**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, OKWENGU & MOHAMMED, JJ.A)**

**CIVIL APPEAL NO 82 OF 2016**

**BETWEEN**

**COMMERCIAL BANK OF AFRICA…………………………..APPELLLANT**

**AND**

**HEZEKIAH KIPKORIR MARITIM…..........…………......1ST RESPONDENT**

**LOICE CHELAGAT NGOSOSEI.......................................2ND RESPONDENT**

**PATRICK MAKHAMA OKONDA.....................................3RD RESPONDENT**

**JEPKEMEI CHANGONY....................................................4TH RESPONDENT**

**TONY KIPROTICH MAIYO..............................................5TH RESPONDENT**

**EVERLINE MUHATIA SHIVACHI..................................6TH RESPONDENT**

**JULIUS KIMAIYO MITEI…...............................................7TH RESPONDENT**

**SAMMY KIBET KOSGEI…................................................8TH RESPONDENT**

**MILKA KOSGEI…..............................................................9TH RESPONDENT**

**MATHEW NGETICH…....................................................10TH RESPONDENT**

**ALEX MALAKWEN MITEI...........................................11TH RESPONDENT**

*(An appeal from the ruling and order from the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated the 15th July 2016*

*in*

*E&L Case No 361 of 2015)*

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**JUDGMENT OF THE COURT**

**[1]** This appeal arises from the determination of an application dated 17th September 2015 in which the respondents herein sought an order of temporary injunction in the following terms:

> ***"an interlocutory injunction do issue against the [appellant] restraining it from evicting the respondents from occupation of the land parcel known as Eldoret Municipality Block 20 (Kapyemit)/2600 pending the hearing and determination of the suit.***

**[2]** The suit was brought by the respondents by way of a plaint dated 17th September 2015 in which they sued the appellant, as well as **Philip Kipkoech Tenai (Tenai)** and **Jonathan Kipketer Kurgat (Kurgat)** as the 1st and 2nd defendants in the Environment and Land Court *(ELC)* respectively in ELC Case No. 361 of 2015. In that suit, the respondents claim that at some point in time, they individually purchased land from **Tenai**. Their collective portions of land all comprise part of **Eldoret Municipality Block 20 (Kapyemet)/*2600*** *(the suit property)*. As they waited for their interests in the land to be registered, they all occupied their respective portions, and have constructed their homes thereupon where they live with their families. On 11th September 2015, the respondents received a notification of sale of the suit property from the appellant, in exercise of its statutory power of sale. It was the respondents' claim that **Tenai** and **Kurgat** fraudulently mortgaged the suit property to the appellant by way of charges dated 16th April 2014 and 28th April 2014 and dishonestly charged the property with the intention of dispossessing the respondents of their property.

**[3]** The respondents also filed an application dated 17th September, 2015 seeking *inter alia* an interlocutory injunction against the appellant restraining it whether by itself, its servants and/or agents from selling, or transferring and evicting the respondents from occupation of the suit property pending the hearing and determination of the application in the first instance and thereafter pending the hearing and determination of the suit. . The grounds upon which the order of injunction were sought were set out in the affidavit of **Hezekiah Kipkorir Maritim** who argued that they have a prima facie case with a probability of success and that should the order of injunction sought not be granted, they would suffer irreparable harm that could not be adequately remedied by an award of damages and further, that the balance of convenience tilts in favour of the respondents since the suit property now forms part of their matrimonial property on which they live with their families.

**[4]** The appellant filed a replying affidavit on 12th October, 2015 and opposed the application, stating that the application was misconceived and bad in law since the sale agreements executed between the respondents and **Tenai** and **Kurgat** related to different parcels of land, and not the suit property. The appellant argued that since the respondents were not party to the agreement with **Tenai** and **Kurgat**, they did not have the legal capacity to lodge a claim to stop the exercise of the appellant's statutory power of sale, and that being the case, they could not establish that they had a *prima facie* case with a probability of success.

**[5]** With respect to whether or not the respondents had established a *prima facie* case with a probability of success, the court found that the sale agreements produced by the respondents did not relate to the suit property. As such, whereas the respondents alleged that they had occupational rights to the suit property, these rights could not supercede the rights of the registered owner. On this basis, the court found that the respondents had failed to demonstrate that they had a *prima facie* case with a probability of success.

**[6]** The court further held that the respondents had not satisfied the second limb for the grant of a temporary injunction and stated as follows:

> ***"In the instant case, the Plaintiffs/Applicants acquired the land parcels on a consideration of purchase price that has been quantified on their respective sale agreements. It is therefore my considered view that in any event the 3rd Defendant exercises its statutory power of sale against the 1st and 2nd defendants, the plaintiff can sue the 1st defendant for the refund of their purchase price and hence the plaintiffs/applicants have not demonstrated that failure of grant of the injunctive orders will render him (sic) an irreparable harm."***

**[7]** Despite the abovementioned findings, the Court allowed the application in the following terms:

> ***"The golden Rule in applications for injunctions is to maintain status quo and hence preserve the suit property… It follows therefore that in view of the circumstances herein, the most convenient order would be, the status quo be maintain (sic) with regards to the suit property pending the hearing and determination of this suit. On this limp (sic) alone the Plaintiffs'/Applicants' application succeeds."***

**[8]** Aggrieved by this Order, the appellant preferred this appeal in which it challenges three parts of the ruling and order. The first is the finding that the respondents have *locus standi* to challenge the appellant's statutory power of sale. The second is the finding of the trial court on the balance of convenience that the golden rule was to maintain *status quo* and hence preserve the suit property and third is the court's order that the *status quo* be maintained with the effect that the appellant is restrained from exercising its statutory power of sale pending the hearing and determination of the suit.

**Submissions by counsel**

**[9]** Submissions in support of the appeal were presented by **Mr Lagat** for the appellant, while the respondents opposed the appeal through **Mr Mathai**.

**Mr Lagat** submitted that the respondent did not have *locus standi* to challenge the appellant's statutory power of sale since the parcels of land that they claim are not the same ones that the appellant seeks to exercise its power of sale over, that once the court had made a finding that the respondents had not adequately demonstrated their interest in the suit property, or in the alternative given adequate evidence that they were in occupation of the suit property, and further without showing that they were persons who could challenge the chargor's right to sell the land under section 103 of the Land Act, then the respondents' could not have been found to have locus to challenge the appellant's power of sale.

**Mr Lagat** further contended that the trial court having rightly found that the respondents had not established a *prima facie* case or irreparable harm, he ought not to have made a finding on where the balance of convenience lies.

**[10] Mr Mathai** opposed the appeal and argued that the respondents had collectively purchased land from **Tenai**, and that this collective parcel formed part of the suit property. Accordingly, the respondents contended that the trial court was correct in finding in favour of the respondents and therefore urged us to dismiss this appeal.

**Determination**

**[11]** In granting an order of injunction, a court exercises judicial discretion, and it is trite law, as stated in ***Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR (Civil Appeal 4 of 2015)** that

> ***"… an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court."***

**[12]** The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited. In ***United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898,** this Court set out these circumstances in the following terms:

> ***"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."***

**[13]** Did the trial court misdirect itself in granting the order of *injunction*? The principles which the court considers in granting orders of injunction are well settled as stated in the case ***Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR (Civil Appeal No. 77 of 2012**) together with the mode of their application 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.***

**[14]** In considering whether or not the respondents have a *prima facie* case we must caution ourselves not to make a final finding on the basis of the material that is before us in view of the fact that the main suit is still pending before the Environment and Land Court. We reiterate the sentiments of this Court stated in ***Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra)** as follows:-

> ***"Ordinarily, this Court would not express any concluded view on the dispute between the parties and must not also form a distinct impression as to the merits of the suit at this stage since such determination is reserved for the trial court after the interlocutory appeal has been disposed of."***

**[15]** On the question as to whether or not the respondents demonstrated a *prima facie* case with a probability of success, the trial court stated that they had not. Reminding ourselves that an applicant for injunction ***"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, (See Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)).***

**[16]** In **Mrao Ltd V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125,** this Court fashioned a definition for *"prima facie case"* in civil cases in the following words:

> **"In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

**[17]** We are minded to find that the respondents did indeed have *locus standi* to challenge the intended sale, and that they had a *bona fide* claim that should be entertained by the trial court. In this regard, we are satisfied that the trial court was correct in stating that the respondents had *locus standi* to contest the sale.

**[18]** It was the appellant's contention that once the court made a finding that the respondents had not established a *prima facie* case, it was not entitled to continue to make a finding on the other limbs. For this proposition, counsel for the appellant relied on the statements of this court in **Nguruman Limited (supra)** where the court stated that:

> ***"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.***
>
> **…**
>
> ***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."***

**[19]** We have addressed our minds to the assertions by the respondents that they live on the suit property together with their families. No evidence was led to contradict their assertions that they were in occupation of the suit property. While as a general rule, occupational rights to property would not ordinarily supercede the rights of a registered owner, the claim by the respondents may have a bona fide claim that may defeat that brought by the appellant. These are issues that ought to be canvassed before the trial court. In ***Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR (Civil Appeal No. 44 of 2014)*** this Court held that:

> ***"It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property."***

**[20]** The respondents have shown that they are in occupation of the property and have claimed to have purchased the suit property from **Tenai** and **Kurgat**. This is a claim that will be canvassed by the trial court and a determination made thereon. We find that the respondents have a prima facie case and have therefore satisfied the first limb for the grant of an order of injunction. This court in **Nguruman Limited** ***(supra)*** held that:

> ***"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."***

**[21]** The balance of convenience tilts in favour of the respondents. Should the appellant proceed to sell the property in question and the respondents are able to prove their claim in the trial court, then the respondents would have suffered irreparable harm as they will have been ejected from their homes. In our view, the trial court properly exercised its discretion and we therefore decline the appellant's invitation to interfere with it.

In the result, this appeal fails in its entirety. It is hereby dismissed. The costs of the appeal shall be costs of the trial of the suit. The suit in the ELC shall be heard on priority basis.

**Dated and delivered at Eldoret this 4th day of April, 2019.**

**E. M. GITHINJI**

**……………………….**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**……………………….**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**……………………….**

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original

**DEPUTY REGISTRAR**