IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A.)

CIVIL APPEAL NO. 80 OF 2018

BETWEEN

VINCENT OCHUNG ABONDO & 14 OTHERS.....APPELLANTS

AND

LUCAS AWADHA OKADO.....1ST RESPONDENT

OLIVER OTIENO ARIKA.....2ND RESPONDENT

(Appeal from the ruling and orders at the Environment and Land Court

at Kisumu (Kibunja, J.) dated 9th May, 2018

in

ELC CASE NO. 170 OF 2017)

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JUDGMENT OF THE COURT

By this interlocutory appeal the appellants challenge the orders of the Environment and Land Court in Kisumu (Kibunja, J.) by which their application for interlocutory injunction pending the hearing of their suit was rejected. They had sought an injunction against the respondents herein in the following terms;

> ***" That a temporary injunction do issue restraining the defendants by themselves, their agents, servants and/or employees from further sub-division, sale, transfer, charges, leases, destruction, wastage, development and/or any other dealings on parcels No. North Sakwa/Nyawita/6102, 6422 & 6423 irregularly registered in the name of the defendants pending the hearing and determination of this suit."***

The application had grounds on its face and was supported by an affidavit by **Vincent Ochung Abondo** sworn on 16th May, 2017. It was resisted by affidavits sworn by the two respondents herein. That resistance took the form of assertions, supported by evidence, that the respondents were the registered proprietors of the various parcels of land sought to be burdened by injunction. The first respondent **Lucas Awadha Okado** showed that North Sakwa/Nyawita/82 was transferred and registered in his name by transmission on 4th June, 1998, and that he was the registered owner of North Sakwa/Nyawita/160. He exhibited copies of titles to the two parcels. **Oliver Otieno Arika,** the 2nd respondent showed that he purchased North Swakwa/Nyawita/1602 and it is registered in his name.

At any rate, it is quite clear from the wording of the prayer for injunction that the parcels respecting which the injunctions were sought were registered in the names of the respondents, only that the appellant alleged that such registrations were irregular. We would imagine that the suit would be seeking to annul the said titles but we were unable to trace the plaint itself in the record of appeal, which of itself casts doubts on the competence of the appeal.

Be that as it may, and based on the fact that the respondents were and remain the registered owners of the properties in question, the learned Judge had no difficulty whatsoever rejecting the application for injunction. He held that they were the absolute and indefeasible owners of their respective parcels in terms of **section 26** of the **Land Registrations Act** unless and until their registration was successfully impugned.

In the absence of title or other interest over the properties, the appellants could not possibly have a right to injunct the same and the learned Judge was of the view that their application was devoid of merit.

We note that the learned Judge isolated the issues for determination in the application before him as;

> ***"a) Whether the plaintiffs have established a prima facie case with a possibility of success for temporary injunction order to issue at this stage.***
>
> ***b) Who pays the costs."***

In an application for interlocutory injunction, the considerations were as set out notoriously in ***GIELLA -vs- CASSMAN BROWN & COMPANY LIMITED [1973] EA 360,*** namely that the applicant must satisfy the court that he has a *prima facie* case with a probability (not possibility!) of success; the applicant should show that unless the injunction is granted he may suffer irreparable loss incapable of compensation by an award of damages and; finally, that if the court is in doubt it would decide the matter on a balance of convenience. The three tests need to be considered and satisfied separately and sequentially (See ***NGURUMAN LIMITED -vs- JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR.)***

It may well be that the learned Judge considered that a consideration of the first limb of the **Giella** principles was enough to dispose of the application and he had reason enough to so find, but we think it would have been neater had he been more deliberate and expressive about application of the said principles.

That notwithstanding, we think that the grant or denial of the injunction having been within the learned Judge's discretion, it would not be open to us to lightly interfere with his decision unless it be shown that he misdirected himself and fell into clear error leading to mis-justice on the bases of the principles laid down in ***MBOGO & ANOTHER -vs- SHAH [1968] EA 93*** and reiterated in numerous other cases including ***MRAO LIMITED -vs- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] eKLR***

The totality of our consideration of this appeal leads us to the inescapable conclusion that the applicants' application was devoid of merit and the learned Judge was correct to dismiss it as he did. We have no reason to interfere with his ruling and this appeal accordingly fails, and is dismissed with costs.

DATED and delivered at Kisumu this 3rd day of October, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.