



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Civil Appeal 106 of 2004**

**MARUMA HOLDINGS CO. LTD. ....  
APPELLANT**

**AND**

**JUMAA ABDALLA MWAZUZU (for his own and on behalf of  
all Persons living on the land under Reference (i.e. 4752/2 KWALE)**

**COMMISSIONER OF LANDS.....  
RESPONDENTS**

**(Appeal from a ruling and order of the High Court of Kenya**

**Mombasa (Lady Justice Khaminwa) dated 26<sup>th</sup> April, 2004**

**in**

**H.C.C.C. No. 12 of 2004 (O.S.))**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appeal before us 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 which are yet to be canvassed in the superior court. The appeal is from the ruling of Khaminwa J. delivered on 26<sup>th</sup> April, 2004 in which the learned Judge allowed the application for temporary injunction against the appellant herein, Maruma Holdings Company Ltd. A brief background to this matter is as follows:-

**Jumaa Abdalla Mwazuzu** (on his own behalf and on behalf of all persons living on the land reference No. 4752/2) as the plaintiffs filed an Originating Summons under **section 38(1)** of the Limitation of Actions Act Cap. 22 Laws of Kenya and **Order XXXVI rule 3D (1) and (2)** of the Civil Procedure Rules seeking the following orders against the defendants (Maruma Holdings Ltd. and Commissioner of Lands):

**“1. THAT the plaintiff herein for (sic) his own and on behalf of all persons living on the land under reference No. 4752/2 be registered as the owners of the said land in place of all the defendants for reasons that they have become entitled to the said land by adverse possession.**

**2. THAT the order herein above referred be registered against the relevant Titles to the said land reference in terms of the Limitation of Actions Act.”**

That Originating Summons was dated 19<sup>th</sup> January, 2004 and filed in the superior court on 20<sup>th</sup> January, 2004. Simultaneously with the said originating summons, the plaintiffs also filed a chamber summons stated to have been brought “under the High Court Practice & Procedure Rules Part 3 (1) & (2) of the Judicature Act of Laws of Kenya and **Order XXXIX rules 1, 2, 3** of Civil Procedure Rules, **section 3A** of the Civil Procedure Act (Cap 21 Laws of Kenya).” That chamber summons application sought the following two main reliefs:

**“3. THAT a temporary injunction do issue against the first defendant restraining it either by itself, its servants, employees, agents and/or whomsoever from evicting the plaintiffs from Land Reference No. 4752/1 Kwale and/or destroying the plaintiff’s (sic) crops, houses, livestock and other chattels and/or from offering for sale, selling, transferring, disposing off and/or in dealing with all that parcel of land reference 4752/2 Kwale in a manner adverse to the plaintiffs possessory rights, untill (sic) this case is heard and determined.**

**4. THAT costs of this application be provided for.”**

That application was based on the following grounds:-

**“(a) The first defendant is currently destroying with impunity plaintiff’s (sic) cash and subsistence crops.**

**(b) The first defendant has threatened to evict the plaintiffs from the suit property in which event the plaintiffs will be rendered landless.”**

In addition to the foregoing grounds, there was a supporting affidavit sworn by Jumaa Abdalla Mwazuzu in which the said Mwazuzu depones:-

**“1. THAT I am the above named person and have authority to swear this affidavit.**

**2. THAT the first defendant has threatened to evict all the plaintiffs and to that end the first defendant has lured (sic) bulldozers to demolish houses and plough out the plaintiffs’ crops, thus rendering the plaintiffs homeless and destitute. (Annexed hereto and marked collectively as “JAM-1” are copies of photographs attesting to the matters aforesaid.**

**3. THAT further the first defendant has instructed (sic) criminal proceedings against some of the plaintiffs in Kwale Resident Magistrate Court Criminal Case Numbers 1891-1901/2003. Annexed hereto and marked as “JAM-2” are copies of the bonds and charge sheets.**

**4. THAT the second defendant has never made any developments on the suit property and save for the plaintiffs exclusive possession and use of the said property the same lies waste and it is therefore in the interest of justice that the second defendant be enjoined from destroying the plaintiffs (sic) crops and fixtures and from evicting the plaintiffs who stand to be rendered land-less and homeless and they would consequently suffer irreparable loss and damage.**

**5. THAT since the suit property was registered in 1925 and a grant issued to M/S East African Estates Limited the plaintiffs and their fathers and fore fathers have had actual uninterrupted exclusive possession and use of the suit property as the same is ancestral land. ....**

**6. THAT I verily belief (sic) that the falling from power of the KANU Government has made the first defendant insecure hence its intention to evict us, as evidenced by the actions of some of its Directors in particularly (sic) Mr. and Mrs. Darius Mbela who are cited as the complainants in the aforesaid criminal cases currently pending before Kwale District Magistrate Court.**

**7. THAT the first defendant is using the police and the Local Administration in particular the area Chief to intimidate the plaintiffs into moving out of the suit properties.**

**8. THAT I verily believe that the plaintiffs, being the indigenous of the suit properties have a prima facie case against the defendants and further that the balance of convenience tilts in favour of the plaintiffs.**

**9. THAT I swear this affidavit in support of this application beseeching this Honourable Court to issue an injunction restraining the defendants from evicting the plaintiffs from the suit properties until this suit is heard and determined.**

**10. THAT all that all that (sic) is deponed to herein is true to the best of my knowledge, information and belief save where otherwise state. (sic)”**

It was that application for temporary injunction that was placed before the superior court (Khaminwa J.) for determination on 19<sup>th</sup> February, 2004. The applicant's advocate requested the court to visit the land in dispute and as there was no objection by the respondent, the learned Judge visited the land in dispute on 5<sup>th</sup> March, 2004. In her ruling, the learned Judge observed that the land in dispute was “**a large piece of land measuring several hundred acres. It was clear the parties, defendants and plaintiffs were not sure of the boundaries fixed for the land**”. It would appear that there was a sketch plan which was then attached to the ruling. We think the sketch plan is the one appearing at page 216 of the record of appeal. The learned Judge considered the rival arguments presented to her by the parties to the dispute and, taking into account what she observed when she visited the land in dispute came to the conclusion that this was a proper case in which to grant a temporary injunction. In the course of her ruling, the learned Judge stated, *inter alia*:

**“The court did see some destruction on the land across the Ukunda/Mombasa main road where trees seemed to have been cut and it was pointed out by some of the plaintiffs where their houses were but now they have been demolished by the defendant.**

**The defendant also showed some cotton trees which had been cut down allegedly by the plaintiffs. It appears to me that this being a land matter involving many persons the case should be heard and finalized once and for all.**

**I have considered the requirements to be fulfilled before issuing an interlocutory injunction. It is clear here that plaintiffs have already land in the same area which they alleged they hold titles (sic). This was not disputed but it is not clear for the court to see the extent of their land. The defendants (sic) land seems to have been surveyed during colonial era. Evidence would have to be shown by both sides to show where each plaintiff is claiming land claimed reaches.” (sic)**

It is that order of temporary injunction that provoked this interlocutory appeal in which the appellant (Maruma Holdings Limited) through its counsel filed a memorandum of appeal setting out ten grounds of appeal. That is the appeal that came before us for hearing on 16<sup>th</sup> January, 2008 when Mr. Moses Mwakisha appeared for the appellant but there was no appearance for the respondent. As the respondents' advocates were served we proceeded to hear the appeal.

In his submissions, Mr. Mwakisha stated that the land in dispute belonged to the appellant and that the people who had moved on to this land had done so with the consent of the owner. It was Mr. Mwakisha's contention that the evidence adduced in the superior court did not warrant the issuance of an injunction. Mr. Mwakisha referred to grounds 1, 2 & 9 of the memorandum of appeal in a bid to show that the appellant had acquired the land in dispute in 1979 when it became the registered owner.

Mr. Mwakisha complained that the superior court did not impose any conditions when it granted the temporary injunction. He was of the view that the circumstances of the case were such that conditions ought to have been imposed on the applicants. Mr. Mwakisha concluded his submissions by asking us to set aside the order of injunction. He, of course, asked for the costs of the appeal.

As we have already stated, this is an interlocutory appeal arising from the ruling of the superior court. The main suit is still pending in that court. We set out the reliefs sought in the originating summons in order to bring out clearly the nature of the claim in this dispute which pits a large number of people against the appellant company. It is a case in which a large number of people are claiming an interest in the land in dispute which land is registered in the appellant's name. The respondents sought a temporary injunction pending the hearing and final determination of the suit. That injunction was granted. The main issue before us now is whether the learned Judge exercised her discretion properly by granting the injunction in her ruling of 26<sup>th</sup> April 2004. It must be stated here that the granting of an interim injunction such as in this case is an exercise of judicial discretion. The principles by which courts have for years been guided in deciding whether or not to grant a temporary injunction were firmly stated by Spry VP in Giella v. Cassman Brown & Co. Ltd [1973] E.A. 358 at p. 360 as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a *prima facie* case with a probability of success. 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 conveniences.”**

In that same case Spry VP said:-

**“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 (Sargent v. Patel (1949) 16 EACA 63).”**

Since the granting of interim injunction is an exercise of judicial discretion, we must consider whether the learned Judge exercised her discretion wrongly for us to interfere with the order of injunction. This is a question that is continually dealt with by this Court in many instances. What are the circumstances in which this Court may be justified to interfere or upset the exercise of discretion by a trial court? In Mbogo v. Shah [1968] E.A. 93 at p. 96 Sir Charles Newbold P said:-

**“We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”**

Applying the foregoing to the facts of this case, can it be said that the learned Judge did not exercise her discretion judicially? The learned Judge had to consider the rival arguments presented to her. This was a case in which the learned Judge decided to visit the land in dispute in order to see for herself the position of the parties on the ground. Having done so, the learned Judge chose to determine the application before her on the balance of convenience. Indeed, in concluding her ruling she stated:-

**“It is my view that the balance of convenience should be applied in this case issued (sic) the injunction sought but so that each party shall confine their activities to the areas covered in the sketch. It is necessary to do so pending the hearing. However, no trees shall be cut down by any party whatsoever. The defendant is therefore restrained from interfering with the activities of the plaintiffs; (sic) confined to where they are in possession whether he has given them permission or not. This will avoid panic among the plaintiffs and discourage disturbances to the defendant.”**

We have given this appeal very careful consideration and we are satisfied that the learned Judge cannot be faulted in the manner she dealt with the chamber summons application for temporary injunction. What has caused us some concern is the fact that a temporary injunction was granted way back in April 2004

and up to this time (January 2008) the dispute remains pending in the superior court. It is to be observed that even the learned Judge appreciated the urgency in the matter when in her ruling she remarked:-

**“The defendant also showed some cotton trees which had been cut down allegedly by the plaintiffs. It appears to me that this being a land matter involving many persons the case be heard and finalized once and for all.”**

We agree with the learned Judge’s remarks. If the parties had taken the learned Judge’s advice seriously, we think that the main suit would have been determined by the High Court by now. We would perhaps, have been called upon to deal with the final appeal. As matters stand now, the end is not in sight. The main suit has to be heard by the superior court, then the losing party will file an appeal, and before the hearing of the appeal there might be an application for stay of execution pursuant to **rule 5(2) (b)** of this Court’s Rules. While the courts are always blamed for the delay in determining disputes, the parties themselves contribute substantially to these long delays as can be seen from the facts of this case.

We think we have said enough in this matter. By way of conclusion, all we can say is that experience has shown that successful interlocutory applications by the enthusiastic parties tend to delay determination of disputes in our courts – see **Teresa Shitakha v. Mary Mwamodo & 4 others (1982 – 88) 1 KAR 965.**

On our part, we say that the learned Judge of the superior court was entitled to decide the application before her on the balance of convenience. We detect no error either in her approach or final determination. Accordingly, we find no merit in this appeal and we order that the same be and is hereby dismissed with costs. As the respondents did not attend court for hearing though served, we will not order any costs to them.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of January, 2008.**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**