Belgo Holdings Ltd v Lakeview Development Ltd & another (Civil Appeal E044 of 2022) [2022] KECA 1291 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1291 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E044 OF 2022

HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA

NOVEMBER 18, 2022

BETWEEN

BELGO HOLDINGS LTD ..... APPELLANT

AND

LAKEVIEW DEVELOPMENT LTD ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

(Appeal from the ruling and order of the Environment & Land Court at Nairobi (Mboya, J.) dated 9th December 2021 in (ELCC No. E064 of 2020)

JUDGMENT

1. Although what is before us is an interlocutory appeal challenging the exercise of discretion by the trial court in granting an interim prohibitory injunction, that has not deterred the appellant from presenting a memorandum of appeal containing a whopping 49 grounds of appeal and 55 sub grounds. Whether that is a "shock and awe" strategy or something else, it does not require rocket science to surmise that at the heart of such a surfeit of grounds of appeal, lies nothing but unnecessary overkill, duplicity and repetition. It bears emphasizing that rule 88(1) of the Court of Appeal Rules, 2022 demands that the memorandum of appeal must be concise and without argument and narrative. A memorandum of appeal such as is before us cannot, by any stretch of imagination, be described as concise, particularly when it is borne in mind that in determining the application from which the appeal arises, the trial court was only required to consider whether the 1st respondent had presented a prima facie case, not an ironclad one.

2. Be that as it may, the background to the appeal is as follows. On or about 10th August 2020, the 1st respondent, Lakeview Development Ltd, filed a suit in the Environment and Land Court (ELC) at Nairobi against the appellant and the 2nd respondent praying for among others, a declaration that it was the proprietor of two properties known as LR No. 28586 I.R. No. 124735 (formerly LR No.

3859) and LR No. 28587 I.R. No. 124736 (formerly LR No. 3860) (hereafter the suit properties). In addition, the 1st respondent prayed for cancellation of the registration of the suit properties in the appellant's name and registration of the same in its name, for rectification of the register, and for delivery by the appellant, of vacant possession of the suit properties.

3. The 1st respondent pleaded that prior to 10th August 1995, it was the registered proprietor of the suit properties. On 29th May 1995 the appellant and the 1st respondent entered into an agreement for sale of the suit properties for Kshs 20 million. Although the agreement indicated that the appellant had paid to the 1st respondent the purchase price, the same was not in fact paid and that on the appellant's request, the 1st respondent signed and gave to the appellant a copy of the transfer to enable the latter arrange financing of the purchase price. The 1st respondent retained the original transfer, on the understanding that the same would be handed over to the appellant only upon full payment of the purchase price. The copy of the transfer was given to the appellant on the basis of trust because the 1st respondent and the appellant at one time shared a common director, Mr. Akbar Esmail, who at the material time was a shareholder and managing director of the appellant.

4. It was further pleaded that in breach of the agreement and representation, the appellant misrepresented to the Land Registrar that the original indenture of transfer was lost and fraudulently and unlawfully transferred the suit properties to its name and failed to pay the purchase price. The 1st respondent pleaded the particulars of the alleged misrepresentation, breach of contract, and fraud and averred that it discovered the fraud on 5th September 2018 after which it demanded from the appellant payment of the purchase price, before it rescinded the agreement. It was the 1st respondent's further averment that the appellant holds the suit properties in trust for it.

5. In its defence dated 6th October 2020, the appellant denied the 1st respondent's averments and pleaded, among others, that the suit was res judicata, that the 1st respondent ought to have challenged the registration of the suit properties in the appellant's name within one year from the date of registration; that the claim founded on fraud ought to have been brought within three years of the date of the alleged fraud or with within three years when the 1st respondent, with due diligence, would have become aware of the fraud; that the transfer of the suit properties in its name was lawful; that the transfer was not pursuant to the agreement for sale cited by the 1st respondent but an earlier agreement by correspondence; that the suit was defective as it was filed without authorisation by the directors of the 1st respondent; that the appellant fully paid the purchase price and the same was acknowledged in the agreement for sale and other correspondence; that the agreement for sale became void due to lack of consent from the Land Control Board and was therefore incapable of being rescinded by the 1st respondent, that the claim for recovery of the purchase price was time- barred and in the alternative that the appellant had been in open and peaceful occupation of the suit properties for more than 12 years.

6. On 10th August, 2020 the 1st respondent applied for an order of interim injunction to prohibit the 1st respondent from selling, transferring or alienating the suit properties pending the hearing of the suit. The appellant opposed the application through grounds of objection dated 28th September 2020 and replying affidavits sworn by Mr. Akbar Esmail on 9th October 2020, 24th February 2021 and 23rd August 2021, all of which raised the objections set out in the defence. After hearing the application, the trial court, by the ruling dated 9th December 2021, allowed the application and granted the order of injunction.

7. The learned judge identified the issues for determination to be: whether the 1st respondent had presented a prima facie case with a probability of success, whether in the absence of the injunction the 1st respondent would suffer irreparable loss or damage, and lastly, on whose side did the balance of convenience tilt. These, as is pertinently clear, are the considerations that guide the High Court and

the subordinate courts in an application for injunction, as explained in *Giella Cassman Brown & Co Ltd* [1973] EA 358.

8. On the merits of the application, the learned judge noted that it was common ground between the parties that the suit properties were previously registered in the name of the 1st respondent and that the parties had entered into an agreement for sale on 29th May 1995. He found that the dispute was on whether the appellant had paid the purchase price to the 1st respondent, which was a matter of fact to be determined at the hearing of the suit. He noted that the mere registration of the suit properties in the name of the appellant did not insulate it from challenge on grounds of fraud, mistake or misrepresentation.

9. As regards the pleading by the appellant that the sale agreement was null and void for lack of consent of the Land Control Board, the learned judge identified that as an issue that could only be determined at the hearing. He noted that if indeed it was true as pleaded by the appellant that the agreement for sale was null and void for lack of consent of the Land Control Board, that raised a further question to be determined at the hearing, namely, how the appellant managed to be the registered proprietor of the suit properties without the consent.

10. Regarding the plea of res judicata raised by the appellant, the learned judge noted that the earlier cases relied upon by the appellant did not concern the dispute in this suit between the appellant and the 1st respondent as to the ownership of the suit properties. He further noted that on 9th October 2020 the appellant applied to strike out the 1st respondent's suit because it was res judicata and time-barred and that those issues were heard and determined in a ruling dated 10th May 2021, (the application was indeed dismissed by Bor, J.) and that, as a judge of concurrent jurisdiction, he could not revisit the same issues as invited by the appellant. He also noted that the 1st respondent had pleaded that it discovered the fraud on 5th September 2018, which was an issue for trial. Also identified as an issue that could only be settled at trial was whether the appellant held the suit properties in trust for the 1st respondent. On the basis of the foregoing, the learned judge concluded that the 1st respondent had presented a prima facie case.

11. Turning to whether the 1st respondent stood to suffer irreparable loss and damage, the learned judge noted that being the contested registered owner of the suit properties, the appellant had the ability to charge or alienate the same before trial, thus destroying the substratum of the suit. The judge added that granted the contestation by the parties, it was in the best interest of both parties and also in the interest of justice to issue an order of injunction to preserve the suit property pending the hearing and determination of the suit. Accordingly, the learned judge allowed the application for injunction, thus precipitating this appeal.

12. We do not intend to regurgitate the appellant's lengthy grounds of appeal and the equally drawn-out submissions. Suffice it to state that the appellant has faulted the learned judge for failing to consider relevant issues and considering irrelevant matters as well as misrepresenting the appellant's case. It was contended that the 1st respondent did not establish a prima facie case because it abandoned its case as pleaded and pursued a different one; that the learned judge ignored two forensic reports and other evidence that showed the indenture pursuant to which the appellant was registered as proprietor of the suit properties was genuine; that the court acted on generalised allegations of fraud; that the court erred by ignoring or failing to hold that the 1st respondent's suit was time-barred; by relying on the 1st respondent's statements and inadmissible evidence and by ignoring two of the appellant's further affidavits, thereby violating the rules of natural justice and the appellant's constitutional right to a fair hearing.

13. The appellant further submitted that the learned judge erred by making suo motu findings on issues that were neither pleaded nor canvassed, such as opining that if the appellant had not paid the purchase price, its title would be vitiated and suggesting that the indefeasibility of the appellant's title may be impeached. It was also submitted that the learned judge erred by relying on pleadings rather than evidence. The appellant further submitted that the 1st respondent did not establish a prima facie case because its suit was based on an agreement that was null and void due to lack of consent from the Land Control Board. It was also urged that the learned judge failed to properly consider the principles for granting an injunction and that even if it was accepted that the 1st respondent had established a prima face case, which the appellant denied, the 1st respondent did not establish that the appellant intended to dispose of the suit properties or how it would suffer irreparable loss or damage.

14. The 1st respondent opposed the appeal on the basis of written submissions dated 12th July 2022. Not surprising, the 1st respondent started by taking objection to the appellant's memorandum of appeal which we have already adverted to, contending that it was a blatant violation of the former rule 86 of the Court of Appeal Rules and further that it did not indicate the nature of the order or relief that the appellant was asking the Court to make. We were urged to strike out the memorandum of appeal as incompetent.

15. Turning to the merits of the appeal, which the 1st respondent argued as an alternative, it was contended that there was no basis for interfering with the exercise of discretion by the learned judge because he had correctly applied and addressed the triad test for grant of an injunction. The 1st respondent submitted that it presented before the court serious issues for trial such as transfer of the suit properties on the basis of a copy of the indenture, illegal issuance of a provisional indenture without publication in the Gazette, and failure by the appellant to pay consideration for the suit properties. It was contended that there was a prima facie case that the appellant had violated the 1st respondent's right to property, and at the interlocutory injunction stage, the trial court was not required to make definite and final findings as the appellant wrongly assumed.

16. On irreparable loss and damage, the 1st respondent maintained that the learned judge committed no error, because he was obliged to preserve the suit property the legality of whose registration in the name of the appellant was in issue. It was further submitted that damages are not an adequate remedy in all cases and where the court is in a situation to stop loss arising from an illegality, it must stop the illegality. Regarding balance of convenience, the 1st respondent maintained that the same tilted in favour of preserving the suit properties pending the hearing and determination of the suit. The ruling in *Virginia Edith Wambui v Joash Ochieng Ougo* [1987] eKLR, was cited to support the proposition that where there is serious conflict of facts, it is better to maintain the status quo pending the hearing and determination of the suit.

17. The 1st respondent concluded by urging us not to interfere with exercise of discretion by the trial court and to accordingly dismiss the application with costs.

18. In its submissions in reply dated 18th July 2022, the appellant contended that the appeal cannot be struck out as urged by the 1st respondent because there was no formal application for that purpose and made within the time prescribed by the former rule 84 of the Rules of this Court. While conceding that it had not indicated the nature of the order it was seeking, the applicant contended that Article 159(2)(d) of *the Constitution* and the overriding objective emphasise substantive justice over technicalities. The appellant further urged that the 1st respondent had not demonstrated the prejudice occasioned to it by the omission to indicate the prayer sought. The appellant even made a belated application in its submissions in reply, for amendment of the memorandum of appeal to include a prayer for

relief, begging the question how the 1st respondent was supposed to respond to that application for amendment.

19. The rest of the appellant's submissions in reply were largely a reiteration of its earlier submissions, which we do not deem necessary to revisit.

20. We have carefully considered the record of appeal, the numerous grounds of appeal, both the appellant's and 1st respondent's written and oral submissions and the authorities relied upon. We have no doubt in our minds that the appellant's memorandum of appeal is neither concise nor within the confines rule 88 (formerly rule 86) of the Court of Appeal Rules. We have already adverted to that and we need not say more. Nevertheless, we are satisfied that it is possible, although with unnecessary tedium, to identify the appellant's core grievance and the relief it seeks. Eschewing undue regard to technicalities, and satisfied that the 1st respondent has been able to respond to the appeal without any obvious prejudice, we decline the invitation by the 1st respondent to strike out the appeal. That is not to say the Court will allow parties to disregard its rules with impunity. When properly moved, the Court must enforce the rules.

21. Turning to the merits of the appeal, as indicated at the beginning of this judgment, the appeal challenges the exercise of discretion by the learned judge in granting an interim injunction. The approach of this Court in an appeal challenging exercise of discretion by the trial court was succinctly stated by Madan, JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898 as follows:

> " 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."

22. In an application for an interim injunction, the learned judge was required to only satisfy himself that the 1st respondent had presented a prima-facie case with a possibility of success at trial, that if he did not grant the injunction the 1st respondent was likely to suffer irreparable loss or damage, and if in doubt, to determine the application on a balance of convenience (See Giella v. Cassman Brown & Co. Ltd, supra)In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, Bosire JA defined a prima facie case thus:

> " I would say that in civil cases it [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 as to call for an explanation or rebuttal from the latter."

23. And in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR, this Court explained that in determining whether an applicant has made out a prima facie case, the court is not required to undertake a minute examination of the case. The Court stated thus:

> " 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 establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (Emphasis added).

24. Looking at the myriad of issues that the appellant has raised in this appeal and its consistent refrain that the 1st respondent did not adduce any evidence to support or prove its pleadings, leaves no doubt in our minds that the appellant expected the court to make definite findings at a time when the court was merely required to find out whether there was on the face of it a prima facie case. A prima facie case is not a case which must ultimately succeed. Anyone with even a remote contact with the law knows of plaintiffs who have established prima facie cases at the stage of interlocutory injunction, but have failed spectacularly after evidence is adduced and witnesses subjected to cross-examination at trial. Similarly, many are the plaintiffs who have lost applications for interlocutory injunctions, but have impressively succeeded on trial. It bears repeating, as has been stated time and again,

> " The correct approach in dealing with an application for injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."(See *George Gikubu Mbuthia v Peter Njeru Mugo & 3 Others* [2015] eKLR).

25. We are satisfied that many of the issues that the appellant faults the learned judge for not determining are not issues that he was supposed to determine in an application for an interlocutory injunction. As to whether the purchase price was paid, whether the indenture was genuine or not, whether the registration of the suit property in the name of the appellant was lawful or fraudulent, whether the 1st respondent's directors were properly appointed, whether the suit was authorised by the 1st respondent's directors, whether consent of the Land Control Board was obtained, whether the agreement for sale became void, whether the appellant holds the suit property in trust to the 1st respondent, and many others, are matters to be determined at the hearing and for which the learned judge cannot be faulted for refusing to make any findings on. Indeed, the whole tenor of the ruling shows that the learned judge was acutely aware of his remit and declined to make any definite finding as he was invited by the appellant to do.

26. The failure to advert to the appellant's two further affidavits cannot, in the circumstances of this appeal, constitute a violation of the right to a fair hearing. Those affidavits contained additional evidence and averments on matters which are for trial rather than for the limited scope of an application for an interim injunction.

27. Two straightforward issues raised by the appellant on the basis of which the learned judge could possibly have found that the 1st respondent did not have a prima facie case were res judicata and limitation of time. The learned judge addressed these issues without making any definitive findings. He noted, as regards res judicata, that the previous suits relied upon by the appellant were on the face of it neither between the same parties nor raised the question of how the appellant obtained registration of the suit properties in its name. As regards limitation of time, the learned judge noted that the 1st respondent had pleaded that it came to learn of the appellant's alleged fraud on 5th September 2018. Beyond that, it was going to be a question of proof through adduction of evidence. Moreover, those two issues were the subject of an earlier ruling on an application by the appellant to strike out the 1st respondent's suit. A different judge of the court refused to strike out the suit having found that it

was neither time- barred nor res judicata. In the circumstances, we are satisfied that the learned judge cannot be faulted in the manner in which he went about considering whether the 1st respondent had established a prima facie case.

28. On the question of irreparable loss or damage, the learned judge considered that the appellant was on the face of it the registered owner of the suit properties with the right and ability to deal with them, even adversely pending the hearing of the suit. He found that the issue of ownership of the suit properties was extremely contested and taking everything into consideration, opted, in the exercise of his discretion, to maintain the status quo, which he considered to be in the interest of justice and in the best interest of both parties. In *Gitau v Savage & 4 others* KLR (E&L) 1, 463 this Court, in dismissing an application challenging grant of an order of injunction by the High Court, stated thus:

> " We are satisfied that a temporary injunction was properly granted in order to maintain status quo until the final determination of the suit."

29. For the foregoing reason, we are satisfied that the applicant has not demonstrated that the learned judge erroneously exercised his discretion in the application for injunction before him. We find no merit in this appeal and dismiss it with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR