IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, SICHALE & KANTAI JJ.A]

CIVIL APPEAL NO. 69 OF 2016

BETWEEN

KENYA POWER & LIGHTING CO. LTD.…..….........…………….. APPELLANT

AND

REST VILLA LIMITED…………….…………………………..…..1ST RESPONDENT

CITY COUNCIL OF NAIROBI………….……………….....…..2ND RESPONDENT

THE CHIEF LAND REGISTRAR……….……………………...3RD RESPONDENT

THE COMMISSIONER OF LANDS…….………….……….....4TH RESPONDENT

THE HON. ATTORNEY GENERAL …..………….….………..5TH RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Gacheru, J) dated 12th February, 2016

IN

ELC No. 448 of 2013)

****

JUDGMENT OF THE COURT

This is an interlocutory appeal filed by **Kenya Power and Lighting Company Limited** (the appellant) against the ruling of **Gacheru, J** dated **12th February, 2016** wherein the learned judge issued injunctive orders in favour of Rest **Villa Limited** (the 1st respondent), pursuant to an application dated **11th April, 2013,** filed by the 1st respondent (the then plaintiff). In the motion the subject of this appeal, the appellant, City Council of Nairobi, the Chief Land Registrar, the Commissioner of Lands and the Honourable Attorney General were named as the 1st, 2nd, 3rd, 4th & 5th respondents respectively. The 1st respondent sought the following orders:

> ***"(i) That pending the hearing and determination of this suit, the court be pleased to issue a temporary injunction to restrain the 1st defendant/respondent whether by itself, its agents, servants, employees, assigns and contractors from alienating, disposing, charging, selling, wasting, constructing, trespassing and or interfering in whatsoever manner with the plaintiff's quiet and peaceful possession of all that property known as LR Nairobi/Block 37/167 and LR no. Nairobi/Block 37/168 (herein after referred to as the "suit properties.***
>
> ***(ii) That pending the hearing and determination of this suit, the court be pleased to issue an interlocutory mandatory injunction compelling the 1st defendant whether by itself, its agents, servants, employees, assigns and contractors to forthwith vacate the suit properties.***
>
> ***(iii) That costs of this application be provided for".***

The ruling of **12th February, 2016** also considered the appellant's motion dated **28th August, 2013** wherein the appellant sought the

following orders as against the 1st respondent (the then plaintiff):-

> ***" (i) The court be pleased to order the plaintiff to give security for costs in the sum of Kenya shillings ten million for the 1st defendant by way of cash deposits within 14 days of the court order failure of which the suit herein be dismissed as stated.***
>
> ***(ii) That the court be pleased to order the plaintiff to pay the 1st defendant/applicant Kshs 3,143,431.00 being taxed costs of HCC No. 199 of 2007 as taxed on the 19th April,2013 within 14 days of the court order failure to which the suit herein be stayed indefinitely or be dismissed with costs.***
>
> ***(iii) That in the alternative the court be pleased to stay the proceedings in his (sic) suit pending the hearing and determination of the counter-claim in HCC No. 199 of 2007.***
>
> ***(iv) Costs of the application be provided for".***

The background to this appeal revolves around the ownership of a parcel of land originally known as **L.R No. 209/1150** (hereinafter **"the suit land"**) which according to the 1st respondent, was subsequently converted to **L.R No. NAIROBI/BLOCK37/167** and **L.R No. NAIROBI/BLOCK37/168**.

From the record of appeal, the appellant claims to be the registered and rightful owner of the suit land whose title was issued by **the Commissioner of Lands** (the 4th respondent) under the Registration of Titles Act (RTA), (now repealed).

According to the appellant, the suit land was originally excised from the head title, **L.R No. 209/6559/R** (better known as City Park) and a grant issued in favour of the **City Council of Nairobi** (the 2nd respondent) in 1932 with various special conditions. Subsequently, the Government allotted the suit land to the appellant on **6th August, 1992** for the purpose of putting up a power sub-station to boost its power supply in the Parklands area of Nairobi and a title to the suit property was issued in favour of the appellant on **20th January, 1993.** The appellant claims that it has since been in possession of the suit land.

It is the 1st respondent's case that in **March 1992**, **Peter Njirwa**, (**Peter**) the managing director of **Njilux Motors Limited** received a temporary occupation license from the Nairobi City Commission (the 2nd respondent's predecessor) over the suit land to be used for parking of new and used vehicles. On **13th August, 1992**, **Peter**, while trading under the name and style of **Njima Investments** was allocated the suit land by the 2nd respondent for the residue of its lease. Effectively therefore, the title to the suit land had been granted to the appellant as well as to the 2nd respondent. It is sub-divisions of the suit land that was allegedly sold to the 1st respondent by the 2nd respondent as LR No. **NAIROBI/BLOCK37/167** and **L.R No. NAIROBI/BLOCK37/168** and the title documents were issued on **30th September 2005** and **27th September 2006** respectively.

The quest to ascertain the ownership of the suit land resulted in a myriad of cases being filed between the appellant, Njilux Motors Limited, the 2nd and 4th respondents including; HCCC No. 1887 of 1994 and HCCC No. 892 of 1993 which were consolidated and heard together and which judgment was unsuccessfully appealed against by Njilux Motors Limited in Civil Appeal No. 206 of 1998. This appeal was decided on **31st March, 2000**. In the year 2000, Njima Investments Ltd filed HCCC No. 1047 of 2000. This suit was withdrawn on **22nd November, 2006.**

Then there was HCC. No.199 of 2007 which was dismissed for want of prosecution.

The counter-claim thereon was not dismissed.

On **6th July 2007**, (after purchasing the contested suit land), the 1st respondent alleges that the appellant's auctioneers invaded the suit land and demolished its property without notice in the guise of enforcing eviction orders issued in HCCC No. 1887 of 1994 seeking to evict Njilux Motors from the suit land.

As stated above, the 1st respondent filed HCCC No. 199 of 2007 seeking *inter alia* an order of injunction restraining the appellant from interfering with its quiet possession of the two parcels of land and a mandatory order for the appellant to vacate the land.

In turn, the appellant filed a counterclaim seeking *inter alia*; a permanent injunction against the 1st respondent from interfering with its possession and occupation of the suit land; and a declaration that the appellant is the *bona fide* proprietor of the suit land. The 1st respondent obtained interlocutory orders on **28th February, 2008** but the suit was subsequently dismissed (on **31st May, 2012**) for want of prosecution. Taxed costs of Kshs. 3,143,431.50 were awarded in favor of the appellant.

In HCCC No.1047 of 2000, Njima Investments being the plaintiff obtained an order of injunction against the appellant on **25th November, 2005**.

On **11th April 2013,** the 1st respondent filed yet another suit HC ELC 448 of 2013 seeking a declaration that the titles of its two parcels in its favour were *bona fide* whereas that of the appellant was null and void. The 1st respondent concurrently filed a notice of motion application of the same date (**11th April 2013)**, seeking interim orders to restrain the 1st respondent from interfering with its occupation and possession of the two parcels of land and a mandatory injunction compelling the appellant to vacate the property. The application was predicated on the grounds that the 1st respondent had been evicted from the suit land by the appellant without notice or competent authority

despite having proper title. The prayers sought in the motion were, *inter alia:*

> ***" (i) That pending hearing and determination of his application interparties, this Honourable court be pleased to issue a temporary injunction to restrain the 1st defendant/respondent whether by itself, its agent, servants, employees, assigns and contractors from alienating, disposing, charging, selling, wasting, constructing, trespassing and/or interfering in whatsoever manner with the plaintiff's quiet and peaceful occupation and possession of all that property known as L.R.NAIROBI/BLOCK 37/167 and L.R. NAIROBI/BLOCK 37/168.***
>
> ***(ii) This Honorable court be pleased to issue an interlocutory mandatory injunction compelling the 1st defendant/respondent whether by itself its agent, servants, employees, assigns and contractors to forthwith vacate all that property known as L.R. NAIROBI/BLOCK37/167 and L.R. NO. NAIROBI/BLOCK 37/168".***

In response, the appellant filed a Preliminary Objection dated **7th April, 2013** asserting that the entire suit and application was *res judicata* and filed a notice of motion dated **10th September, 2013**, seeking orders compelling the 1st respondent to give security for costs in the sum of Kshs. 10 Million; to pay the sum of Kshs. 3,143,431.50 being taxed costs in HCC No. 199 of 2007 or in the alternative stay the proceedings in the suit pending the determination of the counterclaim in HCC No. 199 of 2007. The application was premised on the grounds that the 1st respondent had failed to pay taxed costs in HCC No. 199 of 2007 and secondly, that there was a subsisting counter claim in HCCC No. 199 of 2007, which was duplicate of the suit before the ELC court.

In a ruling delivered on **12th April, 2007**, the Court (**Gacheru J**.) dismissed the appellant's Preliminary Objection and held that the doctrine of *res-judicata* could not apply as the issues raised in HCCC No. 199 of 2007 were not heard on merit given that the suit was dismissed for want of prosecution and further that not all parties in the instant suit had been involved in the previous suit. The Court also dismissed the appellant's notice of motion dated **28th August, 2013** with costs for reasons *inter alia*, that:

> ***"failure by the plaintiff to pay the taxed bill of costs in HCC No. 199 of 2007 cannot be a plausible reason to demand for security of costs in this suit. The plaintiff has an option of executing the orders issued in HCC No. 199 of 2007"***

In partially allowing the 1st respondent's notice of motion dated **11th April 2013** and granting a temporary injunction, the Court held as follows:

> ***"The applicant/plaintiff has title documents for the suit property. The court needs to interrogate how the applicant obtained them. This can only be done by calling of evidence and production of exhibits in the main trial where the evidence will be interrogated through cross examination and reexamination of the witnesses. The plaintiff allege that it was evicted from the suit premises on 6th July 2007 without notice. Since prima facie means more than an arguable case and the evidence must show an infringement of a right, the court finds that the plaintiff/applicant has established that it has a prima facie case.***
>
> ***On the second principles the applicant must show that it will suffer irreparable loss which cannot be compensated by an award of damage.***
>
> ***However, the court finds that in the instant suit, though the suit property can be quantified and since there is evidence that the plaintiff applicant holds title to the two parcels of land, then the best option is preserve the suit property. The said preservation would be best done by confirmation of the Interim Orders earlier granted…"***

Aggrieved by this outcome, the appellant has filed the appeal before us. In a Memorandum of Appeal dated **11th April, 2016**, the appellant listed 6 grounds of appeal which can be summarized as follows: that the learned Judge erred in granting injunctive orders and erred by dismissing the appellant's application for security for costs and/or stay of the suit.

On **9th October, 2019**, the appeal came up before us for plenary hearing. The appellant relied on its submissions and a list of authorities filed on **5th April, 2017** and another digest and list of authorities dated **24th May, 2019.** The 1st respondent opted not to file written submissions. The 2nd respondent filed its submissions on **6th September, 2016**. During the hearing, the appellant was represented by **Mr. Okeyo**, the 1st respondent was represented by **Miss Awinja** and **Mr. Ochieng** appeared for the 2nd respondent. There was no representation from the A.G. (for the 4th & 5th respondents) inspite of service of a hearing notice upon them on **22nd May, 2019.**

In urging the appeal, **Mr. Okeyo** contended that the issue of ownership of the suit land was substantially and conclusively determined by this Court in Civil Appeal No. 206 of 1998, wherein the Court of Appeal decreed on **31st March, 2000**, in a unanimous decision that the suit land belonged to the appellant. He faulted the learned Judge for departing from the decision of a superior court. Counsel submitted that the 1st respondent did not meet the threshold required to warrant the grant of an interlocutory injunction. Relying on the case of ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, it** was counsel's view that the 1st respondent failed to establish a *prima facie* case which is a standard that is higher than an arguable case especially given that the Court of Appeal had confirmed that the appellant has an absolute and indefeasible title to the suit land.

Counsel asserted that the 1st respondent had failed to demonstrate that it would suffer irreparable loss which could not be adequately compensated by an award of damages, having divested its alleged interests in the suit land through a mortgage in the tune of Kshs. 200,000,000.00. Citing the case of ***Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR*** which was in tandem with the decision in ***Nguruman Ltd V. Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012*** to the effect that if a prima facie case had not been established, irreparable loss required no consideration.

Lastly, counsel faulted the learned Judge for granting injunctive orders in a *res-judicata* application and suit. He emphasized that the High Court (**Aganyanya, J.)** had already rendered its decision in a duplicate application filed by the 1st respondent in HCCC 199 of 2007 where injunctive orders were granted on similar grounds.

Mr. Ochieng, while relying on the submissions dated **5th September, 2016** in support of the appeal (on behalf of the 2nd Respondent) faulted the learned Judge for disregarding the averments in its replying affidavit sworn on **24th April, 2013** where it denied approving any conveyance in respect of any of the parcels of land in favour of the 1st respondent. It was submitted that the learned Judge had erred in granting the injunctive orders sought and that the 1st Respondent did not have a *prima facie* case with a probability of success given that the 1st respondent's titles were fraudulent.

In opposing the appeal, **Miss Awinja** contended that the 1st respondent had met the threshold required to warrant the grant of an interlocutory injunction.

She submitted that the 1st respondent had established a *prima facie* case by virtue of being a *bonafide* purchaser for value of the two parcels of land known as NAIROBI/BLOCK37/167 and NAIROBI/BLOCK37/168 and the titles in the name of the 1st respondent were conclusive evidence of ownership. In addition she stated that the titles of the suit land were converted from the Registration of Titles Act (Cap 281) (repealed) to the Land Titles Act. It was argued that the interlocutory orders sought were also necessary in light of the eviction undertaken by the appellant on **6th July, 2007** without prior notice to the 1st respondent who was in possession of the property. Counsel further submitted that the 1st respondent did not know of the judgment that led to its eviction and that the eviction orders were against a different party (Njilux Motors). On the issue of *res judicata,* it was submitted that the principle did not apply in the instant case given that ELC 448 of 2013 and HCCC No. 199 of 2007 had different parties other than the 1st respondent.

We have considered the record, the rival oral and written submissions and the authorities cited. The appeal before us is a first appeal and our mandate is set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> ***"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.***
>
> ***An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***
>
> ***In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270".***

Therefore, it behoves us to re-evaluate and re-assess the evidence tendered in the court below and arrive at our own independent finding(s).

In the Memorandum of Appeal dated **11th April, 2016,** the Judge was faulted for issuing an order of injunction in favour of the 1st respondent and in dismissing the appellant's application for security for costs ***"…..by applying unknown principles in law …."***

For a start, in the motion filed by the 1st respondent, the order sought, *inter alia* was for injunctive reliefs in respect of the suit property. The prerequisites for grant (or otherwise) of an injunctive relief were stated in the oft cited case of ***Giella vs. Cassman Brown & Co. Ltd (1973) EA 358*** wherein it was stated:

> ***"The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience".***

These prerequisites have been espoused in several decisions of this Court including ***Vivo Energy Kenya Limited vrs Maloba Petrol Station Limited & 3 others*** *(supra)* where the court made reference to the case of ***Nguruman Limited vrs. Jan Bonde Nielsen & 2 others*** (supra) and stated *inter alia* that:

> ***"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(sic) any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are 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 vrs. 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". *(emphasis supplied)*

In respect of the suit property, the appellant was in possession at the time the order of injunction was issued. On the other hand, the 1st respondent had been evicted following orders made on **31st March, 2000** in C.A. No. 206 of 1998 which was an appeal against the judgment in HCCC No. 199 of 2007 and in which this Court found that L.R. NO. 209/1150/NAIROBI (the suit land) had been reserved for public purposes.

The appellant claimed ownership and traced its right to ownership as far back as **20th January, 1993** when it was issued with a title in its name which title had neither been cancelled and/or surrendered so as to give rise to titles allegedly issued to the 1st respondent, namely No. L.R. NAIROBI/BLOCK/37/167 and L.R. No. NAIROBI/BLOCK/37/168. Given the above, it is our considered view that the 1st respondent had not established a prima facie case with likelihood of success to warrant the issuance of the injunctive relief in its favour. Having come to this conclusion, we do not deem it necessary to consider the issue of damages likely to be suffered by the 1st respondent (see ***Vivo Energy Kenya Limited vs. Maloba Petrol Station Ltd & 3 others*** (supra). Further, one of the orders sought by the 1st respondent in HCCC No. 448 of 2013 was an order of a mandatory injunction compelling the 1st appellant whether by itself, its agent, servants, employees, assigns and contractors to forthwith vacate all that property known as LR. NAIROBI/BLOCK 37/167 and LR. NO. NAIROBI/BLOCK 37/168. A mandatory injunction, is rarely, if at all granted at an interlocutory stage. (See ***Locabail International Finance Ltd vs. Agro Export & another [1986] IALLER 901***. In the ruling of **12th February, 2016**, the subject of this appeal, **Gacheru, J** considered whether she could issue an order of mandamus and rendered herself thus:

"the court has considered the pleadings herein, the annextures thereto and the submissions by the parties herein. There is no doubt that though the plaintiff has certificates of lease to the suit properties, the same have been challenged by the 1st defendant herein. For the court to finally arrive at the finding on the validity of said title documents, evidence must be called. There is therefore no special circumstances herein and the 1st defendant has also a title document for the suit property. The act done by 1st defendant is not a simple one which can be easily remedied. Furthermore, there is no evidence that the 1st defendant is attempting to steal a march (sic) against the plaintiff/applicant herein. The court finds that it is not proper to issue a mandatory order of injunction at this stage. This should await the calling of evidence and the said issue be decided on merit. For the above reasons, the court declines to allow the plaintiff/applicant prayer No. 4 (ii) of the Notice of Motion dated 11th April, 2013".

We agree.

On the issue of security for costs, it is our view that the conditions precedent to warrant payment of security for costs had not been met. The learned Judge addressed this issue as follows:

"The issue of security is governed by order 26(1) of the Civil Procedure rules which provides that

"In any suit, the court may order that security for the whole or any part of the cost of any defendant or third or subsequent party be given by any party".

The issue of security for costs is discretionary and the court may or may not order for deposit of any security.

Further Order 26 (3) provides that:

"where it appears to the court that the substantial issue is which of the two or more defendant is liable for what proportion of liability, two- or more defendant should bear, no order for security for costs may be made".

In the instant suit, there are more than two defendants herein. The plaintiff has sought for general and exemplary damages against the defendants herein and only the 1st defendant has applied for security of costs. By dint of order 26 rule 3 of the Civil Procedure Rules, then no order for security for costs may be made".

Again, we agree and associate ourselves with the Judge's findings in coming to the conclusion that the order seeking security for costs was ill-advised.

Secondly, as regards costs of Kshs.3,143,431.50, the learned judge was correct in stating that they were to be recovered in HCCC No. 199 of 2007. Moreover, the appellant did not demonstrate why it did not recover costs awarded through the laid down procedure.

The upshot of the above is that the decision of **Gacheru, J** dated **12th February, 2016** granting prayer (1) of the motion of **11th April, 2013** is hereby set aside. The other findings in respect of the 1st respondent's motion of **11th April, 2013** and the appellant's motion of **28th August, 2013** remain undisturbed.

Costs of this appeal shall abide the outcome of ELC No. 448 of 2013.

It is so ordered.

***Dated and Delivered at Nairobi this 3rd day of April, 2020*.**

M. KOOME

…..................................

JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR