



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 35 OF 2016.

MASHA NGAO.....1ST APPELLANT

ROBERT GAMBO BUNJU.....2ND APPELLANT

KATANA NGOTI JAMBO.....3RD APPELLANT

CHRISPUS TSOFWA MWENI.....4TH APPELLANT

MAMA FATUMA.....5TH APPELLANT

BABU WANJE.....6TH APPELLANT

AND

OKOMBOLI ONG'OWA.....RESPONDENT

(Being an appeal against the Ruling and Order of the Environment and Land Court of Kenya at Malindi (**Angote, J.**) delivered on 19th February, 2016 in E. L.C. Case No. 73 of 2015.)

JUDGMENT OF THE COURT

By an application dated 11th May, 2015, the respondent sought the following orders:

“1. ...spent.

2. That a temporary order of injunction do issue restraining the Defendants/Respondents by themselves, servants, agents and/or employees from trespassing and/or interfering in any way with the plaintiff's quiet possession, use, occupation, development and proprietorship of the suit property being all that piece of land known as plot no. 20252/13 title number C.R 30853 situated in Kilifi town pending the hearing and determination of this application and thereafter pending the hearing and determination of this suit.

3. An order directed at the OCPD, Kilifi Police Station to ensure compliance with the order issued by this Honourable court.

4. That the cost of this suit be paid by the defendants.”

In the court below, the appellants were the defendants whereas the respondent was the plaintiff.

The grounds upon which the application was founded were that the respondent, the registered proprietor of all that piece or parcel of land known as **Plot Number 20252/ 13 title number C.R 30853** situate in Kilifi town “*the suit premises*” was being harassed by the appellants who had trespassed into the suit premises and put up temporary structures. That despite the appellant's entreaties for them to vacate the suit premises and bring their trespass to an end, they had refused to budge.

Having been brought under a certificate of urgency, the application was in the first instance heard *ex parte*, whereupon the same was certified

urgent and a temporary order issued in terms of prayers 2 and 3 above. There was a caveat though, that the order was to remain in force for a period of 14 days only. The order and the application were duly served upon the appellants, who responded by opposing it vide a replying affidavit sworn on 22nd May, 2015 by the 1st appellant on his own behalf and on behalf of the other appellants.

In their response, the 1st appellant on behalf of the rest contended that the respondent's acquisition of the suit premises was void *ab-initio* as the special conditions of the lease were never met. Further, that the respondent had purchased the suit premises from one, **Dr. Peter Njiiri Muracia** without the necessary consent or conformity with the terms of the lease. That by contrast, the appellants had all along been in occupation of the suit premises and the respondent ought not be granted the orders sought because he had come to court with unclean hands.

By mutual agreement and with the court's leave, parties agreed to argue the application by way of written submissions, which they duly filed and exchanged. In a reserved Ruling delivered on 19th February, 2016, **Angote, J.** allowed the application as prayed, thereby affirming the subsisting interim orders, pending the hearing and determination of the suit.

Reacting to that Ruling, the appellants preferred this appeal on four grounds; that the Judge misapplied the facts and evidence and arrived at a wrong finding, rendered a meritless decision, failed to consider the evidence on record and lastly, issued a temporary injunction whose effect was permanent and or mandatory in nature.

Expounding on the said grounds by way of written submissions, **Mr. Nyange**, learned counsel for the appellants stated that the Judge had granted 3 orders at the *ex parte* stage, thereby ordering the appellants' ejection from the suit premises by the Officer Commanding Police Division ("*OCPD*") and this in effect, condemned the appellants unheard. That by ordering the *OCPD* to enforce the orders, the Judge erroneously introduced the police into a civil matter and granted undeserved orders, amounting to a mandatory injunction at an interlocutory stage. Citing the case of **Mbuthia v. Jimba Credit Finance Corporation & Another [1988] 1 KLR**, counsel submitted that in an application for an interlocutory injunction, the court should neither make final findings nor decide on issues of fact, but should weigh the relevant strength of each party's case. That the principles laid out in the case of **Giella v. Cassman Brown [1973] EA 358** were not satisfied and that *prima facie*, the balance of convenience tilted in favour of the appellants as they were in occupation of the suit premises.

Mr. Mbura holding brief holdingholding brief for **Mr. Kilonzo**, learned counsel for the respondent on the other hand, submitted that whether or not to grant an injunction is discretionary. In the circumstances of this case the exercise of discretion was fair and cannot be faulted. Citing the case of **Central Bank of Kenya & another v. Uhuru Highway Development Limited & 40 others [2002] KLR 382** the respondent contended that in considering whether or not to grant an interlocutory injunction, the court must not only look at the applicant's case but the entire case.

The principles for the grant of interlocutory injunctions were established in the oft-cited case of **Giella (supra)**; where the court held at page 360 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 this case, the respondent came before court armed with a certificate of search showing him as the registered owner of the suit premises, a transfer evidencing the conveyance of the suit premises in his favour and even the spousal consent for the transfer executed by his wife. Further, he also provided documentation evidencing the transfer process, from stamp duty payment to the valuation report prepared in support of his application for a loan with the suit premises as security from Kenya Commercial Bank, Garden Plaza Branch, Nairobi as well as photographs indicative of the state of the suit premises at the time of his purchase. On the face of it, the suit premises were uninhabited contrary to the claims by the appellants.

On their part, the appellants simply contended that they had been in occupation of the suit premises for decades. *Prima facie*, this weighed against the the respondent's case, there can be no doubt that the respondent had established a case with a probability of success. Of course it is trite that in an application for interlocutory injunction, the trial court must be satisfied not only by the strength of the claim but of the defence as well. [**Central Bank of Kenya case & another v. Uhuru Highway Development Limited & 40 others (supra)**]. However, given what we have stated regarding the appellants' claim to the suit premises, we are satisfied that the learned judge rightly found that a *prima facie* case had been made out by the respondent to warrant a temporary injunction.

What was the damage to be suffered? In the appellant's case, it was said that the respondent had used the Administration Police to intimidate them. The respondent on the other hand contended that the appellants had set some strangers armed with machetes upon him when he went to begin construction on the suit premises. That fearing for his safety, he left the scene and reported the matter at Kilifi Police Station, vide OB No. 50/3/4/2014. Further that his safety was thus threatened. He stood to suffer loss for the land he had apparently acquired with a loan from the Kenya Commercial Bank.

Lastly, is the argument that the orders issued amounted to a mandatory injunction. The orders issued were in similar terms as prayed in the application. If they were in the nature of mandatory injunction, the appellants should have protested but they did not. This line of argument was never pursued before the trial court. They cannot now be heard to say that the orders turned out to be mandatory and that they have led to their eviction. A party's case is set out in his pleadings, and it is trite law that pleadings are binding not just on the parties, but on the court as well (see. **Malawi Railways Ltd v. Nyusulu [1998] MWSC, 3**) as cited with approval by this Court in **Bake 'N' Bite Limited v. Rachel Nungare & 16 others [2015] eKLR**). In their replying affidavit, the appellants mainly focused on alleging issues of fraud, and the respondent's procedural improprieties in the acquisition of the suit premises. However, none of those letters bear a description or relate to the suit premises as the learned Judge correctly found. In the premises, their argument that they were disposed or that the orders amounted to a mandatory injunction must fail.

We come to the conclusion that the appeal is unmerited and is accordingly dismissed with costs.

Dated and delivered at Malindi this 25th day of May, 2017.

ASIKE – MAKHANDI

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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