



Gitonga & another (Suing as the Legal Representatives of John Gitonga Kihara) v National Bank of Kenya Limited & 5 others (Civil Appeal 18 of 2017) [2023] KECA 369 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 18 OF 2017
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
MARCH 31, 2023**

BETWEEN

**DAVID KIHARA GITONGA 1ST APPELLANT
PETER KIHARA 2ND APPELLANT
SUING AS THE LEGAL REPRESENTATIVES OF JOHN GITONGA KIHARA**

AND

**NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT
FOURSOME DEVELOPERS LIMITED 2ND RESPONDENT
DOVE COURT LIMITED 3RD RESPONDENT
SHABA INVESTMENTS LIMITED 4TH RESPONDENT
KAMUTHI HOUSING CO-OPERATIVE SOCIETY LTD 5TH RESPONDENT
K-REP BANK LIMITED 6TH RESPONDENT**

(An appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Ogola, J.) dated 29th September 2015 in HCCC No. 258 of 2010)

JUDGMENT

1. John Gitonga Kihara (the Deceased) filed suit in the High Court of Kenya at Nairobi, HCCC No 258 of 2010 against the 1st respondent, National Bank of Kenya Limited, praying for orders, *inter alia*: an injunction to restrain the 1st respondent from selling, disposing of or transferring LR Nos 280/11 and 280/12 (the suit properties, being the subdivisions of LR No 280/3); that the 1st respondent do furnish the deceased with documents of sale, an account of the proceeds of sale of the properties sold



- or disposed of by the 1st respondent, and that the 1st respondent do pay to the deceased the funds held on his account; that the 1st respondent do transfer the suit properties to the deceased; damages for loss and damage occasioned by the acts of the 1st respondent's; costs of the suit; and interest.
2. The deceased's plaint dated April 23, 2010 was amended on November 14, 2011 to add the 3rd respondent, Dove Court Limited, as the 2nd defendant in that suit. Even though no specific orders were sought against the 3rd respondent, the deceased claimed that the 1st respondent had sold the suit properties to the 3rd respondent during the pendency of the suit with the sole intention of defeating the deceased's claim.
 3. Following John Gitonga Kihara's death on June 16, 2013, the appellants were substituted for the deceased as plaintiffs in the suit and further amended the amended plaint on July 28, 2014. In the further amended plaint, the appellants alleged fraud on the part of the 1st and 3rd respondents. They sought a declaration that the transfer of the suit properties to the 1st respondent was null and void; that the relationship of chargor and chargee reverted on collapse of the sale by the 1st respondent to the 3rd respondent; that the 3rd respondent did not obtain a good or indefeasible title in respect of the suit properties; and that the 3rd respondent was obligated to account to the appellants for its dealings in the suit properties. They also sought an order directing transfer to them of the then remaining portions of the suit properties; an account of the proceeds of the portions already sold; and an injunction restraining the 3rd respondent from dealing in any manner with the suit properties.
 4. In its defence dated March 20, 2013, the 1st respondent stated that it sold the properties in exercise of its statutory power of sale to recover a sum of Kshs 136,686,550/60 due and owing from the deceased to the 1st respondent by the year 1995 on account of advances made to the deceased during the period between 1974 and 1978; that the 1st respondent issued the requisite statutory notice; and that, upon expiry of the notice, the deceased approached the 1st respondent with a request to sell LR No 280/3 (which was subsequently subdivided into the suit properties) by way of a private treaty to service the loan account.
 5. Pursuant to the terms of settlement between the deceased and the 1st respondent, the deceased introduced the 2nd respondent, Foursome Ltd, which offered to purchase LR No 280/3 for Kshs 60,000,000, and in terms of the Agreement for Sale dated November 1, 1995; that LR No 280/3 was then transferred to the 2nd respondent vide an instrument of transfer dated September 13, 1995; that the 1st respondent and the deceased agreed that the sum of Kshs 60,000,000 would be in full settlement of the debt then due; that, accordingly, the deceased's loan account was credited with the sum aforesaid and the then outstanding balance of Kshs 76,868,550/60 written off; that the 1st respondent secured vacant possession of the property in 2003 by enforcement of eviction orders issued in its favour in Nairobi HCCC No 1101 of 2003; and that the deceased's equity of redemption was extinguished upon sale of the said property to the 2nd respondent.
 6. The 3rd respondent also filed a defence dated October 22, 2012 and amended on July 3, 2014. Denying the appellants' claim, the 3rd respondent contended that the suit properties were not transferred to it during the pendency of the suit as alleged; that the impugned transfer was not intended to defeat the appellants' claim; and that the suit properties had already changed hands, and were registered in the name of the 5th respondent, Shaba Investments Ltd.
 7. It is noteworthy that the 2nd respondent did not file a defence to the appellants' suit and that, if it did, the same is not contained in the record as put to us. Neither was the 2nd respondent represented in the appeal before us.



8. By a Notice of Motion dated August 29, 2014, the appellants sought: an order to join the 4th 5th and 6th respondents (Shaba Investments Ltd, Kamuthi Housing Co-Operative Society and K-Rep Bank Ltd) as defendants in the suit; an injunction to restrain the 1st and 3rd respondents from dealing in the suit properties pending hearing and determination of the suit; and costs.
9. The appellants' Motion was grounded on a claim that the 1st respondent had sold and transferred the suit properties during the pendency of the suit. However, the appellants make no reference to the terms of settlement reached between their deceased father and the 1st respondent thereby compromising the mortgage debt and allowing the 1st respondent to exercise its statutory power of sale by way of a private treaty entered into between the 1st and the 2nd respondents.
10. In his Ruling dated September 29, 2015, E Ogola, J dismissed the appellants' Motion. Addressing himself to the main grounds on which the application was made, the learned Judge had this to say in part:
 - “73. The above notwithstanding, this Court having established that there was nothing stopping National Bank from exercising its statutory power of sale and that in the event that the sale of the properties were irregular the Applicant's remedy is in damages, the doctrine of *lis pendens* might not aid the applicants' case.
 76. The above notwithstanding, the joinder of the parties will not serve any useful purpose in this suit, having established that the doctrine of *lis pendens* will not aid the applicants' case and that the bank was entitled to exercise its statutory power of sale as regards the suit properties. In essence, this court finds that the applicants' remedy, if any, lies in damages against the National Bank of Kenya.”
11. Dissatisfied with the decision of E. Ogola, J the appellants moved to this Court on appeal on a whopping 30 grounds against the grain of rule 88 (1) of the *Court of Appeal Rules*, which requires a memorandum of appeal to

“concisely set forth under distinct heads without argument or narrative the grounds of objection to the decision appealed against”.
12. The grounds of appeal set out on the face of the appellants' Memorandum of Appeal dated January 25, 2017 essentially fault the learned Judge for, *inter alia*: declining to join the 4th 5th and 6th respondents as defendants in the suit; holding that the appellants had not established a prima facie case against the 5th and 6th respondents; failing to nullify the charge over, and sale of, the suit properties to the 3rd 4th and 5th respondents; holding that the deceased's equity of redemption was extinguished by the contract of sale which subsequently collapsed; failing to find that collapse of the sale to the 2nd respondent of the suit properties vitiated the deceased's consent to sale by a private treaty; misapplying the doctrine of *lis pendens*; failing to find that the 1st respondent did not have good title to the suit properties capable of being transferred to third parties; holding that the appellants had not established fraud on the part of the 1st respondent; holding that a chargor can acquire, and did acquire, title to the charged property through a vesting order made in proceedings to which the chargor was not party; holding that the court was functus officio in consequence of a consent order recorded by the 1st and 2nd respondents in the absence and knowledge of the appellants; upholding the said consent order, which contravened section 12 of the *Banking Act* and the rule of mortgages, which bars a mortgagee from buying property mortgaged to him; misapprehending the legal consequences of the charger not being party to a suit



in which the charged property was the subject matter; and for allegedly denying the appellants a fair hearing.

13. In support of the appeal, learned senior counsel for the appellants, Dr. Kamau Kuria, filed written submissions dated May 22, 2017 citing 10 authorities to which we will shortly return in the course of our determination of the issues falling to be determined in this appeal.
14. In opposition to the appeal, learned counsel for the 1st respondent, M/s. Moronge and Company, also filed written submissions dated October 6, 2017.
15. M/s. Kilonzo and Company represented the 3rd respondent and filed written submissions dated June 29, 2018.
16. M/s. Mboya Wangonu and Waiyaki, learned counsel for the 4th respondent, filed their written submissions dated September 22, 2017.
17. On their part, M/s. E. M. Washe represented the 5th respondent and filed written submissions dated October 5, 2017.
18. Finally, learned counsel for the 6th respondent, M/s. Munyao, Muthama and Kashindi, filed written submissions dated August 14, 2017.
19. In addition to their written submissions, learned counsel made oral highlights at the hearing of the appeal.
20. A careful examination of the pleadings, the evidence on record, and the rival written and oral submissions of learned counsel for the parties, confirm that, unable to pay the debt, the deceased chargor requested the 1st respondent to discount the debt to a maximum sum of Kshs 60 Million and, in consideration therefor, allowed the property to be sold by Private Treaty to the 2nd Respondent, who the deceased identified and introduced to the 1st respondent for that purpose.
21. The agreed sale was in exercise of the 1st respondent's statutory power of sale in full discharge of the deceased chargor's liabilities to the 1st respondent. The legal effect of that agreement was that the deceased chargor's equity of redemption was forthwith extinguished along with all rights of claim over the property and its subsequent subdivisions.
22. Pursuant to the private treaty expressly sanctioned by the deceased chargor as aforesaid, the 1st and 2nd Respondents entered into a Sale Agreement for L.R No 280/3. Under Clause 2 of the Special Conditions of sale, the 1st Respondent permitted the 2nd Respondent to take possession of the parent suit property to enable them to effect subdivisions. Consequently, L.R No 280/3 was subdivided into 3 parcels and allocated Land Reference numbers 280/10, 280/11 and 280/12. We are not told what became of LR No 280/10. What is clear, though, is that the subdivisions identified as LR Numbers 280/11 and 280/12 comprised the suit properties at the trial and on appeal to this Court.
23. With time, the 2nd Respondent was only able to pay Kshs 12,500,000/= out of the agreed sum of Kshs 60 million and, consequently, the sale fell through. Failure on the 2nd respondent's part to complete the purchase prompted the 1st respondent to institute proceedings to recover possession of the suit properties in HCCC No 478 of 1998, which was settled by the two parties by way of a Consent Judgment recorded on July 7, 2003 and, flowing therefrom, the trial Court granted the 1st Respondent a Vesting Order dated July 15, 2004 thereby constituting the 1st Respondent title holders of the suit properties.



24. On securing a vesting order in respect of the suit properties, the 1st Respondent transferred to the 3rd Respondent LR No 280/11 on December 18, 2009 and, Subsequently, LR No 280/12 on June 2, 2010.
25. The first transfer of LR No 280/11 by the 1st Respondent to the 3rd Respondent prompted the deceased Chargor to file suit in HCCC No 258 of 2010 in April 2010 by which he sought orders of injunction to preserve the suit properties in what appeared to be either a change of mind or sheer misapprehension of the law pertaining to the prior extinction of his equity of redemption.
26. Soon thereafter, the 3rd Respondent transferred the suit properties to the 4th Respondent on July 21, 2011. In turn, the 4th Respondent transferred the suit properties to the 5th Respondent on October 11, 2011, after 5th respondent charged the properties to the 6th Respondent by way of a Charge registered on October 11, 2011 to secure payment of Kshs 560,970,000, and a Further Charge registered on October 7, 2013 to secure payment of a further sum of Kshs 200,000,000.
27. After the demise of the deceased chargor on June 6, 2013, the appellants obtained letters of administration ad litem on May 7, 2014 and embarked on the furtherance of their deceased father's attempt to regain the suit properties.
28. It was in the backdrop of the aforementioned transactions that the appellants thought it worthy to test waters in the wide and deep ocean of legal principles and statute law on charges and mortgages, all in the hope that they might by any chance win scores and regain what their deceased father had to voluntarily let go to redeem himself from the colossal mortgage debt then owed to the 1st respondent.
29. This turn of events was predicated on a claim of breach by the respondents of the *lis pendens* doctrine, and the only way they could do so was by an attempt to join the 4th, 5th and 6th respondents in the proceedings previously commenced by their deceased father against the 1st and 3rd respondents in HCCC No 258 of 2010. They now fault the learned Judge for dismissing their Notice of Motion dated August 29, 2014 by his ruling dated September 29, 2015. It is against this ruling that they moved to this Court on appeal praying that the impugned ruling and order of the High Court (Ogola, J) dated September 29, 2015 be set aside and that the same be substituted for an order allowing, with costs, the appellants' Motion aforesaid.
30. This is an interlocutory appeal in which we are asked to re-examine and pronounce ourselves on the trial Judge's judicial discretion in dismissing the appellants' application to join the 4th, 5th and 6th respondents in the suit. In doing so, we take to mind that one of the latitudes given to judges and judicial officers in the course of their work is judicial discretion founded on the immutable principle that to whom much is given, much is required.
31. *Black's Law Dictionary*, 10th Edition, defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
32. The judicial discretion of the trial court to grant an interlocutory application of the nature presented by the appellants is not a matter of right. In effect, a question arises as to whether the circumstances of this case impel this Court to interfere with the decision reached in exercise of judicial discretion by the trial Judge.



33. Madan, JA. (as he then was) had this to say on the matter in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA p.579 at p.587-8:

“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.”

34. Having examined the record of appeal and the grounds on which it is founded, the impugned ruling, the written and oral submissions of learned senior counsel for the appellants and learned counsel for the respondents, statute law and the cited authorities, we are of the considered view that the appeal against the ruling in respect of the appellants’ Motion for joinder dated August 29, 2014 stands or falls on our findings on the following main issues of law and fact in respect of which learned counsel for the appellants and for the respondents filed written submissions as aforesaid: whether, on the authority of *United India Insurance Co. Ltd v East African Underwriters* (ibid), the learned Judge was at fault in declining to grant the appellants’ application to join the 4th 5th and 6th respondents (Shaba Investments Ltd, Kamuthi Housing Co-Operative Society and K-Rep Bank Ltd) as defendants in Nairobi HCCC No 258 of 2010; whether the learned Judge was at fault in declining to grant injunctive relief as sought by the appellants against the 1st and 5th respondents; and what orders ought we to make in determination of the appeal, including orders as to costs.

35. On the 1st issue, the appellants contended that the 4th, 5th and 6th respondents acquired the suit properties during the pendency of the suit; and that they should have been joined as defendants in the suit. According to learned Senior Counsel for the appellants, the 1st respondent tried to put the suit properties beyond the reach of the appellants by way of purported sales and charges in contravention of section 52 of the *Indian Transfer of Property Act* (the ITPA). Senior counsel submitted that the respondents dealt illegally with the suit properties; that collapse of the sale by the 1st respondent to the 2nd respondent invalidated the consent recorded between the deceased chargor and the 1st respondent; and that the 4th, 5th and 6th respondents purportedly purchased and charged the suit properties in contravention of the *lis pendens* doctrine and, therefore, ought to have been joined as defendants in the suit.

36. On the authority of *Moline v Oganda* [2009] KLR p.620; *Bernadette Wangari Muriu v NSSF Board of Trustees & 2 Others* [2012] eKLR; *Carol Silcock v K. S. Mohammed* [2016] eKLR; *Olympic Company Trading Ltd v Said Mohammed* [2012] eKLR; and *Anne Mwangi v Co- Operative Bank of Kenya* [2013] eKLR, Senior counsel submitted that the 4th, 5th and 6th respondents acted in contravention of the *lis pendens* doctrine as enshrined in section 52 of the *ITPA*, which prohibits transfer or other dealings in the suit property by any party to the suit so as to affect the right of any other party.

37. Section 52 of the *ITPA, 1882*, which was in force in Kenya at the material time, reads:

“ 52. “Transfer of property pending suit relating thereto.

During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable



property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

38. The 1st respondent’s case is that it was by no means in breach of section 52 of the *ITPA* or otherwise in contravention of the *lis pendens* doctrine. In their submissions, learned counsel for the 1st respondent submitted that the appellants’ application dated August 29, 2014 had been overtaken by events; that the deceased chargor and the 1st respondent had reached negotiated settlement sometime in 1995 in terms that the suit properties be sold by way of private treaty in exercise of the 1st respondent’s statutory power of sale; that a consent judgment was recorded in Nairobi HCCC No 478 of 1998 and a vesting order issued in favour of the 1st respondent; that the 1st respondent obtained a mandatory order of eviction in Nairobi HCCC No 1103 of 2003 against the deceased and one Miss. Kagure Kihara Gitonga (a daughter of the deceased); and that the events aforesaid completely changed the substratum of the appellant’s Motion dated August 29, 2014, and of the reliefs sought.
39. In their supplementary submissions dated January 9, 2019, counsel stated that the vesting order, mandatory injunction and the eviction order have never been varied, set aside or otherwise discharged. According to them, no unmistakable right exists in the estate of the deceased which can be claimed by the appellants with regard to the suit properties. Moreover, the deceased’s equity of redemption had long been extinguished by virtue of the negotiated settlement reached, and a consent judgment recorded on express terms between the deceased and the 1st respondent in 1995 allowing the 1st respondent to sell the suit property by way of a private treaty under and by virtue of its statutory power of sale.
40. Pursuant to the said agreement, the 1st respondent sold the suit property to the 2nd respondent, which was unable to complete the purchase. This prompted the 1st respondent to institute proceedings against it in Nairobi HCCC No 478 of 1998 seeking injunctive relief to restrain the 2nd respondent from dealing with the property; cancellation of the 2nd respondent’s title to the suit property, and for a vesting order to issue in favour of the 1st respondent; special damages; and, in the alternative, an award of the outstanding balance of the purchase price.
41. The suit aforesaid was subsequently compromised by a consent order pursuant to which a decree was issued on October 23, 2003 in terms, *inter alia*, that if the 2nd respondent shall not have sold the property or any subdivisions thereof, the 1st respondent shall be entitled to a Vesting Order transferring ownership to the 1st respondent unconditionally. In effect, Nairobi HCCC No 258 of 2010 instituted by the appellants came too late in the day in light of the negotiated settlement, consent order, vesting order in favour of the 1st respondent, mandatory injunction and eviction aforesaid.
42. On the issue as to whether the *lis pendens* doctrine applied to the appellants’ case, learned counsel for the 4th respondent submitted that it did not, and could not aid the appellants, because there were no orders stopping dealings in the suit properties (see [Naftali Ruthi Kinyua v Patrick Thuita Gachure & another](#)[2015] eKLR).
43. It is noteworthy that, though duly served with the hearing notice, Foursome (the 2nd respondent) were not represented at the hearing, and neither did they file any submissions. However, that comes as no surprise in view of the fact that they had relinquished all rights over the suit properties to the 1st respondent in consequence of the consent order pursuant to which a decree was issued on October 23, 2003 in Nairobi HCCC No 478 of 1998.



44. On the authority of *JMK v MWM & another* [2015] eKLR, learned counsel for the 3rd respondent submitted that an application for joinder can only be allowed if the proceedings have not been concluded.
45. In their submissions, learned counsel for the 4th respondent contended that the appellants had not shown any reasonable cause of action against the 4th respondent to warrant their joinder; that the trial court having found that the 1st respondent was entitled to exercise its statutory power of sale, joinder of parties would not have served any purpose in the suit; and that, if the appellants had established their case at the trial, their remedies would only lie in damages.
46. On their part, learned counsel for the 5th respondent cited the mandatory provisions of Order 1 Rule 10 (4) of the *Civil Procedure Rules* and submitted that the appellants were required to amend their plaint to include the persons intended to be joined and annex the amended plaint to their application for joinder. According to counsel, this mandatory requirement was intended to give a clear understanding as to the cause of action against the intended defendants, and to enable the court to determine whether the intended defendants were actually necessary parties. Having failed to comply, the appellants' application was incompetent.
47. Likewise, learned counsel for the 6th respondent contended that the appellants' failure to comply with the mandatory provisions of Order 1 Rule 10(4) of the *Civil Procedure Rules* rendered their application fatally defective. In any event, the 6th respondent was merely a chargee and that the chargor (the 5th respondent) has been paying and continues to repay the facility granted, and that joining them in the suit would serve no useful purpose, but would only saddle them with unnecessary costs of litigation.
48. In determination of the appellants' application for joinder, the learned Judge correctly concluded, as we hereby find, that joinder of the 4th, 5th and 6th respondents in the suit could not have served any useful purpose. Having held that the bank was entitled to exercise its statutory power of sale over the suit properties, the doctrine of *lis pendens* would not have aided the appellant's case to justify joinder.
49. As the High Court at Nairobi correctly held in *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR -
- “The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on.”
50. The purpose of such amendment is to plead and set out with clarity, in the plaint or originating motion/summons, the parties against whom the plaintiffs', petitioners' or applicants' claims are directed and pleaded. In the absence of such amendment, the trial court would be at a loss as to the identity of the parties against whom relief is sought.
51. Merely praying that the 4th, 5th and 6th respondents be joined in the suit without amending the plaint to reflect their names as defendants, as was the case here, was futile to say the least. We need not over emphasize the fact that further amendments in the body of the pleadings was necessary to demonstrate the nature of claims made against them. Indeed, the appellants were obligated to establish what cause of action arose against the 4th, 5th and 6th respondents long after the deceased's equity of redemption had been extinguished. Again, no such amendment was made. Accordingly, we find nothing to fault the learned Judge for declining the appellants' application for joinder.



52. That settles the 1st issue as to whether the learned Judge was at fault in declining to grant the appellants' application to join the 4th, 5th and 6th respondents (Shaba Investments Ltd, Kamuthi Housing Co-Operative Society and K-Rep Bank Ltd) as defendants in Nairobi HCCC No 258 of 2010. It is clear to our mind that the appellants' Motion was without merit for want of compliance with the mandatory provisions of Order 1 Rule 10(4) of the Civil Procedure Rules.
53. Turning to the 2nd issue, we are invited by the respondents to find that the injunctive relief sought by the appellants was not merited. Citing the cases of *Murao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR; *Mbogo & another v Shah* [1968] EA p.98; *Giella v Cassman Brown & Co. Ltd* [1973] EA p.358; and *Ze Yu Yang v Nova Industrial Products Ltd* [2003] 1 EA p.362, learned counsel for the 3rd respondent submitted that a grant of interlocutory injunction is discretionary; that the appellant's Motion was brought after a long period of delay; that the appellants were guilty of laches and, therefore, undeserving of equitable relief and the exercise of the court's discretion; and that the appellants failed to demonstrate that they stood to suffer irreparable injury if the injunctive relief thereby sought was not granted.
54. Likewise, learned counsel for the 4th respondent submitted that the appellants had not established a prima facie case to merit the interlocutory injunction sought. They cited the cases of *Giella v Cassman Brown (supra)*; *Murao Ltd v First American Bank of Kenya Ltd (supra)*; and *American Syanamid v Ethicon Limited* [1975] AC p.396 where the court held that:
- “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief”.
55. Learned counsel further submitted that, by the appellants' own admission, the suit properties were sold to the 2nd respondent with the concurrence of the deceased chargor on or about October 12, 1995, but that the sale collapsed due to non-payment of the sale price; that, consequently, the property reverted to the 1st respondent through a vesting order issued in 2004; that, to date, the said order has not been set aside.
56. Citing the case of *Industrial and Commercial Development Corporation v Kariuki & Another* [1977] KLR p.52, counsel submitted that the equity of redemption subsists until transfer is registered, as was the case here. Accordingly, the appellants had not established a prima facie case to merit the orders sought.
57. What then constitutes a prima facie case? *In Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, this Court held:
- “In civil cases a prima facie case is a 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial.”
58. On the authority of *Muhani & Another v National Bank of Kenya* [1990] KLR p.73, learned counsel for the 5th respondent submitted that the deceased chargor lost all proprietary interest in the suit property after the 1st respondent exercised its statutory power of sale and transferred the properties to the 2nd respondent. According to learned counsel, the appellants had not satisfied the principles for grant of interlocutory injunction as enunciated in *Giella v Cassman Brown (supra)*. Citing the case of



Nyanza Fish Processors Limited v Barclays Bank [2009] eKLR, counsel submitted that the appellants had not demonstrated that, if the interlocutory injunction sought was not granted, they stood to suffer irreparable loss that cannot be compensated by an award of damages. In their view, the appellants could be compensated by an award of damages in the event that they proved their claim. Accordingly, they were not entitled to the injunctive relief sought.

59. In Nyanza Fish Processors Limited v Barclays Bank (*ibid*) this Court held:

“... we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

60. Finally, learned counsel for the 6th respondent relied on the cases of Giella v Cassman Brown (*supra*), Murao Limited v First American Bank of Kenya Limited (*supra*), Nguruman Limited v Jan Bonde Nielsen (*supra*) and Naftali Ruthi Kinua v Patrick Thuita Gachure & Another (*supra*), submitting that the appellants had not satisfied the principles for grant of interlocutory injunctive relief. According to learned counsel, interlocutory injunctions are subject to the discretion of the court, which the Court of Appeal cannot interfere with unless it is satisfied that the learned Judge, in exercising his discretion, misdirected himself in some matter and, as a result, arrived at a wrong decision, or unless it is manifest that the Judge has been clearly wrong in the exercise of his discretion and, as a result, there has been injustice (see County Government of Kilifi v Mombasa Cement Limited [2017] eKLR; and Matiba v Moi & 2 others [2008] 1 KLR p.670).
61. Citing the decision in Nancy Kakoya Amadiva v Expert Credit Limited & another [2015] eKLR, learned counsel submitted further that the orders sought by the appellants were unmerited in view of the fact that the deceased chargor’s equity of redemption had been extinguished when he consented to the sale in issue.
62. As the learned Judge correctly found, the appellants failed to establish a prima facie case against the 1st and 5th respondents. They failed to present any material to demonstrate to the trial Court that they were vested with rights that were apparently infringed by the two respondents so as to call for a rebuttal by them. Their deceased father having released the suit properties to the 1st respondent to sell in exercise of its statutory power of sale, his equity of redemption, and all rights that would have otherwise devolved to his estate and vest in the appellants, were extinguished. Consequently, the appellants did not establish a right of claim with a probability of success on trial. Neither did they demonstrate that, if the interlocutory injunction sought was denied, they stood the risk of suffering irreparable loss not capable of compensation by an award of damages (see Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR; and Kenya Commercial Finance Co. Ltd v Afraba Education Society [2001] Vol. 1 EA 86). Accordingly, we find nothing to fault the decision of the learned Judge not to grant the interlocutory injunction sought and, consequently, this ground of appeal also fails.
63. Taking to mind the principles laid down by Madan, JA. in the afore-cited decision in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd (*supra*), we find nothing in the record as put to us to suggest that the appellants have laid sufficient ground to justify this Court’s interference with the discretionary decision of the learned Judge. It matters not that we, if sitting at first instance, would or might have, given different weight to that given by the learned Judge to the various factors in the case. All said, this Court finds nothing to suggest that the Judge misdirected himself in law; that he misapprehended the facts; that he took account of considerations of which he should not have taken account; that he failed to take account of considerations of which he should have taken account; or that his decision, albeit a discretionary one, was plainly wrong.



64. Having carefully considered the record of appeal, the impugned ruling, the written and oral submissions of learned senior counsel for the appellants, learned counsel for the 1st, 3rd, 4th, 5th and 6th respondents, and the cited authorities, we form the view that the circumstances of this case do not impel this Court to interfere with the judicial discretion of the trial Judge. Accordingly, the appellants' appeal fails and is hereby dismissed with costs to the 1st, 3rd, 4th, 5th and 6th respondents. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

