



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil appeal 121 of 2005**

**SHARIFF ABDI HASSAN ..... APPELLANT**

**AND**

**NADHIF JAMA ADAN ..... RESPONDENT**

**(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Ransley, J) dated 19<sup>th</sup> May, 2005**

**in**

**H.C.C.C. NO. 202 OF 2004)**

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

**JUDGMENT OF THE COURT**

The respondent in this appeal, **Nadhif Jama Adan**, (who was the plaintiff in the superior court) sued the Appellant **Shariff Abdi Hassan** (who was the defendant in the superior court) by way of a plaint dated 2<sup>nd</sup> March 2004 seeking judgment against the appellant as follows:

**“(a) A permanent injunction restraining by himself, his agents, servants or employees from entering upon, remaining thereon, removing from, wasting, subdividing, digging on, excavating, fencing, erecting or building any structure whatsoever or otherwise dealing with the suit property all that property title No. Garissa/Township/105.**

**(b) A permanent injunction compelling the defendants by themselves, their agents, servants or employees to vacate the suit property and demolish any structures put on by the Defendant.**

**(c) That this Honourable Court issue an order compelling the defendants their agents, servants to vacate the suit premises title No. Garissa/Township/105.**

**(d) That this Honourable Court do issue an order for the plaintiff to demolish any illegal structure unlawfully built by the defendant’s their servants or agents on the suit premises title No. Garissa/Township/105.**

**(e) That the officer commanding Garissa Police Station do provide the security and protection for the plaintiff and his contractors during the construction/development of a perimeter wall on title No. Garissa/Township/105.**

**(f) Costs of the suit.”**

The judgment was sought on grounds that the respondent is and had at all times been the registered proprietor of property title No. Garissa/township/105 under the Registered Land Act **chapter 300** Laws of Kenya; had certificate of lease issued to him on 23<sup>rd</sup> December 1998 as the Lessee of the County Council of Garissa for a term of 99 years from April 1984, and the appellant had without the consent of the respondent and without any legal reason or justification entered the same property and took part possession of the same and erected illegal temporary structures/buildings on it. The respondent alleged further in the same plaint that the appellant purported to let the same shanty and illegal structures he had erected on the respondent’s property and was thus unjustly enriching himself at the expense of the respondent and was continuing to erect more structures on the same piece of land. Together with the plaint, the respondent also filed a chamber summons dated 2<sup>nd</sup> March 2004, in which, apart from seeking certification of the application as urgent and seeking dispensation with the service of the summons, he also sought the following substantive orders:

**“3. That a temporary injunction do issue restraining the Defendant by himself, his agents, servants or employees from entering upon, wasting, digging on, excavating, fencing and erecting any structure and whatever from interfering and disrupting the plaintiff, his agent or servants from enjoying possession of the property title No. Garissa/township/105, which order, be enforced by the Officer Commanding Garissa Police Station.**

**4. That a temporary injunction do issue compelling the demolition (sic) of any illegal structure unlawfully built by the Defendant, his servants or agents on the suit premises property title Garissa/Township/105, which order, be enforced by the Officer Commanding Garissa Police Station pending the hearing and determination of this application.**

**5. That this Honourable Court do issue an order compelling the defendant his agents, servants to vacate the suit premises title Garissai/Township/105 (sic) forthwith.**

**6. That the costs of this application be provided for.”**

The application was made on seven grounds which were that the respondent is the registered proprietor of the suit premises pursuant to a Certificate of Lease issued to him on 23<sup>rd</sup> December 1998; that the appellant had without the respondents’ consent entered the suit property and remains there and had erected illegal structures on the land; that the respondent is by that action of the appellant deprived of the enjoyment of the same property; that the appellant is a trespasser to the property; that the invasion of the property by the appellant creates a breach of peace; that the appellant has constructed illegal structures on the suit property without the consent of the respondent and that the remedies sought were fair and just in the circumstances. That application was supported by an affidavit sworn by the respondent in which he explained the factual aspects of the matters giving rise to the suit and the application. He annexed to that affidavit a Certificate of Lease issued on 23<sup>rd</sup> December 1998, Transfer of Lease and copies of the photograph of the developments on the suit property. The appellant opposed that application and filed Replying Affidavit sworn by himself on 22<sup>nd</sup> March 2004 in which he contended that the property in dispute was his plot and the “pictures” annexed in the respondent’s affidavit are in reference to his plot known as plot No. GSA/792. He stated further as follows, *inter alia*:

**“4. That in reference to the certificate of lease annexed to the plaintiff application marked NJAI ie Title No. GARISSA/TOWNSHIP/105 I wish to state that I have no knowledge of such a title and the same must refer to another property elsewhere and not the subject matter of the suit premises herein ie. Plot No. GRA/792.**

**5. That I am also the registered proprietor of (Certificate of lease) title No. GARISSA/TOWNSHIP/40 which was formerly known as GSA/105 (annexed hereto is a photograph and certificate of lease issued to me on 10<sup>th</sup> April 1985 marked in red no. 4 and 5 respectively.**

**6. That nobody has ever attempted to evict me from my plot GSA/792 where I have been in occupation since 1982 where I have been residing with my family, 8 children and their mother it is also the source of my business rented shops.**

**7. That the Plaintiff/Applicant is mistaken as to what parcel of land belongs to him ie Title No. GARISSA/TOWNSHIP/105 is not the plot the Plaintiff/Applicant has exhibited in his annexures marked NJA 2.”**

He went further in that affidavit and denied being a trespasser on the respondent's land and claimed that the certificate of lease exhibited by the respondent is not the title document of the suit premises. Later on 2<sup>nd</sup> February 2005, the appellant filed statement of defence in which he denied the allegations in the plaint. The respondent filed further affidavit sworn on 26<sup>th</sup> March 2004 in which he annexed a copy of the Garissa District Registry map showing all the plots in Garissa town and he maintained that there is no such property as Garissa/792 on the same map and therefore no title exists for the alleged plot, and that such a plot is not registered in the lands registry. He further stated in the further affidavit that the property title No. GARISSA/TOWNSHIP/40 may be that of the appellant but it is distinct from his property GARISSA/TOWNSHIP/105 and the map shows they are both located in different places and have different titles.

The application for injunction was placed before the superior court (Lenaola J) for certification that it was urgent and that was done on 2<sup>nd</sup> March 2004 and interim orders of injunction granted. After it was certified urgent, the record shows that it went for inter partes hearing before other judges but on all occasions it was adjourned with interim orders granted on 2<sup>nd</sup> March 2004 being extended from time to time. On 21<sup>st</sup> July 2004, the application was again placed before Lenaola J for hearing and the hearing started, but before the applicant's counsel could complete addressing the court, the record shows that at the prompting of the court, the following consent order was entered:

**“By Consent**

**1. A government surveyor from the office of the Director of survey should visit the disputed premises within the next 45 days and prepare a detailed report including but not limited to the exact status on the ground and history of titles Nos:**

**(a) GARISSA/Township/105**

**(b) Garissa/Township/40**

**(c) Plot No. garissa/792**

**2. The report to be filed in Court and this matter to be mentioned on 17.9.2004 at 9.00 a.m.**

**3. In the meantime interim orders extended to that date and the applicant shall not in the meantime demolish any structures in the suit premises.”**

The Consent Order was extracted and was served by the court upon the Director of Surveyor, Kenya, who in turn appointed the Provincial Surveyor, North Eastern Province to prepare the report. The report was prepared by the Provincial Surveyor and was eventually received by the court on 30<sup>th</sup> September 2004. The report stated as follows:

**“Parcel No. GARISSA/BLOCK 1/105 is situated opposite Garissa Primary School near the municipal market. The plot is developed partly with a two storey building and partly with temporary structures made of iron sheets. The storey building is used for commercial purposes with the ground floor having a pharmacy, a hotel, Gantaal bus booking office and three shops. The storey are used as lodgings. The temporary structures are used as Kiosks. The parcel fronts the main Garissa – Wajir road.**

**Parcel No. GARISSA/BLOCK 1/40 is adjacent to Jamia mosque and approximately 70 metres from the old water treatment plant. The plot is developed and is partly used as a garage and partly as a residence. The above two mentioned plots are approximately half a kilometer apart. Survey details of parcels 105 and 40 are found in survey plans F/R 131/46 and F/R 131/45 respectively.**

**Plot No. GARISSA/792 could not be traced in RIM and therefore a visit was not made to this plot.**

**Title history of the parcels should be obtained from the Commissioner of Lands, Nairobi as there is no land registry in Garissa.”**

After the above report was filed, the entire application came up for hearing and was heard by the superior court (Ransley J) on 25<sup>th</sup> April 2005. Ruling was delivered on 19<sup>th</sup> May 2005 and the learned Judge allowed the application stating, *inter alia*, as follows:

**“In this case the applicant has produced evidence that he is the owner of plot Garissa/Block/105. What the Respondent relies on are letters showing he was allocated a plot referred to as GSA/792. The letter of Allotment issued to him on the 6<sup>th</sup> January, 1993 is not specific and refers to a plot called B.C.R. Plot Garissa Town. The Respondent is the registered proprietor of Plot No. Garissa/Township/40.**

**I am of the view that the Surveyors report conforms to the terms of the Court Order. From this it is obvious that plots 105 and 40 are separate and distinct. The assumption by the Respondent that plot 105 must be another property elsewhere and not plot GRA/792 is clearly not true.**

**The applicant has established that prima facie he is the owner of the plot 105 and that the metal sheet erected on it are not his. The Applicant has therefore established a prima facie case with a probability of success and in my view damages would not be an adequate remedy. In the result I make the order asked for in the Chamber Summons of the 2<sup>nd</sup> March 2004 with costs to the applicant.**

**The Plaintiff to file in Court an undertaking as to damages.”**

The appellant felt aggrieved by the ruling and order of the superior court and hence this appeal. Fourteen grounds of appeal are filed vide memorandum of appeal dated 3<sup>rd</sup> June 2005. In summary, however the grounds of appeal are mainly that the superior court erred in granting mandatory injunction before the hearing of evidence to determine the ownership of the disputed property; that the structures ordered to be demolished were not illegal structures; that the police should not have been involved as this was a civil matter and not a criminal matter; that the learned judge should not have relied on the provincial surveyor’s report as the same report was not conclusive as to the ownership of the suit premises; that the learned judge erred in law in finding that damages could not be adequate in the matter; that the learned judge erred in failing to find that granting of mandatory injunction in the matter would inconvenience the appellant more than the respondent and that the learned judge misdirected himself in arriving at the decision appealed against.

This, accordingly, is an appeal against the order that granted the injunction, both mandatory and prohibitive to the respondent. The learned judge in doing so exercised his discretion as the application before him called for equitable remedies. This Court would, in law, be reluctant to interfere with the exercise of such discretionary powers and would only do so upon certain conditions being demonstrated and certainly not on grounds that the judge arrived at a decision different from what this Court would have arrived at. In the case of **Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council and two Others** Civil Appeal No. 111 of 2002, this Court in a ruling delivered on 4<sup>th</sup> March 2005 stated:

**“It is clearly the law that the grant or refusal to grant interlocutory relief is in the discretion of the court seized of the matter and an appellate court would not normally interfere with such discretion. The appellate court would however be free to interfere if it is satisfied either that the**

**lower court Judge had misdirected himself in some matter and as a result arrived at a wrong decision or that it is manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice. See Mbogo & Another vs. Shah [1968] EA 93 and Choitram vs. Nazari [1984] KLR 327.”**

It is with the above principles in mind that we propose to consider the appeal before us but also always bearing in mind that this being a first appeal, we are duty bound to analyze the facts that were before the superior court afresh and make our own decision.

The first substantive prayer (prayer 3) in the chamber summons before the superior court was for a prohibitory injunction. The law as to the principles under which such orders can be issued are well settled in the well known case of Giela vs. Cassman Brown & Co. Ltd [1973] EA 358 which are that an applicant seeking prohibitive injunction needs to establish that he has a *prima facie* case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however in doubt, on the forgoing then it will decide the matter on the balance of convenience. The second prayer in the same Chamber Summons, though it appears by use of the word “*temporary*” to be seeking prohibitory injunction, is upon full reading, seeking mandatory injunction for it is seeking an order to compel the demolition of illegal structures allegedly erected on the suit premises by the appellant. Such an order, if granted, would be in the nature of a mandatory and not prohibitory injunction. The third prayer is plainly seeking mandatory injunction as well. The law as regards the principle to be applied when considering the two prayers is different from the principles set out in Giela’s case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. The case of LOCABAIL INTERNATIONAL FINANCE LTD V. AGRO-EXPORT AND ANOTHER [1986] 1 ALL ER 901 sets out the principles applicable in cases of mandatory injunction. It states as follows:

**“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 easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense 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.”**

These principles have been consistently applied in Kenya. In the case of Kamau Mucuha vs. The Ripples Ltd (Civil Application No. Nai. 186 of 1992 (unreported), where Cockar JA. stated after referring to Locabail case as follows:

**“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage.”**

The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is *prima facie* established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass on to the property. In the case of Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council and two Others (supra), this Court stated:

**“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”**

Before the superior court, it was established on a *prima facie* basis that the suit property title No.

GARISSA/TOWNSHIP/105 was registered in the name of the respondent and he held Certificate of Lease to it, a copy of which he annexed to his application. The appellant had title to GARISSA/Township/40 which according to the Provincial Surveyor's report was a property completely distinct from the respondent's property while the other property GRA/792 could not be traced in the records held at the lands Registry. The property title No. GARISSA/TOWNSHIP/ 40 has already been developed. The two properties ie. GARISSA/ TOWNSHIP/105 and GARISSA/TOWNSHIP/40 are half a kilometer apart. Relevant plan was also annexed. Although the Provincial Surveyor's report, obtained pursuant to an order of the court lacked the historical background of the properties, we think it was generally reflective of what the consent order sought and we see no reason to fault the superior court for acting on it. The superior court had the affidavits from both parties, the annexures to the same affidavits and the report produced pursuant to the order. The learned Judge acted on the same and exercising his discretion, came to a conclusion that both prohibitive and mandatory orders were justified. In our view of the matter, we find no reason to interfere with that decision. It was based on sound legal principles.

This appeal cannot succeed. It is dismissed with costs to the respondent. Judgment accordingly.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of May, 2006.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**