



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA , GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 29 OF 2015

BETWEEN

JULIA MORACHA MATUNDURA 1ST APPELLANT

ANNE ONDIEKI 2ND APPELLANT

VERSUS

SARAH MORAA MORACHA 1ST RESPONDENT

SMART NGARE MORACHA 2ND RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Kisii, (S. Okongo, J.) dated 14th November, 2014

in

HCC ELC CASE NO. 93 OF 2014 (O.S)

JUDGMENT OF THE COURT

1. This is an appeal from an interlocutory ruling of the High Court delivered on 14th November 2014. By that ruling, the High Court disallowed an application dated 10th March 2014 by the respondents for an interlocutory injunction to restrain the appellants from dealing with the property known as Title Number Kisii Municipality/Block 11/66. Despite disallowing that application, the court nonetheless, on its own motion issued an order of inhibition, inhibiting any further dealings with the property pending the hearing and determination of the suit.

Background

2. In as far as we can tell, (and we do not express any concluded view on the matter), the facts are to a large extent not in controversy. Sarah Moraa Moracha, the 1st respondent, is the wife of Julius Moracha Matundura, the 1st appellant. Smart Ngare Moracha, the 2nd respondent is their son.

3. The 1st appellant, alongside one William Onkoba Matundura, were appointed by the court as the administrators of the estate of their mother, Teresa Nyanchero Matundura alias Theresa Nyanchiru Matundura, in High Court Succession Cause No. 62 of 2009. One of the assets of the estate of Teresa Nyanchero Matundura, namely 1/3 share of the property known as Title Number Kisii Municipality/Block 11/66 (the property) was upon confirmation of the grant in that cause on 17th December 2012, distributed to the 1st appellant “**to hold in trust for his sons and grandsons.**”
4. Shortly thereafter the 1st appellant entered into an agreement for sale dated 31st January 2013 with the 2nd appellant under which he, as “*the legal administrator and/or beneficiary and/or heir*” of Teresa Nyanchero Matundura agreed to sell to the 2nd appellant, who agreed to purchase the property for Kshs. 2,000,000.00. The property was thereafter transferred and registered in the name of the 2nd appellant.
5. Aggrieved, the respondents commenced suit by way of an Originating Summons in the High Court on 10th March 2014 against the appellants seeking a declaration that the disposal of the property by the 1st appellant to the 2nd appellant was null and void. They prayed that the registration of the property should be cancelled; that the title should revert to the 1st respondent “*to hold in trust for the sons and grandsons*” in accordance with the order of the court in High Court Succession Cause No. 62 of 2009 to which we have already referred.
6. Simultaneous with the Originating Summons, the respondents filed a motion under rules 1 and 2 of Order 40 of the Civil Procedure Rules seeking orders.

*“2. That pending the Inter partes Hearing of this Application, this Honourable Court be pleased to issue an **Order of Injunction** restraining the 2nd Respondent by her Agents, Servants, Employees and/or any other person from evicting, disposing off, alienating, wasting and/or charging **KISII MUNICIPALITY/BLOCK II/66.***

*3. That pending the Inter partes Hearing and determination of this Application this Honourable Court be pleased to issue and **Order of Injunction** restraining the 2nd Respondent by her Agents, Servants, Employees and/or any other person from evicting tenants, disposing off, alienating, wasting and/or charging **KISII MUNICIPALITY/BLOCK II/66.***

*4. That pending the Hearing and determination of this Suit, this Honourable Court be pleased to issue and **Order of Injunction** restraining the 2nd Respondent by her Agents, Servants, Employees and/or any other person from evicting tenants, disposing off, alienating, wasting, charging **KISII MUNICIPALITY/BLOCK II/66.**”*

7. In their affidavits in support of that motion, the respondents reiterated that the disposal of the property by the 1st appellant to the 2nd appellant was irregular and illegal and urged the court to preserve the property pending determination of the suit.
8. The appellants opposed the application strenuously. Apart from swearing affidavits in opposition to the application, they filed grounds of opposition as well as a notice of preliminary objection contending that the Originating Summons was invalid; that the matters raised by the respondents were res judicata, having been determined in Kisii Succession Cause No. 62 of 2009; that the 2nd appellant’s title to the property could not be challenged by reason of section 93 of the Law of Succession Act; and that the respondents did not have locus standi to institute the proceedings.
9. In his replying affidavit, apart from reiterating the grounds contained in the grounds of

opposition and in the notice of preliminary objection, the 1st appellant deposed that he had lawfully entered into the agreement for sale with the 2nd appellant and transferred the property to her; and that his sons had consented to the sale and transfer.

10. On her part, the 2nd appellant in her replying affidavit also reiterated the grounds of objection set out in the statement of the grounds of opposition and in the notice of preliminary objection. She asserted that she is a bona fide purchaser of the property and that as the registered owner she has all appurtenant rights.
11. After considering the application, the affidavits and submissions by counsel, the learned Judge delivered the impugned ruling on 14th November 2014.

The appeal and submissions by counsel

12. Mr. Oguttu Mboya, learned counsel for the appellants, urged the grounds of appeal set out in the appellants' memorandum of appeal. He submitted that the Judge should have ordered the suit to be struck out, considering that the Judge accepted that the respondents' suit was wrongly instituted by Originating Summons and because the 1st respondent did not have the locus standi to institute the suit. In that regard, counsel referred us to the decision of this Court in **Kenya Commercial Bank Limited vs. James Osebe (1982-88) 1KAR 48**; Nakuru High Court decision in **James Koropan vs. Kimittee Ole Setek Civil Case No. 100 of 2005**.
13. According to counsel, the Judge fell into error in resorting to inherent jurisdiction under section 3A of the Civil Procedure Act and s.13 (7) of the Environment and Land Court Act, matters that were not pleaded, to maintain an irredeemable suit. He referred us to our decision in **Independent Electoral And Boundaries Commission and another vs. Stephen Mutinda Mule and another Civil Appeal No. 219 of 2013** arguing that parties should not be allowed to depart from their pleadings.
14. Furthermore, counsel argued, the matter was res judicata, having been the subject of adjudication in High Court Succession Cause No. 62 of 2009 and should have been struck out on that basis. To that end, counsel found support in the decision of **Daniel Kirui and another vs. Monicah Macharia and another, Nakuru Civil Appeal No. 261 of 2002 (CA)**.
15. Counsel concluded by saying that, having expressed doubts as to the viability of the suit, and having found that the respondents had not established a prima facie case, the Judge had no jurisdiction to do anything further and should have '*downed his tools*.'
16. Opposing the appeal, learned counsel for the respondents, Mr. G. M. Nyambati, submitted that the learned Judge properly exercised his discretion in issuing the order for inhibition as the transfer of the property by the 1st appellant to the 2nd appellant is illegal as it is in violation of a court order directing the 1st appellant to hold the property in trust for the sons and grandsons.
17. Mr. Nyambati referred us to a decisions of this Court in **Musa Nyaribari Gekone and two others vs. Peter Miyienda and another, Kisumu Civil Appeal No. 2 of 2014** and **Jane Gachoki Gathecha vs. Priscilla Nyawira Gitungu and another [2008] eKLR** and submitted that section 93 of the Law of Succession Act on which the appellants rely as protecting the 2nd appellant's title is not intended to protect fraudulent transactions; and that the 2nd appellant is not in any case an innocent purchaser.
18. Counsel urged that the 1st appellant did not obtain "*consent of the sons and grandsons*" prior to entering into the agreement for sale with the 2nd appellant. He went on to say that the matters adjudicated upon in High Court Succession Cause No. 62 of 2009 were not the same and the principle of res judicata does not apply.

19. He concluded by saying that in light of Article 159 of the Constitution, the Judge properly invoked section 3 of the Civil Procedure Act and section 13(7) of the Environment and Land Court Act and maintained that the matters raised by the appellants are matters for determination by the trial court.

Determination

20. We have considered the appeal and the submissions by counsel. As already indicated, the Judge disallowed the respondents' motion. Although the Judge appears to have gone beyond his mandate by expressing concluded views on matters that required, at that stage, assessment for purposes only of establishing whether a prima facie case had been made out, the Judge was nonetheless not satisfied that the conditions for the grant of a temporary injunction as propounded in **Giella vs. Cassman Brown & Co. Ltd [1973] E.A. 358** had been met. The appellants cannot possibly be aggrieved by the decision dismissing the respondents' motion.

21. The Judge did not however stop at disallowing the respondents' application for interlocutory injunctions. The Judge concluded his ruling thus:

“18. In conclusion, the applicant’s application dated 10th March 2014 is disallowed. In exercise of the powers conferred upon this court under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and section 13 (7) of the Environment and Land Court Act, 2011, I hereby order that pending the hearing and determination of this suit there shall be an inhibition against the title of the suit property inhibiting the registration of any further dealing with the 1/3 portion thereof which is registered in the name of the 2nd respondent. The cost of the application shall be in the cause.”

22. It is no wonder therefore that during the hearing of the appeal before us learned counsel for the appellants proceeded on the basis that even though the respondents' motion was disallowed, the exercise by the Judge of his discretion to issue an order of inhibition had the effect, for practical purposes, of allowing the motion.

23. We were informed by counsel during the hearing of the appeal that directions have already been taken in the High Court with a view to having the substantive suit heard on merits in that court. We must therefore be guarded in the views we express lest we prejudice the parties or embarrass the trial court.

24. The reasoning by the learned Judge leading to his decision to disallow the respondents' application is not easy to follow. Having taken the view that the 1st appellant held the property in trust; that the consent of the sons and grandsons was not obtained; that the property was transferred to the 2nd appellant in breach of trust; and that the 1st appellant had no rights or interest in the property that he could pass, it is not clear how the learned Judge came to the conclusion that a prima facie case had not been established for purposes of the test in **Giella vs. Cassman Brown & Co. Ltd.**

25. That notwithstanding, we think that in the end, the learned Judge properly exercised his discretion by providing an interim measure of protection inhibiting dealings with the property to afford the parties an opportunity to ventilate the issues.

26. Section 13(7) of the Environment and Land Court Act provides that:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a. *Interim or permanent preservation orders including injunctions;*

b. *prerogative orders*

- c. award of damages;
- d. compensation
- e. specific performance
- f. restitution
- g. declaration; or
- h. costs”

27. Under that provision, the court is clothed with discretion. As an appellate court, we can only interfere with the exercise of 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.

28. 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....”

29. We do not think that we have a basis, in the circumstances of this case, to interfere with the exercise of the discretion by the Judge. Given the views expressed by the Judge that the 1st appellant held the property in trust; that the consent of the sons and grandsons was not obtained; that the property was transferred to the 2nd appellant in breach of trust; that the 1st appellant had no rights or interest in the property that he could pass, we think the decision to preserve the property pending determination of the dispute at the trial was justified. Needless to mention, any concluded views expressed by the Judge in the course of his ruling cannot however bind the trial court.

30. For those reasons the appeal fails and is hereby dismissed with costs to the respondents. Orders accordingly.

Dated at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR