



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJA.)

CIVIL APPEAL NO. 43 OF 2014

BETWEEN

SHAM DESHPAL WADHWA

As legal representative of the Estate of

DESHPAL OMPRAKASH WADHWAAPPELLANT

AND

HABIB ABU MOHAMED.....1ST RESPONDENT

ABDALLA MWARINGA MAYE.....2ND RESPONDENT

IBRAHIM MUKHTAR ABASHEIKH.....3RD RESPONDENT

TAUHIDA TAHIR SHEIKH.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

*(Being an appeal from the ruling and order of the High Court of Kenya at Malindi (Angote, J.)
dated 20th June, 2014*

in

H.C. Civil Suit No. 51 of 2012)

JUDGMENT OF THE COURT

[1] This appeal arises from a ruling delivered by the Environment and Land Court at Malindi (*Angote, J.*) after hearing a Notice of Motion dated 14th September, 2012 in a land dispute pitting the appellant *Sham Deshpal Wadhwa* as legal representative of the estate of *Deshpal Omprakash Wadhwa (deceased)* against *Habib Abu Mohamed, Abdalla Mwaringa Maye, Ibrahim Mukhtar Abasheikh, Tauhida Tahir Sheikh Said and the Attorney General* (hereinafter referred to as the 1st, 2nd, 3rd, 4th and 5th respondents respectively). The dispute concerned a parcel of land known as *Kilifi/Jimba/441*

(hereinafter referred to as “**the suit property**”) that the appellant claimed the deceased was the registered proprietor, but which the 1st and 2nd respondents had illegally and fraudulently acquired, unlawfully subdivided, and unlawfully sold two of the subdivisions namely **Kilifi/Jimba/1382 &1383** to the 3rd and 4th respondents who commenced construction on the subdivisions..

[2] Litigation was commenced by the deceased who filed a suit against the respondents seeking several orders and declarations; a permanent injunction restraining the respondents from entering, constructing on, occupying, releasing, transferring, charging or selling the suit property; and damages for trespass. Filed contemporaneously with the plaint was the Notice of Motion dated 14th September, 2012, in which the deceased sought orders of interlocutory injunctions pending the determination of the suit, restraining the respondents from trespassing and continuing construction on the suit property and the sub-divisions **Kilifi/Jimba/1382 & 1383**; restraining the respondents from alienating, selling, transferring, leasing or charging the aforesated parcels; and an order restraining the registrations of any dealing whatsoever on the aforesated parcels.

[3] Upon hearing the motion, **Angote, J.** delivered a ruling in which he dismissed the deceased’s motion. Being aggrieved, the appellant as legal representative of the deceased who had been duly substituted, lodged this appeal raising five grounds in which he contended that in dismissing the motion, the learned Judge exercised his discretion wrongly, as he failed to consider relevant matters placed before him and instead considered matters that he ought not to have considered at interlocutory stage; and that he failed to properly apply the principles for grant of interlocutory injunctions.

[4] In support of the appeal, the appellant filed written submissions which were highlighted during the hearing of the appeal by learned counsel **Mr. Karega**. Relying on ***Mbogo & Another v Shah [1968] EA 98***, it was submitted that the appellant had disclosed a *prima facie* case with a probability of success as he had shown that the deceased was the registered owner of the leasehold interest in the suit property and that his ownership rights had been infringed upon; that the learned Judge wrongly applied the Court of Appeal decision in ***Munyu Maina v Hiram Gathiha Maina [2013] eKLR*** in an interlocutory application; that the holding in that case that where a registered proprietor’s root of title is under challenge, the registered proprietor had to go beyond the instrument of title and prove the legality of how he acquired the title, could only apply in a full trial; that **section 35(1)** of the Land Registration Act which is similar to **section 37(1)** of the repealed Registered Land Act provides that every document purported to be signed by the Registrar shall in all proceedings be taken to have been so signed unless the contrary was proved.

[5] Further that the appellant had demonstrated that the title issued to the 1st respondent was fraudulent and did not confer him any proprietary rights; and therefore the 3rd and 4th respondents did not acquire any lawful titles; that the learned Judge ignored the issue of non-payment of stamp duty and failed to consider the appellants allegation that the 1st respondent title was procured through fraud and illegality.

[6] Mr. Karega cited ***Central Bank of Kenya & Another v Uhuru Highway Development Limited and 4 others [2000] KLR 382*** submitting that the remedy of injunction should not be made subject of strict rules, and that judicial discretion should not be exercised whimsically, he urged the court to be guided by **Article 159** of the Constitution that requires the application of substantive justice.

[7] The 3rd and 4th respondents also filed written submissions which were highlighted by learned Counsel Mr Kilonzo. Relying on ***Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125***, for the principles upon which the discretion of the court is exercised in an application for interlocutory injunctions, the 3rd and 4th respondents maintained that in exercising his discretion, the learned Judge properly directed himself and considered all the relevant matters; that the whole of the appellant’s suit was premised on the basis that the respondents title to the suit property and the subdivisions were forgeries but the respondents were able to show in their defences and replying affidavits how they lawfully acquired their interests in the suit property; that the learned Judge was fully aware that determination of the matters required a full trial before the appellant could be granted the injunctive reliefs he sought; and that the appellant’s motion sought temporary reliefs which if granted would have amounted to granting a mandatory injunction requiring the respondents to vacate the suit property.

[8] **Mr. Kilonzo** added that the appellant was aware that the respondents had a title to the suit property; that although the titles required investigation the same could not be done at interlocutory stage; that the learned Judge properly analyzed and gave reasons for his decision; that the sentiments made orbiter by the learned Judge, and which did not form the substance of the ruling should be disregarded; and that in addition the Court should uphold the ruling of the learned Judge as the balance of convenience was in the respondents' favour. Although the 1st and 2nd respondent did not file any submissions Mr Kilonzo held brief for their advocate.

[9] We have considered this appeal, the grounds upon which it is anchored, the written submissions, the rival authorities and the oral submissions made before us. We note that in dismissing the appeal, the learned Judge was exercising discretionary powers. We are alive to the principles upon which the Court of Appeal may interfere with the exercise of judicial discretion by the lower court. These are that the Judge misdirected himself on law; or that he misapprehended the facts; or that he took into consideration matters he should not have taken into account or failed to take into consideration matters he should have taken into account; or that his decision albeit a discretionary one was plainly wrong (**Mrao Limited v First American Bank Limited & 2 Others** (supra)). The issue is therefore whether the exercise of discretion by the learned Judge was vitiated by any of the circumstances outlined above.

[10] In dismissing the appellant's motion, the learned Judge stated in part as follows:

“ 30. In view of the fact that the plaintiff in this matter was unable

to get an official search from the District Land Registry to prove prima facie that he was at some particular point and time the registered proprietor of the suit property, it was incumbent upon him to show this court the lease that was signed by the Commissioner of Lands.

31. It is not enough in the absence of an official search for the

plaintiff to exhibit the letter of allotment and certificate of lease considering that the defendants are in possession of title deeds which were issued after Kilifi/Jimba/441 was sub-divided.

32. I say so because the District Land Registrar could have

prepared the certificate of lease in possession of the plaintiff without the authority of the commissioner of lands, as the lessor, as required by the Government Lands Act. The plaintiff's interest in the suit property is the leasehold described in the lease which must be exhibited and not the certificate of lease.

Where a party claims that he has a valid title, the burden of proving that he has a valid title document rests with him. In the case of Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009, the Court of Appeal held as follows:

‘We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register’.

[11] It is evident that what was before the learned Judge was an application seeking interlocutory orders of injunction and that the principles for granting an interlocutory injunction required that the applicant *inter alia* to show a prima facie case with probability of success. As defined in **Mrao Limited v First American Bank Limited & 2 Others** (supra), a prima facie case in a civil case is:

“A case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter”

[12] Therefore in order to succeed in his application, the appellant had to present material before the court upon which his rights allegedly infringed by the respondents could be inferred. In this regard the learned Judge pointed out that the appellant availed a copy of a certificate of lease together with a letter of allotment for the suit property, but found such evidence inadequate.

[13] **Section 35 (1)** of the Land Registration Act provides that every document purporting to be signed by a Registrar shall in all proceedings be presumed to have been so signed unless the contrary is proved. The matter before the court being an interlocutory application, the documents availed by the appellant were sufficient to demonstrate *prima facie* that the appellant had a right in the suit property which called for an explanation from the respondents. The learned Judge could not question the certificate of lease at that interlocutory stage as he purported to do at paragraph 32 of his ruling.

[14] Further, the learned Judge wrongly applied ***the case of Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009***, a decision which was distinguishable as it was not dealing with an interlocutory application. Consequently the learned Judge arrived at a wrong decision by applying a standard of proof that was higher than that required at the interlocutory stage to establish a *prima facie* case. Although the respondents also had certificate of lease signed after the date of the appellant's lease, the appellant had raised the issue of fraud which as appreciated by the learned Judge could only be determined after the full trial. That notwithstanding the evidence available before the learned Judge was sufficient to lead to a conclusion that there was an issue regarding the ownership of the suit property. It being apparent that the 3rd and 4th respondents were in the process of constructing on the suit property, and that there was a possibility of the position being complicated by further dealings, there was need for injunctive orders to preserve the suit property pending the final determination of the dispute and identification of the proper owner of the suit property.

[15] In the circumstances, we find that the learned Judge misdirected himself on the standard of proof and arrived at a decision that was plainly wrong. Accordingly, we allow the appeal, and set aside the order dismissing the application dated 14th September 2012, and substitute thereof an order allowing the application as follows:

- (i) That the 1st, 3rd and 4th respondents by themselves or through their servants or agents and/or through any one deriving title through them be jointly and severally restrained from constructing on or continuing with the construction of any building or any other structures on the parcels of land known as Kilifi/Jimba/441, Kilifi/Jimba/1382 and Kilifi/Jimba/1383 and the subdivisions thereof pending the hearing and determination of the trial in the High Court.
- (ii) That the 1st, 3rd and 4th respondents by themselves or through their servants or agents and/or through any one deriving title through them be jointly and severally restrained from further alienating, selling, transferring, leasing and/or charging or in any other manner whatsoever from having any dealings with all those parcels of land known as Kilifi/Jimba/441, Kilifi/Jimba/1382 and Kilifi/Jimba/1383 and the subdivisions thereof pending the hearing and determination of the trial in the High Court.
- (iii) That the registration of any dealings of whatsoever nature with the parcels of land known as Kilifi/Jimba/441, Kilifi/Jimba/1382 and Kilifi/Jimba/1383 or any subdivision thereof be inhibited pending the hearing and determination of the trial in the High Court.
- (iv) We award the costs of the appeal to the appellant as against the respondents.

Those shall be the orders of the Court.

Dated and delivered at Malindi this 26th day of February, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR