REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 2 OF 2019

JEREMIAH THUKU NGANGA.....1st APPELLANT

PETER KARAMI NGANGA.....2nd APPELLANT

VERSUS

JOHN WAITHAKA AIDAN (suing on behalf

of the estate of AIDA WANGUI WAITHAKA.....RESPONDENT

Being an appeal against the Ruling of Principal Magistrate Hon Nyutu at Engineer Senior Principal Magistrate's Court (delivered on 26th March 2019)

in

SPMC ELC No. 34 of 2018

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard by *Hon Nyutu Principal* Magistrate *in the Senior Principal Magistrate Court at Engineer in ELC No. 34 of 2018* where the learned trial Magistrate, upon considering the Respondent's application seeking interim orders found that he had established a Prima facie case and proceeded to grant the order of injunction so sought.

2. The Appellants, being dissatisfied with the ruling of the trial Magistrate filed the present Appeal on the 2nd August 2019 raising the following grounds in their Memorandum of Appeal:

i. That the learned trial Magistrate erred in law and fact in finding that the Respondent had established a Prima facie case with a high probability of success and met the principles for granting an injunction.

ii. That the learned trial Magistrate erred in law and fact in failing to find that the Appellants and other persons not party to the suit were in actual possession of the suit properties and issuing the orders of injunction would lead to their eviction.

iii. That the learned trial Magistrate erred in law and fact in failing to find that LR No. Nyandarua/Kitiri/515 was no longer available as it was subdivided and transferred to third parties who are not a party to the suit and an injunction would not issue in the circumstances.

iv. That the learned trial Magistrate erred in law and in fact in issuing temporary order of injunction on a non-existing land parcel and which orders have the effect of eviction orders.

3. The Appellants thus sought that the orders issued on 26th March 2019 be set aside and for the status quo obtaining prior to 6th November 2018 to be maintained pending the hearing and determination of Engineer *ELC No. 34 of 2018.*

4. The Appeal was admitted on 9th December 2019 with direction that the same be disposed of by way of written submissions.

5. The Appellants' submission is to the effect that pursuant to a Notice of Motion dated the 13th October 2018 which was opposed through their Replying Affidavit sworn on 4th December 2018, the Respondent herein had sought for injunctive relief against them to the effect that they, their agents, associates, servants, employees and/or any persons working under their instructions be temporary restrained by an injunction from selling, disposing of, alienating, interfering cultivating and/or doing anything adverse to the disputed piece of land lying between their boundaries namely land parcel No. Nyandarua/Kitiri/515 and No. Nyandarua/Kitiri/345, until the suit was heard and determined.

6. That following directions from the Court for the application to be disposed of by way of written submissions, the Respondent herein had failed to file his written submissions and therefore the said application was not prosecuted despite which the trial Magistrate proceeded to find that the Respondent had made out a Prima facie case with a high chance of success and that he had also met the principles for granting an injunction.

7. That assuming that the application had been argued, it was the Appellant's submission that the Respondent had not satisfied the principles warranting the granting of an order of temporary injunction as set out in the case of **Giella vs. Cassman Brown.**

8. That the application for injunction had been premised on a non-existing parcel of land wherein the orders of injunction were to apply to the disputed piece of land lying between the parties' boundaries of land being parcels No. Nyandarua/Kitiri/515 and No. Nyandarua/Kitiri/345, which parcels of land ceased to exist upon their subdivision wherein new numbers had been created. That the law was very clear that Courts cannot make orders in vain.

9. The Appellants also submitted that the orders granted on 26th March 2019 amounted to eviction orders they having been in occupation of the parcel of land originally known as No. Nyandarua/Kitiri/515 since 1964, a fact that had not been disputed by the Respondent.

10. That the trial Magistrate in her ruling had held that the Respondent and his siblings who were not parties to the suit were to be unlawfully dispossessed of the disputed portion of land despite the fact that there had been no evidence presented to her to prove that there was such a threat of disposition.

11. In response and in opposition of the Appeal, the Respondent submitted that there having been a boundary dispute between land parcels No. Nyandarua/Kitiri/345 and No. Nyandarua/Kitiri/515, there had been a Court order from to the principal Magistrates Court Nyahururu, dated the 15th September 2009 directing the district surveyor to survey the two parcels of land so as to show the boundary according to the acreage on their respective titles.

12. That this was done and a report had been filed in Court giving the correct position of the boundaries as per the Registry Index Map. That the Appellants' herein had thereafter and in defiance of the Court order and finding of the District Surveyor, deliberately and maliciously refused to move the boundaries to their correct position and instead influenced the fraudulent making of a new deed map distorting the original boundary plans with a view to grab the suit land and disinherit him (Respondent) The learned trial Magistrate therefore did nor err in law and in fact in granting him interim orders because he (Respondent) had made out a prima facie case.

13. The Respondent further submitted that the Appellants' had not demonstrated how the orders issued by the trial Court amounted to eviction orders. That the issue raised by the Appellants' to the effect that the trial Court's ruling was vague, was only to mislead the Court so as to divert its attention from the real issue in dispute hence being in contempt of a Court Decree, non-compliance of the advisory by the District Surveyor, fraudulent alteration of deed maps and the illegal subdivision of property belonging to the Respondent. That the Appellants had therefore come to Court with unclean hands and the Court should not be used to sanitize an

illegality.

14. That the trial Court in allowing the Respondent's application protected him and his family members from further misappropriation and interference of the disputed property by the Appellants until the main suit is heard and determined and therefore failure to uphold the order of the interlocutory injunction issued by the lower Court would amount to throwing the Respondent and the effort made by his entire family, out in the cold.

15. That the disputed property was ancestral land and no the amount of damages would be adequate as a remedy if they lost their quest to find justice. That the uncooperative conduct by the Appellants to settle the boundary dispute tilted the balance of convenience in his (Respondent) favour. That the Appeal lacked merit and the same ought to be dismissed as there was no evidence of any prejudice that the Appellants would suffer.

Determination.

16. I have considered the Memorandum of Appeal, the ruling by the trial Magistrate, the submissions by learned Counsel, the authorities cited on behalf of the respective parties and the law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384)****. I* also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings (s)he did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

17. *T*he basis of the Appellants' claim is that the trial Magistrate had erred both in law and in fact in granting the Respondent interim injunctive orders despite the Respondent not having argued his application thus failing to satisfy the principles for granting the said orders as set out to the case of **Giella vs. Cassman Brown**. That further, the said application for injunction had been premised on a non-existing parcel of land, the land being No. Nyandarua/Kitiri/515 and No. Nyandarua/Kitiri/345, having ceased to exist upon their subdivision wherein new numbers had been created. The Appellants also submitted that the orders granted on 26th March 2019 amounted to eviction orders, they having been in occupation of the parcel of land originally known as No. Nyandarua/Kitiri/515 since the year 1964, a fact that had not been disputed by the Respondent.

18. The Respondents' contention on the other hand is that there having been a report filed by the District Surveyor, as directed by the Court, giving the correct position of the boundaries as per the Registry Index Map between land parcels No. Nyandarua/Kitiri/345 and No. Nyandarua/Kitiri/515, the Appellants' in defiance of a Court order and finding of the District Surveyor, had deliberately and maliciously refused to move the boundaries to their correct position and instead influenced the fraudulent making of a new deed map distorting the original boundary plans with a view to grab the suit land and disinherit the Respondent. The learned trial Magistrate had therefore not erred in granting the interim orders.

19. I have gained sight of the Application by way of Notice of Motion dated the 27th November 2018 brought under the provision of Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 7(sic) of the Civil Procedure Rules, where the Respondent herein sought for interim orders against the Appellants, as well as the impugned ruling of 26th March 2019 to which the Court held that;

'It is only prudent and just to issue a temporary injunction so as to preserve the land pending the determination as to the true location of the boundary between No. Nyandarua/Kitiri/345 and No. Nyandarua/Kitiri/515. In the circumstance a temporary injunction is hereby issued against the defendants restraining them from interfering with the disputed piece of land lying between No. Nyandarua/Kitiri/345 and No. Nyandarua/Kitiri/515 pending the hearing and determination of this suit. The officer commanding Kinangop Police station shall oversee the implementation of this order.'

20. Although there were no written submissions submitted by the Plaintiff/Respondent, in support of their application for interim orders, as directed by the Court, which in my opinion was not fatal as the Court could rely on the pleadings filed, what comes out clearly is that pursuant to a boundary dispute between the two parcels of land, the matter had gone before the land tribunal which had ordered the District Surveyor to mark the boundary according to the acreage shown in the respective title deeds. This finding had then been adopted by the Principal Magistrate's Court at Nyahururu in ELC Land Dispute No.12 of 2009. The Land Surveyor

had subsequently complied with the order and had filed a report in Court dated 7th November 2011 to which the surveyor had opined that;

"The center line of a seasonal river was adopted as the boundary according to the Registry Index Map'

21. It is also not in dispute that pursuant to the filing of the report the Appellants herein failed and/or refused to move the boundary to where the position that the surveyor had pointed out and have continued to use the disputed parcel of land.

22. It is also not in dispute that the Appellants have been in occupation of the parcel of land originally known as No. Nyandarua/Kitiri/515 since the year 1964, and further that the disputed piece of land has since been subdivided, assigned new numbers and transferred to 3rd parties.

23. Considering the above captioned finding by the Court, I find the issue for determination as being:

i. Whether or not the trial Magistrate exercised her discretion judicially in granting interim injunctive orders so as to call for this Court's interference

24. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

25. What amounts to a *prima facie* case was explained in ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** as follows:

"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

26. In the case of ***Habib Bank Ag Zurich vs Eugene Marion Yakub, C. A. No. 43 of 1982 (unreported)***, *'probability of success'* was taken to mean that *'the Court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage'.*

27. In **American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1** Lord Diplock in respect to the role of the Court on appeal regarding interlocutory stage such as the instant Appeal on temporary injunction held that: -

"*It is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

28. The Court of Appeal expressed a similar view in **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1** held that: -

"the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

29. **In Mbogo and Another vs. Shah [1968] EA 93** the Court of Appeal in this regard stated thus:

"…that this Court will not interfere with the exercise of…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 is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

30. The Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004** in this regard held that*:*

"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the conveniences of the parties and possible injuries to them and to third parties. In the ***Giella*** *case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."*

31. Looking at the facts of this case as submitted, the trial Court had been moved under a Certificate of Urgency, by the Respondent to issue temporary injunctive orders against the Appellant. At this stage, the trial Court was only required to determine whether or not the Applicant/Respondent was deserving of the orders sought. The Court was not required to determine the merit of the case.

32. What had been required was for the Respondent/Applicant to demonstrate that he had made out a prima facie case with a likelihood of success and that unless the Court granted the conservatory order, there was real danger that he would suffer prejudice. The trial Court did consider the annexures herein annexed to the Respondent's application to wit, that he was an administrator to the estate of his mother in regard to parcel No. Nyandarua/Kitiri/345, the Decree issued on 15th September 2009 in Land Dispute No. 12 of 2009, a report dated the 7th November 2011 by the Land Surveyor indicating the center line of a seasonal river as the boundary between land parcels No. Nyandarua/Kitiri/515 and No. Nyandarua/Kitiri/345, to conclude that indeed the Respondent herein had made out a Prima facie case. I agree with the findings.

33. The Supreme Court of India in ***Dalpat Kumar & Another vs. Prahlad Singh & Others, AIR 1993 SC 276,*** held that the phrases ***prima facie case, irreparable loss*** and ***balance of convenience*** are not mere rhetoric phrases for incantation; but that they were important factors to be carefully weighed and considered in each and every case where an application for an injunction is applied for.

34. This brings the Court to the second condition that the Respondent had to satisfy in order to be granted the interim injunctive order to wit that they would suffer *irreparable loss* that could not be compensated in damages if the injunction was not granted.

35. Substantial loss has been expressed to mean that which has to be prevented by preserving the status quo so as not to render the suit/Appeal nugatory. From the trail, Court's pleadings and the subsequent submissions to the Appeal, it had not been denied that despite there having been a decree from the Land Tribunal, which decree was adopted by the Court, and a report from the Land surveyor showing where the boundary between the two competing parcels of land was situate, the Appellants herein have since interfered with the suit land thereby subdividing the disputed portion of land wherein in essence the subject suit has ceased to exist, and new numbers had been created where the resultants lands have been transferred to third parties. The dealing of the suit land adversely as afore pointed out, in my humble opinion constitutes irreparable loss as it would impact on the proceedings herein and the outcome of the Respondent's Succession Cause. To this effect thereof I also find that the balance of convenience, as the trial Magistrate held, was in favour of allowing the Applicant/Respondent's application for interim injunction.

36. The Appellants have raised the issue that in granting the said order for injunction, that in effect it amounted to evicting them from parcel of land No. Nyandarua/Kitiri/515, land they had occupied since the year 1964.

37. This Court in **Jeremiah Thuku Nganga & Another v John Waithaka Aidan [2019] eKLR** found that the trial Magistrate's ruling did not in any way seek to restrain the Appellants from ***occupying, living, continuing to live, or staying*** on the suit property as such an order would have required nothing short of a clear and specific prayer for a mandatory injunction. Indeed what the Court had ordered was that the Appellants **refrain from interfering** with the disputed piece of land lying between No. Nyandarua/Kitiri/345 and No. Nyandarua/Kitiri/515 pending the hearing and determination of this suit. The order was therefore to prohibit the Appellant from wasting, damaging, alienating or wrongfully selling the suit property. See **Lucy Wangui Gachara vs**

Minudi Okemba Lore [2015] eKLR. The Appellant's ground on this issue therefore fails and whether these parcels of land were in existence or not is a matter that would call for facts at a full hearing and is therefore premature to delve in at this stage.

38. In the end therefore I find no merit in this Appeal and proceed to dismiss it with costs. The Appellants shall strictly comply with the order of injunction and not engage in acts that would degrade the suit land, pending the hearing and determination of the suit.

Dated and delivered at Nakuru this 11th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE