REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC APPEAL NO. 30 OF 2019

KINANGOP FARMERS SELF HEP GROUP(SUED THROUGH ITS OFFICIALS PETER KAMAU KAMANGA (CHAIRMAN), JOSEPHAT MWANIKI GITAU (SECRETARY) AND SHADRACK MWAI MBUGUA (TREASURER)) .....APPELLANT

VERSUS

NICHOLAS WACHIRA MUTUNGI

JAMES NJIHIA MWATHI

JAMES MACHARIA NDUNGU

CHARLES KAMAU MUCHAI

GEOFFREY PAUL KAMAU..... RESPONDENTS

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Naivasha (Hon. K. Bidali, Chief Magistrate) delivered on 13th November 2019 in Naivasha CM ELC No. 89 of 2018 Nicholas Wachira Mutungi & 4 Others v Kinangop Farmers Self Help Group)

JUDGMENT

1. On 18th September 2019, Hon. K. Bidali, Chief Magistrate, delivered a ruling in which he granted an injunction restraining the appellant from selling, disposing or interfering with the respondents' interest on the parcel of land known as Gilgil/Gilgil Block 1/16155 (Kikopey) pending hearing and determination of the suit in the subordinate court.

2. The matter next came up before the subordinate court on 23rd October 2019 on which occasion counsel for the appellant sought clarification as to whether, in view of the ruling, the suit property could be subdivided. The 5th respondent took the position, on behalf of the respondents, that the appellants having been restrained from selling, they should equally be restrained from subdividing. The court then scheduled the matter for mention for directions on 13th November 2019 on which date it delivered itself as follows:

RULING

On 18th September, 2018 the court in its ruling restrained the respondent from selling, disposing or interfering with the plaintiff's interest in the suit land pending hearing and determination of the main suit. In the main suit the plaintiff prays for orders that the defendants transfers and issues the plaintiff's with title deeds for their shares exercised (sic) from the suit premises.

So the only issues coming is whether the plaintiff ought to be allowed to continue with subdivision. The main suit had not been heard and in giving directions, I must exercise caution so as not to delve into issues that might come up in the main suit.

That notwithstanding I am of the view that the defendant's having been restrained from interfering or selling the said premises and bearing in mind that the specific portions of land which the plaintiff claim has not been ascertained, it would be in the interest of justice if subdivision is halted pending hearing and determination of the suit.

It is so ordered.

3. The orders of 13th November 2019 provoked the present appeal, whose grounds are pleaded in the Memorandum of Appeal dated 19th November 2019 as follows:

1. THAT the Hon. Chief Magistrate misdirected himself on the law and the facts in failing to find that the persons before Court had no capacity.

2. THAT the Hon. Chief Magistrate misdirected himself on the law and the facts in granting an order that was not sought.

3. THAT the Hon. Chief Magistrate erred in failing to appreciate that the respondents' claim is for portions only of the parcel of known as GILGIL/GILGIL BLOCK 1/16155 (KEKOPEY) which measures approximately 521.47 ha and that to identify their said portions, the subdivision process needs to be completed.

4. THAT the Honourable Chief Magistrate erred and misapprehended the evidence and the applicable law and failed to do justice in making orders preventing subdivision.

4. Based on those grounds, the appellant urged this court to grant it the following orders:

1. THAT the orders made by the Hon. Chief Magistrate stopping or restraining subdivision of the parcel of land known as GILGIL/GILGIL BLOCK 1/16155 (KEKOPEY) be set aside and there be substituted therefore orders dismissing the entire application and or enabling and allowing the appellant to proceed with the subdivision process.

2. THAT costs of this appeal be paid by the respondents.

3. THAT such other or further relief as this honourable court may deem fitting and just be grant (sic).

5. As is stated in the Memorandum of Appeal, this appeal is against the orders made on 13th November 2019. That much is also apparent from the fact that the appeal was filed on 22nd November 2019. Going by the provisions of **Section 16A** of the **Environment and Land Court Act, 2011**, any appeal from the subordinate courts to this court must be filed within a period of thirty days from the date of the order appealed against. It therefore goes without saying that the present appeal cannot possibly be in respect of the orders made in the ruling delivered on 18th September 2019, even if parties appeared to make submissions addressing the said ruling. Such submissions are misdirected. For the same reasons, grounds 1, 3 and 4 of the appeal are misplaced since they address merits of the ruling delivered on 18th September 2019.

6. The appeal was canvassed through written submissions. The appellant argued that there was no prayer for halting subdivision either in the plaint or the application that was before the subordinate court and that the court should not have granted an order that was not sought since by doing so, the parties were disadvantaged. Reliance was placed on the case of **Caltex Oil (Kenya) Limited**

v Rono Limited [2016] eKLR where the Court of Appeal stated thus:

This appeal raises two important issues. The first relates to the jurisdiction of this Court as to whether the court has powers to grant an order not specifically pleaded in the plaint, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.

7. The appellant also argued that the learned magistrate misapprehended the facts and thereby granted orders which were neither justified nor appropriate in the circumstances. Further, that besides *prima facie* case, the learned magistrate did not address himself to the other limbs of the test for granting an interlocutory injunction, to wit irreparable loss and balance of convenience. As I have noted earlier, those aspects of the submissions are misdirected since they address the ruling delivered on 18th September 2019, against which no appeal has been filed.

8. The respondents argued in their submissions that the learned magistrate did not misdirect himself and that the argument that the magistrate granted an order that was not sought is misleading since the suit before the subordinate court addresses not only the respondents' portions but also portions of other members of the appellant. Being unrepresented, they included other matters and annexures which obviously do not belong to the real of submissions.

9. I have carefully considered the appeal and the submissions. The appeal emanates from an order in exercise of discretion. The circumstances in which this court can interfere with the learned magistrate's exercise of discretion are well circumscribed. In ***Mbogo and Another v Shah* [1968] EA 93**, the Court of Appeal stated thus:

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 mis-justice.

10. The ruling delivered on 18th September 2019 was in respect of respondents' Notice of Motion dated 16th November 2018. The following orders were sought in the said application:

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.

2. THAT the Defendants/Respondents their agents, associates, servants, employees and/or any other persons working under their instructions be temporary restrained by an injunction from selling, disposing off, interfering and/or doing anything adverse to the Plaintiffs interest namely parcel of land known as GILGIL/GILGIL BLOCK 1/16155 (KEKOPEY) measuring Approximate area 521.47 Hectares until this Application is heard inter-parties.

3. THAT the Defendants/Respondents their agents, associates, servants, employees and/or any other persons working under his instructions be temporary restrained by an injunction from selling, disposing off, interfering and/or doing anything adverse to the Plaintiffs interest namely parcel of land known as GILGIL/GILGIL BLOCK 1/16155 (KEKOPEY) measuring Approximate area 521.47 Hectares until this Application is heard and determined.

4. THAT the matter be heard inter-parties on ..... day of …… 2018.

5. THAT the Officer Commanding Gilgil Police Station do supervise the effecting of this Order.

6. THAT costs of this application be provided for.

11. A reading of the above prayers shows that the respondents did not seek any order stopping subdivision. The argument, based on ground 2 of the appeal, that the magistrate granted an order that was not sought is therefore well founded. As stated by the Court of Appeal in **Caltex Oil (Kenya) Limited v Rono Limited** (supra), a court has no powers to grant an order that is not specifically sought in the pleadings before it. The logic behind that position is clear enough: a party is bound by his pleadings and issues for determination by the court flow from the pleadings. See **James K. Kamau v Nairobi City Council [2018] eKLR**. Pleadings go to the very core of justice since they give parties notice of the case they have to meet and with it the opportunity to prepare to answer the case.

12. It has to be remembered that the learned magistrate had already rendered himself on the Notice of Motion dated 16th November 2018, following an inter parte hearing. In so doing, the court became *functus officio* in so far as the application was concerned. There was no application for review of the orders of 18th September 2019 or for its correction under **Sections 99** or **100** of the **Civil Procedure Act**. By going back to reconsider the application and delivering a second ruling with further orders on the injunction, even if at the somewhat unusual and unprocedural request for clarification by counsel for the appellant, the learned magistrate misdirected himself and wrongly exercised discretion with the result that there was mis-justice to the appellant who is now saddled with an order which was not sought in the application dated 16th November 2018 and which it was not given an opportunity to exhaustively address prior to its issuance. The appellant is entitled to succeed on that ground alone.

13. In the result, I allow this appeal and set aside the orders issued by the subordinate court on 13th November 2019. I emphasise however that the orders of 18th September 2019 are not affected by this appeal. Since the appellant provoked the situation by its unprocedural request for clarification, I make no order as to costs.

14. It is so ordered.

Dated, signed and delivered at Nakuru this 17th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr P. K. Njuguna for the appellant

Mr N. Mutungi the 1st respondent

Mr J. Mwathi the 2nd respondent

Mr J. Ndungu the 3rd respondent

Mr C. Muchai the 4th respondent

Mr G. Kamau the 5th respondent

Court Assistants: B. Jelimo & J. Lotkomoi