REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 265 OF 2017

PAUL MWENDWA CHANDA.....APPELLANT

VERSUS

GEORGE WAMBUA IVUTI.....RESPONDENT

JUDGMENT

(Appellant having sued the respondent for vacant possession of land and damages; the registered owner of the land having died and appellant being co-administrator of the estate of the deceased; respondent asserting that he purchased the land from the wife of the deceased who is the other co-administrator of the estate of the deceased; respondent having a sale agreement; sale agreement not signed by either wife of the deceased or the appellant as administrators; agreement only signed by some children of the deceased; trial Magistrate upholding the sale and dismissing the appellant's suit hence this appeal; no decree annexed to the appeal; whether failure to extract a decree fatal to the appeal; Section 2 of the Civil Procedure Act providing that decree includes a judgment and further providing that it is not mandatory for a decree to be annexed for purposes of appeal; appeal not fatal for failure to annex the decree; trial Magistrate in his judgment making use of the principles in Giella vs Cassman Brown*; erroneous for the trial Magistrate to consider* Giella vs Cassman Brown *for the said case is limited only to interlocutory injunctions; after trial, the test applicable is proof on a balance of probabilities; erroneous for the trial Magistrate to hold that the sale agreement was proper when it was not signed by the administrators of the estate of the deceased and in any event, no court order had been obtained to sanction the sale; sale agreement invalid also for want of consent of the Land Control Board; no interest passed to the respondent; erroneous for the trial Magistrate to dismiss the appellant's case; appeal allowed; judgment entered for the appellant for vacant possession, a permanent injunction and damages; costs to the appellant)*

(Being an appeal from the decision of Hon. D.O. Ogembo Principal Magistrate in Kwale SPMCC No. 272 of 2006, Paul Mwendwa Chanda vs George Wambua Ivuti, delivered on 11 August 2010)

1. The appellant, as plaintiff, sued the respondent in the Magistrate's Court at Kwale through a plaint filed on 16 July 2006. In the plaint, he pleaded inter alia that he is an administrator of the estate of Solomon Syanda Musili (deceased) jointly with one Esther Ngunia Syanda. It was pleaded that the deceased was the registered owner of the land parcel Kwale/Mwanyamala/281 (the suit land). It was averred that in the year 2004, the respondent moved into the land, erected structures, and embarked on farming activities without the sanction of the appellant as administrator of the estate of the deceased or the other beneficiaries of the estate. In the suit, the appellant sought orders to have the respondent permanently restrained from the land and for an order to compel him demolish the structures and crops on the land, together with damages for trespass.

2. The respondent filed defence where he inter alia pleaded that he moved into the land pursuant to a sale agreement dated 30 June 2004 through which he avers he purchased a portion of the suit land for a consideration of Kshs. 120,000/=. He pleaded that he paid Kshs. 40,000/= on the date of the agreement leaving a balance of Kshs. 80,000/= and he has since paid a total of Kshs. 100,000/= to the family of the deceased. He pleaded that the widow of the deceased and four of his children executed the sale agreement and one of the children received part of the purchase price. He stated that he is ready to pay the balance of Kshs. 20,000/=.

3. At the hearing of the case, the appellant inter alia testified that he is joint administrator of the estate of the deceased alongside his mother, Esther Ngunia Syanda (Mrs. Syanda). The grant of letters of administration shows that they were appointed as administrators on 26 June 1989. He testified that as administrator, he did not sell the land to the respondent. He was aware of the sale to the respondent, by his siblings, but stated that none of the two administrators were involved. He asserted that only himself and his mother could have sold the land. PW-2 was Mrs. Syanda (sometimes also described as Mrs. Chanda), the widow of the deceased and mother to the appellant. She acknowledged that she wanted to sell the land and was given Kshs. 100,000/= by the respondent leaving a balance of Kshs. 20,000/=. She stated that she asked her children for permission but they refused to allow the sale. She stated that she was ready to refund the respondent his money. She denied signing any sale agreement. She mentioned that she told the respondent to wait but he moved in immediately and started farming the land without her consent. She did mention that the dispute was taken to the Chief of the area who made a decision that the respondent should retain the land after she was paid the balance of Kshs. 20,000/= which she did not agree with.

4. PW-3 was Simon Chanda, a son of the deceased. He testified that their mother informed them that she was planning to sell the land but the children refused to give her consent. He stated that as a beneficiary of the estate, he never got any share of the purchase price. He stated that he however offered to refund the respondent who refused. He mentioned that no consent of the Land Control Board (LCB) was given and no transfer executed. In cross-examination, he acknowledged a sale to one Kanga (another person not in the suit) but stated that they stopped him from making any further payments. He objected to the sale as he did not give his consent.

5. PW-4 was one Martha Kalunda a daughter to the deceased and a beneficiary of his estate. She was not aware of the sale of the land to the respondent and was against it.

6. PW-5 was David Chanda, a son of the deceased. He was present when his mother sold the land alongside three of his brothers. However, when their mother informed the other siblings of the sale, they objected to it. He then advised his mother to refund the money but this was rejected by the purchaser. He acknowledged that the family was divided on the issue and when the respondent heard of their disagreement, he moved into the land even before finishing the payment.

7. In his defence, the respondent stated that he purchased the suit land from the mother of the appellant and members of the family. Those present were David, Nixon, Anne, Peter and Jacob, all children of the deceased. An agreement was drawn and signed by their mother and he paid Kshs. 40,000/= to her. He later paid some money to her and to her children, Simon and Anne. He stated that he still has not paid a balance of Kshs. 20,000/= because Mrs. Syanda changed her mind. Cross-examined, he stated that when he bought the land he did not check who the administrators of the land were. He was not aware whether the estate of the deceased had been distributed. He conceded that Mrs. Syanda did not sign the sale agreement and that it was only signed by her children who were present. No Land Control Board consent was obtained.

8. The respondent called two witness. The first defence witness was John Mulinge Kanga. He is the one who sourced the respondent as a buyer and who wrote the sale agreement. He acknowledged that Mrs. Syanda did not sign the agreement though her name appeared therein. He further acknowledged that the appellant did not sign the agreement. He stated that he also purchased some land from the family of the appellant and there is no issue. The second defence witness was Kassim Masudi, the Chief of Dzombo location, where the land is located. He testified that David, one of the brothers of the appellant, came to him wishing to refund money to the respondent because the appellant and another of his brother opposed the sale. He formed a panel which decided that the sale should be upheld.

9. In his judgment, the learned Magistrate was of opinion that the case was one of injunction and he believed that he was guided by the case of *Giella vs Cassman Brown (1973) EA 358.* He listed the principles for granting an injunction as espoused in the said case, that is, that one needs to demonstrate a prima facie case with a probability of success, show that he stands to suffer irreparable injury, and where the court is in doubt, it will decide the matter on a balance of convenience. He considered the matter based on the above principles. On the issue of a prima facie case, he held that only the plaintiff opposed the sale. He was of opinion that this being a land transaction, it needed to be in writing, and the subject agreement was in writing, and consideration was accordingly paid. He was of the view that the parties entered into a legally binding agreement that was proper, and in his opinion, the objection of the appellant against the rest of the beneficiaries could not nullify the otherwise binding agreement. On the lack of LCB consent, he was of opinion that consent may be obtained any time before the transfer, and the agreement could not be deemed a nullity only on the basis that no consent was issued. He also noted that there was another sale to DW-2 which was not contested. He thought that in view of the above, the appellant had not established a prima facie case. He then went on to the second principle of *Giella vs Cassman Brown*, on whether there will be irreparable loss and formed the view that the plaintiff did not stand to suffer any loss should an injunction not issue. He proceeded to the third principle of the case of *Giella vs Cassman Brown* and stated that the evidence showed that none of the beneficiaries live on the land yet the respondent has settled and built a house. In view of that, he was of the view that the balance of convenience weighs in favour of the respondent and not the appellant. He held that the appellant has not met any of the requirements for the grant of an order of injunction and thus held that the appellant's prayers for injunction must fail. He held that the other prayers must fail in view of the fact that the appellant has failed to prove a case for an injunction and proceeded to dismiss the case of the appellant with costs.

10. It is the above judgment that the appellant is aggrieved with. In his Memorandum of Appeal, the appellant has faulted the learned trial Magistrate for finding that the appellant had failed to meet any of the tests for grant of injunctive orders; that the learned Magistrate erred by holding that the sale agreement of 30 June 2004 was valid when it had not been signed by either the appellant or the co-administrator of the estate of the deceased; that the learned Magistrate erred in failing to hold that the sale was invalid as consent of all family members was not given; and that the learned Magistrate erred by failing to hold that the sale was invalid for want of LCB consent.

11. In his written submissions, counsel for the appellant inter alia submitted that the sale agreement was invalid as it was not signed by either administrator of the estate of the deceased. He further submitted that the consent of all beneficiaries was required. He submitted that the sale agreement was not valid for it was not witnessed by an advocate. He further submitted that the sale was void for want of consent of the LCB.

12. The respondent's counsel on her part inter alia submitted that the appeal is incompetent as no decree has been extracted. She did not address herself on the other substantive issues raised in the appeal save to further argue that the appellant could only file suit together with his co-administrator.

13. I have considered the appeal. The first thing I need to determine is whether the appeal is incompetent for failure to annex a formally extracted decree as argued by the respondent. Counsel for the respondent in her submissions, cited Section 65 (1) (b) of the Civil Procedure Act, which provides as follows :-

65. Appeal from other courts

> *(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—*
>
> *a) Deleted by Act No. 10 of 1969, Sch.;*

b) From any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

(2) Deleted by Act No. 10 of 1969, Sch.

(3) Deleted by Act No. 10 of 1969, Sch.

[Act No. 17 of 1967, s. 39, Act No. 10 of 1969, Sch., Act No. 4 of 1974, Sch.]

She further submitted that the appeal is incompetent by dint of Order 42 Rule 2 of the Civil Procedure Rules. Order 42 Rule 2 provides as follows :-

Filing of decree or order [Order 42, rule 2.]

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

14. Counsel further referred me to the case of *Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo (2016) eKLR* where the Court (Ngaah J) stated inter alia as follows after citing Section 79G of the Civil Procedure Act:-

"It is clear from this provision of the law that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal. It is clearly for this reason that ***section 79G*** *provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in* ***section 79G*** *of the Act is not a pastime which one may choose to overlook but rather it is a mandatory ritual without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court."*

For good measure, Section 79G of the Civil Procedure Act, cited above, provides as follows :-

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

15. In the above case of *Ndegwa Kamau T/A Sideview Garage vs Kalumbo*, Ngaa J, held that failure to annex a formal decree was fatal to the appeal and rendered the appeal incompetent and of no consequence. The appeal was thus struck out with costs.

16. I have considered Sections 65 and 79G of the Civil Procedure Act, and also Order 42 Rule 2 which have been relied upon by counsel for the respondent.

17. The primary documents required before an appeal can be heard are stipulated in Order 42 Rule 4 which provides as follows :-

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

18. It will be seen from sub-rule (f) above, that the appellant needs to make available "the judgment, order or decree appealed from." In our case, the judgment is annexed, but no formally drawn decree appears to be extracted. So is the appeal incompetent?

19. To answer this question, we need to know what a "decree" is and for this, we turn to the interpretation section of the Civil Procedure Act, which is Section 2. We have a definition of "decree" in Section 2, and it defines "decree" as follows :-

"decree" *means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—*

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

20. It will be seen from the proviso above, that for purposes of appeal, "decree" includes judgment, and the law further continues to emphasise that *"a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."*

21. The above definition of decree, in my view, answers the question whether the lack of a formally drawn decree renders an appeal incompetent. The law is clear that it does not. In fact for purposes of appeal, a judgment will serve as the "decree", such that if a copy of the judgment is annexed, then one cannot argue that there is no decree annexed. The reasoning for this is not far to find. A "decree" as we know it, is only but a summary of the final order or judgment of the court. It helps to make one see the final orders of the court at a glance. The substance of the order is in the judgment. Now if the whole judgment is annexed, how can you dismiss an appeal because a summary of it is not annexed ? The appeal is against the judgment, and if the judgment is presented, that would be good enough and the law appreciates this.

22. I have read the judgment of Ngaah J, in the case of *Sideview Garage*, and with utmost respect, I do not agree with it, in so far as the good Judge held that the failure to annex a formal decree was fatal to the appeal. That judgment is only of persuasive value and I am not bound by it. I decline to follow it because I do not think that it reflected the correct position of the law. The position of the law, as I have explained above, is set out in Section 2 of the Civil Procedure Act, and where there is a judgment made available, one cannot dismiss the appeal for failure to annex a formally extracted decree, for the judgment will serve as the decree.

23. The argument that this appeal is incompetent for failure to annex a formally drawn decree therefore fails.

24. The next argument of the respondent is that the suit was incompetent because the appellant did not enjoin his co-admnistrator as co-plaintiff in the suit. I do not think that this is a fair point to argue at this juncture, because that is a matter that ought to have been brought up before the trial Magistrate. I have gone through the submissions of counsel for the respondent before the trial Magistrate and I have not seen anywhere where this issue was brought up. Be that as it may, it is not disputed that the appellant is one of the administrators of the estate of the deceased. Counsel for the respondent did not refer me to any law that says that if there are two administrators, a suit cannot be brought up by one administrator, if there is no objection from the other administrator. Mrs. Syanda, the other co-administrator did not come to court to say that she has not sanctioned the filing of the case, and in fact from her evidence, she was in full support of the case. I will not say anymore on this point, for I see no problem with the fact that the appellant filed this suit in order to protect the estate of the deceased. That is indeed his responsibility as administrator.

25. I will now go to the substance of the appeal.

26. The one thing that has struck me in the judgment of the court, is the use of the case of *Giella vs Cassman Brown* in determining the matter. That was a substantial error on the part of the trial Magistrate. We need to understand that the case of *Giella vs Cassman Brown*, lays down the principles that are applied when the court is dealing with an interlocutory application for injunction, and not a permanent injunction. *Giella vs Cassman Brown* applies when one seeks an injunction pending the hearing of the suit. It is because of this that the first principle pronounces that one needs to establish a prima facie case with a probability of success meaning that it appears to the court, from the material provided at that stage of the proceedings, that this is a case that the applicant appears likely to succeed. Once a case is heard, it is determined on merits, not on a superficial appearance of the case. The second principle of *Giella vs Cassman Brown*, refers to demonstration of injury which may not be reparable assuming that the applicant succeeds after a final hearing of the case. Balance of convenience is used where the court is in doubt as to whether or not the first two principles have been achieved. The relevance of *Giella vs Cassman Brown* ends once an interlocutory injunction, that is an injunction pending the hearing of the suit, is determined. The principles in *Giella vs Cassman Brown* do not apply when writing judgment. At the judgment stage, the principle that applies is proof on a balance of probabilities, if the case

is a civil matter.

27. The trial Magistrate was clearly wrong in using *Giella vs Cassman Brown*, rather than using "proof on a balance of probabilities" in determining the case. He thus determined the case based on the wrong principles, and that being the case, on that ground alone, this appeal must succeed.

28. The other ground of appeal is that the trial Magistrate erred when he found that there was a legally binding sale agreement. It is common ground that the sale agreement was not signed by either administrator of the estate of the deceased. I can see however that it was signed by four of the children of the deceased. It is trite law, and I need not cite any authority, that only the administrators of the deceased are permitted to deal with the estate of the deceased, unless there is a court order to the contrary. Even then, before a grant is confirmed, an administrator of the estate of a deceased person cannot deal with immoveable property unless with the permission of the Court. This is brought out by Section 82(a) and (b) of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows :-

> *S. 82 Powers of personal representatives*
>
> *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-*
>
> *(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;*
>
> *(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*
>
> *Provided that-*
>
> > *(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*
> >
> > *(ii) no immovable property shall be should before confirmation of the grant;*

29. Now, it will be seen that none of the administrators signed the sale agreement. That sale agreement was null and void. It will further be seen, that even Mrs. Syanda as co-administrator, assuming that she is the one who sold the property, or sanctioned its sale, had no capacity to sell without the permission of the Court, as the grant had not been confirmed. There is no dispute that the permission of the Court was never sought before the sale in issue. It will further be seen that other beneficiaries, and those would encompass people interested in the property, did not sanction the sale. There was clearly no consensus by all beneficiaries regarding the sale.

30. My holding therefore is that there was no valid sale agreement that was capable of being enforced. The property of the deceased could not be sold to the respondent in the manner that happened in this case. There not having been any valid sale agreement capable of being enforced, no property could pass to the respondent. The respondent thus could not, and did not, receive any proprietary interest in the suit land. It was thus erroneous for the trial Magistrate to hold that the sale agreement in issue was enforceable, for clearly, it was not.

31. The other issue raised was failure to have the consent of the Land Control Board. The land in issue was agricultural land and the Land Control Act, Cap 302, applies. Section 6 thereof provides as follows :-

> *Transactions affecting agricultural land*
>
> *(1) Each of the following transactions that is to say—*
>
> *(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*
>
> *(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*
>
> *(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

32. The law above speaks for itself; consent of the Land Control Board (LCB) is required for subdivisions and sales of agricultural land. In the instance of this case, there was to be a sale of part of the suit land. That would have needed a subdivision, and a consent to subdivide, from the LCB, was required. The sale itself also needed to be sanctioned by the LCB. There was no consent.

33. The Land Control Act, does provide at Section 8, that the application for consent of the LCB is supposed to be made within 6 months of the agreement. That provision of the law is drawn as follows :-

> *Application for consent*

8(1)

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

34. Even assuming that the purported sale agreement of 30 June 2004 was valid, which it was not , no consent of the LCB had been applied for within 6 months of that agreement. Time could be extended as noted by the proviso the Section 8, but no extension of time was lodged, and in any case, it is only the High Court, and not the Magistrate's Court which has jurisdiction to extend time.

35. The trial Magistrate was thus wrong in disregarding the fact that no consent of the Land Control Board had been obtained for the transaction at hand. The effect is that the transaction at hand was null and void for want of consent of the LCB.

37. It will be seen from my above analysis that I am of the view that the trial Magistrate went into error in giving effect to the sale agreement. It mattered not that there was another alleged sale, that to Mr. Kanga, that had not been disputed by the appellant. The trial Magistrate needed to focus solely on the legitimacy of the agreement between the parties before him, and as I have demonstrated above, there was no agreement that could pass any proprietary rights to the respondent.

38. I therefore allow this appeal. I set aside the judgment of the trial Magistrate delivered on 11 August 2010. In place thereof, I allow the case of the appellant as pleaded in his plaint. I issue a permanent injunction restraining the respondent from entering, being upon, residing in, utilising, or erecting any structures, or undertaking any activities, or purporting to exercise any rights of ownership upon any part of the land parcel Kwale/Mwananyamala/281. I also issue an order compelling the respondent to demolish any structures that he has put up on the said land. I issue an order giving the respondent 30 days to give vacant possession and if he does not do so, an application for his eviction may be made for consideration. There is a prayer for damages for trespass. The respondent has now used the land for a considerable length of time without having any right in it and has deprived the estate of the deceased use of this land. In my discretion, taking all factors into consideration, I award the sum of Kshs. 1,000,000/= as general damages for trespass and this amount of money will attract interest at court rates from the date of this judgment. The respondent will also pay the costs of the suit before the Magistrate's Court and the costs of this appeal.

39. One may ask, what happens to the money that the respondent has paid? The respondent, in my view is only entitled to a refund of the exact money that he has paid, and no more, from the persons that he gave his money to. It is upon the respondent to sue for it or find other legal means of recovering it if he is not so refunded.

40. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of March, 2020.

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MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Omondi holding brief for Mr Munyoki for the appellant.

Mr. Mwakisha holding brief for Ms Okech for the respondent.

Court Assistant; David Koitamet.