



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 297 OF 2014

BETWEEN

ALEX WAINAINA T/A JOHN COMMERCIAL AGENCIES.....APPELLANT

AND

JANSON MWANGI WANJHIARESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi – (Nyamweya, J) Dated
18th September, 2014

in

H.C.EL.C No. 1018 of 2013)

JUDGMENT OF THE COURT

Background

The respondent **Edward Janson Mwangi Wanjihia** filed Nairobi Milimani Environment and Land Division case No. 1018 of 2013 against the appellant **Alex Wainaina T/A John Commercial Agencies and four others** on the 22nd August, 2013.

He averred *inter alia* that he brought the action in his capacity as the duly appointed Attorney of **Jane Waigure Gathera** the registered owner of all that piece of land known as Nairobi/Block 97/384; that in January 2012, the appellant unlawfully, trespassed and/or entered and built temporary structures on Nairobi/Block 97/384; and that the appellant leased out the structures to the 2nd, 3rd, 4th and 5th defendants (now interested parties) without the knowledge, notice, permission of the registered owner and thereby denying her the right to use the property as she desired.

In consequence thereof, the respondent sought :-

- (a) an order for the eviction of the appellant and the co-defendants, their tenants, sub-tenants, lessee, employees agents, servants and any other person claiming under them from the suit property,
- (b) In the alternative, a mandatory injunction compelling the defendants, their tenants, lessees,

employees, agents, servants and any other persons claiming under them to vacate and hand over vacant possession of LR. No. Nairobi/Block97/384;

(c) *mesne profits* for occupation of the land from January 2012 up to the date of handing over vacant possession, (d) Any other relief that the Honourable court may deem fit to grant.

Simultaneously filed with the plaint was a chamber summons seeking orders that:

(i) *The appellant and the then co-defendants, their employees, agents and/ or servants, tenants sub-tenants, lessees and any other person claiming under her be evicted from LR. No. Nairobi/Block97/384.*

(ii) *In the alternative, a mandatory injunction be issued compelling the appellant and his then co-defendants, their employees agents and or servants, tenants, lessees and any other person claiming under them to vacate LR. No. LR. Nairobi Block97/384.*

(iii) *The orders of this Honourable court be supervised and or enforced by the officer commanding police Division (OCPD) Embakasi Division.*

Upon service of the plaint as well as the interim chamber summons, the appellant entered appearance, filed a defence and a replying affidavit on the 9th day of September, 2013. The parties elected to proceed by way of written submissions in respect of the chamber application, which the High court, *Nyamweya, J* (trial court) duly considered and delivered a Ruling on 18th September, 2014. The appellant was aggrieved by that decision, hence the interlocutory appeal before us.

Grounds of appeal.

Twenty four (24) grounds were put forward in the memorandum of appeal and may be paraphrased, thus:-

The learned Judge erred in:

- 1. failing to sufficiently appreciate that the appellant had bought the suit property in a public auction and paid for it in full.***
- 2. failing to appreciate that M/S Falcon Properties Limited the seller of the suit property to the respondent had already made an offer to resell the suit property to the appellant and upon him declining, sold the said suit property to the respondent who cannot claim to have a bonafide title.***
- 3. allowing the application for a mandatory injunction and eviction despite the acknowledgment that the appellant had sued Falcon Properties Limited together with the defunct City Council of Nairobi in Nairobi High Court (Environmental and Land Division) ELC NO.633 OF 2009 seeking title for the suit property which case is still pending in court.***
- 4. holding that the proceedings in High Court (Judicial Review and Constitutional Division (Misc. Application No.59 of 2008 had been determined and in proceeding to erroneously make the orders appealed from when in fact the pleadings clearly indicate that these proceedings are subject to Nairobi Court of Appeal No. 156 of 2010 which is still pending before this Honourable Court.***
- 5. granting the orders sought in the interlocutory application which had the effect of fully determining the suit whilst at the same time contradicting herself by making an order for the suit to proceed to full hearing at a later stage.***

- 6. granting all the prayers sought in the interlocutory application and in failing to realize that there was no other substantive cause of action thereto and the suit was thus spent.**
- 7. granting all the orders sought in the interlocutory application though those orders were prayed for in the alternative.**
- 8. failing to appreciate that the application as drawn could not avail the respondent.**
- 9. failing to appreciate and apply the settled principles applicable for the grant of a mandatory injunction.**
- 10. proceeding to upset the status quo by the grant of a mandatory injunction when in fact the appellant has always been in vacant and effective occupation of the suit property and no evidence and/or grounds had been advanced to justify disturbance of the existing status quo.**
- 11. issuing the mandatory injunction and an eviction order against the appellant in the absence of a finding that the appellant had stolen a match against the respondent.**
- 12. failing to appreciate that a mandatory injunction cannot be granted in interlocutory proceedings where such grant would dispose off the entire suit.**
- 13. proceeding to issue a mandatory injunction without establishing that the case before her had no special circumstances and neither was it a clear case for the grant of such orders.**
- 14. granting an order of eviction whilst what was prayed for was an equitable relief of injunction which did not encompass the non-equitable order of eviction.**
- 15. granting the order of mandatory injunction without appreciating that the matter before her was not simple and summary matter which could attract a grant of mandatory injunction.**
- 16. not considering that the respondent would have been adequately compensated by way of damages and that the balance of convenience tilted in favour of the maintenance of the status quo and that the respondent's case had no overwhelming chances of success.**
- 17. issuing the mandatory injunction and an order of eviction whilst at the same time making a finding that the appellant was entitled to ventilate his legitimate claim of ownership of the suit property in the pending suits.**
- 18. failing to appreciate the fact that the criteria for the award of a mandatory injunction is one of "a fair result" which was not applied as the order sought seriously and adversely affected the appellant.**
- 19. failing to appreciate that a bonafide purchaser for value without notice would have good title to land.**
- 20. issuing the orders even after acknowledging that the appellant had developed the suit property and had long been upon it before the respondent purportedly bought it from a party who the appellant had sued before the purported sale took place.**
- 21. failing to appreciate sufficiently or at all that the pleadings, affidavits and submissions made before her and the issue raised in the chamber summons application dated the 19th August, 2014 could only be effectively determined at a full trial of the suit.**

22.determining the suit at an interlocutory stage on conflicting insufficient and inconclusive affidavit evidence.

23.finding in spite of the evidence presented that the respondent had made out a case for the grant of mandatory injunction and issuance of an eviction order.

24.holding that in the absence of a counterclaim, the appellant had not challenged the respondent title whilst in fact such issues as would have been raised in the counter claim had been canvassed in Nairobi High Court (Environmental and Land Division Civil suit ELC NO. 633 of 2009 which is still pending in court.

It is apparent that those grounds are fairly repetitive and prolix contrary to the Rules of this court. It has been stated before, and it bears repeating, that parties must comply with the terms of **Rule 86** of the **Court of Appeal Rules, 2010** or run the risk of the court striking out the offending grounds and/or imposing other sanctions.

After the filing of the appeal, the appellant sought, and this court granted, a conservatory order preserving the *status quo* pending the hearing and disposal of the appeal.

Appellant's submissions.

In urging the appeal through written submissions, learned counsel **Mr. A.G.N. Kamau**, reduced the grounds of appeal to four by combining grounds 1,2 and 20; 3,4 and 24; 5,6,7,9,10,11,12,13,14,15,16,17,18,21,22 and 23; and ground 19 on its own.

On ground 1, the appellant invited us to find that the appellant had sufficiently demonstrated before the trial court that he had purchased the suit property at a public auction in the year 2007 for value and without notice. He further contended that the original owner of the suit property was aware of this fact and recognized the appellant's interest in the suit property following that auction purchase. That is why the said owner purported to offer to sell the same property to the appellant. The appellant ought therefore, to have been served with the Judicial Review proceedings and the respondent's failure to do so denied the appellant an opportunity of being heard. He is still interested in the outcome of Civil Appeal No 156/2010 which is pending determination before this court.

On ground 2, it was the appellant's contention that it was erroneous for the trial court, to order a trial when in fact the interlocutory orders issued by the court left nothing to go for trial.

With regard to ground 3, it was the appellant's assertion that the trial court misdirected itself in failing to appreciate that the circumstances of the case before it did not warrant the granting of an order of a mandatory injunction; that the court failed to proportionally weigh the detriment that the mandatory injunction would inflict on the appellant and the benefit it would confer on the respondent; and that the court failed to consider the relevant elements for grant of injunctive relief as set out in the case of *Giella vs. Cassman Brown Ltd [1973] EA 358*.

On ground 4, the appellant argued that the trial court fell into error when it granted both the main and alternative prayers contrary to established principles of law on the subject; that she failed to appreciate that in fact the appellant was a *bona fide* purchaser for value having purchased the suit property in a public auction in 2007 and that the order of eviction was therefore misplaced in the circumstances.

On account of all the above the appellant urged us to allow the appeal.

Respondent's submissions

Mr. N.D.A Ouko, learned counsel for the respondent, in his written submissions contended that the appellant's appeal fell through upon his admission that the sale by public auction was nullified through HCC Judicial Review Appl. No. 58/2008. The appellant therefore does not have a valid title to the suit

property; he has never filed a counterclaim as against the respondent; and further admitted that Falcon Properties Limited offered to sell him property which he had allegedly already purchased and yet he took no action to protect his title. He cannot therefore be heard to complain that the property was later on sold to the respondent in the absence of lawful prohibition. Any purported right of ownership, therefore, should be directed against the defunct City Council of Nairobi and not the respondent.

On ground 3, the respondent argued that the appellant was not a party to the alleged pending litigation which, in any event, was never consolidated.

As for the 4th ground, it was the respondent's assertion that the alleged appellant's occupation of the suit land was inconsequential, even if he succeeded in the appeal, because, on the facts, the balance of convenience tilted in favour of the respondent.

The appellants appeal should therefore be dismissed.

For his part, **Mr. Mutembei Marete**, learned counsel for the interested parties who never filed any written submissions, orally intimated that he was supporting the appeal.

Several authorities were cited by counsel on all sides and we have considered them.

Analysis and Determination:

The principles.

This is a first appeal on an interlocutory application which called for the exercise of discretion of the trial court. The principles governing the exercise of judicial discretion were well set out by **Ringera JA** (as he then was) in the case of **Githiaka vs. Nduriri [2004] 2KLR 67**. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the Court, that is to do justice to the parties before it. The parameters for interference with the exercise of such a discretion were well put by the predecessor of this Court in the decision in the case of **Mbogo and Another vs. Shah [1968] EA.93**, namely, for an appellate court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice.

Decision of the trial court.

In making the orders it ultimately did, the trial court considered the submission by the appellant that he had bought the disputed property in an auction and that he was in possession of it. It also considered the submission that a mandatory injunction was not appropriate because it would determine the suit before hearing on merits. The submissions on the other hand were considered that the public auction was set aside in other proceedings in which the appellant was not a party. The court then surmised, thus: “

***“I am in this respect also guided by the decision of the Court of Appeal in Dr. Joseph Arap Ngok versus Justice Moijo ole Keiwa & 4 others Nairobi CA No.60 of 1997 that a party who has been issued with a good title takes precedence over equitable rights to title. In addition, the 1st defendant in its defence filed herein on 6th September, 2013 does not raise any counterclaim to challenge the plaintiff's title or seek any claim or prayers of ownership to the suit property. The 1st defendant still has the opportunity in this respect to ventilate any claim of ownership to the suit property or challenge the plaintiff title at the full hearing of this suit, and the other pending suits filed with respect to the suit property.*”**

I am therefore of the view that special circumstances exist in this case to warrant the granting of the mandatory injunction sought of vacant possession. This finding notwithstanding, I appreciate the fact that the 1st defendant and the other defendant's have

erected structures on the suit property and may therefore require adequate notice and time to remove the said structures.”

On the basis of the foregoing observations and reasoning, the learned judge handed down the following orders.

- 1. That the defendants, their employees, agents and or servants tenants, sub-tenants, lessees and any other persons claiming under, them shall within sixty (60) days of service by the plaintiff of the orders granted herein yield vacant possession of all that property known as LR. No. Nairobi/Block97/384 to the plaintiff. Eviction orders shall issue upon default.***
- 2. The plaintiff shall serve the defendant's with the orders herein within fourteen(14) days of the date of this ruling.***
- 3. The officer commanding police Division (OCPD) Embakasi Division shall supervise and ensure compliance and enforcement of the orders given herein.***
- 4. The costs of the plaintiff's chamber summons dated 19th August, 2013 shall be in the cause. Orders accordingly.”***

The Issues.

In our view, three issues arise for our consideration and determination of the appeal. Firstly, whether it was appropriate for the trial court to grant both the main relief sought in the application and also the relief sought in the alternative. Secondly, whether there was proper exercise of judicial discretion in acceding to the respondent's plea for an order of eviction at an interlocutory stage of the proceedings. Thirdly, whether a mandatory injunction was warranted in the circumstances of this case.

On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose, on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not be granted in a blanket form. On this the trial court was in error.

On the second issue, it is our view that *the locus classicus* case of ***Giella vs. Cassman Brown [1973] EA 358*** has for a long time provided courts with the guiding principles on applications for injunctory relief. It was indeed cited before the trial court. Simply put:

(i) The applicant must show a prima facie case with a probability of success.

(ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(iii) When the court is in doubt it will decide the application on a balance of convenience.

This court has previously held that in considering the first principle, the trial court must avoid the temptation of making conclusive findings of fact before they are tested in cross examination. A prohibitory injunction, rather than a mandatory injunction which is considered on different principles, is meant to forestall the happening of an event. In the case of ***Stephen Kipkebut T/A Riverside Lodge and Rooms vs. Naftali Ogola [2009] EKL***R the court held that an order which results in the granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. We have examined the record and we think, with respect, that the trial court in its analysis, fell into this temptation in finding that the appellant's case stood no chance of success at the hearing. The result was that the other principles in the ***Giella case*** were ignored. In the circumstances of this case, we think the court should have gone further and examined various other factors including: the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff as was stated by the court in the case of ***Kenya Railways Corporation versus Thomas Ngutu & others [2009] eKLR***; the appellant having been in possession of the suit land which he developed before the respondent's rights accrued; the fact that the appellant had asserted that he was a purchaser for value without notice which was a triable issue; the nature of the inconvenience the respondent would suffer if the injunction were to be withheld and that which would be suffered by the appellant if the injunction were to be granted; whether the respondent could be compensated by way of damages for loss of use of the suit property during the pendency of the litigation; the uncertain outcomes of various relevant cases before this and other courts; and also whether granting the relief in the manner sought would leave any issue for agitation in the main suit.

For those reasons we are entitled to interfere with the discretion of the trial court.

Turning to the last issue and the principles governing the granting of mandatory injunctions, the appellant has drawn our attention to the decision in the case of Abdi Hassan vs. Nadhi Jama Andason [2006] eKLR for the proposition that 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 easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Before granting a mandatory injunction, the court had to feel a high sense 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 of a prohibitory injunction.

The test to be applied was reiterated by this Court in the case of Kenya Breweries Limited and Tembo Co-Operative savings & Credit Society Limited vs. Washington O. Okeyo Nairobi , Civil Appeal No. 332 of 2000 (UR) where the Court had this to say:-

"The test whether a grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edn. Para 948 which reads:

"A mandatory injunction can be granted on an interlocutory applications as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff....a mandatory injunction will be granted on an interlocutory application."

Wording to similar effect were also used in Locabail International Finance Ltd. Vs. Agro export and others [1986] 1ALL ER 901 at Pg.901.

These principles have received full approval by the courts in this country, including:- Belle Maison Limited Vs. Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) , Ripples Limited Vs. Kamau Mucuha H.C.C.C. No. 4522 of 1992 per Mwera, J. and Magnate Ventures Limited vs Eng. Kenya Limited [2009] KLR 538 which summarized the principles thus:

(i) A mandatory injunction need not to be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was:-

(a) Clear and one which the court thought it ought to be decided at once, or

(b) If the act done was a simple and summary one which could be easily remedied.

(c) Or if the defendant attempted to steal a match on the plaintiff.

(ii) The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances."

The consistent reiteration of those principles by the courts is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution. We have applied the above principles to the rival arguments herein with regard to the trial court's exercise of discretion and we find it is safe for us to interfere with the exercise of that discretion. It is beyond argument that the factual matrix of the case before us is not clear and straight forward, capable of summary disposal of the case. There is certainly no evidence that the appellant attempted to steal a match on the respondent.

Furthermore, the acknowledged pending cases which had a direct bearing on the ownership of the

disputed property cannot be wished away and will feature at the trial of the main suit. In our view, it was presumptuous of the trial court to rely on the absence of a counter claim when the pleadings were in their infancy and were not beyond amendment. On the totality of the facts before the court it was evidently clear that issues in controversy as between the appellant and the respondent would be better disposed of through a merit trial. The trial court was, therefore, in error when it not only made final orders at an interlocutory stage, but also issued an eviction order which was not part of the equitable relief envisaged under **Order 40** of the **Civil Procedure Rules**, the legal basis of the application before the court.

Disposition.

The upshot of the above analysis is that this appeal is meritorious and is accordingly allowed. We set aside the orders of the trial court made on the 18th day of September, 2014 and substitute therefor an order dismissing the respondent's application.

The appellant will have the costs of the appeal as well as the costs in the court below.

Dated and Delivered at Nairobi this 8th day of May, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

D/O