



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 53 OF 2015

DANSON MWANGI MAKANGAAPPELLANT

AND

MARY MUTHONI GITHUIRESPONDENT

(Appeal from part of the ruling and orders of the Environment and Land Court at Nyeri (Waithaka, J.) dated 23rd day of March, 2015 in Environment and Land Case No. 546 of 2014)

JUDGMENT OF THE COURT

The appellant **Danson Mwangi Makanga** filed Nyeri H.C.C. No. 189 of 2011 dated the 30th November, 2011, against the respondent **Mary Muthoni Githui** averring *inter alia* that he was the registered owner of LR No. Nyeri 115/Island Farm/223 (the suit property) under the provisions of the repealed Registered Land Act, Cap 300, Laws of Kenya (the R.L.A.) and that the respondent, without any colour of right, had trespassed thereon. He therefore sought an order for eviction of the respondent, her family and properties from the suit property, damages for trespass, costs and interest.

The respondent resisted the appellant's claim vide a defence and counter claim dated the 24th day of January, 2012, in which she *inter alia* averred that she was in exclusive use of approximately 7.14 hectares of the suit property in respect of which she had acquired title through the appellant's acquiescence; and as a result of which the appellant's claim was time barred under the **Limitation of Actions Act, Chapter 22 Laws of Kenya**; rendering the appellants title to the suit property subject to her overriding interests under **section 30 (f) of the R.L.A**; in consequence of which she prayed for the suit to be dismissed with costs to her.

In her counterclaim, the respondent reiterated the contents of her defence that she was in adverse possession of a portion of approximately 7.14 hectares of the suit property for a period of over twelve years and to which she was entitled to be registered as the proprietor. She sought from the court various declarations namely (i) she is entitled to be registered as proprietor of the portion she then occupied on the suit property of approximately 7.14 hectares by way of adverse possession; (ii) that the appellant's title to the said portion had become extinguished by the respondent's adverse possession; (iii) an order for the subdivision of the suit property with the resulting subdivision to the extent of 7.14 hectares under her occupation being adjudged in her favour; (iv) an order for the appellant to execute all the transfer documents to give effect to the registration of the resulting suit portion in her favour failing which the registrar of the court be authorized to execute the same on his behalf; (v) a permanent injunction to

restrain the appellant, his servants, agents or family from interfering with her quiet use and enjoyment of the said portions, together with an attendant order for costs.

The appellant filed a reply to defence stating that the respondent had been arraigned in Nyeri Chief Magistrate's Criminal Case No. 909 of 2011 for the offence of forcible detainer of the suit portion subject of the counter claim; he denied the respondent's continuous occupation of the suit portion for over a period of twelve years and that she had acquired title thereto by way of adverse possession and put her to strict proof; prayed for the counter claim to be dismissed with costs to him.

The respondent put in a reply to the appellant's defence to the counter claim denying the appellant's averments and put him to strict proof.

On the defence and counterclaim, the respondent anchored a Notice of Motion dated the 9th day of September, 2014 seeking an order to restrain the appellant by himself, his family members, servants, agents or otherwise howsoever, from in any way trespassing on or interfering with the respondent or her property on the suit property or interfering with the suit portion particularly from selling, leasing, alienating or in any other way howsoever dealing with the suit portion pending the hearing and determination of the suit. It was supported by grounds on its body, a supporting, further, and supplementary affidavits. It was opposed by the appellant through grounds of opposition dated the 15th day of September, 2014 and a replying affidavit deposed on the 22nd September, 2014.

Hot on the heels of the above response to the respondent's application, the appellant also filed a chamber summons dated the 29th day of September, 2014 seeking an order to restrain the respondent, her agents, servants and or any one of them from building, cutting or felling trees or in any way interfering with the occupation and possession of the suit property pending the hearing and determination of the suit. It was anchored on the grounds on its body, a supporting and a further affidavit deposed on the 14th October, 2014. It was opposed through the respondent's replying affidavit deposed on the 13th day of October, 2014. Both opposing applications were heard together resulting in the impugned ruling of L.N. Waitthaka. J. dated the 23rd day of March, 2015 vide which she dismissed the appellant's chamber summons dated the 29th day of September, 2014 but allowed the respondent's notice of motion dated the 9th day of September, 2014.

The appellant was aggrieved. He is now before us on an interlocutory appeal raising four (4) grounds of appeal. These read:-

“1. The learned judge erred in law in making a final determination at an interlocutory stage on the issue of the alleged occupation by the respondent of the suit land when she held that the defendant's occupation of the suit land by the time the suit was filed, in the accordance with the provisions of section 28 as read with section 30(g) of the Registered Land Act was an overriding interest on the plaintiff's land. A miscarriage of justice was thereby occasioned.

2. In so far as the matters before learned judge were interlocutory applications and not a full hearing on the merits, the holding by the learned judge that the defendant had an overriding interest on the plaintiff's land prejudiced the plaintiff's case and the final hearing and determination of the suit. A miscarriage of justice was thereby occasioned.

3. The learned judge's finding that the defendant had an overriding interest on the plaintiff's land completely decided the issues in dispute in this case at an interlocutory stage thus leaving nothing to be heard on evidence and thereby depriving the defendant his right to be heard contrary to the rules of natural justice. A miscarriage of justice was thereby occasioned.

4. The learned judge erred in making a determination on the issue of an overriding interest when the matter before her was an interlocutory application thereby deciding on an issue that had not been placed before her by either of the parties. A miscarriage of justice was thereby occasioned.”

Learned counsel Mr. Wahome Gikonyo while reiterating the grounds of appeal submitted that the learned judge of the superior court fell into error when she upheld, the respondent's alleged overriding interests under **section 30(f)** of the **R.L.A** without giving the specific circumstances that compelled her to give that reasoning; second, her finding became a determination of the issues in controversy as between the parties without hearing evidence and cross-examination thereby grossly prejudicing the appellant.

To buttress his submission Mr. Waweru Gikonyo cited the case of **Olive Mwhaki Mugenda & Another versus Okiya Omtata Okoiti & 4 Others [2016] eKLR** for the propositions that (i) final orders can only be granted at the interlocutory stage, in exceptional circumstances and the reasons for granting such final orders must be stated; (ii) the balance of convenience and irreparable, injury need to be demonstrated before interlocutory final orders can be granted; (iii) a court can also grant such orders if failure to do so would prick the conscience of the court resulting in injustice being perpetrated throughout the hearing and at the end the court would not be able to vindicate the cause of justice; (iv) where the court is satisfied that the petitioner is bound to succeed; and lastly (v) the court must record reasons for passing such an order and make it clear as to what are the special circumstances for which such a relief is being granted.

In response learned counsel Waweru Macharia submitted that the respondent has no objection to a merit trial so long as the status quo orders granted by the learned judge for the protection of her interests are preserved pending the hearing and the determination of the suit. He cited the case of **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] eKLR** for the proposition that in an interlocutory appeal where the dispute between the parties is still outstanding care must be exercised to obviate the risk of trespassing on the jurisdiction of the judge who will eventually hear the case, and **Vivo Energy Kenya Limited versus Maloba Petrol Station Limited & 3 Others [2005] eKLR** reiterating the same principle that in an interlocutory appeal where the suit between the parties is yet to be tried, the court has to refrain from expressing concluded views on any issue it thinks may arise in the pending trial.

In reply Mr. Wahome Gikonyo submitted that they have no objection to the merit trial but are opposed to the perpetuation of the impugned orders.

This is an interlocutory appeal. The mandate of the court in such an appeal has been reiterated by numerous pronouncements by the Court. In the **United India Insurance Co. Ltd. versus East African Underwriter (Kenya) Ltd [1985] EA 898** Madan JA (as he then was) at page 108 had this to say about the exercise of this jurisdiction:-

“the Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the grounds 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; fifthly, that his decision albeit discretionary one, is plainly wrong.”

See also **Mrao Ltd. versus First American Bank of Kenya Ltd. & 2 Others (supra)**.

We have revisited the record and considered it in the light of the rival submissions set out above as well as the impugned ruling and the principles of law cited on both sides of the argument. In our view, only one issue falls for our determination that is whether the learned judge of the Superior Court exercised her discretion improperly when she dismissed the appellant's injunctive relief application but allowed that of the respondent.

The principles that the learned judge was enjoined to apply in resolving in one way or the other of the rival applications were long settled in the landmark case of **Giella versus Cassman Brown [1973] EA 358**. These have been refined by numerous decisions of the Court. In **Nguruman Limited versus Jan Bande Nielsen & 2 Others CA No. 77 of 2012** the following observations were made:-

“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 on the face of it the person applying for an injunction has a right, which has been threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discerning 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 the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

The Court continued:-

“In an interlocutory injunction application the applicant has to satisfy the triple requirement to; (a) establish his case only at a prima facie level; (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay doubts to (b) by showing that the balance of convenience is in his favour.

Finally, the Court concluded:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles, which the applicant is expected to surmount sequentially -----

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 -----

If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap frogging by the applicant to injunction directly without crossing the other hurdles in between.”

The approach the learned judge took in determining the rival applications was to examine the rival pleadings which according to the learned Judge revealed that the status quo as at the time the appellant moved to court to present the plaint was that the respondent was in occupation of the suit property and that is why the appellant sought her eviction while she sought to assert her title to a portion of the suit property through adverse possession. The proceedings in Nyeri CM’s Criminal Case No. 90 of 2011 demonstrate that this was the correct position. This status quo was however altered when arsonists burnt down the dwelling house of the respondent forcing her to seek accommodation elsewhere but she continued with her other activities like farming on the suit property. It was when she attempted to put up another dwelling house to restore the status quo prevailing as at the time she responded to the appellant’s claim that the appellant moved to court to seek injunctive relief.

In resolving the above rival positions the learned judge reasoned *inter alia* that:- the status which was obtaining when the suit was filed changed when unknown arsonists destroyed the respondent’s dwelling house forcing her to seek accommodation elsewhere but continued to carry on other activities such as farming; though the **R.L.A** was repealed, it was the law governing the resolution of the dispute before court by dint of the provisions of **Section 107** of the **Land Registration Act 212**; the appellant’s rights as an indefeasible owner under **Section 28** of the **R.L.A** were subject to the respondents’ asserted overriding interest under **section 30(f)** of the **R.L.A** unless an inquiry carried out under **section 30(g)** of the same **R.L.A** discloses none; the respective rights of the disputing parties were not conclusively determined by the criminal proceedings in Nyeri CM’s.CR. C. No. 909 of 2011; and lastly that since there was no demonstration that the process used to terminate or purport to terminate the respondents interest in the suit property was proper or lawful there was no way the appellant could be allowed to benefit from the intervening circumstances that saw the respondent unwillingly move from the suit property.

On the basis of the above reasoning the learned judge drew out the following conclusions:

(i) there was no evidence that the appellant was responsible for the changed circumstances as to the status quo prevailing at the time the suit was filed; (ii) the principles of law the court was enjoined to apply in resolving the rival applications were those enunciated in the case of **Giella versus Cassman Brown** (supra); (iii) when the rival applications are considered in the light of the above principles, the appellant had failed to demonstrate that the circumstances then obtaining as concerned the suit property were lawfully caused; (iv) the above being the position the only circumstances that the court could rely on to grant a relief to either of the rival applications were those prevailing as at the time the suit was filed; (v) as at the time the suit was filed, the respondent's possession or occupation of the suit property constituted an overriding interest; (vi) since the change in the said status was not lawfully caused, the status that the court was enjoined to protect was that which was prevailing as at the time the suit was filed; (vii) being cognizant that the respondent's dwelling house had been destroyed by unknown perpetrators, it was not prudent to allow her to rebuild it for her own security reasons but she could continue carrying out other activities pending the determination of the suit and lastly that (viii) since the appellant's application was not a preliminary objection it was not prudent to interrogate the issue as to whether the respondent's counter claim had been properly laid.

We have revisited the learned judge's reasoning and final conclusions reflected above. In our view, they do not amount to a final determination of the litigation as learned counsel Mr. Wahome Gikonyo would want us to believe. The learned judge simply assessed the pleadings on which the applications were anchored, the reliefs sought and the grounds in support of either application as contained in the supporting documents. She applied the guiding principles in **Giella versus Cassman Brown**.

These guiding principles are none other than the three pillars on which an injunctive relief can be granted as reiterated in the **Nguruman Ltd case** (supra) namely: demonstration of the existence of (a) *a prima facie case with a probability of success*; (b) *irreparable damage likely to be suffered if the injunctive relief is not granted*; and (c) *where (a) and (b) are inapplicable demonstration that the balance of convenience tilts in favour of the applicant*.

In the learned judge's view, both applications had met the threshold on the first ingredient under **Giella versus Cassman Brown** (supra). We find this finding sound as it is well supported.

We find no interrogation of the second pillar of irreparable loss incapable of compensation by way of damages. There is however, interrogation of the last pillar that is of the balance of convenience hinged on the status quo prevailing as at the time each competing application was presented to court.

The above status quo was however not the status quo prevailing as at the time the competing applications were determined. This change had arisen from the undisputed fact that the respondent's dwelling house had been torched by unknown arsonists. It is this change in the status quo that prompted the appellant to move to court to seek an injunctive relief to prevent the respondent from putting up another dwelling structure on the suit property. In respect of that change in the status quo, the learned judge held thus:-

“I find and hold that the plaintiff has failed to prove that the circumstances currently obtaining as concerns the suit property were lawfully caused. That being the case, the only circumstances that the plaintiff can rely on to defeat the defendant's interest in the suit property are those which obtained when the suit was filed. Having found that at the time the current suit was filed the defendant's possession and occupation constituted an overriding interest on the plaintiff that suit and that the said status was not lawfully brought to an end. I agree with the defendants learned counsel that the status quo that ought to be maintained is that which obtained at the time the current suit was filed.”

All that the above learned judge's conclusions amount to is that in her view, it was prudent to exercise her discretion in favour of preserving the status quo prevailing as at the time the suit was filed pending the determination of the suit before her. This is borne by the following conclusion:

“Being cognizant of the fact that the defendant’s homestead was destroyed through criminal activities whose perpetrators are unknown, I hold the view that for the defendant’s own security, it may not be prudent to allow her to rebuilt her house in the suit property. She may however continue using the portion of the suit property she has been previously using for the activities she is currently carrying thereon pending the hearing and determination of the suit.

The above holding is crystal clear that no final orders were granted in terms of the reliefs sought by the parties. The learned judge was categorical that her obligation was to preserve the status quo prevailing as at the time the litigation was initiated pending the hearing and determination of the suit. That is why the respondent’s application was partially allowed for her to continue with activities other than construction of a dwelling house on the suit land. Had the learned judge finally determined the issues in controversy she could not have hesitated to order for vacant possession in the respondent’s favour for the suit portion under her possession/occupation or alternatively order eviction in case the appellant's claim was upheld.

The upshot of the above is that we find the learned Judge properly exercised her discretion and there is no merit in this appeal. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 5th day of April, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR