



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 79 OF 2016

SAMWEL NJOROGE KIMINGI.....1ST APPELLANT

ROBERT MUNENE MWAURA.....2ND APPELLANT

ANTHONY GACHAGU MUCHINA.....3RD APPELLANT

DANIEL KARANJA MWAURA.....4TH APPELLANT

PETER CHEGE MWAURA.....5TH APPELLANT

-VERSUS-

BENSON NJUGUNA CHEGE.....1ST RESPONDENT

DANIEL MWANGI MWITO.....2ND RESPONDENT

JOSEPH IRAKA WAINAINA.....3RD RESPONDENT

JOSEPH MUCHOKI MWANGI.....4TH RESPONDENT

FRANK KAMANDA MBUTHIA.....5TH RESPONDENT

JAMES NJUGUNA MBUGUA.....6TH RESPONDENT

STEPHEN KAROBIA.....7TH RESPONDENT

KARURI MWANGI.....8TH RESPONDENT

DAVID MBURI NJUGUNA.....9TH RESPONDENT

STEPHEN KAMAU NG'ANG'A.....10TH RESPONDENT

GEORGE WAWERU NGATA.....11TH RESPONDENT

DAVID WAITHAKA KAGURU.....12TH RESPONDENT

ZACHARIA NJOROGE.....13TH RESPONDENT

(Being an appeal from the Ruling and Order of Hon. T. Orlando, Resident Magistrate,
delivered on 4 May 2016 in Eldoret Chief Magistrates Civil Case No. 1015 of 2015)

JUDGMENT

[1] This is an interlocutory appeal from the Ruling and Order of the Principal Magistrate's Court (**Hon. T. Olando**) made on **4 May 2016** in **Eldoret Chief Magistrate's Civil Case No. 1015 of 2015** wherein the Appellants, as officials of **Eldo Rika Self Help Group** (hereinafter "**the Group**"), had been sued by the Respondents in connection with their management of the affairs of the Group, especially the management of the two accounts of the Group at the Cooperative Bank, Eldoret Branch and Equity Bank, Eldoret Branch. Accordingly, the Respondents prayed for a Permanent Injunction restraining the Appellants by themselves, their servants, agents from operating the two accounts or selling, leasing, entering into an agreement for sale, wasting, or in any manner alienating, transferring, completing any conveyance whatsoever, charging, mortgaging properties belonging to the Group; together with costs and interest and any other relief the Court may deem fit to grant.

[2] It was in that light that the Respondents filed an application, by way of the Notice of Motion dated **22 December 2015**, for a temporary injunction, pending the hearing and determination of the suit. The application was heard on **9 March 2016** by **Hon. T. Olando, RM**, and in his terse ruling dated **4 May 2016**, the Learned Trial Magistrate expressed himself thus:

"This matter came up on 9th March 2016 for hearing of the application dated 22nd December 2015 and upon considering the application supporting affidavit and the replying affidavit together with the submission, I note that there is a dispute between the defendants and the plaintiffs and the plaintiff have a prima facie case.

There is a likelihood that the money will be misappropriated and the plaintiffs will suffer irreparable loss. I thus allow the application pending the inter-parties hearing of the case..."

[3] Being aggrieved by the Ruling and Order of the lower court, the Appellants, who were the Respondents in the said application, filed this appeal on **20 May 2016** on the following grounds:

[a] That the Learned Magistrate erred in law and fact by delivering a ruling against the principles of **Order 21 of the Civil Procedure Rules, 2010**;

[b] That the Learned Magistrate erred in law and fact by granting injunctive orders where the Respondents had failed to meet the threshold for the injunctive orders;

[c] That the Learned Magistrate erred in law and fact in failing to take into consideration that the Respondents failed to demonstrate the ownership of the properties owned by **Eldo Rika Self Help Group**;

[d] That the Learned Magistrate erred in law and fact ruling in favour of the Respondents who failed to demonstrate that the Bank Accounts, namely Cooperative Bank Eldoret Branch Account Number [particulars withheld] and Equity Bank Eldoret Branch Account No. [particulars withheld], belong to Rika Self Help Group or the amount of money deposited in the Account;

[e] That the Learned Magistrate erred in law and fact in rendering a decision that was contrary to the law and facts and the rules of natural justice;

[f] That the Learned Magistrate erred in law and in fact making a ruling in the absence of evidence.

Accordingly, the Appellants prayed that the appeal be allowed and the Ruling of **Hon. T. Olando** dated **4 May 2016** be set aside; and that the costs of the appeal be awarded to them.

[4] Pursuant to the directions given on **13 November 2018**, the appeal was canvassed by way of written submissions, which I have given careful consideration. In their written submissions dated **7 December 2018**, the Appellants proffered the argument that, the Respondents had failed to demonstrate a *prima facie* case in the manner envisaged in **Giella vs. Cassman Brown; Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**; **Habib Bank A.G Zurich vs. Eugene Marion Yakubs** and **Nguruman Ltd vs. Jan Bonde Nelsen & 2 Others**. In particular, it was submitted that although allegations were made that funds of the Group were being misused, no evidence was adduced to show that the two accounts in question exist in the first place, or that they are accounts held by the Group.

[5] In the same vein, it was the contention of the Appellants that the Respondents did not demonstrate that damages would not have been an adequate remedy; and therefore that the Respondent's application ought to have been dismissed with costs. Lastly, Counsel for the Appellants faulted the ruling of the lower court, contending that it was made without regard to the mandatory provisions of **Order 21 Rule 4** of the **Civil Procedure Rules**. The Court was accordingly urged to declare it void.

[6] Counsel for the Respondents, on the other hand, supported the lower court ruling, arguing that the court took into consideration the principles laid down in **Giella vs. Cassman Brown Case** (supra) and the reason given for the application, namely: that the Appellants were misappropriating the funds of the Group and that unless they were restrained, the Respondents would suffer irreparable loss incapable of compensation by an award of damages. Specific mention was made of paragraph 6 of the application's Supporting Affidavit as the averment proving that the Appellants had been running the affairs of the Group in utter disregard of its Constitution and the best interest of the members; and that unless restrained, the Group would continue to suffer loss through such misappropriation. The cases of **Neke Siteto Mopei & 3 Others vs. Murment M. Senter & 3 Others [2015] eKLR** and **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** were cited in support of the Respondents' submissions. Hence, the Respondents urged for the dismissal of this appeal, arguing that **Order 21 Rule 4** of the **Civil Procedure Rules** is specific to judgments and therefore has no application to rulings.

[7] Needless to state that, ordinarily, an appellate court ought not to interfere with the exercise of discretion by the trial court, even if, on the

facts, it would have come to a different conclusion. Accordingly, the limited circumstances under which an appellate court can interfere with the exercise of discretion by the trial court were well articulated by *Madan, JA* (as he then was) in *United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd* [1985] E.A 898, thus:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

[8] Moreover, this being an interlocutory appeal, I am mindful that the issues in dispute between the parties are yet to be tried before the lower court; and hence the need for restraint so as to not embarrass the trial court. Precedents abound to support this proposition. For instance, in *George Gikubu Mbuthia v Peter Njeru Mugo & 3 others* [2015] eKLR, the Court of Appeal held thus in connection with interlocutory appeals:

“It is well settled that an appellate court considering an appeal arising from an interlocutory decision of the court below cannot make definitive determinations of either law or fact on the issues pending in the main dispute to avoid embarrassing the trial Court. Indeed, in this instance, the Judges in Civil Appeal No. 111 of 1986 considered only whether Schofield, J’s decision was made within the well-known principles for the grant of an interlocutory injunction enunciated in *Giella Vs. Cassman Brown & Co. Ltd* [1973] EA 358.”

[9] Hence, since the law governing the grant of temporary injunction is settled, the issue for my determination is the question whether a good case was made before the lower court to warrant the issuance of the temporary injunctive orders dated **4 May 2016**; bearing in mind the cautionary words of the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR that:

“... in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

[10] Thus, looking at the Supporting Affidavit filed by the Respondents before the lower court, it was demonstrated that the parties are indeed members of the Group, whose Certificate of Registration as a self-help group and Constitution were annexed to the Supporting Affidavit as exhibits. Therefore, when the Respondents averred in paragraph 6 of the Supporting Affidavit that:

[a] The Appellants had not been consulting the trustees of the Group in decision-making;

[b] On or about the month of **October 2015**, the Appellants purchased property at **Kshs. 4.2 million** without consulting the members or the development committee;

[c] The Appellants had failed to account for all the documentation and receipts relating to transactions for purchase of properties by the Group; and

[d] That the Appellants had been misusing group money and had not been providing an account to the membership; they demonstrated a genuine grievance, a *prima facie* case, worth calling the Appellants to respond to; and granted the nature of the substantive relief sought in the Complaint, the Learned Trial Magistrate cannot be faulted for granting a temporary injunction as he did. I note that in their Replying Affidavit, the Appellants conceded to having bought the property aforementioned, but maintained that the members were accordingly consulted. The lower court was thus entitled to consider both sides of the story and determine for itself where the justice of the case lay. Hence, although the ruling was a short one, it captured the key elements at play in any application for interlocutory injunction. It is manifest therefrom that the Learned Magistrate was satisfied as to the first two considerations and therefore did not have to consider the balance of convenience. Hence, compliance was had with the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules**, which in any case, is specific to Judgments.

[11] In the result, I would dismiss the appeal and direct that the lower court file be returned forthwith to facilitate an expeditious hearing and determination on the merits.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 8TH DAY OF MAY 2019

OLGA SEWE

JUDGE