JOSHUA MIRITI NTARICHIA ……..…… 1ST APPELLANT

VERSUS

ISAACK M'NKINKAIBUA ……. 1ST RESPONDENT

JOSEPH KOOME …….. 2ND RESPONDENT

(An appeal against the ruling of the Hon. Mr. N. Ithiga S.P.M. Meru in

CMCC No. 353 of 2003 delivered on 1st July 2003)

JUDGMENT

The first and 2nd respondent filed a case in the lower court against the appellant. It was disclosed in the plaint that the first respondent was the owner of parcel No. Akirang'ondu Adjudication Section 31. The first respondent had leased that property to three other persons one of whom included the appellant. Those lessors had agreed with the first appellant to pluck miraa on his parcel of land. The lessors would each pluck miraa rotationally during the plucking period. i.e. each would pluck one period and the other the next period until all of them had plucked then the rotation would start again. On or about 9th September 2002 the first respondent entered into another lease agreement with the 2nd respondent. The appellant objected to that agreement and threatened not to allow the 2nd respondent to pluck miraa. That was the reason why the suit was filed. The 1st and 2nd respondent were the plaintiffs and they sought in that claim an order of injunction seeking to restrain the appellant from interfering with the 2nd respondent's right of plucking. At the interlocutory stage, the respondents filed a chamber summons dated 23rd May 2003. In that chamber summons, they were seeking the very same orders that were in the plaint only that the chamber summons sought temporary interlocutory injunction. At the hearing of that chamber summons, the 1st respondent's arguments were that there was no obligation upon him in the agreement between him and the appellant which restricted him from entering into other lease agreements. Further he stated that he had already entered into a lease agreement with the 2nd respondent which agreement was binding upon him. The appellant's argument was that the first respondent could not add the 2nd respondent as a lessor. After hearing the chamber summons, the lower court granted an interim injunction pending the hearing of the suit. That provoked the present appeal whereby the appellant has brought the following grounds for consideration by this court.

1. That the Learned S.P.M. erred in law and in fact in granting a temporary injunction yet the applicants had failed to make a *prima facie* case against the appellant.

2. That the learned S.P.M. ignored the evidence before him and also he ignored the well known principles of injunction.

3. That the learned S.P.M. wrongly exercised his discretion in favour of the respondent.

4. That the ruling of the learned S.P.M. is against the evidence before him.

In the learned magistrate's ruling to the summons, he found that there was no agreement that the appellant needed to be consulted if the first respondent wanted to enter into another lease agreement. Further he found that the 2nd respondent was already in occupation of the suit property in readiness for plucking the miraa. He further found as follows:-

"***I find the defendant can be compensated for the loss by way of damages…….. I find the balance of convenience tilts in favour of the applicants (both respondents)……. He (1st respondent) has a prima facie case against the defendant (appellant). The 2nd plaintiff (the 2nd respondent) ……. Should not be subjected to loss and hardship because another tenant like him with equal rights is not happy with his new agreement with the owner of miraa."***

This being the first appellant court, I am only entitled to interfere with the learned magistrate's exercise of his discretion in granting an injunction if he had not considered the correct principles of granting an injunction. In reading the ruling, I found that the learned magistrate did consider and final that the respondents had made out a *prima facie* case with a probability of success. That being so, the first ground of appeal is rejected. Further I found that the learned magistrate did not ignore the evidence before him. In fact he found that the agreement did not have a clause which prevented the first respondent from entering into subsequent lease agreements. I could not find anything in his considered ruling which suggested that the learned magistrate usurped the function of the trial court as was in the case of **Cut Tobacco (K) Ltd V. British American Tobacco (K) Ltd (2001) EA** quoted as follows:-

"***The grant of an interim injunction was discretionary and an appellate court could interfere only where it was shown that the discretion had not been exercised judicially. In this instance, there was nothing to show that in the event of British American Tobacco succeeding at trial it would suffer such a loss as could not be compensated by damages. As the Judge had applied the wrong tests to the issues and decided the application in a manner that usurped the functions of a trial court, the appeal would be allowed."***

The above case in as far as it talked about the usurping the functions of the trial court is not applicable here. I do however find that the learned magistrate on considering whether the respondents had made out a *prima facie* case, he did not inquire thereafter whether damages that the respondents would suffer if the injunction was not granted could be compensated by an award of damages. The principles of granting an injunction were set out in the cerebrated case of **Giella v. Cassman Brown & Co. Ltd** (1973) EA where it was held:-

"***An applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; when the court is in doubt, it will decide the application on the balance of convenience."***

The court of appeal in the case of **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** (2001) EA made a finding that the principles of granting an injunction as stated in the case of **Giella** (supra) were to be considered in sequence. The Court of Appeal in that case stated:-

"***The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour; secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience – see Giella V. Cassman Brown and Co. Ltd (1973) EA 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."***

It is clear from the above authorities that the respondents should have proved to the court not only the first principle of granting an injunction but also the second principle. The lower court should have considered that the contract between the two respondents had a contractual price and accordingly the second respondent could have been compensated with the refund of that price as damages at the

conclusion of the case. The learned magistrate after finding that the respondents had shown a *prima facie* case failed to consider whether damages could be awarded and went straight to consider where the balance of convenience lies. Moreover, I find that the respondents were not entitled to an interim injunction which was similar to the prayer in the plaint. The end result of granting such an injunction is that the respondents would have no incentive to go for the full trial. Indeed by granting the injunction the learned magistrate essentially concluded the suit. For that reason, and because the lower court did not consider the issue of damages I find that this appeal does succeed. The respondents in their submissions argued that miraa prices fluctuates daily and accordingly damages could not be assessed. That issue was not raised before the lower court. It was raised for the first time at the hearing of this appeal. For that reason that argument is rejected. In the end, the judgment of this court is as follows:-

1. The appellant appeal is hereby allowed and accordingly the ruling of 1st July 2003 in CMCC No. 353 of 2003 Meru is hereby set aside and is substituted with an order dismissing the application dated 23rd May 2003 with costs to the appellant. The injunction of first July 2003 in that case is hereby vacated.

2. The appellant is awarded costs of this appeal.

Dated and delivered at Meru this 8th day of October 2009.

MARY KASANGO

JUDGE