IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 57 OF 2015

BETWEEN

SAID AHMED.....APPELLANT

AND

MANASSEH DENGA.....1ST RESPONDENT

ECO-BANK KENYA LIMITED.....2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Court, Nairobi (Kamau, J) dated 30th January, 2015

in

HCCC No. 196 of 2014)

****

JUDGMENT OF THE COURT

This interlocutory appeal has been heard twice over; first, on 8th December, 2016 after which one of the Hon. Judges retired, leaving two who had no common agreement on the result. An order was then made on 25th April, 2018 for rehearing before a different bench, and so it was on 19th September, 2018.

The appeal arises from the ruling of the High Court **(Jackie Kamau, J.)** made on 30th January, 2015 granting injunctive relief pending the hearing and determination of the main suit. That suit was filed by the 1st respondent herein **(Denga)** who was the registered proprietor of House No.1 on LR No. 3734/815, situate in Lavington, Nairobi **(the disputed property)** which he bought in the year 2011 for Ksh.47 million. He respondent before us, Eco Bank Kenya Ltd **(the bank)** to secure a loan of Ksh.40,745,317 which was payable over a period of 25 years subject to the terms of the charge. Within the first three years, Denga had repaid about Ksh.24.5 million which was more than half the amount owing, but that did not stop the bank from claiming that he had defaulted on the terms of repayment and proceeded to exercise its statutory power of sale. On 14th May, 2014, the bank auctioned the disputed property to the appellant, Said Ahmed **(Ahmed)** for Ksh.46 million and he paid the entire sum. The transfer of the disputed property to Ahmed was executed on 28th May, 2014 and lodged with the Land Titles Registry on 16th June, 2014. But Ahmed has never been given physical possession of it as Denga is still *in situ*.

Denga was infuriated by the bank's decision to auction his property and doing so at an under value. According to his valuer, its real market value was Ksh.75 million. He filed suit on the eve of the auction but was unable to stop it. He then amended the plaint on 10th June, 2014 to enjoin Ahmed. Against both, he alleged fraud, illegality, breach of contract, conspiracy and collusion, particulars of which he supplied. He seeks orders in the main suit that:

> ***"a) A declaration that the Plaintiff's has complied with its obligations under the charge dated 12th May 2011 registered against the suit premises being House No. one (1) on L.R No. 3734/815 (Original Number 3734/808/7).***
>
> ***b) An Order that accounts be taken as between parties to confirm that the plaintiff has repaid the sums due and owing to the amount initially advanced to him by way of loan by the 1st defendant.***

c) A Declaration that the sale of the House No. one (1) on L.R No. 3734/815 (Original Number 3734/808/7) to the 2nd Defendant is void.

d) An Order cancelling the transfer of House No. one (1) on L.R No. 3734/815 (Original Number 3734/808/7) to the 2nd Defendant if the same had been effected.

e) Damages.

f) A permanent injunction to restrain the defendant from selling, offering for sale, transferring and/or in any other manner disposing the suit premises on L.R. No. 209/8343/162 Nairobi."

The defence filed by the bank, if any, does not seem to be on record. Only the affidavit in opposition to the interlocutory matter is on record. But Ahmed filed a defence and counterclaim asserting that he was an innocent purchaser for value and denied all particulars of fraud, collusion or conspiracy with the bank. He sought in his counterclaim the following orders:

"a) A Declaration that the purchase of House No. 1 on LR NO. 3734/815(Original Number 3734/808/7) (the property) by the Defendant was lawful.

b) A declaration that the Defendant is a 'protected purchaser' as contemplated under the provisions of Section 99 of the Land Act.

c) An Order that the Plaintiff deliver vacant possession of the premises within 7 days of the Order in the alternative be evicted."

In his application for injunction dated 10th June, 2014, Denga sought to stop the auctioneers from proceeding with the auction but it was too late. Instead he sought, in two prayers, to stop any further processing of the transfer and interference with his possession, thus:

"1 .....

2. The defendant and his agents including Valley Auctioneers be restrained from effecting registration of the transfer of House No. 1 on LR No. 3734/815 (original no. 3734/808/7) from the plaintiffs name to the 2nd defendant and/or interfering with the plaintiff's occupation and possession of the same pending the inter partes hearing of this application.

3. The Defendant and its agents including Valley Auctioneers, be restrained from effecting a registration of House no One(1) on L.R. No 3734/815 (Original number 3734/808/7) from the Plaintiff's name to the 2nd Defendant and/or interfering with the Plaintiff's occupation and possession of the same pending the hearing and determination of this suit."

In view of the intention by Ahmed to have the property transferred before the hearing of the application, the trial court made the following interim order on 19th June, 2014 pending the hearing of the application:

"I have heard submission by counsel and note that the issue in contention is whether or not this court should grant any injunctive orders as the application for registration of the transfer instrument was lodged on 16th June, 2014. It is not exactly clear whether or not the said transfer has been endorsed by the registrar as is required by law. However, it is in the interest of justice that any further action be stopped as regards the title of the suit property to enable the parties ventilate their cases. It will be burdensome and complicated to undo what will have been done hence the need to preserve the suit property. In the circumstances foregoing, I hereby grant prayer (2) of the Plaintiff's Notice of Motion application dated 10th June, 2014 and filed on 11th June, 2014 pending its inter partes hearing on a date to be taken after the plaintiff files its application, to serve the 2nd defendant by substituted service by tomorrow, 19th June, 2014."

In respect of prayer 3, the trial court made a considered ruling and in the end, it was satisfied that Denga had made out a *prima facie* case with a probability of success and granted the injunction as sought. The court found in particular that the amount of debt due to the bank was disputed but that was not a reason to grant an injunction; that the bank never served Denga with the statutory notice in accordance with ***section 90*** of **Land Act**, informing him of the nature and extent of the alleged default and giving him the opportunity to rectify the default; that the bank never served any *'notice to sell'* contrary to ***section 90 (2)*** of the **Land Act**; that as a result of those transgressions of the law, the purported public auction carried out on 14th May, 2014 was a nullity and automatically invalidated the sale to Ahmed; that Title of the disputed property had not passed to Ahmed as no transfer had been effected in accordance with ***section 37 (2)*** of the **Land Registration Act**; that damages were not an adequate remedy where the loss was occasioned by a clear breach of the law; that there was no evidence that Denga had collected the balance of proceeds of the auction sale; and that the balance of convenience tilted in favour of Denga since the bank's right to exercise its Statutory Power of Sale had not crystallized.

Ahmed was aggrieved by those findings and filed the appeal now before us premised on 10 grounds. Essentially, he complains that the trial court erred and misdirected itself in:

(a) finding that Denga had made out a prima facie case with a probability of success;

(b) failing to appreciate that the actions sought to be restrained had already taken place;

(c) failing to acknowledge that Denga's equity of redemption was extinguished at the fall of the hammer;

(d) failing to find that Ahmed was a bona fide purchaser for value entitled to protection;

(e) failing to hold that damages were an adequate remedy;

(f) ignoring the evidence of transfer of the property to Ahmed;

(g) holding that the transfer was not compliant with section 37(2) of the Land Registration Act;

(h) disregarding the rights of a registered proprietor which are guaranteed under the Constitution;

(i) failing to follow previous decisions of the Court of Appeal; and

(j) making conclusive findings of law and fact in an interlocutory matter and thus usurping the jurisdiction of the court in the main trial.

Learned counsel for him **Mr. Gichuru Muchoki** filed written submissions and a list of authorities which he highlighted orally at the hearing. The thrust of the submissions is that the trial court did not have regard to the law relating to injunctions and therefore failed to exercise its discretion judiciously. He cited the cases of ***Giella vs Cassman Brown (1973) EA 360*** and ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** to support the submission that Denga had not established a *prima facie* case with any probability of success. That is because, in his view, the transfer of the disputed property had already been completed and the court was acting in vain. He referred to the memorandum of sale executed on 14th May, 2014, the certificate of sale issued on the same day, and the registration of transfer made on 16th June, 2014, while the motion was filed on 11th June, 2014 and the injunction issued on 30th January, 2015. Furthermore, emphasized counsel, the equity of redemption was extinguished at the fall of the hammer in exercise of the statutory power of sale. He cited the case of ***Captain Patrick Kanyagia & Another vs Damaris Wangechi & 2 Others [1995]eKLR*** in support of that proposition. To drive the point home, he relied on this Court's decision in ***Central Kenya Ltd vs Trust Bank Ltd & 5 Others [2000] eKLR*** where the court stated:

"It is not in dispute that title to the suit property is registered under Registration of Titles Act. It is not also in dispute that at the material time the suit property was encumbered with said registered charges in favour of Trust Bank and Trust Finance. If the registration of the said charges and their presence on the register was conclusive evidence of the title of Trust Bank and Trust Finance as chargees in the absence of any prima facie evidence of fraud, then the transfer by them of the suit property exercising their statutory power of sale as chargees in favour of Floriculture gave to it an indefeasible title and right to immediate possession and therefore the charge created by Floriculture in favour of First National similarly was conclusive evidence of the suit property being subject to the said charge and First National's title is not subject to challenge. The appellant, it appears, has no right or title left in the suit property unless, of course, it proves at the trial of the suit the substantive ground of fraud or conspiracy to defraud to which First National was a party. We therefore agree with the learned judge that no prima facie evidence was produced before him to show that the appellant had a case with a probability of success."

Turning to the alleged irregularities in the sale, counsel contended that the court did not consider the evidence on record which established that the auction was regular in fact and proper in law. There was no evidence of collusion, conspiracy, fraud, misrepresentation or other dishonest conduct on the part of Ahmed who, like other members of the public, participated in the auction. He was thus an innocent purchaser fully protected under ***section 99*** of the **Land Act** (formerly ***section 69B*** of the **Transfer of Property Act**), which provides:

"(1) This section applies to-

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies-

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land:

(b) is not obliged to see the application of the purchase money;

(c) is not obliged to inquire whether there has been a default by the charger or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper, or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

In those circumstances, counsel submitted, damages were a sufficient remedy and were indeed sought in the main suit. It would be inequitable to deny possession of the disputed property to a person who had committed in excess of Ksh.46 million to the investment, and in effect be a blatant derogation of his right to own property under ***Article 40*** of the **Constitution**.

Finally, counsel submitted that it was unnecessary for the trial court to make a finding on the balance of convenience when, in its own finding, there was no doubt on the first two requirements in the ***Giella case.***

In making those submissions, counsel was supported by learned counsel for the bank, **Mr. E. N. Mwangi**, who also filed written submissions and authorities which were orally highlighted. Mr. Mwangi emphasized that the trial court had made conclusive findings of fact in an interlocutory matter contrary to law. He cited the findings that the statutory notice was not issued by the bank; that the postal address of Denga to which the statutory notice was sent did not belong to him; that the statutory notice was not served on Denga at all; that as a consequence, the sale of the property had no legal basis and was therefore a nullity; and that appropriation of the sale proceeds by Denga was a non-issue. Counsel criticized the trial court for ignoring evidence on record which was contrary to those findings and also ignoring the authorities cited by the bank in opposition to the application. He particularly referred to the finding that the transfer to Ahmed was not in accordance with ***section 37 (2)*** of the ***Land Registration Act*** which stipulates:

"A transfer shall be completed by -

a. Filing the Instrument; and

b. Registration of the transferee as proprietor of the land, lease or charge."

In his view, there was clear evidence on record, of compliance with that section and therefore the application had been overtaken by events. Counsel asked us to consider the relevant authorities on those submissions including: ***Downhill Limited vs Harith Ali El-Busaidy & Another [2000] eKLR; Olive Mwihaki Mugenda & Another vs Okiya Omtata Okoiti & 4 Others [2016] eKLR;*** and ***Jacob Miriti vs Samuel Mwangi [2007] eKLR.***

For his part, learned counsel for Denga, **Mr. F. G. Thuita**, relied on the written submissions and authorities filed but also made some highlights. He had no doubt that the discretion of the trial court was properly exercised as it was based on findings which were not contested that the bank had used the wrong postal address to serve the statutory notice which was never received by Denga. In his submission, the bank acted in a highhanded manner in rejecting overtures at settlement of the matter and instead conspiring with the auctioneers and Ahmed to deprive him of the property at a throwaway price. In coming to the conclusion that a *prima facie* case had been established, the trial court considered all the affidavits filed on record, and was careful not to call the findings final. In his view, the issue of the address used in sending the statutory notices was crucial and there was undisputed evidence that the bank did not use the address given in the charge instruments as by law required. If proved at the trial, the purported sale would be nullified, and there was no misdirection committed in law. There was also no misdirection in law when the trial court found that the contractual and statutory rights of Denga had been violated. In his submission, the finding was in line with the principle in the ***Mrao case (supra).***

As for the contention that Ahmed was an innocent purchaser who was absolutely protected and that the remedy for Denga was in damages, counsel submitted that it was presumptuous to make such definitive and final findings before the actual trial. Denga will prove as pleaded, that Ahmed was part of the conspiracy to have the property sold to him at a throwaway price. The fact that the bank or Ahmed was able to pay monetary compensation even where it is shown that statutory and contractual obligations had been violated would set a dangerous and mischievous precedent allowing those who have the financial muscle to flout the law. In his view, the protection of the right to property under ***section 99*** of the Land Act and ***Article 40*** of the Constitution extends to Denga as it does to Ahmed and an equitable balance must therefore be struck at the interlocutory stage. He cited the case of ***Alice Awino Okello*** **vs** ***Trust Bank Ltd & Anor LLR No. 625 (CCK)*** in which this Court declared:

"the balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances."

As for the contention that the prayers made in the application had been overtaken by events, counsel observed that prayer 3 included, not only the restraining of the transfer, but also interference with possession which Denga had and continues to have. There was thus no misapprehension of facts to warrant interference by this Court. Similarly on the contention that the equity of redemption was extinguished, counsel submitted that it can only be extinguished by a valid sale, not one which ostensibly, as found in this case, was *void ab initio.*

In sum, according to counsel, the trial court analyzed and considered all relevant facts and correctly applied the law on injunctions. He finally cited the case of ***Paul Tirimba Machogu vs Rachel Moraa Mochama [2015] eKLR,*** where this Court stated:

"So, it is plain that the learned Judge was alive to the fact that he was considering an interlocutory application and the issue as to how Plot No. B/13 Gekomu became Nyaribari Chache/B/B/Boburia 6353 was a matter to be resolved at the trial. The learned Judge however found, at that interlocutory stage, that the appellant had acted in a high handed manner when he evicted the respondent and her tenants without due process from a property which, prima facie, she had developed. That prompted the learned Judge to cite this Court's statement in the case of Kamau Mucuha vs The Ripples Ltd [Civil Application No Nai 186 of 1992] (UR) that :-

"A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act ..."

For equal measure, the learned Judge cited the case of Taj Superpower Cash and Carry Ltd vs Nairobi City Council & 2 Others [Court of Appeal Civil Appeal No. 111 of 2002] (UR) where it was stated:-

" ... a wrong doer cannot keep what he has taken because he can pay for it ...."

And in Gusii Mwalimu Investment Co Ltd and Another vs Mwalimu Hotel Kisii Ltd (supra,) we said:-

"A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession."

In our view, the learned Judge properly appreciated the gravity of the matter before him and directed his mind to the conditions for the grant of both a temporary prohibitory and a temporary mandatory injunctions and came to the conclusion, in our view, properly that the respondent deserved both orders at the interlocutory stage. Issues of which of the titles claimed by either party was superior; unstamped or unregistered documents and unsubstantiated or unproved allegations could not be conclusively determined at the interlocutory stage on contested affidavit evidence. The learned Judge of the lower court may have expressed himself strongly in some of his findings but the fact remains that those findings were only prima facie findings which will not bind the trial Judge. The learned Judge was considering an interlocutory application at the nascent stage of the suit long before the opportunity to amend was closed, directions taken or discovery given."

We have anxiously considered the grounds of appeal as well as the submissions of counsel and the authorities cited before us. As appreciated by the parties, this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive findings of fact as that would prejudice the proceedings in the main trial which is still pending. Our task is to determine whether the trial court properly exercised its discretion in granting the order for a temporary injunction. It is common ground that such discretion cannot be interfered with lightly by an appellate court unless it is shown that the discretion was clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Those principles were stated in the ageless case of ***Mbogo & Another vs Shah [1968] EA 93.*** In the subsequent case of ***United India Insurance Co Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] KLR 898*** Madan, JA stated thus:

"***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.***"

The *locus classicus* case for consideration of injunctions is the ***Giella case (supra).*** The principles set therein were re-examined and restated by this Court in ***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) allay 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 vs 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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be

measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

We are in no doubt that the trial court was aware of those principles and indeed expressly referred to them in the ***Giella case***. The court found that a *prima facie* case with a probability of success had been established. A *prima facie*

> ***"...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… [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."***

See ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*** at pages ***137*** and ***138.***

This Court, in the ***Nguruman case (supra)*** further expounded on the same issue 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."***

The trial court arrived at that conclusion principally after forming the view, borne out by the documents placed before it, that the bank was in breach of fundamental statutory and contractual obligations. The obligations pertained to service of the statutory notice on Denga which is a mandatory prerequisite to a lawful auction. The criticism has been levelled against the court for making final findings of fact at an interlocutory stage. If indeed that was so, it would, of course, amount to a fatal misdirection. See the cases of ***Agip (K) Ltd vs Vora [2000] 2 EA 285***, ***Rockland Kenya Ltd vs Elliot White Miller [1994] eKLR*** and ***Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 Others [2015] eKLR***. In our assessment, however, the analysis fell short of resolution of those issues and leaves factual assertions from both sides for testing in cross examination at the hearing of the main suit. We would say with this Court in the case of ***Paul Tirimba Machogu vs Rachel Moraa Mochama [2015] eKLR,*** that:

> ***"..the learned Judge properly appreciated the gravity of the matter before him and directed his mind to the conditions for the grant of both a temporary prohibitory and a temporary mandatory injunctions and came to the conclusion, in our view, properly that the respondent deserved both orders at the interlocutory stage. Issues of which of the titles claimed by either party was superior; unstamped or unregistered documents and unsubstantiated or unproved allegations could not be conclusively determined at the interlocutory stage on contested affidavit evidence. The learned Judge of the lower court may have expressed himself strongly in some of his findings but the fact remains that those findings were only prima facie findings which will not bind the trial Judge. The learned Judge was considering an interlocutory application at the nascent stage of the suit long before the opportunity to amend was closed, directions taken or discovery given."***

The appellant disputes strongly that he had anything to do with the statutory infringements levelled against the bank, and contends that he was an innocent purchaser fully protected by the law. In our view, that would be one of the fundamental issues for determination by the court in the main suit. A final finding made at the interlocutory stage would be presumptuous.

It is also strongly argued that damages were a sufficient remedy even if a *prima facie* case was found to exist. The underlying principles require that the issue of damages be examined where a *prima facie* case with a probability of success is established. It is, of course, not in every case that damages would be an adequate remedy. Irreparable injury, that is, *'where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy'* - is exempted. So too, '*where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of* ***Aikman vs Muchoki [1984] KLR 353.'*** See the case of ***Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd [2005] eKLR*** per **Maraga, J. (**now the Chief Justice). The trial court in this case took that latter view and we think it was entitled to do so. Having made findings on the first two principles and expressing no doubts thereon, the trial court, as correctly submitted by the appellant, had no business considering the balance of convenience.

Finally, it was argued that the application for injunction was overtaken by events. It is evident that Denga was intent on stopping the auction but it was too late. He had himself to blame for filing the application at that late hour. He also tried to stop the processing of the transfer, but there were difficulties in serving the appellant who went ahead and had the memorandum of sale and transfer executed by the bank and presented for registration. An interim order was issued on 19th June, 2014, as reproduced above, but it too does not appear to have stopped the bank, which was aware of the proceedings from inception, or Ahmed, from processing the documents. Factually, the finding that the transfer had not been registered was in error as there was *prima facie* evidence of it. But the prayers made went further and sought to restrain dispossession of the disputed property. That prayer had not been overtaken by events and was properly considered.

All in all, we have formed the view that there was no misdirection of fact or law and that on the basis of the material placed before it, the trial court exercised its discretion in a judicious manner. We are unable to say that the decision was plainly wrong.

Having so said, however, it is not lost to us that the appellant has invested in excess of Ksh.46 million and there is *prima facie* evidence of the transfer having been made to him. The order issued by the trial court on prayer 3 would entail the reversal of the transfer pending the hearing of the main suit. In our view, the *status quo* as at 16th June, 2014 ought to be maintained instead until the hearing and determination of the main suit, and we so order.

Subject to that qualification, we order that the appeal be and is hereby dismissed.

The costs of the appeal shall abide the outcome of the main suit.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR