



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWILU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 126 OF 2011

BETWEEN

MOHAMUD MOHAMED MOHAMUD.....APPELLANT

AND

ATHI WATER SERVICES BOARD.....RESPONDENT

(An appeal against the ruling and order of the High Court of Kenya at Nairobi (Muchelule, J.) dated 8th December, 2010

JUDGMENT OF THE COURT

By a plaint dated 21st December, 2009, the appellant, **Mohamud Mohamed Mohamud**, brought action against the respondent, **Athi Water Services Board**, in the High Court at Nairobi, seeking mainly a declaratory order and orders of injunction. The appellant claimed that he is the registered proprietor of LR No. 11927/3 (herein-after "*the suit land*") since August 2008, and was in possession thereof since then until 17th December, 2009, when an entity called **Basil Drilling Limited** (hereinafter "*Basil*") broke onto the suit land and commenced work of drilling a borehole thereon. When breaking onto the suit land, the appellant claims, Basil's agents demolished part of the wall surrounding the same.

On 18th December, 2009, the appellant alleges that Basil's agents informed him that they had been hired to drill the borehole by the respondent. The respondent did not stop its acts which the appellant considered acts of wastage thus provoking the suit before the High Court.

Filed with the plaint was a chamber summons which was expressed to be brought mainly under **Order XXXIX (now Order 40) Rules 1, 2 and 3** of the **Civil Procedure Rules** for an order of injunction restraining the respondent, then as the defendant, from further trespassing upon and/or interfering with the appellant's possession, control, right and/or interest over the suit land. The appellant also sought a mandatory injunction compelling the respondent to remove all structures and/or material it caused to be placed on the suit land. In the chamber summons, the appellant complained, as he had done in the plaint, about what he termed illegal and unjustified interference of the respondent with his quiet and peaceful possession of the suit land.

The appellant appeared ex-parte, before Rawal J (as she then was) who, at that stage, was satisfied with the *prima facie* merits of the chamber summons and granted the prohibitory injunction sought.

When the respondent was served, it filed three affidavits in opposition to the appellant's application. The

first one was a replying affidavit sworn by one **Eng. Lawrence Wainaina Mwangi**, the respondent's Chief Executive Officer who deponed, in part, that the respondent was a state corporation established under section 51 of the Water Act of 2002 with the responsibility to provide water to City residents and its environs; that it had leased from the defunct Nairobi City Council (defunct City Council) the suit land and had been paying the requisite fees since 2004; that it lawfully took over the functions of Water undertakers from the defunct City Council and took possession of the suit land with effect from 1st July 2005; that the defunct City Council had had an elevated tank on the suit land for over twenty (20) years which it had re-habilitated at the cost of Kshs.2.5 m; that it had become necessary to drill a borehole on the suit land to increase its capacity to provide water to City residents; that the project was funded by the World Bank and Kenya Commercial Bank; that the drilling of the borehole was complete save for the installation of a water-pump; that the defunct City Council had denied leasing the suit land to the appellant or its predecessor in title; that the registration of a lease in favour of the appellant was not authentic and that the appellant did not deserve any order of injunction.

The second affidavit was sworn by one, **John Kariuki Mwangi**, a Manager with Nairobi City Water and Sewerage Company Limited (hereinafter "NCWSC"). It was a further affidavit and confirmed the averment in the replying affidavit of Eng. Lawrence Wainaina Mwangi that the suit land and the assets thereon had been leased by the respondent; that among the assets, was an elevated water tank which had been on the land for a long time until 22nd July, 2009 when one, **Abdullahi Shariff**, laid a claim over the suit land on behalf of an entity called, **Laiser Communications**, which claim, according to Mr. John Kariuki Mwangi, had no basis.

The third affidavit was sworn by the deponent of the replying affidavit, Eng. Lawrence Wainaina Mwangi, which affidavit attempted to demonstrate the efforts made by the defunct City Council, to challenge the appellant's title to the suit land.

In response to the three affidavits, the appellant filed a further affidavit on 24th February, 2010. In it, he reiterated that he is the registered proprietor of the suit land and that he has no relationship with Abdullahi Shariff mentioned in the second affidavit. He further deponed that the respondent and the deponents of the affidavits in opposition to his application acknowledged his title to the suit land and that the documents relied upon by them were of doubtful authority.

Eventually the chamber summons was heard inter partes by Muchelule J, and on 8th December, 2010, he gave his ruling dismissing the chamber summons and setting aside the injunction which had been granted at the *ex parte* stage and which dismissal had been sought by the respondent in an application which the learned judge heard alongside the appellant's injunction application. The learned Judge concluded his ruling in the following manner:-

"The result is that the plaintiff's title to the suit property has been put to serious question. At the hearing the court will have to resolve the matter. For the purpose of this application I find the plaintiff although the owner of the lease, has not demonstrated a prima facie case with the probability of success.

In case I am wrong, the defendant is a state corporation. There was no demonstration that it will be incapable of paying whatever damages that the plaintiff may suffer if the application is not granted.

The suit property has a borehole and raised tank. They provide water at public expense to the residents of the area. Weighed, against the plaintiff's private interest in the suit property I find the balance of convenience tilts in favour of allowing the public continue benefitting from the water. The result is that the application for injunction is declined. The application to set aside the injunction which is in place is allowed....."

The appellant was aggrieved and hence this appeal in which he lays out some nine (9) grounds. The main complaints however are against the findings of the learned Judge that a *prima facie* case had not been demonstrated and that the title of the appellant was shrouded in mystery which findings, the appellant contends, were against the affidavit evidence adduced and the law argued before the learned Judge.

Ms. Angela Maina, the learned counsel who appeared for the appellant, reduced those grounds to two when she argued ground 1 separately and grounds 2 to 9 together. Learned counsel contended that the title of the appellant to the suit land was not challenged as the respondent's claim was not supported by documentary evidence. In learned counsel's view, the appellant as the registered proprietor as lessee of the suit land, was protected by law and his title could only be challenged in exceptional circumstances which had not been demonstrated in this case.

It was also Ms. Maina's submission that the appellant satisfied all the conditions set out in the case of **Giella -v- Cassman Brown & Co. Ltd. [1973] EA 358**, and yet he was denied an injunction. According to learned counsel, the appellant's right to property had been infringed upon by the respondent's agents and he was entitled to the remedy of injunction and as the appellant was the registered proprietor, according to learned counsel, the balance of convenience tilted in his favour.

Mr. Thangei, learned counsel for the respondent submitted that the learned Judge, in dismissing the appellant's application for injunction, exercised a discretion which exercise, according to him, was proper. In learned counsel's view, the status of the title to the suit land did not fall for determination at the interlocutory stage as the same was the function of the trial court which is yet to hear the case. Learned counsel submitted that the respondent had been in possession for over 20 years which was a pertinent issue and could not be ignored by the learned Judge. The fact that the appellant ultimately derived title from the defunct City Council which had questioned the transfer in its favour cast shadows upon the validity of the appellant's title, so the respondent's legal advisor, contended.

In those premises, according to learned counsel, no *prima facie* case was established by the appellant and his application for orders of injunction was rightly dismissed.

We have considered the record, the grounds of appeal, the submissions of learned counsel, the authorities cited and the law. This being a first appeal, our role is as set out in the authority of **Selle v Associated Motor Boat Co. Ltd. [1968]E.A 123**, as that of reconsidering the evidence, evaluating the same ourselves and drawing our own conclusions. We are alive to the fact that this appeal is of an interlocutory nature and that being so, it is not necessary and it would not be right for us to make definitive conclusions on facts and issues of law which are yet to be canvassed before the High Court. We ask ourselves, whether the learned Judge was right in refusing to grant the orders of injunction sought by the appellant. It is not in contention that the granting of an interim injunction is an exercise of judicial discretion. The principles by which this Court and the High Court have always been guided in deciding whether or not to grant a temporary injunction were crystallized in the case of **Giella -v- Cassman Brown & Co. Ltd. [1973] EA 358**. They are as follows:- first an applicant must demonstrate that he has a *prima facie* case with a probability of success at the trial. 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, **Spry VP**, 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 (Sergeant -v- Patel [1949], 16 EACA 63)”

Having considered the plaint, the chamber summons before the High Court, the ruling given thereon, the submissions made by Ms Maina and Mr Thengei, we ask ourselves whether it can be said that the High Court Judge did not exercise his discretion judicially. This is not a final appeal given that it arises from an order made on an interlocutory application for orders of injunction. Once the injunction application was declined, it was still open to the parties to set down the main suit for hearing. Of course, the applicant filed an appeal against the said ruling which appeal is the subject of this judgment. However, the main dispute remains unresolved and is pending in the High Court.

As regards this appeal, we are unable to fault the learned Judge of the High Court in the manner in which

he dealt with the applications; the foundation for this appeal. We are satisfied that he exercised his discretion judicially.

The learned Judge considered the parties' respective claims to the suit land and was persuaded that determination of the rightful owner of the suit land would await the trial. He weighed the documentary evidence of title exhibited by the appellant against the long possession of the same land by the respondent and we were persuaded, on a *prima facie* basis, that that possession remains undisturbed pending trial. The learned Judge also considered the role the respondent is playing in society in distributing water to City residents using the facility existing on the suit land and the borehole already drilled at the time of the application for injunction and was persuaded that the balance of convenience tilted in favour of allowing the respondent discharge its duties to the City residents.

The learned Judge considered the mandatory injunction sought by the appellants and was of the view that such an order could not be granted under the then Order XXXIX of the Civil Procedure Rules but under the inherent jurisdiction of the court. For that proposition, he invoked the case of ***Belle Manson Ltd. -v- Yaya Towers Ltd, [HCCC NO 2225 of 1992 at Nairobi] (UR)***. The learned Judge did not discuss the principles applicable in considering an application for a mandatory injunction, may be, because he was of the view that he had no jurisdiction to grant such injunction under Order XXXIX, but section 3A of the Civil Procedure Act was also invoked. In our view, the failure to discuss the principles for granting a mandatory injunction did not occasion a failure of justice. We are of that view, because the learned Judge eventually found that the appellant had not demonstrated a *prima facie* case with a probability of success.

In the case of ***Locabail International Finance Ltd -v- Agroexport and Others [1986] 1 ALL ER 901***, the court considered the characteristics of a mandatory injunction. At page 901, the court stated:

“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 march on the plaintiff.

Moreover, 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.”

The above principles have been applied by our courts for a long time. See the cases of ***Kenya Breweries Limited & Another -v- Washington O. Okeyo [2002]I EA 109*** and ***Kamau Mukuha -v- The Ripples [1990 – 1994] EA 388***.

In this case, the learned Judge of the High Court found that the appellant had not established a *prima facie* case with the probability of success. There was therefore no justification to grant the mandatory injunction sought by the appellant at the interlocutory stage given that the threshold for granting the same is higher than that for a prohibitory injunction. The case was not an open and shut case requiring a simple and summary solution which could be easily remedied if the injunction would be later found not to have been deserved. No special circumstances were also demonstrated. It cannot also be said that the appellant's case was clear. The title claimed by the appellant is challenged on valid grounds; the parent owner of the suit land (the defunct City Council of Nairobi) doubted the validity of the appellant's title; the respondent and its predecessors had been in possession for over twenty (20) years and owned an elevated water tank on the suit land; the respondent had also drilled a borehole thereon which could become operational on the installation of a pump.

All those factors were before the learned Judge when he considered the appellant's application. It is evident that the learned Judge in declining the appellant's application acted on the basis of those matters and not on whim or caprice.

As we observed earlier the less we say about this dispute the better as the trial is yet to be held. We are however, certain that there is no basis for interfering with the exercise of discretion by the learned Judge

of the High Court.

The upshot of the foregoing is that this appeal lacks merit and we order that the same be and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 17th DAY OF JULY 2015.

M.K. KOOME

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR