Mateli v Kieti (Environment & Land Case E062 of 2022) [2023] KEMC 289 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEMC 289 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

ENVIRONMENT & LAND CASE E062 OF 2022

CN ONDIEKI, PM

JANUARY 26, 2023

BETWEEN

TITUS MULWA MATELI .... PLAINTIFF

AND

BENJAMIN MAINGI KIETI .... DEFENDANT

RULING

Part I: Prelude

1. An injunctive relief serves at least eleven purposes. However, the overarching life-force of an injunctive relief (and specifically a temporary injunctive relief) is to prevent the ends of justice from being defeated.[1] The specific purposes served by a temporary injunctive relief is first, to prevent an irreparable injury the Applicant is likely to suffer if the injunctive relief is not issued.[2] The second purpose of a temporary injunctive relief is to prevent the property in dispute from the danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a Decree or from removal or disposal in circumstances affording reasonable probability that the Applicant will or may be obstructed or delayed in the execution of any Decree that may be passed against the Defendant in the suit; to restrain breach of contract or other injury of any kind, whether compensation is claimed in the suit or not.[3] The third and fourth purposes of a temporary injunction is to maintain a position that will more easily enable justice to be done when its final order is made and at the same time

1 See section 63 of the *Civil Procedure Act*.

2 See Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358, per Sir William Duffus P, Spry VP and Law JA (as they then were). See also American Cyanamid Co vs. Ethicom Ltd [1975] AC 396, per Lord Diplock.

3 See Order 40 of the Civil Procedure Rules.

regulate the acts of the parties in a way that is the most just and convenient in all circumstances.[4] The fifth specific purpose of a temporary injunction is to improve the chance of the Court being able to do justice after a determination of the merits at the trial.[5] The sixth specific object of a temporary injunction is to preserve the substratum of the suit pending the hearing and determination of the suit.[6] The seventh specific purpose served by a temporary injunction is being a Constitutional tool for guaranteeing the right to a fair hearing and due process of the law as contemplated by Article 50 of *the Constitution* of Kenya by guaranteeing that no party to a suit will be condemned unheard by preserving the subject matter of the suit when it is in danger of being wasted, damaged, or alienated by the opponent before the Court has determined the dispute on merits.[7] The eighth object of an a temporary injunction is underpinned in the doctrine of lis pendens, which doctrine basically commands that while litigation is underway, nothing should change to avoid rendering the litigation an academic exercise. Put differently, while litigation is pending, status quo should be maintained.[8] The ninth purpose served by an interlocutory injunction is to mitigate the risk of injustice to the Applicant during the period before that uncertainty could be resolved by protecting the Applicant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.[9] The tenth specific purpose of a temporary injunction is to serve justice by striking a balance of justice, as opposed to a balance of convenience.[10] When guided by this purpose, in considering whether to grant an interlocutory injunction or not, a Court should not only be transfixed to the three conditions in an inflexible straight-jacket style but consider the bigger picture which is whether it will be just and equitable to grant.[11] And finally but in no way the least, the eleventh object of a temporary injunction is to prevent breach of the law.[12] This is the milieu against which this Application will be determined.

Part II: The Plaintiff/applicant's Case

2. Vide a Plaint dated 20th June 2022 and filed on 21st June 2022, the Plaintiff brought this action against the Defendant seeking Judgment for: (a) A permanent injunction restraining the Defendant, his agents, servants or anyone working under their instructions from entering, constructing on or in any way manner whatsoever dealing with the Plaintiff's parcel of land known as Mitaboni/Ngelani/803.

4 See D.R. Spry in his book Equitable Remedies, 6th Edition, LBC, at page 447.

5 See National Commercial Bank Ltd vs. Olint Corporation [2009] WLR 1405.

6 See Kenya Electricity Transmission Company Limited vs. Kibotu Limited [2019] eKLR, per Odeny, J.

7 See Thomas Edison Ltd vs. Bathock [1912] 15 C.L.R. 679.

8 See Mawji vs. International University & Another (1976-80) KLR 229, per Madan, J., (as he then was), who adopted the reasoning in the English Court of Appeal decision in Bellamy vs. Sabine (1857) Ide J 566, 585, per Turner L.J.

9 See American Cyanamid Co vs. Ethicom Ltd [1975] AC 396, per Lord Diplock.

10 See Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892, per Sir John Donaldson MR; and the Court of Appeal for Saskatchewan in Mosaic Potash Esterhazy Limited Partnership vs. Potash Corporation of Saskatchewan Inc. 2011 SKCA 120, per Richards J.A.

11 See the Court of Appeal for Saskatchewan in Mosaic Potash Esterhazy Limited Partnership vs. Potash Corporation of Saskatchewan Inc. 2011 SKCA 120, per Richards J.A.

12 See the Textbook Commercial Litigation: Pre-Emptive Remedies, 4th Edition, at paragraph A1-017.

(b) An order directing the Defendant to transfer all land known as Mitaboni/Ngelani/803 to the Plaintiff. (c) Costs and interest.

3. Contemporaneously, the Plaintiff/Applicant (hereinafter "the Applicant") filed a Notice of Motion dated 3rd June 2022 and filed together with the Plaint on the same said date, seeking an interlocutory injunction along the same grain of the said permanent injunction.

4. This Application is predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit sworn on 13th June 2022 by the Applicant.

5. On the face of the Notice of Motion, it is averred that the Applicant is the beneficial owner of the parcel of land known as Mitaboni/Ngelani/803 (hereinafter "the suit property") registered in the name of the Respondent, having bought the whole of it on 3rd November 2015and paid the full purchase price of Kshs. 2,325,000, but the Respondent has been dilly-dallying in effecting a transfer. The Applicant avers that he has since erected a temporary structure thereon and has been utilizing the suit property in crop and animal farming and even planted trees thereon. The Applicant now avers that the Respondent forcefully re-entered the suit property on 6th June 2022 and tilled it using a tractor destroying his crops, trees and fenced it using a chain link.

6. In the said Supporting Affidavit, the two material grounds set out in the Motion have been rehashed. In addition, the Applicants have exhibited: (i) a copy of the Sale Agreement dated 3rd November 2015 marked TMM1; (ii) search certificate marked TMM2; and (iii) photos of the alleged destruction marked TMM3. In addition, the Applicant deposes that a farmhand has been living on the property since 2015 and he witnessed the incidents averred.

7. In his written Submissions dated 28th July 2022 and filed on 1st August 2022, learned Counsel Mr. Kyalo instructed by the Firm of Messieurs Kyalo, Muia & Company Advocates representing the Applicant rehashes the contents of Application.

8. In summary, Counsel submits that this Application has met all the conditions laid in Giella vs. Cassman Brown (1973) EA 358 and Order 40 of the Civil Procedure Rules.

Part III: The Defendant/respondent's Case

9. The Application is opposed by the Respondent. In his Replying Affidavit dated 4th July 2022 and filed on 6th July 2022, the Respondent deposes that he is the proprietor of the suit property and that on 3rd November 2015, he sold it to the Applicant at a sum of Kshs. 2,325,000. He states that the Applicant never developed the suit property after purchase and that the Applicant later expressed his intention to rescind the contract and have his money refunded on grounds that there is no network coverage in that area. He deposes that since he had no money to refund immediately, he asked his daughter to look for a way of refunding the money. He deposes that his daughter mobilized her siblings to raise the refund and they asked the Applicant to give a bank account in which the refund was to be deposited and he did give a bank account domiciled in Equity Bank namely 06xxxxxx27596. The Respondent deposes that his said children deposited money into the said account amounting to Kshs. 2,075,000, leaving a balance of Kshs. 250,000. In this connection, copies of the banking slips have been exhibited marked BMK1. He thus states that following the said partial refund, he re-entered the suit property and started using it. He states that he needs until December 2022 to clear the balance (Kshs. 250,000).

10. In his Supplementary Affidavit, the Respondent states he refunded the Applicant Kshs. 1,525,000 and his daughter refunded Kshs. 750,000. He has exhibited a copies fund transfers marked BMK 1 & 2. The Respondent further states that the crops shown on the photos are his daughter's crops. The Respondent further states that it is only when the Applicant realized that the Respondent's daughter

had started clearing the land and had actually sold a portion of the land that he started raising issues. In this connection, he has exhibited a sale agreement for sale of a portion of the suit property his daughter marked BMK3 and a text message allegedly from the Applicant marked BMK4. In this regard, the Respondent states that since the Applicant failed to disclose the issue of rescinding the contract, this Court should find him dishonest.

11. In her written Submissions dated 22nd August 2022 and filed on 23rd August 2022, learned Counsel Ms. Kaveke instructed by the Firm of Messieurs Mutiso Mutinda & Company Advocates representing the Defendant/Respondent rehashes the contents of the Replying Affidavit and the Supplementary Affidavit. I thus find no need of reproducing the Submissions here. Counsel argues that the Applicants have failed to meet the conditions set out in order 40 of the Civil Procedure Rules; Giella Cassman Brown & Co. Ltd [1973] EA 358; Cut Tobacco Ltd vs. British American Tobacco (K) Ltd [2001] eKLR; and Noor Mohamed Janmohamed vs. Kassan Ali Virji Madhani [1953] 20 KLR 7.

12. It is further submitted that the Applicant having been refunded has no protectable interest in the property, placing reliance in Mary Mutoro sirengo & anor vs. Marcellus Lazima Chege [2010] eKLR.

Part IV: Issues For Determination

13. Commending themselves for determination, gleaning from the Notice of Motion and Replying Affidavit, this Court has distilled two issues for determination as follows:

    a. First, whether this Application has met the threshold for grant of a prohibitory interlocutory injunction.

    b. Second, who should shoulder the costs of this Application?

Part V: Analysis of the Law; Examination Of Facts; Evaluation of Evidence And Determination

14. I now embark on analysis of the law, examination of facts, evaluation of evidence and determination of each of the two issues for determination, seriatim.

(a) Whether this Application has met the threshold for grant of a prohibitory interlocutory injunction

15. Just before I dispose this issue, I desire to lay the framework within which it will be disposed. An injunction is a discretionary equitable remedy in the form of a Court Order which compels a party to do or refrain from doing specified acts and granted only in circumstances where irreparable harm is likely to occur. See Charter House Investments Ltd vs. Simon K. Sang and others [2010] eKLR, per Omolo, Githinji and Visram JJ.A., (as they then were). See also the Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Sixth Edition), page 784.

16. The kind of injunction the Applicant is seeking now is, a prohibitory preliminary interlocutory injunction, one of the subsets of interlocutory injunctions. There are two classes of interlocutory inunctions namely temporary interlocutory injunction which is granted ex parte and preliminary interlocutory injunction which is granted inter partes. The two classes can either take prohibitive or mandatory posture. While a prohibitive preliminary interlocutory injunction prevents, a mandatory preliminary interlocutory injunction requires a party to do a positive thing without which the Respondent will be in breach of the order. See the Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Sixth Edition), page 784.

17. Injunctive relief was an initiative of the English Courts of Equity. The rationale behind it was a realization that the only legal remedy which existed at the time namely money damages would not redress all wrongs sufficiently, thus, the legal remedy of money damages would occasion some aggrieved parties irreparable damage. Thus, along with initiating this remedy, the Courts of Equity initiated a doctrine that it would only be granted where there is no adequate remedy at law. Just like the intention of money damages, an injunction is thus meant to make whole again someone whose rights have been violated.

18. It's noteworthy to appreciate the extent to which the order of injunction has been codified in Kenya in order to inter alia appreciate the extent to which the Doctrines of Equity (the mother and father of injunctive reliefs) have been modified by written law. The proviso to section 3(1)(c) of the *Judicature Act* reads thus: - "Provided that the said common law, doctrines of equity and statutes of general Application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary." A further impetus for this understanding is found in the ratio of Lord Denning, in Nyali Limited vs. Attorney-General [1955] 1 All ER 646, where His Lordship stated that common law may only be applied in foreign lands with modifications that fit local circumstances, since in foreign lands people have their own laws and customs that they respect.

19. Section 63 of the *Civil Procedure Act* (hereinafter "the CPA") provides for supplemental proceedings, in civil proceedings primarily to prevent the ends of justice from being defeated. One of such supplemental proceedings is an injunctive relief housed in section 63 (c) & (e) of the CPA which provides that "In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed— ... (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold..."

20. Order 40 of the CPR provides for the procedure deployable in Applications for temporary injunctions and other interlocutory orders as contemplated under section 63 of the *Civil Procedure Act*. Order 40 is deployable in the direction of restraining the sued party from wasting, damaging, alienating, wrongfully selling, or removing from jurisdiction property in dispute or from breaching a contract or committing any other injury, whether compensation is claimed in the suit or not. For purposes of this Application, see Order 40 rules 1 and 2. A party who disobeys the injunctive order exposes himself to a jail term of up to six months. See Order 40 rule 3 of the CPR.

21. What is the purpose underpinning interlocutory injunctive reliefs? An injunctive relief serves at least eleven purposes. However, the overarching life-force of an injunctive relief (and specifically a temporary injunctive relief) is to prevent the ends of justice from being defeated. See section 63 of the *Civil Procedure Act*. The specific purposes served by a temporary injunctive relief is first, to prevent an irreparable injury the Applicant is likely to suffer if the injunctive relief is not issued. See Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358, per Sir William Duffus P, Spry VP and Law JA (as they then were). See also American Cyanamid Co vs. Ethicom Ltd [1975] AC 396, per Lord Diplock. The second purpose of a temporary injunctive relief is to prevent the property in dispute from the danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a Decree or from removal or disposal in circumstances affording reasonable probability that the Applicant will or may be obstructed or delayed in the execution of any Decree that may be passed against the Defendant in the suit; to restrain breach of contract or other injury of any kind, whether compensation is claimed in the suit or not. See Order 40 of the Civil Procedure Rules. The third and fourth purposes of a temporary injunction is to maintain a position that will more easily enable justice to be done when its final order is made and at the same time regulate the acts of the parties in a way that is the most just and convenient in all circumstances. See D.R. Spry in his book Equitable Remedies,

6th Edition, LBC, at page 447. The fifth specific purpose of a temporary injunction is to improve the chance of the Court being able to do justice after a determination of the merits at the trial. See National Commercial Bank Ltd vs. Olint Corporation [2009] WLR 1405. The sixth specific object of a temporary injunction is to preserve the substratum of the suit pending the hearing and determination of the suit. See Kenya Electricity Transmission Company Limited vs. Kibotu Limited [2019] eKLR, per Odeny, J. The seventh specific purpose served by a temporary injunction is being a Constitutional tool for guaranteeing the right to a fair hearing and due process of the law as contemplated by Article 50 of *the Constitution* of Kenya by guaranteeing that no party to a suit will be condemned unheard by preserving the subject matter of the suit when it is in danger of being wasted, damaged, or alienated by the opponent before the Court has determined the dispute on merits. See Thomas Edison Ltd vs. Bathock [1912] 15 C.L.R. 679. The eighth object of a temporary injunction is underpinned in the doctrine of lis pendens, which doctrine basically commands that while litigation is underway, nothing should change to avoid rendering the litigation an academic exercise. Put differently, while litigation is pending, status quo should be maintained. See Mawji vs. International University & Another (1976-80) KLR 229, per Madan, J., (as he then was), who adopted the reasoning in the English Court of Appeal decision in Bellamy vs. Sabine (1857) Ide J 566, 585, per Turner L.J. The ninth purpose served by an interlocutory injunction is to mitigate the risk of injustice to the Applicant during the period before that uncertainty could be resolved by protecting the Applicant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. See American Cyanamid Co vs. Ethicom Ltd [1975] AC 396, per Lord Diplock. The tenth specific purpose of a temporary injunction is to serve justice by striking a balance of justice, as opposed to a balance of convenience. See Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892, per Sir John Donaldson MR; and the Court of Appeal for Saskatchewan, Canada, in Mosaic Potash Esterhazy Limited Partnership vs. Potash Corporation of Saskatchewan Inc. 2011 SKCA 120, per Richards J.A. When guided by this purpose, in considering whether to grant an interlocutory injunction or not, a Court should not only be transfixed to the three conditions in an inflexible straight-jacket style but consider the bigger picture which is whether it will be just and equitable to grant. See the Mosaic Potash Esterhazy Limited Partnership case, supra. And finally but in no way the least, the eleventh object of a temporary injunction is to prevent breach of the law. See the Textbook Commercial Litigation: Pre-Emptive Remedies, 4th Edition, at paragraph A1-017.

22. What is the requisite threshold for grant of an interlocutory injunctive relief? Largely, the requisite threshold has been developed by Courts and not enacted in legislation in Kenya. The first key threshold is that an injunction being an equitable relief, full and frank disclosure of facts is central. See Kenleb Cons Ltd vs. New Gatitu Service Station Ltd & Another [1990] eKLR; and Kenya Electricity Transmission Company Limited vs. Kibotu Limited [2019] eKLR, per Odeny, J.

23. What is the requisite threshold for grant of an interlocutory injunctive relief? Largely, the requisite threshold has been developed by Courts and not enacted in legislation in Kenya. The first key threshold is that an injunction being an equitable relief, full and frank disclosure of facts is central. See Kenleb Cons Ltd vs. New Gatitu Service Station Ltd & Another [1990] eKLR; and Kenya Electricity Transmission Company Limited vs. Kibotu Limited [2019] eKLR, per Odeny, J.

24. And what are the requisite conditions for grant of a mandatory or prohibitive preliminary interlocutory injunctive relief? In 1972, the principles governing the granting of interlocutory injunctions in Kenya were laid down by the Court of Appeal in the Judgment of Spry V.P in EA Industries Ltd vs. Trufoods Ltd [1972] EA 420, where at page 421, the Learned Judge enunciated that "There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A Plaintiff has to show a prima facie case with a

probability of success, and if the Court is in doubt it will decide the Application on the balance of convenience. An interlocutory injunction will not normally be granted unless the Applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages." A year later, in 1973, the same learned Judge, Spry V.P., rehashed his enunciation in in the EA Industries Ltd case (supra) but with modifications and laid down the principles which are hitherto often adverted to and has now entrenched as the locus classicus in Applications for injunctive reliefs, whether interlocutory or permanent, in the Court of Appeal decision in Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358. The case was heard by Sir William Duffus P, Spry VP and Law JA. In Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358, an interim injunction was granted in the High Court to stop the Appellant competing with the Respondent his former employer on the basis of a covenant by him not to engage in a similar undertaking in any of the six major towns of East Africa. On appeal the Appellant argued that the Judge should have allowed an adjournment for him to file an Affidavit, that the order was defective in not specifying the period for which it was granted, that no reasonable probability of success had been shown by the Respondent and that it had not been shown that damages would not be an adequate remedy. It was held that 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; and if the Court is in doubt, it will decide the Application on the balance of convenience. Since this will be the paramount guiding ray in this Application for ease of contextualization, see the leading Judgment of Spry VP, with which Sir William Duffus P and Law, J.A. concurred.

25. Is the sequence of the said conditions laid in Giella case imperative? While echoing the decision in Giella, the Court of Appeal underscored the importance of the sequence contemplated in Giella decision in the case of Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001]1E.A. 86. The Court stated as follows (at page 89): "The sequence of granting 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 where the Court is in doubt it will decide the Application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the Court is in doubt then the third condition can be addressed."

26. The conditions in Giella case apply to both interlocutory and permanent injunctive reliefs. While restating the conditions laid down in Giella decision, the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, underscored the powerhouse nature of this one-stop test to the effect that it is deployable in both Applications for an order of interlocutory and permanent injunction. Ouko, Kiage and M'Inoti JJ.A., stated as follows: "In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to; (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong

the Applicant 's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Applicant to injunction directly without crossing the other hurdles in between."

27. Before I conclude this discussion, it is imperative to underline that although an impression has been so created, the Giella case has not enjoyed a monopoly. The first condition established in the Giella case has since received an alternative condition in England, which alternative has also been embraced locally. In England, the requirement that an Applicant establishes the first condition of "a prima facie case" or "a strong prima facie case" as set in the Giella case was substituted by a less rigorous test of establishing "a serious question to be tried" in the American Cynamid case. In Kenya, reading decisions of Superior Courts, jurists seem to have embraced both the first condition set in the Giella case and the first alternative condition set in American Cynamid case. A good example which has adopted the two alternatives is the decision in Nguruman case which I will discuss hereinafter. In American Cyanamid Co vs. Ethicom Ltd [1975] AC 396, the interlocutory appeal concerned a patent for the use as absorbable surgical sutures of filaments made of a particular kind of chain polymer known as a polyhydroxyacetic ester (sutures which disintegrate and are absorbed by the human body once they have served their purpose. The Appellants - American Cyanamid - an American Company, were the registered proprietors of the patent and its priority date in the United Kingdom was 2nd October 1964. At that date the absorbable sutures in use were of natural origin and they were made from animal tissues popularly known as catgut. The Respondents - Ethicon - a subsidiary of another American Company, were the dominant suppliers of catgut sutures in the U.K. market and Cyanamid introduced their patented product in 1970. At the High Court, Graham J., on 30th July, 973, granted an interlocutory injunction upon the usual undertaking in damages by Cyanamid. Ethicon appealed to the Court of Appeal. On 5th February, 1974, the Court of Appeal gave Judgment and allowed the appeal and discharged Graham J.'s order of injunction. However, an appeal to the House of Lords (composed of Lords Diplock, Viscount Dilhorne, Cross of Chelsea, Salmon and Edmund-Davies) reversed the Court of Appeal decision and reverted to the High Court position. The House of Lords developed a three conditions, in that sequence, as the test for granting an interlocutory injunction as follows: (a) First, the Court must be satisfied that there is a serious question to be tried, i.e. the claim must not be frivolous or vexatious. (b) Second, the Court must consider the adequacy of damages which has two steps: (i) Step 1, the Court must consider whether, if the Plaintiff were to succeed at trial, damages would be an adequate remedy. If damages would be an adequate remedy and the Defendant would be in a financial position to pay them, no interim injunction should normally be granted; and (ii) Step 2, the Court must consider whether, if the Defendant were to succeed at trial, he would be adequately compensated by the Plaintiff's undertaking in damages for the loss caused by being prevented from carrying out the work between the time of the Application for the interim injunction and the trial. If he would be adequately compensated, then an interim injunction should be granted. (c) Third, if there is doubt as to the adequacy of damages to the claimant or the Defendant, the Court must consider the 'balance of convenience'. In this case, Lord Diplock replaced the traditional first condition of "prima facie case with chances of success" with "a serious question to be tried" arguing that it was problematic at the interlocutory stage to use diametrically opposing, untested and rival Affidavit evidence to consider whether or not, the Applicant has made a prima facie case. His Lordship reasoned that that it is enough for an Applicant to demonstrate a serious question to be tried (which means a case which certainly neither frivolous nor vexatious nor an abuse of the process of the Court et alia) which condition is less laborious and less awkward for the Court to determine.

28. Are the three conditions straight-jacket tenets, outside of which a Court should drop the pen and decline to act? Since the American Cynamid case, there has been a slow but sure paradigm

shift towards flexibility as opposed to rigidity. The only focus in this shift is justice. It has thus been argued that the three conditions should not be viewed by a Court of justice as straightjacket and watertight compartments outside of which a Court cannot act, the interrogation around the problematic condition 1 (which demands demonstration of a prima facie case with probability of success) also played out in and was discussed at length in the Canadian decision of the Court of Appeal for Saskatchewan in Mosaic Potash Esterhazy Limited Partnership vs. Potash Corporation of Saskatchewan Inc. 2011 SKCA 120. In this case, one of the key issues for determination was whether the three factors for granting an interlocutory injunction are merely guidelines or rather than as requirements or prerequisites. In considering whether to grant an interlocutory injunction or not, a Court should not only be transfixed to the three factors but also focus on the bigger picture which is whether it will be just and equitable to grant. The three factors are not inflexible straightjacket but rather, they should be regarded as the framework in which a Court will assess whether an injunction is warranted in any particular case and the ultimate focus of the Court must always be on the justice and equity of the situation in issue. The formulation of a rigid test for all types of cases, without considering their nature, should not shackle a Court of law and justice and more so a Court of equity. If the original purpose of equity is to be met, it will then invite the Court to consider more than just the strength of the Plaintiff's position but in addition, whether equity will allow the Plaintiff to suffer by mere failure to establish a strong prima facie case in circumstances where for instance there will be the irreparable harm. See the leading Judgment of Richards J.A., with which Smith and Herauf, JJ.A concurred.

29. In their seminal works (an Article), Steven Mason & McCathy Tetraut, entitled Interlocutory Injunctions: Practical Considerations, while adopting the first condition as laid down by the Supreme Court of Canada in in R. J. R. Macdonald vs. Canada (Attorney General) 3 S.C.R. 199, the Learned authors state as follows regarding the test: "With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald Vs. Canada (Attorney General) 3 S.C.R. 199 "Once satisfied that the Application is neither vexatious nor frivolous, the motions Judge should proceed to consider the second and third tests, even if of the opinion that the Plaintiff is unlikely to succeed at the trial…"

30. In Kenya, it appears to me that both the first condition enunciated in the Giella case and the first condition set in American Cyanamid and Mosaic Potash cases have been embraced with equal verve. For instance, Ouko, Kiage and M'Inoti JJ.A., in the Court of Appeal decision in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, embraced the first condition enunciated in American Cynamid case and rendered themselves as follows: "We reiterate 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 e stablish 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."

31. The flexibility urged in the Mosaic Potash has been received and embraced by the superior Courts in Kenya. In particular, it has been enunciated that Courts should not restrictively apply the three factors enunciated in the Giella case on grounds that although prescribed and necessary parts of the analysis, are nonetheless not usefully seen as an inflexible straight jacket and should instead be regarded as the framework in which a Court will assess whether an injunction is warranted on any particular case and that the ultimate focus of the Court must always be on the justice and equity of the situation in issue since they are not water tight compartments. Some of the cases where the Mosaic Potash

reasoning has been embraced and applied in Kenya include West Kenya Sugar Company Limited vs. Agriculture Fisheries & Food Authority & 11 others [2016] eKLR (per Sitati, Maina and Mrima, JJ); Mary Lairumbi & another vs. Inspector General of Police & 4 others [2018] eKLR (C. Kariuki, J); and G.B.M. Kariuki vs. Director of Criminal Investigations & 3 others [2016] eKLR (per Aburili, J).

32. Who bears the burden of proof? Section 63 of the CPA and Order 40 Rules 1 and 2 of the CPR allude that the burden of proof and the incidence of burden - contemplated under sections 107, 108, 109 and 110 of the *Evidence Act* - lies with the Applicant. Also see Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, per Ouko, Kiage and M'Inoti JJ.A.; and Kenya Commercial Finance Co Ltd vs. Afraha Education Society [2001] 1 EA 86, per Gicheru, Lakha and Keiwua JJA (as they then were).

33. What is the standard of proof? The standard of proof is the usual standard of proof resrved for civil suits namely balance of probabilities. See Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, per Ouko, Kiage and M'Inoti JJ.A.; Electric Mobility Co. Pty Ltd vs. Whiz enterprises Pty Ltd (2006) NSWSC 580; International Air Transport Association & Another vs. Akarim Agencies Company Ltd & 2 others 2014 eKLR; Andrew Chege Wainaina vs. David Karanja Mwangi & another [2017] eKLR; and Steven Mason & McCathy Tetraut, entitled Interlocutory Injunctions: Practical Considerations.

34. What amounts to a 'prima facie case'? A prima facie case is that which at first sight or on first appearance but subject to further evidence or information, there is evidence sufficient to establish a fact or raise a presumption unless disproved or rebutted. See Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), page 1310. It that case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. It is more than an arguable case. See Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others (2003) eKLR, Kwach, Bosire and O'Kubasu JJ.A. (as they then were). See also Kenya Commercial Finance Co Ltd vs. Afraha Education Society (2001) 1 EA 86, per Gicheru, Lakha and Keiwua, JJA (as they then were); and Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, Ouko, Kiage and M'Inoti JJ.A.

35. What amounts to irreparable harm/injury/damage? In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. See Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), page 856; Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352; Joseph Mbugua Gichanga vs. Co-operative of Kenya Ltd (2005) eKLR, per Maraga, J. (as he then was); Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR, Ombwayo, J.; the Text Book authored by Robert J. Sharpe, Injunctions and Specific Performance, 4th Edition, at page 27; and Brigadier Arthur Ndonj Owuor vs. The Standard Ltd (2011) eKLR, per Dulu, J.

36. What are the considerations ingrained in "balance of convenience"? It involves a balancing test to decide whether to issue a preliminary injunction to stop an alleged infringement while weighing the benefit to the Plaintiff and the public against the burden on the Defendant. See Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), page 163. This condition is deployable only in instances where doubt exists as to the Applicant' right or irreparable harm. See Paul Gitonga Wanjau vs. Gathithis Tea Factory Company Ltd & others [2016] eKLR, per Mativo, J. The practical guideline to employ in weighing a balance of convenience is to address your judicial mind to a situation where the injunction is not granted and the suit is ultimately decided in favour of the Plaintiff,

in which case the inconvenience which would been occasioned to the Plaintiff would be greater than that which would be caused to the Defendant if an injunction is granted but the suit is ultimately dismissed. See Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR, per Ombwayo, J. In this regard, the Court should thus opt for the lower risk of injustice rather than the higher risk of injustice option. See Amir Suleiman vs. Amboseli Resort Limited [2004] eKLR, per Ojwang, Ag. J (as he then was); and the English case of Films Rover International Ltd vs. Cannon Film Sales Ltd [1987] 1 WLR 670, per Hoffman, J. where his Lordship took a view that in considering to grant injunctive relief on a balance of convenience: "A fundamental principle of….is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'…"

Determination

37. It bears repeating that the Applicant is seeking a prohibitory preliminary interlocutory injunction against the Respondents. The gravamen of the Applicant's case being that they are beneficial owners of the suit property and are apprehensive that if the 1st Respondent permitted to continue developing the portion of the suit property sold to him before this suit is heard and determined, they will suffer irreparable harm.

38. On the other hand, the crux of the Respondents' case is that the Applicant has failed to make the cut for injunctive relief since they are also beneficially entitled to the suit property, arguing that the 2nd and 3rd Respondents' father was the owner of the property.

39. As discussed supra, the second and third conditions for grant of injunctive relief are common denominators in both the Giella case and the American Cyanamid/Mosaic Potash cases, the variance being only in the first condition. Deploying the requisite conditions for grant of injunctive relief therefore, this Application turns on whether the Applicant has demonstrated a prima facie case with reasonable prospect of success (as enunciated in Giella case); or its alternative videlicet a serious question to be tried (a question which is not frivolous, vexatious or an abuse of the process of the Court, as enunciated in the American Cyanamid case); and secondly, whether the Applicant has demonstrated the second condition of qualifying for injunctive relief which is whether the Applicant has demonstrated that she will suffer irreparable harm/damage/injury (harm/damage/injury which cannot be compensated by an award of monetary damages) or its alternative, which is to persuade this Court that the balance of convenience tilts in her favour.

40. In determining whether a prima facie case has been established, the cautionary principle posits that when considering an interlocutory relief, it should not be granted if its effect is to conclusively, definitively and finally determine a dispute at the interlocutory stage. In this context, abundant caution is urged. In further connection to this, although a Court may not neatly avoid straying into merits of the dispute to some degree, the Court should always guard against the temptation of conclusively, definitively and finally determining the dispute at the interlocutory stage, which then may result into prejudging or prejudicing the pending suit. A Court should always shun the temptation of making definitive and conclusive findings at the interlocutory stage. For this proposition, see Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) vs. Sarah Nyiva Hillman & 3 others [2018] eKLR; Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR; Githunguri vs. Jimba Credit Finance Corporation Ltd [1988] KLR 1; Said Ahmed vs. Mannasseh Denga & Another [2019] eKLR; American Cyanamid Co. vs. Ethicon Ltd [1975] AC 396; Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi [2006] eKLR; John Nduva Wambua & another vs. Kioko Makaya [2019] eKLR; and David Kamau Gakuru vs. National Industrial Credit Bank Ltd [2002] eKLR.

41. In considering this whether or not a prima facie case has been established by the Applicant therefore, I will be guided by the cautionary principle afore-discussed and proceed with abundance of caution by refraining to make any concluded views on the principal issue for determination (set out herein below) to avoid prejudging or prejudicing the pending suit. Further, I will avoid interrogation of facts and evaluation of evidence in such a manner that can risk determining the main suit at this interlocutory stage. The primary issue which will be determined in fullness of time is ownership of and/or trespass into the suit property. Being the nub and fulcrum upon which this dispute will eventually turn, at this interlocutory stage, it is a no-go-zone, for to do so is to prematurely determine and pre-empt the suit.

42. However, it has been appreciated that in Applications of this nature, the Court cannot utterly and neatly shun the prospect of peering into the merits of the case, to some degree especially when considering whether or not a prima facie case has been established by the Applicant. However, Superior Courts have again enunciated that if this happens, the opinion expressed at the interim or interlocutory stage is non-binding on the trial Court which will finally dispose the matter. In an Indian case of Kanshi Ram vs. Bansi Lal Air 1977 Himachal Pradesh 61 which dealt with order 39 rules 1 and 2 of the Indian Civil Procedure Rules (the like of 40 Rule 1(a) of the Civil Procedure Rules of Kenya) which ratio was echoed in Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others [1996] eKLR, the issue of going into the merits of a case at an interlocutory stage was addressed. Akiwumi, Tunoi and Shah, JJ.A. (as they then were) expressed themselves as follows: "In every Application for an interim injunction in a pending suit it is necessary for the Court to enter, to some degree, into the merits of the case in order to determine whether a prima facie case exists. To what degree the Court will enter will vary with the facts of each case. When the Court declares that prima facie case exists it intends to say that the case of the Plaintiff is not without merits. Any opinion expressed by the Court, whether it be of the trial Court or an appellate Court or revisional Court cannot in law preclude the trial Court from considering the issue afresh when deciding the suit and for that purpose it must have regard to all the material then before it. In deciding that issue, it will properly have no regard to the finding rendered on the point while disposing of the Application for interim injunction. No matter how Superior the Court rendering that finding including High Court, the trial Court is bound in the proper discharge of its duties to ignore the finding when it proceeds to dispose of the suit and to apply its mind independently to the decision of the issue."

43. Having considered the rival Affidavit evidence and specifically the Respondent's well-supported uncontroverted deposition that the contract had been mutually rescinded and in pursuant thereto and by the time this Application was lodged, the Applicant had received Kshs. 2,075,000, out of the total purchase price of Kshs. 2,325,000, through his bank account domiciled in Equity Bank (account number 06xxxxxx27596, leaving a balance of Kshs. 250,000), a material fact which was never mentioned or even alluded to by the Applicant in his Application, this Court first finds and so concludes that the Applicant failed in his inexorable duty to make a full and frank disclosure of this material fact (namely mutual rescission and the fact that he had received a substantial amount of the refund in the sum of Kshs. 2,075,000). The failure to disclose renders the Applicant guilty of an inequitable conduct and thus underserving of an equitable remedy. On this ground alone, such the Applicant approached this Court with soiled hands and he cannot thus benefit from an equitable remedy for he who comes to equity must come with clean hands.

44. Further, premised on the same material facts (undisclosed by the Applicant), this Court is afraid to underscore that the doctrine of estoppel by representation cannot comport with and possibly permit or accommodate the remedies sought by the Applicant in the suit namely a permanent injunction and specific performance (by way of transfer of the suit property to the Applicant) as prayed in the Plaint. This class of estoppel also called the "common law estoppel by representation" in Halsbury's Laws of

England, Volume 16(2), 2003 reissue, is defined as follows: “Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto.” This thus renders Application short of glory of a prima facie case with reasonable prospect of success as against the Respondent (as enunciated in Giella decision) and also short of the glory of the alternative condition (namely a serious question to be tried between the Applicant and the Respondent) as enunciated in the American Cyanamid case, to qualify for the remedy of a permanent injunction and specific performance as prayed in the Plaint.

45. Concerning the second condition of grating temporary injunctions, this Court is unpersuaded that if the Respondent is permitted to continue with alleged developments on the suit property, the Applicant will suffer irreparable damage.

46. In any event, having considered the balance of convenience guiding principles laid down in Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR, by Ombwayo, J.; Amir Suleiman vs. Amboseli Resort Limited [2004] eKLR, by Ojwang, Ag. J (as he then was); and the English case of Films Rover International Ltd vs. Cannon Film Sales Ltd [1987] 1 WLR 670, by Hoffman, J., which principles Counsel a Court of law to picture a situation where the injunction is not granted and the suit is ultimately decided in favour of the Applicant, in which case the inconvenience which would been occasioned to the Applicant will be greater than that which would be caused to the Respondent if an injunction is granted but the suit is ultimately dismissed, and elect a course carrying the lower risk of injustice, this Court does not find difficulty in concluding that the Applicant has failed to persuade this Court that the balance of convenience tilts in his favour.

(b) Who should shoulder the costs of this Application?

47. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another [2016] eKLR, per C. Kariuki, J.

48. How then is this discretion exercised? Discretion is not the same thing as carte blanche. Beacons demarcating how discretion is exercised are as follows.

49. The first beacon is that discretion ought to be exercised with circumspection and judiciously. See Christopher Kiprotich vs. Daniel Gathua & 5 others [1976] eKLR; Mbogo and Another vs. Shah [1968] EA 93 and Mohindra vs. Mohindra (1953) 20 EACA 56; Sharp vs. Wakefield [1891] 64 L.T Rep. 180 Ap. Ca.173, per Lord Halsbury L. C.; and Rooke’s case, 5 Rep. 99b (1598), cited in approval by Mativo, J. in Republic vs. Public Procurement Administrative Review Board & 2 others [2018] eKLR.

50. The second beacon is that costs follow the event unless the Court finds a good cause to negate this trajectory. See Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another [2016] eKLR). In this context, the meaning ascribed to the words “costs shall follow the event” is that the party who calls

forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), Judicial Hints on Civil Procedure 2nd edition at page 99; Dipchem East Africa Limited vs. Karutturi Limited (In Receivership) [2015] eKLR, per Gikonyo, J.; Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another (2016) eKLR, per Mativo, J.; and Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

51. The third beacon which is closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR, per Odunga, J.

52. The fourth beacon which is closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.

53. The fifth beacon which connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others (2014) eKLR; and Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J.

PART VI: DISPOSITION

54. Based on the foregoing reasons, this Application is dismissed. Considering the principles governing costs discussed supra, this Court hereby directs that costs of this Application shall be in the cause. In the best interest of justice, the Plaintiff is directed to take immediate steps to set the matter down for a pre-trial conference within 30 days, to mitigate any hardship that may result to any party herein.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 26TH DAY OF JANUARY, 2023

....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff/Applicant:..

Advocate for the Defendant/Respondent:...

Court Assistant:..