



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 65 OF 2014

BETWEEN

PETER ATANDI NYABUTI APPELLANT

VERSUS

MELLEN KEMUNTO PHILIP RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Kisii, (S. Okong'o, J.) dated 6th June, 2014

in

ELC NO. 189 OF 2013)

JUDGMENT OF THE COURT

1. The appellant, Peter Atandi Nyabuti, is aggrieved by orders issued by the High Court at Kisii on 6th June 2014. Those orders restrained him from interfering with the respondent's occupation and use of a property known as **Title Number Nyaribari Chache/B/B/Boburia/1588** or subdivisions thereof known as **Nyaribari Chache/B/B/Boburia/9508, 9509, 9510, 9511 and 9512** and inhibited any dealings therewith pending the hearing and determination of High Court ELC Case No. 189 of 2013 in the Environment and Land Court at Kisii. This is an interlocutory appeal and the only issue we need to address is whether the learned Judge of the High Court (Okong'o, J.), properly exercised his discretion when granting those orders.

Background

2. In her suit filed at the High Court at Kisii in April 2013, the respondent pleaded that she obtained letters of administration ad litem in respect of the estate of her mother in law, Hellen Mokeira Ayora, deceased, who was the registered proprietor of the Title Number Nyaribari Chache/B/B/Boburia/1588 (the property); that prior to her death, Hellen Mokeira Ayora had subdivided the property amongst her three sons, Ombese Ayora, Yuvenalis Onchuru and Stephen Sangara Ayora, (deceased), that after the death of Hellen Mokeira Ayora, the property was fraudulently and illegally transferred to Yuvenalis Onchuru Ayora and Charles Ayora Sangara who subsequently subdivided the property into five portions, Nyaribari

Cache/B/B/Boburia/9508, 9509, 9510, 9511 and 9512 which were registered in their names except Nyaribari Cache/B/B/Boburia/ 9510 that was registered in the name of the appellant. Accordingly, the respondent sought a declaration that the transfer of the property and subsequent subdivisions and transfers were null and void; an order for cancellation of those titles and restoration of the property to the name of the deceased.

3. In his defence, the appellant pleaded, among other things, that the respondent lacked the legal capacity to initiate the action; that the respondent failed to disclose that the deceased's son, Stephen Sangara Ayora, divorced her and she did not therefore have any relationship with the deceased; that the appellant is a bona fide purchaser for value of the parcel known as Nyaribari Cache/B/B/Boburia/9510 with good title thereto.
4. On their part, Yuvenalis Onchuru Ayora and Charles Ayora Sangara denied that the transfer and subdivision of the property was illegal. They also contended that the marriage between the respondent and Stephen Sangara Ayora had been dissolved and the property or any part thereof was not available for distribution to her.
5. On 24th April 2013, the respondent filed a motion seeking temporary orders to restrain dealings in or interference with the property of the subdivisions pending the hearing and determination of the suit before the High Court. That motion was opposed. After considering the motion, the affidavits, the submissions by counsel, and the legal principles on the basis of which applications for interlocutory injunctions are considered in line with **Giella vs. Cassman Brown & Co Ltd [1973] EA 358**, the learned Judge delivered the impugned ruling on 6th June 2014. The Judge was satisfied that the respondent had established a prima facie case with a probability of success.
6. Being of that view, the learned Judge granted an injunction to restrain the defendants from interfering with the respondent's occupation and use of the portion of the property occupied and used by the respondent pending the hearing and determination of the suit.
7. Aggrieved, the appellant lodged the present appeal.

The appeal and submissions by counsel

8. At the hearing of the appeal before us, learned counsel for the appellant, Mr. O. M. Otieno, referred to the memorandum of appeal and submitted that the Judge erred in granting the temporary injunction as the threshold for doing so under the principles in **Giella vs. Cassman Brown & Co Ltd** (supra) had not been met; that the respondent did not establish that she was ever in occupation of the property or any portion thereof having been estranged from her late husband; that the respondent was indolent and did not deserve the injunction in that despite the fact that the title to the property was created in 2011, the respondent did not move the court until 2013; and that the respondent lacked the capacity to petition for letters of administration in respect of the estate of the deceased.
9. Citing the decisions of this Court in **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] eKLR** and **Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others [2015] eKLR**, counsel concluded his submissions by saying that the Judge erred in his approach to the application before him and went beyond the scope of the application in that he made final findings of fact on disputed affidavits.
10. Opposing the appeal, learned counsel for the respondent, Mr. S. Sagwe, submitted that the substance of the dispute is yet to be heard on the merits and the status quo should be maintained; that the learned Judge properly exercised his discretion as the property was in danger of alienation; that the property was transferred before succession proceedings in respect of the estate of the deceased; and that the property should be safeguarded pending hearing of the substantive suit in the High Court.

11. Ms. Ochwal, who appeared for the Land Registrar, stated that the Land Registrar was not taking any position and left the matter to the Court.

Determination

12. We have considered the appeal and submissions by learned counsel. We begin by cautioning ourselves that the dispute between the parties is pending determination by the High Court as the main suit in which the impugned interlocutory decision was made is yet to be heard and determined. We must therefore refrain from making conclusions that may embarrass the trial court or otherwise prejudice the parties at the trial.

13. The grant or refusal of an interlocutory injunction involves the exercise of the court's discretion. As the Court said in **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004**,

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

14. As an appellate court, we can only interfere with the exercise of that discretion if satisfied that the Judge misdirected himself in law or that he misapprehended the facts or that he took into account extraneous considerations or that he failed to take into account relevant considerations or that his decision is plainly wrong. Enunciating these principles in **Mbogo & Another vs. Shah [1968] E.A. 93** at page 96, Sir Charles Newbold P. stated:

‘...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....’

15. As already indicated the appellant has faulted the learned Judge for taking the view that the respondent, as the daughter in law of the deceased, had established sufficient interest in the estate of the deceased notwithstanding claims by the appellant that she was estranged or divorced from the deceased's deceased son, Stephen Sangara Ayora; that the respondent did not establish that she was in occupation of the property or any part of it; and that she was indolent in that she belatedly made the claim to the property.

16. In reaching his decision to grant the interlocutory injunction, the learned Judge was clearly alive to the legal principles applicable when considering applications of that nature. Based on the material presented before him we are unable to find that the learned Judge's decision was plainly wrong. On the face of it, the respondent demonstrated, prima facie, that she was granted letters of administration ad litem on the basis of which she instituted the suit; that she had a relationship with the deceased by reason of having been married to the deceased's son; that the deceased's estate had not been administered to the extent that a grant of letters of administration of her estate had not been sought prior to the disposal of the property that formed part of the estate. In those

circumstances, we think the learned Judge was right in taking the view that:

”The fact that the 1st and the 2nd defendants were entitled to the ownership of Plot No. 1588 together with their deceased brother on the death of their mother did not mean that the said property could be transferred to the 1st and 2nd defendants directly from the name of their mother, Hellen Mokeira Ayora, deceased, without following the procedure provided for in the Law of Succession Act, Cap 160, Laws of Kenya. That being the position, the 1st and 2nd defendants had to undertake succession proceedings before the title of Plot No. 1588 could be transferred to their names. It is thereafter, that they could deal with the property including sub-dividing and selling the same.

11. The plaintiff has established on a prima facie basis that she has an interest in Plot No. 1588 that was subdivided to give rise to Plot Nos. 9508, 9509, 9510, 9511 and 9512 which interest is protectable through the orders of injunction sought. The plaintiff is the widow of the deceased’s son. The plaintiff has a right therefore to a share of the deceased’s property.”

17. The Judge was in those circumstances entitled to order, as he did, that matters be held where they were pending the hearing and determination of the suit by issuing the interlocutory injunctive orders. We do not think, that in those circumstances we have any basis for interfering with the learned Judge’s exercise of discretion.

18. There is therefore no merit in the appellant’s appeal and the same is hereby dismissed with costs.

Orders accordingly.

Dated at Kisumu this 21st day of April, 2016

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR