IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 9 OF 2016

JOSEPH GICHINA MUHORO..…….... APPELLANT

VERSUS

DANIEL OTIENO ALARA…...……1ST RESPONDENT

JOSEPH MBAUNI NDUGUYA…...……...2ND RESPONDENT

GERALD MARU……...……..3RD RESPONDENT

(*An Appeal from order of the Environment and Land Court at Kitale, (E. Obaga, J.) dated 24th September*, 2015

in

KITALE ELC NO. 84 OF 2015)

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JUDGMENT OF THE COURT

1. In a ruling delivered on 24th September 2015 in Land Case No. 84 of 2015, the Environment and Land Court at Kitale, (E. Obaga, J.) dismissed with costs, the appellant's motion for temporary injunction dated 11th June 2015 seeking to restrain the respondents from entering or trespassing upon any portion of his property known as Title Number West Pokot/Keringet "A"/44 (the appellant's property) pending the hearing and determination of his suit.

2. Aggrieved, the appellant lodged this appeal.

Background

3. The appellant's case as set out in his plaint, witness statement and affidavits before the lower court is that he is the registered proprietor of the property measuring approximately 0.69 hectares that is charged to Kenya Commercial Bank Limited to secure a loan facility; that he intended to sell a portion of the property measuring 0.12 acres with a view to paying off the bank's debt and to redeem the property; that the 1st respondent expressed an interest to purchase that portion and later undertook, in consideration of a brokerage commission of Kshs. 50,000.00 to procure a buyer for the appellant; that even though no

purchaser was procured and no agreement for sale was entered into, the 2nd and 3rd respondents descended on the property with a mob on 13th May 2015 and "forcefully fenced out an area measuring 0.12 acres."

4. The appellant contends that the occupation of that portion of the appellant's property by the 2nd and 3rd respondents is illegal and tantamount to trespass. In his suit, the appellant therefore seeks judgment against the respondents for an order of eviction and a permanent injunction to restrain them from trespassing on the property. Subsequent to that suit, the appellant, as stated, presented his motion for interlocutory injunction dated 11th June 2015 but presented to the court on 12th June 2015, seeking to restrain the respondents from trespassing on the property.

5. The 1st and 3rd respondents did not respond to the suit or to the application. In his defence and in his affidavit in opposition to the application, the 2nd respondent contested the appellant's claims and asserted that he (and one Joseph Kimiri Kiguru) are the registered proprietors of the property known as Title Number West Pokot/Keringet "A"/46, having purchased the same from the previous owners under an agreement for sale dated 29th April 2015; that after purchasing the same they had the boundary between Title Number West Pokot/Keringet "A"/46 and the appellant's property aligned by the County Survey Office, West Pokot County, in the presence of the appellant; that thereafter they erected a fence demarcating the boundary between their property and the appellant's property within the defined boundary; that as confirmed by the County Surveyor, the 2nd respondent has not encroached on the appellant's property.

6. After hearing the appellant's motion for interlocutory injunction dated 11th June 2015, the court, as already indicated, rejected the same in the ruling delivered on 24th September 2015 aforesaid that is the subject of this appeal.

The appeal and submissions by counsel

7. Referring to the memorandum of appeal, learned counsel for the appellant, Mr. Wambura, submitted that that the Judge erred in his appreciation and the principles in **Giella v Cassman Brown [1973] EA 358;** that the Judge did not adequately consider the material placed before him before concluding that the appellant had not established a prima facie case with a probability of success.

8. According to counsel, the appellant raised serious legal issues regarding the validity of the actions of the surveyor who purportedly confirmed the boundaries between the two properties; that it is clear that the procedure set out under Sections 18 and 19 of the Land Registration Act were not followed; and that the Judge misapprehended the nature of the dispute. Accordingly, counsel invited us to set aside the decision of the lower court and substitute it with an order preserving the status quo pending the hearing and determination of his suit in the Environment and Land Court.

9. Opposing the appeal, learned counsel for the 2nd respondent, Mr. Waweru, submitted that the appellant did not establish a prima facie case against the 2nd respondent; that the 2nd respondent is the registered proprietor of the property known as Title Number West Pokot/Keringet "A"/46; that no evidence was presented to support the claim that the 2nd respondent hived off 0.12 acres from the appellant's property; that indeed the survey exercise carried out in the presence of the appellant established that there is no encroachment and a report of the surveyor to that effect was placed before the court.

10. According to counsel, that the court correctly appreciated the principles governing applications for temporary injunctions and correctly applied them to the facts of this case; that the Judge also considered that damages would be an adequate remedy should the appellant ultimately succeed in his claim; and that to grant the orders in the terms sought by the appellant would be tantamount to granting a mandatory injunction when the circumstances do not warrant it. Counsel urged us to dismiss the appeal to pave way for the expeditious hearing of the substantive suit before the lower court

Analysis and determination

11. We have considered the appeal and submissions by counsel. We are aware that the main suit in which the impugned interlocutory decision appealed from is based is yet to be heard and determined. We must therefore be cautious lest we make pronouncements that may subsequently prejudice the parties at the trial.

12. The application before the lower court called for the exercise of discretion by that court. As an appellate court, we can only interfere with the exercise of judicial discretion if we are 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. As this Court held in **Mbogo & Another vs. Shah [1968] E.A. 93**:

> ***"…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…."***

13. The substance of the appellant's case before the lower court is that the respondents have hived off 0.12 acres from his property and trespassed thereon. The 2nd respondent exhibited before the lower court a copy of an agreement for sale that shows that he and one Kimiri Kiguru purchased Title Number West Pokot/Keringet "A"/46 in April 2015. It is common ground that that property adjoins the appellant's property.

14. The dispute appears to have arisen when the 2nd respondent on purchasing West Pokot/Keringet "A"/46 fenced it off. According to the appellant, the 2nd respondent thereby encroached onto his property.

15. The manner in which the 2nd respondent went about resolving that dispute, it would seem, was to engage the County Survey Office, West Pokot County, Kapenguria "to determine the level of encroachment". That culminated in a "Surveyor's Report" dated 22nd May 2015 in which the surveyor concluded that "there was no encroachment from parcel No. 46 or 44". The same report shows that the appellant disputed that conclusion.

16. That report is what informed the conclusion by the learned Judge in the impugned ruling that "it is therefore clear that there is no invasion of the applicant's suit land by any of the respondents." The learned Judge went on to say:

> "**it has emerged that contrary to the applicant's allegations that the three respondents curved out a portion of his land, it is actually a dispute over boundary which has since been resolved. The surveyors must have been sent to the ground by the Land Registrar. A determination of the boundary was made…It does not matter whether it is the applicant or the second respondent who prompted the Land Registrar to move and resolve the boundary dispute. The fact is that the position as regards the boundary has been determined**."

17. And later on in his ruling the Judge expressed the view that if the appellant "finally manages to show that the surveyor was wrong in his findings, the land is still there and the boundary will be aligned."

18. The material that was before the court does not show that the boundary dispute was either referred to, or determined by the Registrar as envisaged under Sections 18 and 19 of the Land Registration Act, Act No. 3 of 2012. The Judge seems to have assumed, without evidence to support that assumption, that the West Pokot County Surveyors must have determined there was no encroachment on instructions of the Registrar. That, in our view, was a misdirection that resulted in the conclusion that the appellant had not established a prima facie case. We must therefore interfere with the Judge's decision. We think the circumstances warranted a preservation of the status quo. We echo the words of this Court in **Charter**

House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004 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."**

19. We therefore allow the appeal and set aside the ruling and order of the court given on 24th September 2015 dismissing the appellant's application dated 11th June 2015. We substitute therewith an order restraining the respondents from disposing of Title Number West Pokot/Keringet "A"/46 pending the hearing and determination of the suit in the High Court. We further direct that the suit before the lower court be heard and determined on a priority basis before any Judge of that court other than E. Obaga, J.

20. The appellant shall have the costs of the appeal and of the application before the lower court dated 11th June 2015.

Orders accordingly.

Dated and delivered at Kisumu this 28th day of October, 2016

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR