IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.24 OF 2015

BETWEEN

MOHAMED NDOGE …….APPELLANT

AND

MOHAMED GOLO NDOGO

KUNO GALANO

BAKARI HINDADA suing as the chairman, secretary

of NOOR BANDI MOSQUE ……....RESPONDENTS

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Angote, J.) dated 13th February, 2015

In

ELCC.N0.23 of 2014)

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JUDGMENT OF THE COURT

As opposed to an order of temporary injunction issued provisionally before the court has had the opportunity to assess the merits of the application, a permanent injunction comes at the end of the trial after parties have presented evidence and been cross examined on their rival claims. A temporary injunction serves to preserve the subject matter in *status quo* during the pendency of a suit. It follows, therefore that the standard of proof in either case will be different. At the interlocutory stage the proof is on a *prima facie* plane. Based on the evidence of the parties the court may grant a permanent injunction if it is satisfied, on a preponderance of that evidence that irreparable harm, loss or damage, not capable of being compensated by an award of damages, in the absence of injunction, will be occasioned. At the interlocutory stage the threshold (*prima facie*) is lower than that expected at the trial (on a balance of probabilities). See **Giella** v **Cassman Brown** (1973) EA 358 and **Mrao Ltd** v **First America Bank of Kenya and 2 others** (2003) KLR 125.

In the appeal the respondents, Sunni Muslims who were the officials and members of Bandi

mosque in Garsen, Tana River County instituted an action against the appellant claiming that he had commenced construction of a Wahabi Muslim Sect mosque on the same parcel of land as Bandi mosque; that the parcel of land where the proposed mosque is being constructed belongs to the respondents having been allowed the use by the Tana and Athi Rivers Development Authority, (TARDA) the registered proprietor, that given the proximity of the proposed mosque and the existing mosque there would be interference as prayers will be conducted through loud speakers; that it will not be ideologically tenable to have two mosques of different sects in such close proximity with each other; and that efforts by the County Government, Ministry of Lands officials and TARDA itself failed to resolve the dispute.

Consequently the respondents prayed that the appellant be ordered by a mandatory injunction to give vacant possession, and be restrained by an order of prohibitory injunction from constructing a mosque on the suit property. They also sought that the appellant be condemned to pay costs of the suit and interest to the respondent.

The appellant in resisting the action denied the foregoing averments maintaining that the land in question belonged to TARDA; and that in view of the distance between the existing mosque and the proposed site of the second mosque, there was no likelihood of interference as alleged.

At the trial each side presented evidence as follows. The respondents' case was that prior to the events leading to the dispute, the appellant and the respondents and indeed the entire village worshiped in the same mosque, Badi mosque, which was built in 1992 on a 2 acre piece of land belonging to TARDA. As a matter of fact the appellant was an Imam and an adherent of the Sunni sect. However in the year 2006, following a disagreement with some of the mosque members he, so to speak, converted to the Wahabi sect and left Bandi mosque. Some of the reasons attributed to this move was that the appellant preferred to conduct prayers in Orma as opposed to Arabic language; that he practiced and preached the Wahabi ideals and principles which did not conform to the doctrines of the Sunni Sect.

After he left Bandi mosque to begin a Wahabi mosque, he was allowed the temporary use of the Muslim school (Madrasa) belonging to Bandi mosque by the area Chief. On 1st February, 2014 the appellant is said to have brought surveyors to the land in question with a view to subdividing it. Thereafter he began to deliver building material on the site he had earmarked the Wahabi mosque. After parties, with the help of the National and County Government agencies as well as TARDA and the police failed to reconcile, the respondents filed suit. In the respondents' view the Wahabi mosque ought to be at least 700 meters from the existing one. For the appellant it was contended that the site of the Wahabi mosque was 300 meters from the existing one hence there would be no form of interference. The appellant and his witnesses conceded that when they commenced construction of the Wahabi mosque they had not sought the consent of the owner of the land, TARDA; and that when they did so after the construction commenced and after the filing of the suit, the consent was denied.

Weighing the rival evidence one against the other and bearing in mind the reliefs sought, the learned Judge (**Angote, J.**) held that the land upon which the appellant intended to put up a Wahabi mosque and on which the existing one stood was one parcel belonging to TARDA; that without the consent of TARDA the appellant could not proceed with his project; that in contrast the existing mosque was constructed with the consent of TARDA. It was his view that TARDA's decision to withhold its consent for a Wahabi mosque must have been informed by the fact that it had given the community land for a mosque and saw no need for a second mosque within such close proximity. In conclusion the learned Judge stated;

> ***"45. The permission to build a second mosque by the Defendant on the same piece of land has not been obtained from TARDA. This Court, in the interest of keeping peace and tranquility in that area, cannot allow the Defendant to construct a second mosque on land belonging to TARDA without its authority."***

The appellant was aggrieved and has brought the instant appeal on 7 grounds which were argued globally

in his written submissions. In particular the appellant is aggrieved by the finding of the learned Judge that an injunction could issue in favour of the respondents who were not the owners of the suit property; that the learned Judge erred in failing to find that the respondents, by bringing an action as officials of Bandi Mosque ought to have demonstrated that the mosque is a registered organization; that without this proof they lacked *locus standi*; and that the consideration by the learned Judge in granting injunction on the ground of "*peace and tranquility*" was in error as there was no evidence of threat to peace. In making a finding based on that consideration, it was submitted, the learned Judge failed to consider the first principle in the case of **Giella** (supra), namely, that the respondent had a *prima facie* case.

In their submissions the respondents have argued that the appeal lacks merit because the land where the existing mosque was constructed was donated to the respondents by TARDA in 1992; that the respondents have since been in occupation; that as a result they had superior possessory right hence could bring a suit to protect that right. They have further submitted that they had presented sufficient evidence to prove that they were officials of the mosque; that the suit was not brought in the name of the mosque but on its behalf by its officials; that in any case, this objection ought to have been raised at the trial; and that the holding by the learned Judge that the order of injunction would issue in the interest of peace and tranquility was not the sole basis for granting injunction, but was informed by the fact that there has been long standing dispute over the land in question that had brought about tension in the community.

It is a common factor that neither the applicant nor the respondents own the suit property. As a matter of fact it belongs to TARDA. It is also not in contention that while the respondents had the consent of TARDA to build a mosque and Madrasa on the suit property the appellant had no such approval. It is the appellant's argument that since the respondent too did not have any proprietary right or interest over the suit property it had no capacity to seek to restrain any third party from doing any act on it.

The principal question here, it seems to us, is whether a person in exclusive occupation of land with the registered owner's permission could maintain an action for injunction to protect it. As early as 1883 in the case of **North London Railways Co** v **Great Northern Railway Co** (1883) 11 QBD 30, it was recognized that an injunctive relief would not issue if there was no violation of the plaintiff's rights. We think ourselves that in the context of Kenya today a requirement that the right must be proprietary before injunctive orders can issue cannot *perse* be applicable. The correct position as we understand the law is that the court will grant an injunction, first and foremost at the interlocutory stage to prevent its processes from being abused once a suit has been filed and to preserve the subject matter in controversy until the parties' legal rights are established and determined after trial. Although dealing only with the granting of a temporary injunction and the consequences of disobedience, the significance of **Section 63(c)** of the Civil Procedure Act is the recognition that a court can grant a temporary order of injunction "*in order to prevent the ends of justice from being defeated*".

Similarly, although Order **40** of the Civil Procedure Rules only makes provision for temporary injunctions and interlocutory orders, it is the foundation upon which the final orders are issued after *interpartes* hearing and at the trial. Indeed the dilemma about granting interlocutory injunctions is the risk that the court may make the wrong decision in the sense of granting an injunction to a party who fails to establish his right at the trial or failing to grant an injunction to a party who succeeds at the trial. The court ought therefore to trend carefully and adopt whichever course that appears to carry the lower risk of injustice guided by the test in **Giella** (supra). The basis of granting an injunction under **Order 40** is that the property in dispute is in danger of being wasted, damaged or alienated by any party, among other considerations. The respondents in their plaint swore;

> ***"4. That the said Mosque, Muslim school and the parcel of land is owned by the Plaintiffs and other Muslims of the Sunni sect at Bandi village aforesaid.***
>
> ***….***
>
> ***10. The Plaintiffs maintain that on or about 1st February, 2014 the Defendant brought surveyors on the Plaintiffs' portion of land and started subdividing and/or***

> ***excising off the portion on which is built the Plaintiffs Muslim School (Madrasa) with the intention of subdividing the parcel of land and acquiring a Beacon Certificate and title document for the said portion of land without the Plaintiffs' consent.***
>
> ***11. That the Plaintiffs complained to the County Government over the proposed subdivision of their land but the County Government has not stopped the proposed subdivision and now the Defendant has commenced construction of a foundation for a permanent building thereon intended to be used by the Defendant and his followers as a Mosque which building will be next to the Plaintiffs Mosque and Muslim School (Madrasa) without the Plaintiffs' consent.***
>
> ***12. The Plaintiffs contend that the Defendant has no colour of right over the portion of land on which he is now construction (sic) the Mosque and the construction of the Mosque will not only deprive the Plaintiffs of their land but that when prayers start being conducted in the said Mosque they will interfere with the prayers, sermons, and public addresses ("Hotuba") in the Plaintiffs' Mosque since the prayers, sermons and public addresses are conducted with the aid of loud speakers since the intended Mosque will be adjacent to our Mosque".*** (Emphasis supplied)

These averments *ex facie* would leave one with no doubt that the true owner of the suit property was the respondent. The fact of the matter however is that the respondents are not the owners of the subject property. We understand their complaint against the construction of the Wahabi mosque to be that, in view of its closeness to their mosque and given the differences in ideology, coupled with the apprehension of the noise from the loud speakers from both mosques, there would be interference with the latter's worship. The respondents are licensees in exclusive possession and in our view could maintain an action against any third party committing acts of trespass or threatening that possession and to avert a nuisance; even though they were not the owners of the land upon which their mosque and madrasa stood.

As a matter of fact, TARDA had expressly withheld its permission to the appellant to put up another mosque. The minutes of the aforesaid meeting were clear that;

> ***"…he (TARDA'S project manager) was very clear that TARDA cannot approve the construction, and subject to reaction from head office, Mr.Mwakio explicitly put it that the land belongs to the Authority and the fact that the community is accommodated should not mean they can use it the way they want."***

The learned Judge by stating that the respondents were entitled ***to a permanent injunction "…in the interest of keeping peace and tranquility in the area…",*** the learned Judge was not introducing a new consideration for granting of an injunction but merely weighing the balance of convenience.

For these reasons we find no merit in the appeal which is hereby dismissed with costs to the respondents

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M’INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR