



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 31 OF 2014**

**BETWEEN**

**NJURURI ANGELO NYAGA.....APPELLANT**

**AND**

**DOROTHY WERIMBA KARIUKI.....1<sup>ST</sup> RESPONDENT**

**JANE GITIRI NJUE.....2<sup>ND</sup> RESPONDENT**

**PETER MBOGO.....3<sup>RD</sup> RESPONDENT**

*(An appeal from the Ruling/Decree of the High Court of Kenya at Kerugoya (Olao, J.)*

*dated 25<sup>th</sup> February, 2014*

*in*

***H.C. ECL Case No. 777 OF 2013)***

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**JUDGMENT OF THE COURT**

This is an appeal from an interlocutory order of injunction issued on 25<sup>th</sup> February, 2014 in ELC case No. 777 of 2013 by **Olao, J. Dorothy Werimba Kaiurki** and **Jane Gitiri Njue**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sued **Peter Mbogo** and **Njururi Angelo Nyaga**, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively. They were seeking *inter alia* for a declaratory order that the sale and transfer of land parcel No. Ngandori/Kiriari/4329 (suit land) by the 1<sup>st</sup> appellant to the 2<sup>nd</sup> appellant was null and void. The aforesaid suit was contemporaneously filed with a notice of motion seeking for injunctive orders to restrain the defendant (now appellant) from entering, evicting, selling or transferring the suit land until the suit was heard and determined.

The aforesaid application was somewhat allowed vide the ruling of 25<sup>th</sup> February 2014, thereby provoking the instant appeal. In that ruling the following orders were made;-

- 1. Neither of the parties to this suit shall sell, transfer or in any way interfere with the suit***

*property until this case is heard and determined.*

*2. The plaintiffs/applicants shall continue to work on the tea crop on the land.*

*3. Each party to bear their own costs.”*

**Njururi Angelo Nyaga (appellant)** was aggrieved by the aforesaid orders; although during the hearing of this appeal, **Mr. Mungai**, learned counsel for the appellant, indicated that his client was only aggrieved by order No. 2 which allowed the respondent to work on the tea crop on the suit land.

In the appellant's memorandum of appeal, he raised some 15 grounds of appeal to wit:-

*1. The learned Judge erred in law in declining to review, discharge and or set aside the exparte injunctive orders.*

*2. The learned Judge misdirected himself on the proper threshold and or principle of injunction applicable in this matter and misconstrued the law in Cassman Brown case.*

*3. That the learned Magistrate failed to appreciate the threshold for injunction as postulated in the American Cynamid case.*

*4. That the learned Judge misconstrued the facts of this matter so as to arrive at an erroneous decision.*

*5. That the learned Judge failed to appreciate that the applicant had not laid any prima facie.*

*6. That the learned Judge failed to appreciate that the respondent had not demonstrated any reasonable grounds to deserve the equitable remedy.*

*7. That the learned Judge similarly failed to apply the principles of injunction to the facts presented before him and therefore arrived at an erroneous decision.*

*8. That the learned Judge failed to recon [sic] that the net effect of the injunctive orders granted were extremely prejudicial to the appellant.*

*9. That the learned Judge failed to appreciate the sanity of title whose absolute nature was to be defeated by the injunctive orders.*

*10. That the learned Judge misconstrued the law as to favour a party who did not deserve any equity.*

*11. That the learned Judge proceeded to deal with the application in the absence of representation from the 2<sup>nd</sup> defendant who had confirmed dead [sic] at the time the application was being decided.*

*12. That the learned Judge ignored the submissions that the appellant had purchased land for valuable consideration.*

*13. That the learned Judge misdirected himself in arriving at reasoning that the 'tea' crop on the land was not planted by the appellant.*

*14. That the learned Judge failed to appreciate the known definition of land and purchasers right and interests vested by the purchase.*

*15. That in totaling the learned Judge failed to appreciate the absolute nature of title and consequences of ownership.*

In support of the above grounds, Mr. Mungai submitted that the aforesaid order that excluded his client from working on the suit land was prejudicial to his client who is the registered proprietor. The trial Judge was faulted for failing to appreciate, that the order denied the appellant access and use of the suit land until the suit was heard and determined. According to Mr. Mungai, the court should not have issued the said orders without giving corresponding directions on when the main suit will be heard. As a result of that lapse on the part of the Judge, the appellant has been unable to get a hearing date for the main suit. Moreover, the order of injunction could not issue in the circumstances of this case as there were no prayers in the main suit seeking for mandatory orders of injunction thus there was no substratum to support an interim order of injunction.

The suit in the High Court was filed on 24<sup>th</sup> October, 2013. The property was transferred to the appellant by **Peter Mbogo (deceased)** on 11<sup>th</sup> September, 2013 thus the appellant contends that he followed the laid down procedure in the acquisition of his title even before any suit had been filed. The deceased transferred the suit land to the appellant for a valuable consideration of Kshs. 1 million in a sale transaction that was conducted to the satisfaction of the parties to the contract. According to the appellant, the respondents have no *locus standi* and the appellant's title is absolute and indefeasible.

The respondents' case before the High Court was a claim of beneficial ownership as wives of the deceased who was registered as proprietor of the suit property before it was transferred to the appellant. They contended that they lived and worked on the suit land and by virtue of **Section 93(2)** of the **Land Registration Act** No. 3 of 2012; they acquired an interest in the suit land as common owners. The respondents claimed in their suit that they were not consulted by their late husband when he purported to sell and transfer the suit land to the appellant; they also claimed that they had carried out extensive developments for the last 40 years from where they earned their livelihoods.

In issuing the aforesaid orders, the learned Judge of the High Court was exercising discretionary powers; an appellate Court may only interfere with the exercise of judicial discretion if satisfied either;

- a. The Judge misdirected himself on law, or
- b. That he misapprehended the facts
- c. That he took account of considerations of which he should not have taken an account; or
- d. That he failed to take account of consideration of which he should have taken account; or
- e. That his decision, albeit discretionary one was plainly wrong.

See ***Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 126.***

The principles that guide a Judge in granting an order of injunction are well known:-

***“The applicant must show a prima facie case with a probability of success. Similarly, on 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.”***

See ***EA Industries vs. Tru Foods [1972] EA 420.***

We have to examine whether the learned Judge in granting order No. 2 directed his mind to the above principles and whether his exercise of discretion was judicious. We wish to refer to the definition of what constitutes a *prima facie* case as stated in the case of ***Mrao Limited*** (supra), where **Bosire, J.A** expressed himself as follows:

***“So what is a prima facie case? I would say that in Civil Cases it's 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 rebutting from the latter.”***

The respondents’ case as it was appreciated by the trial Judge was that they were wives of predecessor of the appellant in title of the suit premises. They claimed that they were in occupation of the suit land for 40 years where they had undertaken substantive development including the crop of tea. They also stated that they were not consulted when the suit land where they held substantive beneficial interests was sold and transferred to the appellant. In our view these are issues calling for trial. We are aware that not every triable issue leads to a successful outcome of a claim, however, these issues at a glance establishes a prima facie case necessitating a full trial. Accordingly, we cannot fault the trial Judge for exercising his discretion in favour of the respondents in view of the material that was before him.

On the issue that the order of interim injunction was not an issue pleaded or prayed for in the plaint, we agree the plaint and the orders prayed for, did not include a prayer for a mandatory order of injunction. However the specific application that was before the Judge sought for injunctive orders. The injunction order which preserved the status quo of the suit property is intricately connected with the orders sought in the plaint such that if the property is not preserved, the final orders would be rendered nugatory and the property especially the respondents’ rights to occupation would have been jeopardized before the determination of the main suit. We find the order of injunction was auxiliary or supplementary to the prayers sought. In *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09*, this court differently constituted had the following to say:-

***“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.”***

Having expressed ourselves as we have, we nonetheless find the learned Judge erred for failing to issue directions on the hearing of the main suit as the interim order of injunction should not be issued for more than a year. Accordingly, we direct the parties to appear before the trial Judge on 1<sup>st</sup> December, 2014 for purposes of taking directions on how the main suit should be heard.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of November, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***