IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU, MURGOR & SICHALE, JJ.A)

CIVIL APPEAL NO. 347 OF 2014

BETWEEN

JACKSON K. CHEBET.....APPELLANT

AND

SELLY J. BUSIENEI.....1ST RESPONDENT

RICHARD K. BUSIENEI.....2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya

at Eldoret, (S. Munyao, J.) dated 18/09/2014

in

ELC CASE NO. 235 OF 2014)

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JUDGMENT OF THE COURT

1. The appellant, Jackson K. Chebet, has appealed against an interlocutory decision of the Environment and Land Court (ELC) of Kenya at Eldoret, (Munyao Sila, J.) given on 18th September 2014 restraining him from concluding the purchase of a property known as L. R. No. 6459/4 from the 2nd respondent and ordering him to vacate and stay away from that property pending the hearing and determination of the suit.

Background

2. There is no dispute that by an agreement for sale dated 19th May 2014, entered into between Richard Kipruto Busienei, the 2nd respondent, as vendor and the appellant as the purchaser, the 2nd respondent as the registered owner of the property known as L. R. No. 6459/4 (the property) measuring approximately 43.97 Ha (108.64 acres) agreed to sell the same to the appellant at an agreed price of Kshs. 43,456,000.00. Under the terms of that agreement, the appellant was required to pay the amount of Kshs. 20,000,000.00 between 20th May 2014 and 20th June 2014 and the balance of Kshs. 23,456,000.00 “on or before 20th September 2014 latest.”

3. As regards possession of the property, the agreement provided that "the [appellant] shall take possession of the land…immediately up to a portion of fifty acres by 20th June 2014" and the remaining portion of approximately 58 acres by 20th September 2014 by which time the 2nd respondent was to ensure that the entire land is available for the appellant's "entire use/occupation".

4. Other relevant provisions in the agreement for sale included provisions that the issue of transfer "shall be done and process begin on 20th September 2014"; that the property was charged to Equity Bank and that the 2nd respondent was indebted to CFC Stanbic and that the initial payments towards the purchase price would "provide/cater for the discharge of the title and the debt"; that the 2nd respondent "shall cause transfer of the entire interest in the said land by 20th September 2014" and that the 2nd respondents "family have no objection to … transaction…"

5. Enter the 1st respondent, Selly J. Busienei, the wife of the 2nd respondent. In her plaint before the ELC dated 10th July 2014, she prayed for a declaration that the sale of the property by her husband, the 2nd respondent, to the appellant is void. She also sought a permanent injunction to restrain the appellant and her husband from concluding the sale. She asserted before the ELC, (and her husband the 2nd respondent concurred), that although the property is registered in the name of her husband, the 2nd respondent, it forms part of the family and matrimonial land.

6. The 1st respondent averred that although her husband had suggested to her sometime in April 2014 that they should dispose of 50 acres of the property "to offset pressing financial needs", she did not consent to the sale of the property and was surprised when the appellant "begun erecting a fence and other permanent structures" on the property; that although she was not averse to the sale of 50 acres of the property, she never consented to the sale of the entire property. Whilst intimating that "she may only consent to the lower portion of the [property] to be sold" and that she "is opposed to the sale of the upper portion and also the whole parcel", the 1st respondent contended that under Section 93 of the Land Registration Act the sale of the entire property without her consent is null and void.

7. Alongside the plaint, the 1st respondent filed a motion under Order 40 rule 1 of the Civil Procedure Rules and sought a temporary injunction, pending the hearing interpartes, to restrain the appellant and the 2nd respondent from "concluding the purported land sale agreement/contract of land Reference No. 6459/4" and also to restrain the appellant "from blocking [the 1st respondent] from planting this year's wheat crop on the upper portion of the land" and that pending the hearing of the suit, the appellant and the 2nd respondent 'be restrained by way of an injunction from concluding the land sale transaction of land Reference No. 6459/4"

8. ELC certified the application as urgent and issued interim orders on 10th July 2014 restraining the appellant and the 2nd respondent from concluding the agreement for sale and from registering any transfer instrument over the property.

9. The appellant on his part filed a motion dated 21st July 2014 also under Order 40 rule 1 of the Civil Procedure Rules seeking orders to restrain the respondents from trespassing, encroaching, cultivating or dealing with a portion of the property measuring 50 acres "currently occupied" by the appellant.

10. Based on the affidavits filed in support and in opposition to the two applications there is no contention, as already indicated, that a sale agreement was entered into between the appellant and the 2nd respondent. The assertion by the appellant that he paid Kshs.20, 000,000.00 of the purchase price to the 2nd respondent and that part of that amount was used to defray the 2nd respondents liabilities with the bank and that he took possession of part of the property do not appear to have been challenged. The main issues in controversy that arose were whether the consent of 1st respondent had been sought and obtained in relation to the transaction; whether the consent of the land control board was obtained; whether the appellant had taken possession of part of the property and if so whether it was the lower or upper part of the property.

11. Having considered the two applications before him and the affidavits and the submissions by counsel the learned Judge expressed himself as follows:

> **"In this matter, I am of the view, given the material presented before me, that the plaintiff has laid out a prima facie case with a probability of success. I am not too convinced as to the strength of the case of the 2nd defendant, given first, there has been no demonstration that spousal consent was ever obtained, secondly there being doubts as to the subject matter of the agreement, and thirdly, there being no demonstration that there was any agreement that the 2nddefendant would take possession of the upper portion of the suit land. In addition as I pointed out, consent of the land control board has yet to be obtained, and the 2nd defendant ought not to have been too comfortable in taking possession of the land. Even if I was in doubt, the balance of convenience tilts in favour of having the land preserved in the state that it was prior to the agreement, since that agreement is still subject to the consent of the Land Control Board. If I am to allow the 2nd defendant use of the suit land, and consent of the Land Control Board is denied, that order would be an order in vain since the agreement of the parties would never be enforced for want of consent of the Land Control Board."**

12. Having expressed himself thus, and despite his sympathy with the appellant "because he has made serious investment on the land" the Judge felt that he had no alternative "but to order the [appellant] to keep off the entire suit land pending the hearing and determination of [the] suit." He allowed the 1st respondent's application and made orders that:

> **"(1) I allow the application for injunction by the plaintiff and order the 2nd defendant to stay away from the suit land, LR No. 6459/4, pending hearing and determination of this suit.**
>
> **(2) The 2nd defendant must vacate the said land within 14 days from the date hereof and is at liberty to pull down any structures that he has made and cart away the materials thereof within the said 14 days.**
>
> **(3) I further bar the defendants from completing the agreement of 19 May 2014 pending hearing and determination of this suit.**
>
> **(4) The above orders are made without prejudice to the discretion of the 1st defendant and the plaintiff to allow the 2nd defendant possession and use of the lower portion of the suit land or of the land parcel LR No. 6459/5."**

13. The appellant is aggrieved by those orders hence the present appeal.

<u>The appeal and submissions by counsel</u>

14. Mr. Kiprono A. E. learned counsel for the appellant referred to the memorandum of appeal and submitted that the learned Judge erred in granting final orders at an interlocutory stage; that the Judge prejudged the matter on contested facts without the benefit of a full hearing; that the judge failed to appreciate that all Section 93(3)(b) of the Land Registration Act requires is one to inquire whether spousal consent has been granted, which in this case was done, and acknowledged in the agreement for sale; and that the 1st respondent acknowledges that she was aware of the transaction. According to counsel, the Judge misapprehended the material placed before him and failed to appreciate that it was only the upper portion of the property that was available for occupation by the appellant.

15. Counsel for the appellant took issue with the orders granted by the Judge saying that by ordering the appellant to vacate the property, he granted a mandatory injunction when circumstances were unbefitting; that the orders issued by the court had not been sought; that what the 1st respondent had prayed for, and which the appellant would not have an issue with, was an interim injunction to restrain the completion of the sale; and that the 1st respondent did not seek an order for eviction and the court should not have issued

and order that was not sought.

16. Opposing the appeal, learned counsel for the 1st appellant Mr. Omusundi M. J. submitted that the decision of the court is correct as the consent of the 1st respondent to the transaction was not obtained as required under Section 93 of the Land Registration Act; that even though the 2nd respondent had consulted the 1st respondent on the prospects of selling a portion of the property, she did not give her consent and only became aware of the transaction after the fact. According to counsel, the appellant has other statutory remedies that he can pursue for the rescinded contract. With that, counsel urged us to uphold the decision of the ELC.

17. Mr. Manani B. O. learned counsel for the 2nd respondent cited several authorities including **United India Insurance Co. Ltd and others v East African Underwriters (Kenya) Ltd [1985] eKLR** and submitted that there is no basis for this Court to interfere with the manner in which the ELC exercised its discretion in this matter. According to counsel, the learned Judge properly considered the effect of the absence of consents from the 1st respondent and that of the land control board and properly applied the law; that the Judge correctly appreciated that there was doubt whether the parties intended to transact in the property or the adjoining property known as L. R. No. 6459/5 which according to the 2nd respondent is what the parties had intended to be the subject of the agreement for sale; and that in any event the bank to which the property was charged did not consent to the transaction.

Determination

18. This is an appeal from an interlocutory decision of the ELC that involved the exercise of judicial discretion by that court. As submitted by Mr. Manani for the 2nd respondent this Court is only entitled to interfere with exercise of discretion by a lower court on account of a misdirection in law, or due to misapprehension of facts; or failure to take into account relevant considerations or taking into account irrelevant considerations or if the decision is plainly wrong. 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…"***

19. We are aware that the suit between the parties is pending determination before the ELC and is yet to be heard on its merits. We must therefore guard against pronouncements that may prejudice the parties or embarrass the trial court that will hear the parties and determine the dispute.

20. As already indicated, there is no contest that the appellant and 2nd respondent entered into the agreement for sale. The contested issue is whether the 1st respondent consented to the transaction and if not the impact of the absence of such consent in light of Section 93(3)(b) of the Land Registration Act. There is also the question whether the 50 acres of the property which the appellant was entitled to occupy was the lower portion or the upper portion. These in our view were matters that could not be resolved through untested affidavit evidence. It is not the function of a court, at interlocutory stage, "*to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial*." (Per Lord Diplock in **American Cyanamid Co vs. Ethicon [1975] AC 396**).

21. As indicated, there were two applications for interim relief before the Judge. The appellant on his part was saying that having entered into the agreement for sale with the 2nd respondent; and having paid a substantial portion of the purchase price in accordance with the agreement that was supposed to be used by the 2nd respondent to clear the encumbrances on the property; and having taken possession of the

property in accordance with the agreement, he was entitled to protection in his occupation of the 50 acres.

22. The 1st respondent on the other hand was saying that her consent to the transaction had not been sought; that even if she did not oppose the sale of 50 acres of the property, the portion that she would not have objected to would have been the lower portion of the property.

23. The agreement for sale is silent on which portion of the property the appellant was entitled to occupy immediately on payment of the Kshs. 20,000,000.00. There were conflicting depositions on whether it was the lower or the upper portion.

24. The learned Judge was dealing with applications that required demonstration of a prima facie with a probability of success, amongst other requirements articulated in the celebrated **Giella v Cassman Brown & Co. Ltd (1973) EA 358**. He was not called upon to pronounce himself finally on matters that required further interrogation during the hearing.

25. In those circumstances, we think the learned Judge was right in taking the view that he did, that the subject matter should be preserved pending the hearing and determination of the suit on the merits. The approach the Judge took in considering whether a prima facie case had been made out is based on sound legal principle. In the case of **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004**, this Court stated that:

> ***"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.***"

26. The circumstances in this case called for the maintenance of the status quo. That would have been achieved by granting an injunction in terms of prayer (c) of the 1st respondent's application that sought to restrain the conclusion of the sale transaction. The learned Judge however went beyond what was sought by making orders compelling the appellant to vacate the property. We are therefore in agreement with counsel for the appellant that the learned Judge erred in granting orders that neither party sought. To the extent that the orders granted by the court went beyond those sought by the parties, the appeal succeeds.

27. The result is that the orders given by ELC ordering the appellant to vacate and stay away from the property are hereby set aside. However, the order by ELC barring the completion of the agreement for sale pending the hearing and determination of the suit is hereby upheld.

28. Each party shall bear its own costs of the appeal.

Orders accordingly.

Dated and delivered at Eldoret this 29th day of July, 2016.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR