



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 31 OF 2014

BETWEEN

PAUL TIRIMBA MACHOGU.....APPELLANT

AND

RACHEL MORAA MOCHAMA.....RESPONDENT

(Appeal from the Ruling & Orders of the High Court of Kenya at Kisii (Okongo, J)

dated 29th November, 2013

in

KISII ELC. NO. 72 OF 2012)

JUDGMENT OF THE COURT

This is an appeal from the ruling of **S. Okongo J**, delivered on 29th November, 2013 in which the learned Judge granted orders of injunction against the appellant herein, **Paul Tirimba Machogu**, requiring him/his agents and/or servants and or any persons acting on his behalf to vacate, open up and or give free and full access to the respondent of plot number B/13 Gekomu within Kisii Municipality and further restraining him/his agents and/or servants and/or any persons acting on his behalf from thereafter entering upon, locking up and/or in any manner interfering with the said plot.

As the appeal is of an interlocutory nature, it is not necessary and it would not be right for us to make definitive conclusions on facts and issues which are yet to be canvassed in the lower court. Although it is an appeal from an interlocutory order, it was argued as if it was the final appeal and for that reason a brief background will be necessary.

The dispute between the parties herein revolves around a piece of land within Kisii Municipality. The appellant describes it as NyaribariChache/B/B/Boburia/6353 and the respondent knows it as plot number B/13 Gekomu. The respondent claimed, he purchased his plot from one **Nehemiah Okemwa Okenye** sometimes in the year 2006 at the consideration of Kshs.3,200,000/=. He exhibited a sale agreement to that effect and alleged that the plot was then partly developed. He carried out further development and in the year 2010 only a few sections remained to be completed to make the development habitable. He

further alleged that on 1st December, 2010 he leased the plot to one **John Omari Bichanga** who was to complete the development and on completion took possession on 1st January, 2011. The respondent exhibited a copy of the tenancy agreement in that regard. It was also the respondent's case, at the court below, that the said John Omari Bichanga sublet the premises to other sub tenants with her consent.

The respondent further claimed that while she was away in Nairobi in early February, 2013 her said head tenant telephoned her to tell her that her sub tenants had been evicted from her plot and that her eviction was threatened.

The respondent alleged that she travelled from Nairobi and found that her plot was secured by security guards who denied her access to the same. She then instituted the suit in the lower court. Simultaneously with the plaint, the respondent also filed a Notice of Motion stated to have been brought under **Order 40 rules 1 & 2** of the Civil Procedure Rules and all other enabling provisions of the law, seeking the following main reliefs:-

“ (b) That pending the hearing and determination of this application a temporary mandatory injunction do issue against the Defendant himself and/or his agents and/or servants and/or any persons acting on his behalf to vacate, open up and/or give free and full access of Plot No. B/13 Gekomu within Kisii Municipality to Plaintiff/Applicant.

c. That pending the hearing and determination of this application a temporary injunction do issue against the Defendant himself and/or his agents and/or servants and/or any persons acting on his behalf from entering into, locking up and/or in any manner interfering with Plot No. B/13 Gekomu within Kisii Municipality.

d. That pending the hearing and determination of this suit a temporary injunction do issue against the Defendant himself and/or his agents and/or servants and/or any persons acting on his behalf to vacate open up and/or give free and full access of Plot No.B/13 Gekomu within Kisii Municipality to Plaintiff/Applicant.

e. That pending the hearing and determination of this suit a temporary injunction do issue against the Defendant himself, and/or his agents and/or servants and/or any persons acting on his behalf from entering onto locking up and/or in any manner interfering with Plot No.B/13 Gekomu within Kisii Municipality.”

When the appellant was served with the Notice of Motion, he filed a replying affidavit and his response to the case put forward by the respondent was that the dispute was over parcel number Nyaribari Chache/B/B/Boburia/6353 which he had purchased from one **Lenah Moraa Oira** and was, at the time the respondent made her claim against him, it was (already) registered in his name. The same title was created after subdivision of former title number Nyaribari Chache B/B/Boburia/2738. According to the appellant, he was an innocent purchaser for valuable consideration and without notice of any other adverse interest. He exhibited copies of the agreement of sale, certificate of official search, extract of title and the register in respect of the said title. The appellant further claimed that the respondent had no recognisable or registrable interest in the property in dispute. He further discredited the respondent's claim because the person who had allegedly sold her the plot she was claiming had laid claim to the original parcel number Nyaribari Chache/B/B/Boburia/2738 in Kisii CMCC No.431 of 1997 which claim was dismissed. According to the appellant, having failed to establish his claim in the said case, he had no registrable interest which he could transfer to anyone including the respondent. The appellant also discredited the respondent's claim to the property in dispute because the documents she relied upon contradicted themselves: She alleged that she had purchased her plot and exhibited a sale agreement but also relied on an alleged allotment from the Municipal Council of Kisii. In the appellant's view, he had an unassailable title to the property in dispute and had incurred great expense in obtaining requisite approvals and consents which expense would go to waste with the granting of the orders sought. Needless to add, the appellant's answer to the respondent's claim was further given in the defence he delivered when served with the plaint.

When the Notice of Motion was placed before S. Okongo J, Counsel for the parties agreed to canvass the same by way of written submissions in which the parties' respective positions were elaborated.

The learned Judge, after considering the Notice of Motion, the affidavits filed, submissions of learned counsel and the authorities cited to him, allowed the respondent's prayer's for both orders of prohibitory and mandatory injunction stating, in doing so, as follows, *inter alia*:-

“ 19. Although the plaintiff's interest in the suit property was not registered and as such the 1st defendant (sic) couldn't have had notice thereof as alleged, in my view, the plaintiff's occupation and possession of the suit property created an overriding interest to which the suit property was subject to (sic). The defendant who acquired Plot No. 6353 with the Plaintiff in occupation did so subject to the plaintiff's right of occupation even if it is assumed for argument sake that the plaintiff had no other interest in the suit property. This is in accordance with section 30 (9) of the Registered Land Act Cap 300 Laws of Kenya (now repealed) under which Plot No.6353 is registered.

20. The defendant has argued further that as a registered proprietor of the suit property, he was entitled to keep out any trespassers therefrom. In my view what the defendant engaged in amounted to taking the law into his hands. It is for the court to declare the plaintiff and her tenants – trespassers on the suit property or on Plot No. 6353. The defendant had no right to declare the plaintiff as trespasser on Plot No. 6353 and to proceed to forcefully evict her therefrom.

21. I am satisfied from the foregoing that the plaintiff has established a prima facie case against the defendant with a probability of success.

I am also persuaded that unless the orders sought are granted the plaintiff stands to suffer irreparable harm. The plaintiff purchased the suit property as she claims at a sum of Kshs.3,200,000.00. She had rented it out to tenants who were paying her rents. The said tenants were forcefully thrown out by the defendant without following due process. The plaintiff who has been dispossessed of the suit property in such manner would no doubt suffer irreparable harm unless an injunction is granted to restore the status quo that was prevailing prior to the unlawful eviction.”

The above is the decision which has prompted this appeal premised upon some eleven grounds which in summary are that the learned Judge erred in relying on inadmissible evidence; that the learned Judge erred in making definitive findings in an interlocutory application; that the learned Judge erred in failing to appreciate that the appellant was an innocent purchaser for value without notice; that the learned Judge misapprehended the evidence; that the learned Judge wrongly exercised his discretion; that the learned Judge misapplied the equitable principle that equity aids the diligent; that the learned Judge's decision was against the weight of evidence; and that the learned Judge took into account irrelevant matters.

Mr. Bw'Omote, learned counsel for the appellant, addressed us at length on the above grounds of appeal. A summary of his submissions will suffice. Learned counsel opened his address by stating that the registered proprietor of the property in dispute is the appellant and that the respondent did not demonstrate that she had a registrable interest in the same. He then contended that the property was vacant at the time the appellant purchased the same on 10th February, 2012 and his registration was not shown to have been irregular or fraudulent. Learned counsel referred us to the case of ***Kenya Commercial Finance Co. Ltd -Vs- Afraha Education Society [2001] 1 EA. 86*** in support of his contention that the principles for the grant of a temporary injunction were not demonstrated by the respondent especially as she had no registrable interest in the property in dispute. Learned counsel faulted the learned Judge for finding an overruling interest in favour of the respondent, yet the same had not been pleaded or proved. In Learned counsel's view, failure to appreciate the conditions for the grant of a temporary injunction by the learned Judge resulted in an injustice to the appellant who had no contractual relationship with the respondent. In any event, according to counsel, damages would have sufficed. He added that besides the respondent's lack of a registrable interest, she relied upon unstamped and

unregistered documents. In learned counsel's view, even the balance of convenience tilted in favour of refusing the orders sought by the respondent.

Relying on this Court's decision in **United India Insurance Co. Ltd -Vs- East African Underwriters (Kenya) Ltd [1985] KLR - 898**, Mr. Bw'Omote submitted that we should interfere with the learned Judge's exercise of discretion.

Learned counsel in support of his submissions referred to the documents which were exhibited by the appellant which demonstrated the appellant's title which, according to learned counsel, was superior against the entire world.

Mr. **Soire**, learned counsel who represented the respondent, submitted that from the documents exhibited by the parties herein before the lower court, it was apparent that Plot No. B/13 Gekomu and parcel number Nyaribari Chache/B/B/Boburia/6353 were one and the same on the ground. He supported that contention by referring to two letters addressed to the respondent and her tenants by the appellant's advocates, M/s **Kerosi Ondieki & Co. Advocates**. He added that the two letters were in consonance with the respondent's position that the property in dispute was already developed when it was allegedly purchased by the appellant, and it had been developed by the respondent. In learned counsel's view, the said letters further demonstrated that the respondent's tenants were in possession when the appellant purchased the same and were forcefully evicted therefrom prior to the filing of the suit and application before the lower court. The appellant's actions, in learned counsel's view, were unlawful and the order of mandatory injunction was deserved. For that proposition, learned counsel placed reliance upon the case of **Kenya Hotel Limited -Vs – Kenya Commercial Bank Ltd and another, [civil case No 8 of 2004] (UR)** a decision of **Ibrahim J**, (as he then was) where the case of **Gusii Mwalimu Investments Co. Ltd & Another -Vs – Mwalimu Hotel Kisii Ltd (Court of Appeal E.A. No. 160 of 1995), (UR)** was cited with approval.

On alleged reliance on unstamped and unregistered documents, learned counsel submitted that want of stamping or registration was not fatal as the matter was at an interlocutory stage. For this proposition, learned counsel placed reliance upon the case of **Westlands Residential Resort Limited -Vs – Kawakanja Ltd and 2 others [CA Civil Appeal No. 165 “A” of 2011] (UR)**.

Learned counsel further contended that the learned Judge of the lower court was being unfairly discredited as, in his view, he considered the principles for granting both a temporary prohibitory injunction and a mandatory one and after doing so properly exercised his discretion in allowing the respondent's Notice of Motion.

On the alleged suspect root of the respondent's title, Mr. Soire submitted that that was not the case as, in his view, Kisii CMCC No. 431 of 1997 concerned neighbouring plots and the decision therein did not defeat the respondent's claim.

We have considered the record and also anxiously considered the affidavit evidence which was tendered before the lower court by the parties to this dispute. We have, as well, considered, again anxiously, the submissions of learned counsel for both parties and the law. At the outset as we have already stated, we are aware that the decision appealed against relates to an interlocutory matter namely orders of injunction and for that reason parties do anticipate a full hearing in the lower court. It would therefore not be proper for this Court to pronounce itself finally on the matters raised.

The dispute which the lower court will have to grapple with at the hearing of the suit will be as to who of the parties is the rightful owner of the property in dispute. The appellant claims he is the rightful owner being the registered proprietor of parcel number Nyaribari Chache/B/B/Boburia/6353. The respondent on the other hand claims he is the rightful owner being the owner of Plot No. B/13 Gekomu within the Municipality of Kisii. The learned Judge found, on the material before him, that the respondent had developed the property in dispute and had leased it to one, John Omari Bichanga, who had in turn, with her consent, leased the property to other sub tenants. It was therefore the prima facie finding of the learned Judge that the respondent was in occupation of the property in dispute until sometime in

February, 2013 when the appellant somehow evicted her tenant and sub tenants.

On this issue of occupation, the respondent placed reliance on two letters both dated 14th January, 2013 addressed to her and her tenants respectively by M/s Kerosi Ondieki & Co. Advocates. Because of the significance of those letters we set the contents thereof in full hereunder:-

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14/01/2013

TO

MOCHAMA

Dear Sir,

RE: B/B/BOBURIA/6353 PAUL TIRIMBA MOCHOGU

Duly instructed by our above named client we write to you as follows;

That our client is the registered owner of Land parcel B/B BOBURIA/6353 but without any colour of the law you purported to “lease” the land to one JOHN OMARI. This is a criminal offence.

Our instructions are that you move out of the said land parcel immediately or you rise **(sic)** legal action at your own peril. In case the same is not done we have further instructions to file a suit against you without further reference. The rent that you have been collection (sic) should be passed to us on (sic) onward transmission to our client.

By copy of this letter JOHN OMARI is advised to remove his properties from the premises as the owner has started developing the said property.

Our client will evict you and seek damages at your own peril – in case you don't comply.

Yours faithfully,

KEROSI ONDIEKI & CO.

ADVOCATE”

“ TO

TENANTS

Dear Sirs,

RE: B/B/BOBURIA/6353 PAUL TIRIMBA MOCHOGU

Duly instructed by our above named Client we hereby write to you as hereunder.

That you are occupying our client (sic) premises without his consent. We are hereby demanding that you move out of the said premises immediately or you risk legal action against you at your own costs.

This is to warn you that you are committing an offence which you risk to be jailed.

By copy of this letter the OCS OCPD and DCIO KISII Central are informed.

Your faithfully

KEROSI ONDIEKI & CO

ADVOCATE.”

Underling ours.

These letters were addressed to the respondent and the tenants on the instructions of the appellant. Therein, the appellant unequivocally acknowledged that the property in dispute was, to some extent, developed and tenants were in occupation thereof, having leased the same from the respondent. The two letters were in consonance with the stance taken by the respondent that she had developed the property in dispute and had leased it out to other parties. The respondent, in her affidavit in support of her application for injunction, swore that her tenant and his sub tenants were evicted from the said property and she could not access the same as there were security guards who denied her access.

In the replying affidavit filed in opposition to the respondent's application for injunction, the appellant did not expressly challenge the averments of the respondent that she had developed the property and that the same had been occupied by her tenant and sub-tenants who had been evicted therefrom. The gist of his response to the application was that he was the registered proprietor of the property in dispute and his title was superior *vis-a-vis* the whole world and that he was entitled to exercise all the rights of a registered proprietor which rights obviously included to have exclusive possession of the property in dispute. He supported his averments with copies of the title, register, sale agreement and approvals for development of the property in dispute.

The issue which was before the learned Judge at the interlocutory stage was whether sufficient material had been placed before him to warrant the granting of orders of injunction sought. The learned Judge, in a detailed ruling considered all that was urged before him and came to the conclusion that on the material before him, the respondent deserved both a temporary mandatory injunction and a temporary prohibitory injunction. He therefore allowed the respondent's application. The main issue before us now is whether the learned Judge was right in allowing the orders sought by the respondent. It must be stated at the outset that the granting of an order of injunction on an interim application is an exercise of judicial discretion. The principles by which both this Court and the Lower court are guided in deciding whether or not to grant a temporary injunction are well settled. For a temporary injunction, the locus classicus is the case of ***Giella -Vs – Cassman Brown & Co. Ltd [1973] EA 358***. There, Spry VP stated, at page 360, as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In the same case, the same learned Judge also stated:-

“First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent -Vs – Patel [1949], 16 EACA 63).”

For a temporary mandatory injunction, the case of ***Locabail Internatinal Finance Ltd -Vs – Agroexport and others [1986] 1ALL ER 901***, set out the prerequisite for the grant of the same. There, it was stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the

matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. More over, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

Having considered the pleadings in this matter, the Notice of Motion before the Lower court, the ruling given therein and submissions of counsel, can it be said that the learned Judge of the lower court did not exercise his discretion judicially?

We have given this matter very careful consideration and as we said earlier on in this judgment, counsel appear to have argued this appeal as if it was a final one. This of course is not the final appeal. What we are concerned with is the ruling on the respondent's Notice of Motion for orders of temporary injunction. Once the orders were granted, it was still upon the parties to set down the main suit for hearing. Maybe the parties' rights would have crystalized by now. The appellant was still entitled to file an appeal against the interlocutory orders as he has done. That is his undoubted right. The main dispute however remains pending in the lower court.

In considering whether the respondent had satisfied the conditions for the grant of a temporary prohibitory injunction, the learned Judge first set out the principles in ***Giella -Vs Cassman Brown & Co. Ltd (supra)***. He indeed cited the case itself. The learned Judge then set out the requirements for the grant of a temporary mandatory injunction and after doing so, stated as follows, in his ruling:-

“Applying the foregoing principles to this case the question that I need to answer is whether the plaintiff has satisfied this court that she has unusually strong and clear case against the defendant that warrants the issuance of the prohibitory and mandatory injunction sought.”

The learned Judge proceeded to answer the question he had set himself as follows:-

“It is not disputed that the suit property and Plot No.6353 are one and the same parcel of land on the ground. How the suit property changed to be Plot No. 6353 or vice versa is a matter for the trial court to determine. It is not disputed that the plaintiff was in occupation of the suit property at all material times until 2nd February, 2013 or thereabout when the defendant by himself and/or through his agents forcefully evicted her and her tenants therefrom. It is not disputed that the defendant was aware of the plaintiff's interest in the suit property and that she was in occupation of the same and had let out the same to a tenant.”

After the learned Judge considered the prima facie merits of the case put forward by the parties he concluded as follows:-

“20 The defendant has argued further that as a registered proprietor of the suit property he was entitled to keep out any trespassers therefrom. In my view what the defendant engaged in amounted to taking the law into his hands. It is for the court to declare the plaintiff and her tenants as trespassers on the suit property or on Plot No. 6353. The defendant had no right to declare the plaintiff as a trespasser on Plot No. 6353 and to proceed to forcefully evict her therefrom.”

So, it is plain that the learned Judge was alive to the fact that he was considering an interlocutory application and the issue as to how Plot No. B/13 Gekomu became Nyaribari Chache/B/B/Boburia 6353 was a matter to be resolved at the trial. The learned Judge however found, at that interlocutory stage, that the appellant had acted in a high handed manner when he evicted the respondent and her tenants without due process from a property which, prima facie, she had developed. That prompted the learned Judge to cite this Court's statement in the case of ***Kamau Mucuha -Vs – The Ripples Ltd [Civil Application No Nai 186 of 1992] (UR)*** that :-

“A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act ...”

For equal measure, the learned Judge cited the case of ***Taj Superpower Cash and Carry Ltd -Vs – Nairobi City Council & 2 Others [Court of Appeal Civil Appeal No. 111 of 2002] (UR)*** where it was stated:-

“ ... a wrong doer cannot keep what he has taken because he can pay for it”

And in ***Gusii Mwalimu Investment Co Ltd and Another -Vs- Mwalimu Hotel Kisii Ltd (supra.)*** we said:-

“A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”

In our view, the learned Judge properly appreciated the gravity of the matter before him and directed his mind to the conditions for the grant of both a temporary prohibitory and a temporary mandatory injunctions and came to the conclusion, in our view, properly that the respondent deserved both orders at the interlocutory stage. Issues of which of the titles claimed by either party was superior; unstamped or unregistered documents and unsubstantiated or unproved allegations could not be conclusively determined at the interlocutory stage on contested affidavit evidence. The learned Judge of the lower court may have expressed himself strongly in some of his findings but the fact remains that those findings were only prima facie findings which will not bind the trial Judge. The learned Judge was considering an interlocutory application at the nascent stage of the suit long before the opportunity to amend was closed, directions taken or discovery given.

One aspect of the matter was however certain. The disputed parcel of land had a building or buildings thereon which the respondent claimed. The building or buildings may not have been completed to the fine taste of the appellant but the respondent had let them out and was earning rent therefrom which fact the appellant acknowledged. Given the respondent's claim, we cannot fault the learned judge for finding that the respondent deserved at least to be evicted after due process of the law.

The appellant is currently armed with a title deed under the Registered Land Act (***now repealed***) for the property in dispute. He has, in his possession, approved plans and relevant consents to carry out development on the disputed property. If the learned Judge had not made the orders impugned, nothing would have prevented the appellant from demolishing the developments on the disputed parcel of land and erecting new structures thereon thereby changing, in a substantial manner, the character of the disputed property so that by the time the trial commences the status quo would have substantially been altered.

We are of the humble view that the principles enunciated in the case of ***Kenya Commercial Finance Co. Ltd -Vs- Afraha Education Society*** (supra): the sequential application of the principles of granting interlocutory injunctions, and the case of ***United India Insurance Co Ltd -Vs East African Underwriters (Kenya) Ltd [1985] KLR- 898***: exercise of judicial discretion, were properly applied by the learned Judge. We are unable to find any misdirection in law or misapprehension of the facts on the part of the learned Judge of the Lower court. We have also not detected consideration of irrelevant matters and failure by the learned Judge to consider relevant matters. We cannot also say that the decision of the learned Judge is plainly wrong.

In the end we do not find any justification to interfere with the learned Judge's exercise of his undoubted discretion. We find no merit in this appeal which we now dismiss with costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF APRIL, 2015

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR