complete record, it becomes well nigh impossible for this Court to interrogate whether the appellant had made out a *prima facie* case, the mainstay of the present appeal. In addition, even the document examiner’s report, which the appellant relies upon in support of its case, was filed in response to an application that came while the matter was already pending ruling in the trial court. As earlier mentioned, the matter in the court below was disposed of by way of written submissions, with oral highlights on 9th March, 2016. Thereafter, the ruling was reserved to be delivered on 29th April, 2016. It does not escape the attention of this Court that the applications addressed by the parties’ oral and written submissions are only two, the respondent’s application of 19th November, 2015 and the appellant’s application of 21st January, 2016. The inference to be drawn therefore, is that the application dated 31st March, 2016 was never seriously canvassed before court. Yet, this is the application in response to which the document examiner’s report was produced.

Therefore, given the foregoing and the incomplete record before us, and which files in the face of Rule 87 of this Court’s Rules, we have no alternative but to hold that the appeal as filed and argued is incompetent for want of necessary documents. After all, it was the appellant who sought to have court believe that a *prima facie* case did not exist and that in the circumstances, the orders should not have been granted. To

establish this as a fact and to illustrate the trial Judge's shortcomings, it behooved the appellant to place a complete record before us; which despite having been granted such leave to file a supplementary record, he failed to do so. The appeal is accordingly dismissed with costs to the respondent.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR