IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 90 OF 2017

BETWEEN

MOSES KIBIEGO YATOR.....APPELLANT

AND

ECO-BANK KENYA LIMITED.....1ST RESPONDENT

VALLEY AUCTIONEERS.....2ND RESPONDENT

STEPHEN KIPCHICHIR MELLY.....3RD RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court of Kenya

at Eldoret ***(Ombwayo, J.)*** *dated* ***4th November, 2016***

in

ELDORET ELC NO. 426 OF 2013

****

JUDGMENT OF THE COURT

By this interlocutory appeal, the appellant **Moses Kibiego Yator,** who was the plaintiff in the Environment and Land Court at Eldoret, challenges the ruling and order of Ombwayo, J. by which his application for injunction dated 21st May, 2015 was disallowed. That application sought a number of other orders including;

> ***"2.THAT Valley Auctioneers and Stephen Kipchichir Melly be enjoined in this suit as 2nd and 3rd defendants;***
>
> ***3. THAT the plaintiff be granted leave to amend the plaint to incorporate the new parties;***
>
> ***4. THAT an interlocutory injunction do issue against Stephen Kipchirchir Melly restraining him whether by himself, his servants and/or agents from evicting the plaintiff from the land parcel known as KIPLOMBE/KIPLOMBE BLOCK 6 (KUTSI)/42 or dealing with the same pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit;***
>
> ***5. THAT the costs of this application be provided for."***

It was common ground that by the time the application was made the suit land above mentioned had been transferred and registered in the name of **Stephen Kipchirchir Melly,** the 3rd respondent herein, following a sale by public auction conducted by **Valley Auctioneers,** the 2nd respondent, as instructed by **Eco-Bank Kenya Limited,** the 1st respondent, which was exercising its statutory power of sale.

The appellant complained in that application that the sale and transfer of the suit land, previously registered in his name, was unlawful and a nullity and he listed no less than seventeen reasons for that assertion. His application had grounds on its face indicating the aforesaid reasons

and was also supported by an affidavit of the appellant swearing to his various matters of complaint.

The respondents filed replying affidavits in response and opposition to that application and the learned Judge then delivered his ruling in which, though finding that the appellant had established a *prima facie* case with probability of success for reasons stated, especially that the proper process was not followed, he nonetheless denied the injunction sought, on the basis that the appellant had not proved he would suffer irreparable loss incapable of compensation by damages.

That ruling aggrieved the appellant and after filing a notice of appeal he followed it up with a memorandum of appeal complaining that the learned Judge erred in law and fact in;

- *finding that the appellant had failed to demonstrate irreparable loss, in misapprehension of settled principles;*
- *failing to consider the adverse consequences of an unlawful eviction would have on the appellant, and the clear breaches of law;*
- *finding that the debt had outstripped the borrowed sum without evidence of loan status and want of repayments;*
- *failing to find that the appellant's occupation of the land called for maintenance of status quo, if in doubt about irreparable harm.*

In consequence, the appellant prayed that the learned Judge's ruling and order be set aside and in its place we allow his application as prayed. He also sought costs.

The parties filed written submissions which were highlighted by counsel at the hearing of the appeal.

For the appellant, learned counsel **Mr. Mugambi**, contended that after finding that the appellant had a *prima facie* case, the learned Judge ought to have also found that the appellant stood to suffer irreparable loss since breaches of the law as happened in this case, constitute irreparable loss. For that proposition he cited ***PALMY COMPANY LIMITED -vs- CONSOLIDATED BANK OF KENYA LIMITED [2014] eKLR***, a decision of the High Court where Gikonyo, J. held that the breach of law suffices as an irreparable damage which is not compensable by an award of damages; and ***JOSEPH SIRO MOSIOMO -vs- HOUSING FINANCE COMPANY LIMITED [2008] eKLR,*** where Warsame, J. (as he then was) expressed himself that damages are not and cannot be a substitute for the loss which is occasioned by a clear breach of the law.

Emphasising that the suit land is family land measuring 27.8 acres which the appellant is in occupation of, counsel submitted that the appellant's equity of redemption was unlawfully clogged by the auction. Although he conceded that the appellant had not paid the outstanding debt, counsel nonetheless stated that the 3rd respondent's remedy lay in damages and that the injunction ought to have been granted.

Mr. Bisonga, learned counsel for the 1st and 2nd respondents chose to rely on his written submissions without highlighting them. Those submissions were to the effect that an applicant who establishes that he has a *prima facie* case does not thereby automatically get entitled to an injunction. He needs to go further to establish that he would not suffer irreparable loss. He cited this Court's now notorious decision in ***NGURUMAN LIMITED -vs- JAN BONDE NIELSEN & 2 OTHERS; Civil Appeal No. 77 of 2012.*** The applicant had failed to show irreparable loss or that the balance of convenience tilted in his favour. Moreover, the grant or refusal of injunction was in the Judge's discretion, and it was properly rejected by the learned Judge. This Court's decision in ***CHARTERHOUSE INVESTMENTS LIMITED -vs- SIMON K. SANG & OTHERS, Civil Appeal No. 315 of 2004*** was cited in aid.

On his part, **Mr. Bosek**, learned counsel for the 3rd respondent first associated himself with Mr. Bisonga's submissions and added that the 3rd respondent as a purchaser of the suit land at an auction was protected by **section 99** of the **Land Act** and his title is unimpeachable. Urging that the ***GIELLA -vs- CASSMAN BROWN [1973] EA 358*** principles are to be applied sequentially, he defended the learned Judge for denying the injunction on the basis that irreparable loss had not been proved. Moreover, the suit land having been given as security for a loan, it is capable of being valued so that the issue of irreparable loss does not arise. Further, though he was seeking an equitable remedy, the appellant had not done equity in that he had not repaid the debt he owed. His remedy, if any, lay in damages only.

In this appeal, what is being challenged is the exercise of discretion by the learned Judge. As an appellate court, we are extremely slow to interfere with a first instance court's decision that lies in its discretion, and it matters not that had we been dealing with the matter ourselves, we might have arrived at a different decision. This was well-expressed by Madan, JA. (as he then was) in ***UNITED INDIA INSURANCE COMPANY LIMITED -vs- EAST AFRICAN UNDERWRITERS (KENYA) LIMITED [1985] EA 898*** thus;

> ***"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 as at first instance, would or might have given different weight to that given by the Judge to the varies 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 consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

See also ***MBOGO -vs- SHAH [1968] EA 93.***

From our perusal of the record and the ruling of the learned Judge, there really is no doubt at all that the learned Judge properly appreciated the principles for the grant of interlocutory injunctions. As he did find that there was a *prima facie* case with a probability of success, the appellant is not aggrieved by that. His complaint is that the learned Judge ought to have found that the breaches of law amounted to irreparable loss.

From our own assessment of this matter, we find that the learned Judge did no wrong in finding that there was no irreparable loss. The sale and transfer had already occurred and the 3rd respondent was the new registered owner. Even though the learned Judge did not refer to **section 99** of the **Land Act 2012**, it would seem to us, without deciding the point at this interlocutory stage, that the purchaser is protected, and further that what remedy there is for the chargor who may be subjected to loss lies only in damages.

Once the learned Judge found that irreparable loss had not been demonstrated, he did not have to consider balance of convenience.

Ultimately, we do not think that the learned Judge committed any error of principle, misdirected himself or was otherwise plainly wrong so as to entitle us to interfere with his exercise of discretion.

In consequence, this appeal is devoid of merit and it is accordingly dismissed with costs.

DATED and delivered at Eldoret this 28th day of November, 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 APEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.