



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
CIVIL APPEAL 179 OF 2007

BETWEEN

MISTRY VALJI NARAN MULJI.....APPELLANT

AND

JANENDRA R. SHAH &1st RESPONDENT

VIRCHAND M. MALDE.....2ND RESPONDENT

RATILAL G. SAMAT.....3RD RESPONDENT

PREMAC PROPERTIES LIMITED.....4TH RESPONDENT

VANTAGE ROAD TRANSPORTERS LIMITED.....5TH RESPONDENT

EUITORIAL COMMERCIAL BANK LIMITED.....6TH RESPONDENT

*(Being Appeal against the Ruling and Order of the High Court of Kenya at Mombasa (Maraga, J.)
dated 9th February, 2007*

in

H.C.CC. No. 55 of 2006)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court (*Maraga J. as he then was*) delivered on 9th February, 2007 in which the learned Judge declined to grant the appellant’s Chamber Summons praying for a prohibitory as well as a mandatory injunction against **Vantage Road Transporters Limited** (the 5th respondent). The dispute between the parties concerned land known as **Mombasa/Block XII/4**, situated along Lumumba Road, Mombasa.

The appellant's case before the lower court was that since June, 1985, upto the date of filing of its Plaint (11th March, 2005), he has been in exclusive uninterrupted adverse possession of the suit land, to wit **MOMBASA/BLOCK XII/4 Lumumba Road, Mombasa**. According to him, he became entitled to be registered as owner of the suit land by adverse possession under **Section 38 (1)** of the **Limitation of the Actions Act (Cap 22)**.

On 16th August, 2001, **Janendra R. Shah, Virchanda M. Malde, and Ratilal G. Samat** (the 1st 2nd and 3rd respondents respectively) filed Mombasa **HCCC No. 423 of 2001**, seeking among other reliefs, an order of ejection of the appellant and a firm called "**Mistry V. Naran Mulji & Co.**" from the suit land. The appellant had earlier filed **Mombasa, HCCC 204 of 2001 (O.S)** against the 1st , 2nd and 3rd respondents and **Premac Properties Limited** (4th respondent) the registered owners of the suit land, for an order that he had become entitled to the suit land by adverse possession and should therefore be registered as proprietor of the same under the provisions of **Section 38 (1)** of the **Limitation of Actions Act (Cap 22)** and **Section 30 (f) and (g)** of the **Registered Land Act (Cap 300)**. Filed with the originating summons was a Chamber summons for an interlocutory restraining injunction against the defendants from evicting him. That application was however dismissed prompting the appellant to file **Mombasa HCCC No. 55 of 2005**. According to the averments in the Plaint, in (HCCC 55 of 2005), on 24th November, 2004, while the aforesaid suits were pending before the High Court, the suit land was transferred to the 5th respondent which in turn charged the said land to **Equatorial Commercial Bank Limited the** (6th respondent) upon removal of a caution which had been registered against the title by the 4th respondent. The appellant contends that the removal of the caution was done behind its back to facilitate the aforesaid transfer of the suit property to the 5th respondent.

It was also the appellant's case that on 16th January, 2005, the 5th respondent entered the suit land and, among other things, demolished his compound wall on the basis of which he now claims the sum of Kshs.600,000/= being the cost of restoring the demolished compound wall. He further asked for a permanent injunction restraining the 5th respondent from trespassing and from making good its threat to evict the appellant from the suit land. The demolition of the aforesaid wall by the 5th respondent was done notwithstanding the fact that there were interim orders of injunction in place prohibiting the 5th respondent from among other things, interfering with the appellant's quiet possession of the suit property. The order had been made by **Mwera J.** A director of the 5th respondent was committed to civil jail for the breach on the order.

The appellant in the meantime, was forcibly evicted from the suit property by the 5th respondent, which act prompted him to file an Amended Plaint on 16th March, 2005 wherein further prayers were made to declare as null and void, the removal of the caution placed by 4th respondent and also the withdrawal of the charge over the suit land by 6th respondent. It was further averred that even if those acts were valid, they were sub-servient to the appellant's interest in the suit land. Thus a mandatory injunction along with the special damages and general damages for trespass were sought in an amended plaint the appellant filed. It also filed another interlocutory application seeking a mandatory order of injunction to put it back in possession. It is that application, dated 14th March 2005, which Maraga J. heard and delivered his ruling on 9th February 2007 which ruling is the subject matter of the appeal before us.

As at the hearing of that application there were three suits between the parties herein pending which following a Notice of Motion dated 18th March 2005 were consolidated. The suits, were **Mombasa HCCC No. 204 of 2001 (OS); Mombasa HCCC No. 423 of 2001 and Mombasa HCCC No. 55 of 2005.**

The Chamber Summons dated 14th March, 2005 sought the following interim orders:-

3. That an interim injunction be issued restraining the fifth Defendant and prohibiting by itself, its directions, servants, agents and workers –

- (i) from battering, assaulting, causing or carrying out violent and unlawful acts threatening and endangering lives of the Plaintiff, his son, employees, workers and invitees to enter his said land and the building within, and, in anyway, interfering with its lawful occupation and use;**
- (ii) from trespassing the said land and damaging or continuing to damage the compound wall, main gate and buildings therein;**
- (iii) from tampering, damaging looting and in any manner dealing and removing all the Plaintiff's movable assets and belongings, equipment, furniture, vehicles and trucks in the said land;**

4. That mandatory injunction be issued directing the fifth defendant to forthwith vacate the said land and restore it to the plaintiff with buildings and assets of the plaintiff therein with or without the buildings (if destroyed or damaged) and the plaintiff's assets and belongings.

Maraga J. (as he then was) heard counsel for the parties, and ruled that the 5th respondent having acquired the land in dispute on 24th November, 2004, the appellant's claim for adverse possession could only succeed against it if it could establish that its possession was adverse as against the 5th respondent's predecessor in title of the land.

The learned Judge then examined the documentary evidence before him and came to the conclusion that upto 1984 the appellant recognized the ownership of the land by the first three defendants and sought the intervention of the Provincial Administration to enable it buy the land. He could not find evidence to show any repudiation of that acknowledgement by the appellant. In view of that the learned Judge was not persuaded that the appellant had made out a prima facie case with the probability of success upon trial. The learned Judge did not think special circumstances existed to make him exercise his discretion for the grant of a mandatory order of injunction. In the event he dismissed the appellant's application with costs, and thus provoked this appeal.

Among the grounds of appeal in the appellant's appeal are the following:

4. that the learned Judge Confused the two aspects of immovable property namely its ownership on the one hand and possession and occupation on the other hand. If he had appreciated the same property (sic) and correctly he ought to come (sic) to the conclusion that the occupation and the uninterrupted exclusive possession against the true owners since end of December, 1979, resulted in his acquiring adverse possession by prescription of time for over 12 years.

5. that the learned Judge misdirected himself in being clearly influenced by the alleged fact that up to the year 1989 the Appellant recognized the title of the first three Respondents to the land and is not appreciating properly or at all that the Plaintiff's attempt to beseech the Provincial Officers to intercede with the first three Respondents for him to buy the land from them has an (sic) relevance to the distinct and separate question of continued possession and occupation of the land adverse to the title of the first three Respondents or any other registered proprietor of the land.

8. the learned Judge erred in not finding that the Appellant had occupied the land and put up structures and buildings thereon and continued in occupation thereof for over 12 years without any interruption and had acquired clear overriding interest under Section 30 (f) of the Registered Land Act Cap 306 of the Laws of Kenya and that the same could not be defeated or wished way by the first five Respondents by transfer or charge and that despite the transfer or charge over it the first five Respondents could not acquire any title thereto, the title of the first three Respondents having been extinguished by adverse possession after the expiry of 12 years.

10. the learned Judge further erred in not holding that the Caveat lodged against the title to the suit land was fraudulently and unlawfully removed by the 5th Respondent by forging the signature of Mrs. Akhtar Shahid which was a forgery and affirmed by her to be forged which affirmation was not contested on oath or rebutted.

12. the learned Judge erred in not appreciating that during the pendency in Court of legal proceedings disputing ownership in immovable property no immovable property can be dealt with, alienating or charged and that in any event, and dealings with the immovable properties pending decision on ownership is avoidable if not void altogether.

14. the learned Judge erred in not taking sufficient or proper account of the evidence which showed clearly that the hands of the Respondents were unclean, painted with illegality in using forged documents and using brutal force by hiring gangs of ruffians to evict the Appellant on the land by the 5th Respondent hiring a squad of goons and demolition of machinery to evict the Appellant which it had no legal right to do.

It may be relevant to note that facts of the matter are convoluted when there are three consolidated suits with the history dating back to the 70s.

The different version of the status of the suit premises as on the date of alleged eviction may lead us to cite and consider some parts of affidavits filed from both sides.

The appellant has averred in a supporting affidavit sworn on 11th March, 2005 and filed in Court on the same date that 5th respondent unlawfully and forcibly evicted the appellant and damaged his properties.

As against those averments the 5th respondent responded by the replying affidavit of its Director, **S. P. Butt** sworn on 1st April, 2005 as under:

“6. That on 11th March, 2005 after hearing the Advocates for the parties and upon considering the objection, the Honourable Justice Maraga vacated the ex parte orders which had been granted to the Plaintiff and struck out the application with costs to the 5th and 6th Defendants. In the bundle of documents annexed to this affidavit and marked “SPB1” at page 23-32 are documents containing a true copy of the ruling and order of the Honourable Mr. Justice Maraga aforesaid.

7. that the orders having been vacated and there being no order restraining the 5th Defendant from entering the suit premises which it had bought from the 1st 2nd and 3rd Defendants, the 5th Defendant entered and took possession of the suit premises on 11th March, 2005 at about 2.00 pm in the afternoon.

8. That immediately the 5th Defendant entered the premises, the Plaintiff made a request that he be allowed to take away the few belongings it had at the suit premises, which request the 5th Defendant granted. The Plaintiff took away all his belongings including documents, stationery, furniture, equipments, vehicles and trucks from the suit premises and took them to his other premises where he currently runs his construction business.

9. That the only things which remained at the suit premises which belong to the Plaintiff and which the Plaintiff has neglected to take away from the suit premises are scrap metals, three old immobilized lorry-shells and a scrap body of a school bus. The 5th Defendant will counterclaim for storage charges and for general damages for the nuisance against the Plaintiff.

10. That I am informed by employees of the 5th Defendant who were in the suit premises at the time of entry that after taking away all his useful properties to his other premises, the Plaintiff returned to the suit premises at about 5.00 pm with journalists and police officers and started claiming that he and his employees had been assaulted and forcefully evicted from the suit premises in an attempt to create a story for publication in the press.

11. That at this time I was personally not at the suit premises. I was telephoned by employees of the 5th Defendant who informed me of the foregoing facts.

12. That when I arrived at the suit premises, I found that the police officers the Plaintiff had brought had stopped my employees from taking in the trucks and other properties of the 5th Defendant into the suit premises and from removing the temporary structures build thereon by the former owners which the 5th Defendant did not intend to use in its business operations, but which the 5th Defendant had bought together with the suit premises.

14. That on my arrival, I explained to the police officers the circumstances leading to the 5th Defendant's entry into the suit premises, I showed both the police officers and the journalists all documents relating to the suit premises. I also demanded that the Plaintiff shows the Police Officers and myself whoever was assaulted them during the entry since nobody had in fact been assaulted or battered. The police officers also surveyed the suit premises.

15. That upon perusing the documents and surveying the situation, the police officers realized that the Plaintiff had lied to them that his son, employees and workers had been assaulted and that the 5th Defendant had damaged his furniture, equipments and machinery, when none of these had happened. Consequently, the police offices and the journalists left the premises displeased with the Plaintiff.

16. That I assert that nobody was assaulted by the employees of the 5th Defendant during the entry. The 5th Defendant has not placed before the court any evidence and the allegation of battery and assault is being made by the Plaintiff to draw unwarranted sympathy to himself and lay a false basis for his baseless and fraudulent claims herein.

20. That the Plaintiff had in fact removed his useful furniture, trucks, equipments and other useful belongings to his other premises following an arbitral award in 1979 which ordered that he does so failure to which the same would be removed forcefully without compensation and they left behind only scrap metals and immobilized vehicles to signify a pretended occupation of the suit premises. In the bundle of documents annexed hereto and marked "SPB1" at page 14-19 are true copies of the submission to the arbitrator and the Arbitral Award as well as the previous decision by Honourable Justice Kneller rejecting the Plaintiff's claims over the property.

23. That I am now informed by the 1st Defendant and I verily believe the same to be true that before the 5th Defendant purchased the suit premises, the Plaintiff had upto 1989 offered to purchase the suit premises from them. The Plaintiff cannot now claim title to the suit premises having recognized the 1st, 2nd and 3rd Defendants as the proprietors thereof. In the bundle of documents annexed hereto and marked "SPB1" at page 33-41 are true copies of documents of offer evidencing this fact.

26. That I am informed by the 1st, 2nd and 3rd Defendants and I verily believe the same to be true that the previous owners of the suit premises have always asserted their rights to the suit property as against the Plaintiff and the claim by the Plaintiff for title to the suit property by way of adverse possession is fraudulent and has no basis. In the bundle of documents annexed hereto and marked "SPB1" are true copies of documents evidencing this fact."

From the perusal of the documents annexed to the said replying affidavit it transpires that the earlier owners of the suit property had, as late as in the years 1998 and 1999, demanded from the Appellant the vacant possession of the suit land. We shall, however restrain ourselves to make any further comment on those documents, except to consider the same as supporting the averments made by a party to the suit.

With the above averments and facts pleaded and submissions made thereon, the superior court made the Ruling which is under challenge.

It is common ground that the application sought discretionary orders from the superior court under **Order XXXIX Rules 1 and 2** (now **Order 40 of Civil Procedure Rules 2010**). Those being equitable and discretionary remedies, they cannot be granted as matter of right of the party seeking the same. The principles of grant of such relief have been laid down in the celebrated case of **Giella vs Cassman Brown**

[1973] E. A. 358, i.e. a party seeking such remedy must demonstrate that a *prima facie* case exists with reasonable probability of success; that he stands to suffer irreparable damage which cannot be adequately compensated by an award of damages; and that in doubt, the balance of convenience tilts in his favour. It is also trite law that in respect of mandatory injunction, the criterion for granting is slightly different.

While keeping in mind those principles, the superior court observed in the ruling as under:

“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 interlocutory 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.”

After observing as above, the Superior Court found as under:-

“On the basis of the correspondence annexed to the replying affidavit of Shahid Pervez Butt the managing director of the fifth Defendant it appears to me that upto 1989 the Plaintiff recognized the first three Defendants’ title to the land. In that correspondence the Plaintiff beseeched the Provincial Administration officials to intercede with the first three Defendants for him to buy the land from them thus recognizing their title to the land. Evidence will therefore be required to show that the Plaintiff expressly repudiated that acknowledgment and if so when. That evidence or a reference to such evidence is not before me and as a matter of fact Mr. Gautama did not address the issue of that repudiation at all. All I understood him to say is that it has been more than 12 years since 1989.

“It is not in doubt that the Plaintiff is not in possession of the suit piece of land. If that was not the case he could not have sought a mandatory injunction to enable him go back. The fifth Defendant has in the replying affidavit of its managing director admitted that it demolished the structures with which it had bought the land but which it did not need. The land is therefore empty. There is therefore no more threat of bodily harm to the Plaintiff, his son or workmen. And for him to use the land he will need to put up some structures on it. That in my view is not the right thing to allow or authorize at this stage especially in view of what I have said regarding the Plaintiff’s title to the land having not been established.”

Can this court, in view of what is observed hereinbefore, interfere with the discretionary orders of the High Court?

Since the decision in the case of *Mbogo –vs- Shah [1968] EA 93* the courts in the country have been following consistently and with well placed reverence. As material the court in that case rendered itself thus:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In our view, the superior court exercised its discretion appropriately and arrived at the right conclusion by properly acting on right principles and considering all the relevant matters placed before it.

We may point out that an issue was raised before us and we also note that the claim of forgery of the signature on the removal of the caution was not considered in the ruling. However, considering the pertinent facts as regards the issue of adverse possession, the said issue is best left to be decided at the trial of the suit. Thus in our opinion the said failure could not have affected and did not affect the decision 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 5th respondent.

Dated and delivered at Nairobi this 16th day of March, 2012.

R S. C. OMOLO

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JUDGE OF APPEAL

S E. O. BOSIRE

.....
JUDGE OF APPEAL

K. H. RAWAL

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR