Case Number:	Civil Appeal 112 of 2008
Date Delivered:	16 Mar 2012
Case Class:	Civil
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	Emmanuel Okello O'Kubasu, Alnashir Ramazanali Magan Visram, David Kenani Maraga
Citation:	Kenya Anti-Corruption Commission v Bhangra Limited & another [2012] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	201 of 2007
Case Outcome:	Appeal allowed
History County:	Mombasa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: O'KUBASU, VISRAM & MARAGA, JJ.A.)

CIVIL APPEAL NO. 112 OF 2008

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION……...……APPELLANT

AND

BHANGRA LIMITED……...1ST RESPONDENT

SAMMY SILAS KOMEN MWAITA……...2ND RESPONDENT

(Appeal against the Ruling and Order issued by the High Court of Kenya at Mombasa (J.K. Sergon J) dated 19th February 2008

In

HCCC NO. 201 OF 2007)

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JUDGMENT OF THE COURT

1. This is an appeal against the ruling of the Hon. Justice Sergon delivered on 19th February 2008 in Mombasa HCCC No. 201 of 2007 dismissing the Appellant's application for a temporary injunction. That ruling also applied to Mombasa HCCC Nos. 202 of 2007 and 204 of 2007.

2. The facts of the case are fairly simple and straight forward. By a letter of allotment Ref. No. 75892/XX dated 9th December 1996, the Commissioner of Lands leased to the first defendant the un-surveyed piece of land situated in Mombasa Island and known as **UNS: BCR Plot C M. ISLAND** for a term of 99 years from 1st December 1996. That piece of land was apparently later surveyed and designated Title No. Mombasa Island/Block XI/936 (the suit land). On 27th January 2003, the Commissioner of Lands issued to the first defendant.

3. In its plaint the Appellant claims that the suit land is part of an unclassified road reserve vested in

the Municipal Council of Mombasa for maintenance and upkeep for the benefit of the public. The second defendant who was at the material time the Commissioner of Lands had therefore no authority to alienate it to the first defendant or to any other person. It further claimed that as both the defendants knew that the suit land was a road reserve, its alienation to the first defendant was fraudulent and illegal and accused both the defendants of that fraud. The Appellant therefore claims in that suit a declaration that the said lease in respect of the suit land dated 27th January 2003 and registered on 27th February 2003 in favour of the first defendant was *ultra vires* the second defendant's statutory powers and is thus illegal, null and void *ab initio*; an order directed to the District Land Registrar Mombasa to rectify the register relating to the suit land by cancelling all entries relating to that lease; that the first defendant do forthwith deliver vacant possession of the suit land; that a perpetual injunction do issue to restrain the first defendant, its agents, servants or assigns from trespassing upon, transferring, leasing, wasting or in any other way dealing with the suit land other than surrendering it to the Government of Kenya; general damages against the second defendant; costs and interest.

4. Contemporaneous with the filing of the suit, the Appellant filed a Chamber summons under **Order 39 Rules 1, 2, 2A, 3** and **9** of the then **Civil Procedure Rules** and sought a temporary injunction to restrain the defendants by themselves, their agents and or servants from selling, leasing, charging, sub-dividing, wasting, transferring or in any other way dealing with the suit until that suit is heard and determined.

5. Upon being served both the Respondents filed separate defences. The first Respondent averred that the suit is misconceived and bad in law on the grounds, *inter alia,* that the Appellant having not caused it to be charged and convicted of any crime under the **Anti-Corruption and Economic Crimes Act No. 3 of 2003** (the Act), it had no authority to file that suit to recover the land; that as the suit land is still owned by the Government of Kenya and only leased to the First Respondent, the same has not been lost within the meaning of **Section 7(h)** of the **Act**; that the said lease cannot be nullified without first making the Commissioner of lands a party to the suit and that **Section 7** of the **Act,** under which the suit is brought, is at any rate unconstitutional.

6. The first Respondent further avers in its defence that it is an innocent lessee which acquired its interest in the suit land for valuable consideration without notice of any irregularities and its title is therefore indefeasible under **Registered Land Act Cap 300** of the Laws of Kenya.

7. In the replying affidavit of its director, Ashok Labshanker Doshi, the first Respondent reiterated the averments in its plaint and added that as the Government of Kenya was the registered proprietor of the suit land, which the first Respondent confirmed by search prior to the acquisition of the same, the first Respondent was not obliged to inquire into how the Government had, on its part, acquired it. In the circumstances and in the absence of proof that the first Respondent intended to dispose of the land, the Appellant had not made a *prima facie* case to warrant the grant to it of an injunction.

8. The second Respondent did not file any replying affidavit and did not participate in the hearing of the injunction application. In his defence he averred that the suit is incompetent and bad in law because, according to him, the Appellant has no *locus stand* in the matter. He further averred that as he acted for a known principal that is the Government of Kenya, which should have been sued, no reasonable cause of action has been disclosed against him. He also said that the allocation was legal as it was approved by other Government Departments and that it earned the Government revenue.

9. After hearing the application inter-partes, the Hon. Justice Sergon dismissed it thus provoking this appeal.

10. In its memorandum of appeal with 13 grounds, the Appellant has raised four main points: that the learned judge failed to note that the second Respondent illegally alienated the suit land, a road reserve, to the first Respondent; that the learned judge erred in holding that despite the fact that the second Respondent was the Commissioner of Lands at the material time failure to join the Commissioner of Lands as a defendant in the suit was fatal to the Appellants case; that the learned trial judge erred in finding that the first Respondent was an innocent purchaser for value and that the learned judge erred in holding that the Appellant had not made out a prima facie case to warrant the issue of an injunction and that an award of damages would adequately compensate the Appellant.

11. Relying on these submissions, Miss Bor for the Appellant referred us to the survey plan for the area on page 48 of the Record of Appeal and submitted that the suit land is clearly a road reserve the alienation of which **Section 192** of the **Local Governments Act** prohibits. In the absence of any evidence that the road had, pursuant to **Section 185** of the **Local Government Act,** she said it was also clear that the alienation of the suit land was illegal. In the circumstances the Appellant had put up a strong case with a high probability of success. As proof that the Appellant has made out a prima facie case, when the first Respondent started construction on Parcel Nos. 936 and 937, on the Appellant's application, this court restrained further construction. She further argued that **Section 39** of the **Registered Land Act** does not apply to this case as the 1st Respondent is not purchaser for valuable consideration. Miss Bor further argued that the second Respondent was the Commissioner of Lands at the material time and he is the one who actually executed the lease of the suit land in favour of the first Appellant. In the circumstances and in view of the fact that the Appellant has not sought any relief against the Commissioner of Lands as an office, the Appellant's failure to sue the Commissioner of Lands is not fatal to its case as the judge found. She said the authority in **Pashito Holdings Ltd & Another vs Paul Nderitu & Others, Civil Appeal No. 138 of 1997** is distinguishable as in that case there were specific reliefs sought against the Commissioner of Land who was not a party. She urged us to allow this appeal.

12. Mr. Okongo for the first Respondent strongly opposed this appeal. He submitted that the grant of an injunction is a discretionary equitable remedy. Basing himself on the principles set out in the case of **Mbogo vs Shah [1968] EA 93** as to when a judge's discretion can be disturbed, he submitted that the Appellant has failed to show that the trial judge injudiciously exercised his discretion in this matter.

13. Counsel submitted that in allocating the suit land to the first Respondent the second Respondent was exercising his statutory authority. In his view therefore, the suit should have been brought against the Government pursuant to **Section 4** of the **Government Proceedings Act.** He further argued that as the main complaint in the suit is against the Commissioner of lands, and the Appellant having failed to join him, on the authority of the **Pashito** case (supra) the trial judge's finding that the suit against the 1st Respondent is a non starter cannot be faulted.

14. Finally Mr. Okongo submitted that no proper case has been made out to challenge the first Respondent's title to the suit land. It is an innocent purchaser for value and under **Section 39** of the **Registered Land Act**, its title is therefore indefeasible. He said upon consideration of all these points, the Judge was right in finding that the Appellant had not made out a prima facie case to warrant the issue of an injunction. He therefore urged us to dismiss this appeal with costs.

15. We have carefully read the record of appeal and considered these rival submissions. As this is an appeal against a ruling on an interlocutory application in a suit which is still pending for hearing, we do not wish to make any definitive findings which may prejudice the hearing of the appeal. In the circumstances, much as we were impressed by the elaborate submissions made by counsel and the many authorities they cited, we shall restrict ourselves to issue of whether or not the Appellant made out

a prima facie case to warrant the issue of an injunction. Once we resolve that issue, we shall leave the matter at that lest as we have said we prejudice the hearing of the case.

16. The principles for the grant of an injunction have long been well settled. To be entitled to an injunction, the Appellant must, in his pleadings, make out a prima facie case with a probability of success and show that damages will not adequately compensate him. If the court is in doubt on either or both of these points, then it will decide the matter on the balance of convenience. These principles were set out way back in 1973 in the case of **Giella vs Cassman Brown & Company [1973] EA 358** and there has been no derogation from them ever since. If anything, they have religiously been applied save for elaboration and emphasis here and there. For instance in the case of **Mrao Limited vs First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125** this court stated what a prima facie case is. It said it is more than an arguable case. It said a prima facie case must show an infringement of a right the enforcement of which the Appellant has a probability of succeeding.

17. As regards an award of damages being an adequate remedy Ringera J (as he then was) held in **Lucy Njoki Waithaka vs ICDC, Nairobi HCCC No. 321 of 2001** that it is no axiomatic in all cases and gave an example of an arrogant trespasser who cannot be protected by an injunction simply because he is able to pay damages.

18. We have examined the facts of this case against these principles. In a nutshell the Appellant's complaint in the suit before the High Court is that the second Respondent illegally alienated the suit land to the first Respondent. Upon perusing the survey plan on page 48 of the record of appeal, we are satisfied that the Appellant's claim is a road reserve is not frivolous. We agree with Miss Bor that in the absence of evidence that the road was legally closed before the suit land was alienated to the first Respondent, the Appellant's claim has a probability of success.

19. As regards damages, which the learned judge said can be quantifiable, if indeed the suit land is a road reserve, we agree with Ms Bor damages cannot adequately compensate the public for the inconvience and loss of time leave alone the loss in terms of high fuel consumption caused by traffic jams resulting from the closure or narrowing of that road.

20. Disposal or further development of the suit land as was attempted on Parcel No. 936 and 937 will complicate the matter.

21. Taking all these factors into account, we are satisfied that the Appellant made out a clear case entitling it to a temporary injunction and the learned judge erred in dismissing the application. Consequently we allow this appeal, set aside the judge's ruling of 19th February 2008 and substitute it with an order allowing the Appellants application dated 29th October 2007 in terms of prayer 3 thereof. The Appellant shall have the costs of this appeal as well as those of the application in the High Court against the First Respondent.

DATED and delivered at Mombasa this 16th day of March 2012.

E.O. O'KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR