



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 4 OF 2013

BETWEEN

ARIF BAYUSUF.....APPELLANT

AND

LUCY TOFANI.....RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya

at Malindi (Meoli, J.) dated 10th December, 2012

in

H.C.C.C. No. 99 of 2012)

JUDGMENT OF THE COURT

This is an appeal arising from the ruling of *Meoli, J.* dated 10th December, 2012 in *H.C.C.C. No. 99 of 2012*.

Briefly the facts of the case are that *Arif Bayusuf*, the appellant herein filed suit against the respondent vide a plaint dated 29th June, 2012. In the Plaint, the appellant averred that on 28th April, 1995 he was allocated property known as LR. No. 27378 measuring 5.896 hectares (*the suit land*). On 1st December, 2006 he obtained a title for a term of 99 years from 1st May, 1995. He stated that on or about October 2004 the respondent without any justification encroached onto the suit land and erected a tent for camping purposes besides setting up other structures albeit of a temporary nature. He sought orders *inter alia* for an injunction to permanently restrain the respondent from interfering with the suit land.

The respondent filed a statement of defence dated 28th August, 2012. She denied the appellant's assertion of being the owner of the suit land. In her defence she stated that she moved onto the suit land in 1971 and that the land allocated to the appellant is not the one she occupies.

During the pendency of the suit, the appellant filed a Notice of Motion dated 29th June, 2012 seeking an order *inter alia*,

“THAT an interlocutory injunction do issue to restrain the Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon occupying construction on or developing or selling, transferring, charging, occupying constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever and howsoever interfering with the Plaintiff’s possession and title thereof and or dealing with or transacting with the property the subject matter of this suit and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all that piece or parcel of land situate in S.W. of Lamu Township in LAMU District containing by measurement five decimal eight nine six (5.896) hectares or thereabouts that is to say L.R. No. 27378 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed hereto and more particularly on Land Survey Plan Number 266435 deposited in the Survey Records Office at Nairobi (Grant Number CR 41945).”

After hearing the Notice of Motion application, the learned Judge delivered her ruling on 10th December, 2012 and declined to grant an order for injunction. The appellant was dissatisfied with the outcome of his application, and he preferred this appeal.

When the matter came up before us, the two learned counsels opted to canvass the appeal by way of written submissions. We granted them their wish.

In his written submissions, **Mr. Taib**, learned counsel for the appellant urged us to find that the learned Judge wrongly referred to property known as **UNSURVEYED HOTEL PLOT 1-KIPINI** yet the suit land was L.R. No. 27378; that the respondent does not lay claim to the suit land in her defence; that the High Court failed to consider the principles for the issuance of an injunction as laid down in the case of **Giella vs Cassman Brown & Co. [1973] E.A. 358**; that the Judge erred in issuing injunction orders against the appellant when none were sought; that the learned Judge erred in finding that the appellant had not tendered any evidence of possession as according to the appellant, the fact that the appellant had title to the property is sufficient to confirm physical possession; that the learned Judge erred in making a finding that the location of the disputed plot was a central issue yet the appellant's plot was ascertainable and finally, that the appellant had established a *prima facie* case as there was no 'defence' on record.

The appellant relied on the following cases:

“Mrao Ltd vs Firt American Bank Ltd & 2 Others [2003] KLR 135;

Giella vs Cassman Brown & Co. Ltd.; (supra)

Niaz Mohamed Jan Mohamed vs The Commissioner of Lands & 4 Others [1996] e KLR;

Mwangangi & 64 Others vs Wote Town Council KLR (E&L) 1;

JAJ Super Power Cash & Carry Ltd v Nairobi City Council & 2 Others;

Alloeisioud Iriga v Settlement Fund Trustees & 3 Others H.C.C.C. No. 32B of 1997 [2005 e LR;

Omar & 8 Others v Murania & Another KLR (E & L);

Russel Co. Ltd v Commercial Bank of Africa Ltd & Another Civil Appeal No. 31 of 1985

and

Shariff Abdi Hassan v Madhif Jama Adan, Civil Appeal No. 121 of 2005.

In response, the respondent submitted that the reference to **“UNSURVEYED HOTEL PLOT 1-KIPINI”** is derived from the letter of allotment purportedly issued to the appellant; that the appellant has never been

in possession of the suit land; that the respondent had been in possession long before the appellant was issued with the letter of allotment; that the allotted area vide the letter of allotment dated 28th April, 1995 was 15.00 hectares yet the title in possession of the appellant gave the acreage as 5.9866 hectares; that the statement of defence in the record of appeal is duly signed, although there had been an oversight in not signing it initially, and finally that the trial Judge took into account matters that she ought to have taken into account.

As submitted by Mr. Taib for the appellant the case of ***Geilla vs Cassman Brown & Co. Ltd*** lays out the three conditions to be considered for grant of an interlocutory injunctive relief. These are:

i. Prima facie case with likelihood of success.

ii. An applicant has to demonstrate that it will suffer irreparable injury which would not adequately be compensated by an award of damages.

iii. If in doubt, a court will decide an application on the balance of convenience.

It is undisputed that the appellant is armed with a title dated 1st December, 2006 granting him a 99 year lease with effect from 1st May, 1995 in respect of LR. No. 27378. Prior to that the appellant had been issued with a letter of allotment dated 28th April, 1995 for 15.0 hectares being UNSURVEYED HOTEL PLOT I-KIPINI. It was the appellant's case that the title issued to him was in pursuance to the letter of allotment.

On the other hand it is common ground that the respondent has been in occupation of the suit land and has erected tents thereon. In the affidavit in support of the Notice of Motion the subject of this appeal, the appellant exhibited the structures developed by the respondent. These included a completed cottage, a dining, a tent and a toilet. The appellant's contention, however, was that the encroachment commenced in 2004 and that although the respondent had structures on the suit land they were of a temporary nature.

On her part, the respondent averred that she established a camp site on the disputed plot in 1971 and that she has been in occupation since then. The respondent annexed pictures of a campsite complete with a reception area, parking area, water tank, dinning tent and a kitchen. The dinning and the tents are fitted with furniture and furnishings.

On our part, we have carefully considered the written submissions, the facts of the case as well as case law. It is common ground that the respondent is in possession, although the date when possession commenced is disputed. The respondent claims to have been in possession from 1971 whilst the appellant claims that the respondent's possession commenced in 2004. Be that as it may the interlocutory injunctive relief such as the one sought by the appellant cannot issue. This is because the purpose of an interlocutory injunctive relief is to maintain the status quo. The status quo here is that the respondent is in occupation of the suit premises, and it would appear that the appellant was in effect seeking a mandatory injunction to remove the respondent from the suit premises as an injunction to restrain the respondent from being in occupation would be inappropriate given the evidence of occupation by the respondent. - See ***Abel Salim & Others vs Okong'o & Others 176-1980 V.I. KLR 53***. Again as was held in the case of ***Mrao Limited*** (supra) which was cited by the appellants counsel.

A *prima facie* case was defined as:

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

In the instant case, the title in possession of the appellant is in respect of L.R. No. 27378. The acreage according to the title is 5.896 hectares. The date of issuance of the title is 1st December, 2006. However, the letter of allotment dated 28th April, 1995 is in respect of UNSURVEYED HOTEL PLOT 1-KIPINI.

The acreage according to the letter of allotment is 15.00 hectares. Although, the appellant contended that the title for LR. NO. 27378 was issued in pursuance to the letter of allotment, we note that there is a great variance in terms of size between the acreage on the letter of allotment and on the title. This is an issue that requires interrogation at the trial. In view of this we are hesitant to interfere with the Judge's discretion.

One more issue deserves mention. In her judgment the learned Judge ordered as follows

“19. In the circumstances of this case, and in the interest of justice, I would order that the Defendant be restrained from undertaking any further developments upon the suit land in her possession or dealing with the same in any manner adverse to the title thereto, pending the hearing and determination of the suit.

20. By the same token, the plaintiff will be similarly restrained from undertaking any developments on making dispositions in any manner adverse to the title in respect of the suit property, pending the hearing and determination of the suit. Costs will be in the cause.”

In our view, and as submitted by Mr Taib the learned Judge granted orders that were not sought. We are in agreement that the respondent did not seek any order and against the appellant. The High Court ought to have dealt with the appellant's application and determined it without making orders that were not sought.

Be that as it may the appeal herein is dismissed with costs.

Dated and delivered at Malindi this 20th .day of February, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR