IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 297 OF 2016

BETWEEN

MOSES PARANTAI .....1ST APPELLANT

JOHN KAMUYE OLE KIOK .....2ND APPELLANT

VERSUS

KEEKONYOIKE COMMUNITY TRUST

(suing through the duly appointed trustees) .....1ST RESPONDENT

THE CABINET SECRETARY

MINISTRY OF LANDS HOUSING AND

URBAN DEVELOPMENT ..... 2ND RESPONDENT

(Being an appeal against the ruling and orders of (Hon. Lucy Gacheru, J) dated 14th October 2016

in

ELC No. 683 of 2014)

****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the Environment and Land Court of Kenya at Nairobi, Milimani Law Courts, (**L. Gacheru, J**.) dated 14th October 2016.

The background to the appeal is that the 1st respondent, a community Trust duly registered under the Laws of Kenya filed a suit in the Environment and Land Court (ELC) Milimani Law Courts Civil Suit No. 683 of 2014 (the suit) through its Trustees contending *inter alia* that: the appellants who were previous Chairman and Vice Chairman of Keekonyokie Community Trust Board of Trustees (the 1st respondent), were ousted from office in a meeting held on 24th October 2013 for among other reasons, issues of mistrust and mismanagement. New officials were elected and registered as the new Board of Trustees of the 1st respondent pursuant to which change the 1st respondent was issued with a certificate of Change of Trustees by the Ministry of Lands. Appellants failed and or refused to surrender all the requisite documents particularly the original title deed to **LR No. Ngong/Ngong/12418** (the suit property) triggering the suit resulting in this appeal in which the 1st respondent prayed for: a mandatory injunction compelling the appellants to hand over all vital documents in relation to the 1st respondent's Trust including the original title deed to the suit property to the duly newly elected registered Board of Trustees; a mandatory injunction compelling the appellants to peacefully handover office of the chairman of 1st respondent and to cease all forms of rebellion; a permanent injunction restraining the appellants, their agents and/or servants from subdividing, alienating, wasting, demarcating, disposing and/or in any manner dealing with the suit property; costs of the suit to be paid jointly and severally by the appellants; and lastly any such other or further relief as the Honourable Court may deem fit to grant.

In their defence, the appellants denied the allegations leveled against them by the 1st respondent, in particular that: there were elections held on 24th October 2013; if at all any elections were held, then the same were unprocedural, illegal and invalid as they were not held in accordance with the constitution of the Trust; the registration of new trustees if at all any was effected was done without the original

certificate of incorporation and secondly, without authentication by the relevant authorities under the law.

Simultaneously with the filing of the plaint, the 1st respondent filed a Notice of Motion dated 15th July 2015 seeking orders that: the original title deed to the suit property be held by the 1st respondent's advocates on stakeholder basis or in the alternative, the said title be deposited with and be held by the court and second, that an order of injunction do issue restraining the appellants from sub-dividing, alienating, wasting or in any way dealing with the suit property pending the hearing and determination of the suit. The application was based on the grounds similar to averments in the plaint already highlighted above. In their replying affidavit to the 1st respondent's application sworn by the 1st appellant, the appellants' contentions were similar to their averments in their defence already highlighted above.

During the pendency of the hearing of the suit and the 1st respondent's application of 15th July 2015, the appellants filed a Notice of Preliminary Objection (P.O) on the grounds that:

> **1. The recording of the alleged trustees was done without the original certificate of incorporation as required under Section 6(2) of the Trustees (Perpetual Succession) Act as read together with section 17 of the Act and Rule 3 of the Rules therein.**
>
> **2. That the certificate of Change of trustees submitted by the alleged trustees is not signed by the Cabinet Secretary as provided for under section 6(2) of the Trustees (Perpetual Succession) Act as read together with paragraph 3 of the Certificate of Incorporation.**
>
> **3. The election of the alleged new trustees was not done in compliance with regulation 10(a) of the Keekonyokie Community Trust and other regulations therein.**
>
> **4. That the alleged new trustees have not complied with the requirements under the Trustees (Perpetual Succession) Act and the rules therein when applying and recording of new trustees in a trust.**
>
> **5. The suit is therefore bad in law and in contravention of section 3(3) of the Trustees (Perpetual Succession) Act.**

The 1st respondent filed a replying affidavit to the P.O alleging *inter alia* that appellants were non-suited on their P.O as it did not satisfy the threshold for sustaining a P.O namely, a pure point of law.

The Cabinet Secretary to the Ministry of Lands and Housing then named as the 3rd defendant, filed a replying affidavit supporting the 1st respondent's opposition to the P.O.

Both the 1st respondent's application dated 15th July 2015 and the appellant's P.O were by consent of the respective parties consolidated and canvassed by way of written submissions. The learned trial judge evaluated the record, considered it in light of the rival pleadings and submissions of the respective parties the case of **Mukisa Biscuit Co. Ltd vs. West End Distributors Ltd [1969] E.A 696** on the threshold for sustaining a P.O and applying that threshold to the dispute, ruled that for the court to determine the rival allegations made with regard to issues of Trustees and a certificate of change of trustees, it had to ascertain those facts before drawing out conclusion thereon and on that account ruled that the P.Os raised by the applicants were not on pure points of law. On that account, the Court found the Notice of Preliminary Objection raised by the appellants unsustainable and rejected it.

On the merits of the Notice of Motion dated 15th July 2015, the learned trial judge reviewed the case of **Seventh Day Adventist Church E.A Ltd vs. Ministry of Education & 3 Others [2014]eKLR** for the proposition, *inter alia*, that where conflicting rights are of equal importance, the court must strike a balance between them. Considering the above proposition in light of the rival position before the court, the learned judge observed *inter alia* that: the 2nd respondent had confirmed that it was duly registered and was issued with a certificate of change of trustees as per the application filed in the Ministry of Lands in November 2013; that appellants had vehemently opposed that position; the court was not in a position at that juncture to find with certainty that the change of trustees had been effected regularly; that the court had no alternative in the circumstances but to await the calling of evidence and production of exhibits and the testing of the said evidence on cross-examination before drawing any conclusion on the matter; that there was however no doubt that appellants were in possession of the certificate of title for the suit property owned by the 1st respondent who alleged that appellants had attempted to alienate 200 acres from the said suit property; although appellants denied the allegation, it was nevertheless prudent to safeguard title to the suit property pending determination of the dispute between the current trustees and the appellants.

Turning to the second prayer in the said application for an interlocutory injunction, the learned judge took into consideration Order 40 Rule 1 CPR on which the application for interlocutory injunction was premised; reviewed the case of **Esso (K) Ltd vs. Mark Makwata Okiya Civil Appeal [1992]eKLR**; and the case of **Films Rover International vs. Cannon Film Sales Ltd [1986] 3 ALL ER 772** both of which dealt with the issue of the threshold for sustaining an interlocutory injunction, in applying that threshold to the rival positions the Court found no basis for the 1st respondent's allegation that appellants had attempted to alienate about 200 acres from the suit property but that finding notwithstanding held the view that since there were trusteeship wrangles between the 1st respondent and the appellants which in the learned judge's view put the suit property in jeopardy of being wasted or damaged, necessitated issuance of a preservatory order pending determining of the competing interest in the suit especially when it was not in doubt that the suit property belonged to the 1st respondent's community members.

Also reviewed was the case of **Ougo vs. Otieno & Another [1987]eKLR** for the holding *inter alia* that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute is resolved following a trial. On that basis, the learned judge issued an order for preservation of *status quo* over the suit property, and directed that the certificate of title be deposited in court. Second, that none of the parties to the suit should subdivide, alienate, waste, demarcate, dispose off, charge and/or in any manner deal with the suit property pending the hearing and final determination of the suit. Third, appellants were directed to comply with the directive on depositing of the title within 14 days of the order.

The appellants were aggrieved and filed this appeal raising seven grounds of appeal subsequently condensed into two thematic issues in the appellants' first set of written submissions dated 20th May 2017. It is the appellants' complaint that the Hon. Judge of the High Court erred both in fact and law by:

1) Holding that the appellants' preliminary objection did not meet the description of what constitutes a preliminary objection.

2) issuing orders at the request of parties who had no *locus standi* to act on behalf of the 1st respondent.

The appeal was canvassed by written submissions. Those for appellants are dated 4th May 2017. Those for the 1st respondent are dated 20th June 2017, while those for the 2nd respondent though described as 3rd respondent are dated 4th May 2020. The appellants filed further submissions in rebuttal of the 1st and 2nd respondents submissions dated 4th May 2020.

Supporting the 1st ground of appeal, the appellants relied on the case of **Attorney General & Another vs. Andrew Maina Githinji & Another [2016]eKLR; Republic vs. Permanent Secretary Minister of Roads & 3 Others Ex parte Kingfisher Properties Ltd [2009]eKLR; Mohamed Zafar Niaz** & **2 Others vs. Permanent Secretary Ministry of Education [2006[eKLR**, and submitted that: appellants' preliminary objection was well-founded in law as the certificate of Change of Trustees submitted by the alleged trustees to the court was not signed or certified by the Cabinet Secretary as required by **section 6(2)** of the **Trustees (Perpetual Succession) Act** (the Act); that **section 38(1)** of the **Interpretation and General Provisions Act Cap 2 of the Laws of Kenya** mandates the Minister to delegate his powers by a Gazette Notice, which delegation must comply with the law; the document relied upon by the 1st respondent in support of their assertion that there was change in the 1st respondent's Board of Trustees was not signed by the Minister but by the Registrar of Documents, and nothing was produced to indicate that the Minister had delegated any authority to the said Registrar of Documents to sign those documents on his behalf. The said document was therefore illegal, null and void and should not, therefore, have been acted upon by the trial court to sustain the injunctive relief, and lastly, that the issue as to who were the lawful Trustees of the 1st respondent was a pure point of law which should have been sustained by the trial court.

Turning to the second ground of appeal, the appellants relied on **Black's Law Dictionary, 8th Edition** on the definition of *locus standi* as a Latin phrase meaning *"place to stand"*; the case of **Raila Odinga vs. Hon. Justice Majid Cocker (High Court Misc. App. No. 58 of 1997 (UR**); and reiterated the earlier submissions in support of ground 1 that the 1st respondent had no *locus standi* to sue the appellants because the certificate issued to the 1st respondent was illegal and therefore null and *void abinitio* and should not have been relied upon by the trial court to sustain the 1st respondents' injunction against the appellants.

Opposing the appeal, the 1st respondent relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [supra] and submitted that at the heart of the P.O was the allegation that trustees of the 1st respondent had no *locus standi* to file the suit before the High Court under the Act which in their opinion was a factual issue that could only be ascertained through the examination of the probative value of the evidence tendered by the rival parties at the full trial and not at an interim stage based solely on pleadings. Second, that the facts pleaded by the disputing parties at the trial were all in dispute, and as such, needed to be ascertained at the full hearing, and so fell short of the threshold requirements for sustaining a P.O.

On a proper interpretation of **section 6(2)** of the Act, the 1st respondent submitted that pursuant to the above provision, it is the remaining trustees who attest and declare who the newly elected trustees are to the Minister. Paragraph 3 of the certificate of incorporation is explicit that Change of Trustees under **section 6(2)** of the Act, was effected by the remaining Trustees who had certified the new Trustees place of the ousted Trustees to the Minister.

In the circumstances of this appeal, it was submitted, the recording of the newly elected Trustees was properly done by the Registrar of Documents under delegated powers of the Cabinet Secretary, Ministry of Lands after the same had been certified to the Minister upon application to that effect by the 1st respondent's Trustees:- It was therefore erroneous for the appellants to contend that the newly elected Trustees applied and recorded themselves as such in the certificate of Change of Trustees; that the change of Board of Trustees was therefore done regularly, procedurally and in accordance with the prerequisites in the 1st respondent's certificate of incorporation and regulations made thereunder as well as the relevant provisions in the Act. Further, Regulation 10(a) and (b) of the 1st respondents' Trust regulations, mandates the community to change Trustees in instances where the outgoing trustees have abused or misused the position entrusted to them by the community; that the appellants herein abused their position of trust in the 1st respondent, hence the decision reached by the community in the meeting held on 24th October 2013 to relieve them of that role through a process validly invoked by the community members properly mandated by the governing regulations and to elect new Trustees to replace them which change took effect immediately in terms of the said regulations.

Opposing the appeal on ground 1, the 2nd respondent erroneously described as 3rd respondent in its submissions, relied on the case of **Peter Michomo Muiru vs. Barclays Bank of Kenya Ltd & Another [2016]eKLR**; **Omondi vs. National Bank of Kenya Ltd & 2 Others [2001]KLR 579 [IEA177]**; **Oraro vs. Mbaja [2005] IKLR 141** and submitted that the trial court properly appreciated the facts on record and correctly applied the law to those facts and rightly declined to sustain the appellant's P.O as the same was not founded on a pure point of law but on facts which were not only highly contested but also needed to be ascertained by the trial court to determine whether 1st respondent had locus standi to sue appellants. Ruling otherwise would have offended the principles that guide courts on the threshold requirements enunciated in the **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [supra], argued 2nd respondent.

Turning to ground 2, the 2nd respondent relied on section 3(3) of the Act; the case of Registered Trustees of **Maximum Miracle Centre vs. Andrew Mlewa Mkare [2013]eKLR**; and **Peter Taracha & Another vs International Pentecostal Holiness Church & Another [2016]eKLR,** and submitted that: section 3(3) of the Act clothed the 1st respondent with *locus standi* to sue the appellants on behalf of the community. Second, that the new Board of Trustees of the 1st respondent had *locus standi* under Article 22 of the Constitution of Kenya 2010 to sue as members of the 1st respondent.

The appellants in their further submissions filed in rebuttal of the respondents' submissions, relied on the case of **Libyan Arab Uganda Bank for Foreign Trade and Development & Another vs. Adam Vassiliadia [1986] UG CA 6**; **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014]eKLR**; and **Nairobi City Council vs. Thabiti Enterprises Limited [1997]eKLR**; all on the now crystallized principles on pleadings distilled as hereunder:

> *(i) In any trial the judge sits to hear and determine issues raised by parties and not to conduct an investigation or examination of those issues.*
>
> *(ii) Parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or is at variance with the averments of the pleadings must be disregarded.*
>
> *(iii) The rule that parties are not allowed to depart from their pleadings enables parties to prepare their evidence on issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*
>
> *(iv) Certainty in pleadings operates to define and delimit with clarity, and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them.*
>
> *(v) Pleadings serve a two-fold purpose of informing each party what the case of the opposite party which they will have to meet before and at the trial is all about on one hand and at the same time informing the court what the issues are between the parties before the court and which will govern both the proceedings and the determination of these issues at the trial.*

Applying the above threshold to the 1st respondent's submissions, the appellants faulted the 1st respondent's submission that they (the appellants) are nonsuited on their appeal for being in contempt of the very court orders that form the impugned decision which according to the appellants is being raised for the first time on appeal as it did not form part of the rival pleadings interrogated before the trial court and does not therefore fall for consideration by this court on appeal and should therefore be rejected.

Turning to the submissions of the 2nd respondent, the appellants reiterated their earlier submissions that the role played by the Registrar when he first registered the appellants and thereafter purported to register the 1st respondent's current Trustees is still alive and highly contentious even on appeal, notwithstanding that it is still pending determination by the trial court.

The 1st respondent cannot, therefore, rely on **sections 3** and **6** of the Act to justify their alleged position as the rightful Trustees of the 1st respondent.

Likewise, the issue of elections that allegedly brought on board new Trustees for the 1st respondent is also still alive and highly contentious before the trial court.

The appeal before us arises from the exercise of discretion by the High Court firstly, to reject the appellants' preliminary objection and second to grant an order of interlocutory injunction in favour of the 1st respondent. In this regard our mandate is limited to the determination as to whether the trial court exercised its mandate judiciously and give reasons either way. The threshold we are enjoined to apply in the discharge of our above mandate has now been crystallized by case law. We take it from the case of **Mbogo & Another vs. Shah [1968] E.A** on **page 93** in which **Sir Charles New Bold, P**. expressed himself as follows:

> **"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**
>
> **Sir Clement De Lestang, V.-P.** on the other hand in the same case on **page 94** had this to say:
>
> **"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its discretion is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

See also the case of **Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003]eKLR** which reiterated as follows:

> **"2. The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:**
>
> **a) The judge misdirected himself on law; or**
>
> **b) That he misapprehended the facts; or**
>
> **c)That he took account of considerations of which he should not have taken account; or**
>
> **d) That he failed to take account of consideration of which he should have taken account; or**

e) That his decision, albeit a discretionary one, was plainly wrong."

We have applied the above threshold to the record and considered it in light of the rival submissions set out above. The issues that fall for our determination are the same as those condensed by the appellants in their written submissions dated 20th May 2017, namely whether the learned judge erred both in law and in fact by:

1) **Rejecting the appellants' preliminary objection.**

2) **Sustaining the 1st respondent's application for an interlocutory injunction.**

Starting with the first issue, the threshold for sustaining a preliminary objection and which we fully adopt was set by the predecessor of this Court in the often cited case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A page 696** where **Sir Charles Newbold, P.**stated as follows:

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

Law, JA, on the other hand, he had this to say:

> **"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are on an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

We have applied the above threshold to the rival positions herein. The tests we are enjoined to apply in determining whether the learned judge erred when she rejected the appellants' preliminary objection are firstly whether: the appellants' preliminary objection raised a pure point of law; second, whether there was demonstration that all the facts pleaded by the opposite party who in the instant appeal is the 1st respondent are correct; and third, whether on the record as laid before the trial court and now before this Court on Appeal, there is no fact that needs to be ascertained.

Starting with the first test, it is our finding that a plain reading of all the grounds of preliminary objection raised by the appellants highlighted above indicates clearly that the central or core issue in contest was, who among the appellants and the persons who filed the suit on behalf of the 1st respondent were the rightful members of the 1st respondent's Board of Trustees. The issue need no magnifying glass to show that this is a factual issue and not a pure point of law of the type by **LAW, JA**. in the excerpt of his judgment set out above in the **Mukisa Biscuit** case [supra].

As for the second test, the facts pleaded by the 1st respondent as the opposite party in the suit were highly contested by the appellants not only at the interlocutory trial but also on appeal, with the appellants' contention being that they are the rightful members of the Board of Trustees of the 1st respondent and not the persons who filed the suit on its behalf and who had no *locus standi* to file the suit.

As for the third test, it is common ground that both at the trial and now on appeal and as correctly held by the learned judge, there was need to determine who were the rightful members of the Board of Trustees of the 1st respondent, which in our view and as correctly held by the learned judge was a matter which could not be determined at that interlocutory stage of the trial because it called for evidence to be tendered first by the rival parties, that evidence would have to be tested on cross examination, documents relied upon by the respective parties would be scrutinized and an informed opinion reached before conclusions were drawn.

In light of the above assessment and reasoning we find no merit in ground one of the appeal and it is accordingly dismissed.

Turning to the second ground of appeal, the threshold for sustaining an application for an interlocutory injunction was crystallized by the predecessor of the court in the case of **Giella vs. Cassman Brown [1973] E.A 358**. These are that, first, an applicant must show a prima facie case with a probability of success. Second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated for by an award of damages. Thirdly, if the court is in doubt, it will decide an application of this nature on the balance of convenience. A prima facie case has been defined by this court in the case of **Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003]eKLR** as follows:

> **"4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."**

The approach a court is enjoined to take when confronted by an application of this nature is that set by this court in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014]eKLR** 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."

We have applied the above threshold to the record before us and find no error in the approach the learned judge took when determining the interlocutory injunction application. This is borne out by the record that the first ingredient to be interrogated was that in relation to demonstration of existence of a prima facie case with a probability of success; and which the learned judge found demonstrated to exist. The reasoning the learned judge gave for reaching that conclusion and correctly so in our view was that it had been established by the rival factual position on the record that the suit property belongs to the 1st respondent; second, that the same was held under trust by a duly elected Board of Trustees. Third that the said Board of Trustees is usually elected from time to time by the community who are the beneficiaries of the suit property. Fourth, that it was apparent that there were leadership wrangles within the leadership of the 1st respondent's Board of Trustees and it was therefore only appropriate that the suit property, as well as the attendant title, be safeguarded pending the hearing of the suit. The above finding was sufficient to sustain the interlocutory application in terms of the guidelines provided for in the **Nguruman Limited** case [supra]. There was therefore no obligation for the learned judge to interrogate and make any definitive finding on the remaining ingredients in terms of the same **Nguruman Limited** case [supra].

The upshot of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 7th day of August, 2020.

R. N. NAMBUYE

…….…..

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……..……..

JUDGE OF APPEAL

A. K. MURGOR

…….……..……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR