REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA

CIVIL APPEAL NO. 100 OF 2014

BETWEEN

STEPHEN MBUGUA MWAGIRU.....APPELLANT

VERSUS

MUTHAIGA COUNTRY CLUB LIMITED.....1ST RESPONDENT

MUTHAIGA COUNTRY CLUB HOLDINGS LTD.....2ND RESPONDENT

COLLIN CHURCH.....3RD RESPONDENT

GRAHAM NICHOLAS.....4TH RESPONDENT

(Appeal from the Ruling and/or Order of the High Court of Kenya at Nairobi (R. Ougo, J.) Dated 6th March, 2014

in

H.C.C.C.No. 239 of 2013)

****

JUDGMENT OF THE COURT

This is an interlocutory appeal arising from the Ruling of **R.E. Ougo, J.** dated the 6th day of March, 2014 dismissing the appellant's application for injunction.

The brief background to the appeal is that, the appellant joined the 1st and 2nd respondents in 2004 as a full member after paying the requisite fee of Kshs.90,825.The relationship between the appellant and the 1st and 2nd respondents is contractual. The terms of engagement are outlined partly in the 1st and 2nd

respondents' Memoranda and Articles of Association and the respective constitutions. The litigation resulting in this appeal was precipitated by a letter the appellant wrote to the 1st and 2nd respondents opposing an application for the intended membership of **Fabian Philippart,** which was viewed as a misconduct on the part of the appellant and reported to the 4th respondent for action.

On the 31st October, 2012, the management committee of the 1st and 2nd respondents met without the participation of the appellant, discussed complaints leveled against him by persons unknown to him, and resolved to expel him from its membership. In November, 2012, the appellant received two letters dated the 22nd and 29th November, 2012, respectively, communicating the appellant's suspension and requesting him to tender his resignation from the 1st and 2nd respondents membership, failing which he would be expelled. He lodged an appeal against the said decision on the 4th day of December, 2012. On the 6th day of December, 2012 the 3rd respondent refused to supply him with particulars of the accusations leveled against him but advised that he apologize as an expression of remorse first and then explain himself later. Following that advice, the appellant wrote a letter on the 13th day of December, 2012, giving a blanket apology. On the 25th February, 2013, he received an email from the 4th respondent requesting him to meet the 4threspondent on the 8th March, 2013, which he did,

and apologized for the alleged misconduct. On the 24th April, 2013, the Club through the 3rd respondent confirmed the expulsion.

The appellant was aggrieved. He wrote a letter on the 29th day of May, seeking the appointment of an independent tribunal to rehear his case, which request was declined, prompting the simultaneous filing of both the plaint dated the 26th day of June, 2003, and the Notice of Motion brought under order **40** Rules **1 to 10**, Order **51** Rules **1 to 3** of the Civil Procedure Rules, and sections **1A** and **IB, 1C** and **3A** of the Civil Procedure Act, substantively seeking an order to restrain the respondents either by themselves, their servants and agents or otherwise, howsoever, from suspending or expelling him from or in any way whatsoever interfering with the appellant and his familys' enjoyment of the Muthaiga Country Club facilities, pending the hearing and determination of the suit. The application was based on the grounds in its body, and supporting and supplementary affidavits of the appellant. In these, the appellant basically reiterated the contents of the averments in the plaint as we have summarized them.

The application was resisted through a replying affidavit deposed by **Colin Edward Church** and filed in court on the 10th day of July, 2013. In summary, the respondent admitted that indeed the appellant had been their member; that he was bound by rules and procedures of the 1st respondent upon his admission to its membership; that the appellant violated those rules and procedures; that the respondents found his conduct as specified in the replying affidavit injurious to the interests of the Club and then suspended and subsequently expelled him from the Club membership which actions were unsuccessfully appealed against.

The learned Judge made findings, *inter alia*, that the appellant had already been expelled from the club as at the time he approached the court for its intervention and as such, no interlocutory order could be issued as that would have been in vain; that the appellant had not also proved how much he stood to suffer as irreparable loss considering that the club was a social and leisure association; and that the issue as to whether or not due process was followed in expelling the appellant from the club was a matter to be determined at the full hearing. She also found that any inconvenience the appellant may ultimately have suffered at the conclusion of the trial was capable of compensation by way of damages. On that account, the Judge dismissed the application triggering this appeal.

The appellant raised seventeen grounds of appeal which may be summarized that the learned Judge erred:

> ***1. In finding no merit in the appellant's application and instead ruled in favour of the respondents.***
>
> ***2. When she wholly ignored the rule in Stanley Munga Githinguri versus Jimba Credit Limited Civil Appeal No. 44 of 1998 which bars a civil court hearing an interlocutory application from making a final determination of facts and the law and thereby bringing the suit to an end prematurely.***
>
> ***3. In not holding that the appellant satisfied the threshold for the granting of an injunction.***
>
> ***4. When she made findings that were against the overwhelming evidence on the record.***

Learned Senior Counsel **Dr. Kamau Kuria** was in attendance for the appellant, while learned counsel **Mr. Ouma George** appeared for all the respondents. The appeal was disposed of by way of written submissions with oral highlights.

Learned Senior Counsel relied on **Patel and others versus Dhanji and others [1975] EA 301** and submitted that the learned Judge not only failed to appreciate that the appellant had demonstrated that the rules governing the contractual relationship between him and the respondents had been violated by the respondents, and that interlocutory Judgment had been entered in favour of the appellant on the 14th day of November, 2013, thereby crystallizing the prayers for a permanent injunction sought in the plaint, which should have formed sufficient anchor for the learned Judge to grant the injunction sought.

Relying on **Stanley Munga Githunguri versus Jimba Credit Limited, CA Nai No. 144 of 1998,** Senior counsel submitted that the Judge fell into error when she granted final orders by holding *inter alia* that the appellant had already been expelled from the Club, and an interlocutory order could therefore not be issued; that the appellant had not proved how he stood to suffer irreparable harm; and, that the issue as to whether due process was followed in expelling the appellant from the club was a matter to be determined at the full hearing; and, lastly, that such a loss could be compensated for by way of costs, which orders in senior counsel's view, prejudiced the outcome of the pending suit.

Relying on **Nguruman Limited versus Jan Bonde Nielsen and 2 others [2014] eKLR,** he submitted that the appellant had satisfied the threshold for the granting of an injunction as he had demonstrated that he would suffer irreparable injury if a temporary injunction was not granted as the expulsion implied that he could not get along with his fellow club members or that he was unfit to be associated with, as the transgressions leveled against him would have been assumed to be correct.

Senior Counsel further submitted that, by dismissing the application and holding that damages would be an adequate remedy, the trial Judge ensured that the law would unduly lean in favour of those rich enough to pay damages for all manner of contraventions of human rights, which, according to him would not only be unjust but would also amount to a miscarriage of justice. Lastly, that the balance of convenience tilted in favour of the appellant and enjoined the Judge to preserve the *status quo ante* pending the hearing and determination of the suit.

Citing **African Safari Club versus Safe Rentals Ltd Civil Application No. 53 of 2010** and **Muriu Kamau and another versus Kenya National Bank [2009] eKLR, Dr. Kuria** faulted the trial Judge for his failure to apply the overriding objective principles to find in favour of the appellant. He urged us in terms of the principle, in **Selle versus Associated Motor Boat Company Ltd [1968] EA 123**, to revisit the record, re-evaluate it on our own and interfere with the Judges' discretion which, in his view was unjudiciously exercised, reverse it and substitute it with an order granting the injunction sought.

Opposing the appeal, learned counsel **Mr. Ouma George** invited us to find that the appellant's expulsion from the 1st respondent's membership was as a result of his gross contravention of its Articles of Association and bylaws comprising the Rules and Regulations which bound all its members including the appellant; that the appellant's membership to the 1st respondent did not guarantee him proprietary rights; that the appellant's suspension and ultimate expulsion from the membership of the 1st respondent on the 31st day of October, 2013, was justified as the respondents' committee members that deliberated over the issue were satisfied that his conduct both within and outside the 1st respondents premises was injurious to its interests.

Relying on **Lucy Wangui Gachara versus Minudi Okemba Lore [2015] eKLR, United India Insurance Co. Ltd versus East African Underwriters (Kenya) Ltd [1985] EA 898 and Mrao Ltd versus First Bank of Kenya Ltd and 2 Others** [**2003] KLR 125,** counsel submitted that the appeal as filed and argued did not meet the threshold set for our interference with the Judge's discretion as the appellant failed to demonstrate that she misdirected herself in law; misapprehended the facts, took account of considerations she should not have taken account of; failed to take account of considerations she should have taken account of or that on the basis of the record before us, the trial Judge's decision albeit a discretionary one was plainly wrong.

Relying on **Esso (K) Ltd versus Mark Okinyi CA Number 69 of 1991**, Counsel urged that given the undisputed facts before the Judge, that the appellant had been suspended and then subsequently expelled from the 1st respondent's membership, there was no way the Judge could have granted an injunction restraining the 1st respondent from doing what it had already accomplished on the 31st day of October, 2012, long before the appellant moved to seek the courts' intervention.

Turning to the alleged entry of an interlocutory judgment in favour of the appellant, counsel submitted that the respondents were served with the claim to which they responded by entering their memorandum of appearance on 13th August, 2013, followed by the filing of the defence on the 2nd day of October, 2013. Both were on record when the appellant's application came up for hearing before the trial Judge on 26th day of June, 2013, at the conclusion of which the Judge reserved the matter for the delivery of the ruling on the 6th day of January, 2014. At no time was the issue of entry of interlocutory judgment raised before the Judge during the hearing of the application for injunction, argued counsel. The issue was being raised for the first time on appeal and counsel urged us to ignore it. Moreover, a scrutiny of the record does not reveal any entry of such judgment and none was pointed out to us by senior counsel.

Counsel urged that the merits of the competing claims were yet to be determined by the trial court hence the need for us to refrain from making any conclusive view on the matters in dispute. Denying that the findings made in the impugned ruling brought the entire suit to an end, counsel contended that all that the Judge did was to rule, and correctly so according to counsel, that the event the appellant sought to restrain had already occurred; and that the issue as to whether due process had been followed by the respondents when expelling the appellant from its membership was a matter for the merit trial of the main suit. The alleged irreparable injury and damage to the appellant's reputation in counsels' view were also matters that could only lie in a defamation claim which could also be dealt with at the main trial.

The principles that guide the interference or otherwise with the exercise of judicial discretion have crystallized in a long line of cases. S**ir Clement De Lestang V.P**. put it succinctly in **Mbogo versus Shah [1968] EA 93** at page 94

thus:-

> ***"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 decision 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."***

The President, **Sir Charles Newbold** agreeing, added his own understanding at page 96, thus:-

> ***" 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."***

See also Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein he stated 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 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 consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

We have considered the record, the rival submissions, and the principles of law set out above. In our view, only one issue falls for our determination namely: whether the learned Judge exercised her discretion judiciously when she withheld the interlocutory injunction from the appellant.

The record is clear that in the determination of the competing interests before her, the trial Judge reviewed the pleadings, the supportive facts, the submissions and case law relied upon by the respective parties and then conclude thereon as follows:-

> ***"The issue for determination is whether the applicant is entitled to temporary injunction sought. I have considered the facts as deponed by the applicant, the ground of opposition filed, together with the submissions made by both counsel. The applicant seeks an injunction. The principles of granting an injunction are that the applicant has to establish a prima facie case with probability of success, the applicant has to show that he will suffer irreparable loss and if the court is in doubt, it will decide the case on a balance of convenience (see Giella versus Cassman Brown Company Ltd ea 1973 ca 51 OF 1972 AT PAGE 318. The applicant has already been expelled from the Club and as such, an interlocutory order cannot be issued at this juncture. It is my view that the applicant has not proved how he stands to suffer irreparable loss noting that the said Club is a social and leisure association. The issue on whether or not due process was followed in expelling him from the club is a matter to be determined at full hearing which can be compensated for by way of damages. I find that this application lacks merit and the same is dismissed with costs to the respondent orders accordingly.***

It is not disputed the appellant's suspension and ultimate expulsion from the Club occurred way back on the 31st October, 2012; and that the appellants' appeal against that expulsion was unsuccessful. What the appellant sought from the court below was an interlocutory injunction. The substantive relief as laid by the appellant in the interlocutory application read as hereunder:

> ***"3. That this Court be pleased to restrain the defendants/respondents by themselves, their servants and agents or otherwise howsoever from suspending or expelling from or in any way whatsoever interfering with the plaintiff and his families enjoyment of the Muthaiga Country Club facilities pending the hearing and determinations of this suit."***

The said relief as framed was anticipatory in nature. It was forward looking which went contrary to the background facts set out above. On the basis of which the interlocutory application was anchored and which led the Judge to the conclusions set out above.

The Judge correctly appreciated that the principles of law that were to guide her in the determination of the application for injunction were those enunciated in the celebrated case of **Giella versus Cassman Brown [1958] EA 358** namely, that:

> ***iv. An applicant must show a prima facie case with a probability of success;***
>
> ***v. An injunction will not normaly be granted unless the applicant might otherwise suffer irreparable injury.***
>
> ***vi. When the Court is in doubt, it will decide the application on the balance of convenience."***

In terms of the holding in **Kenya Commercial Finance Co. Ltd versus Afraha Education Society [2001] Vol. 1 EA 86,** and reiterated in **Nguruman Limited versus Jan Bonde Nielson and 2 others [2014] eKLR,** the Judge was expected to apply all the above ingredients as separate, distinct and logical hurdles which the appellant was expected to surmount sequentially.

The first is the establishment of a *prima facie* case with a probability of success. In the case of **Mrao Ltd versus First American Limited and 2 others** (supra) the Court defined a *prima facie* case to mean one that includes but is not confined to a genuine and arguable case. It is a case which on the material presented, a tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.

A claimant for an interlocutory injunction has to demonstrate that he/she has a genuine complaint against the defendant's "proposed activities." An interlocutory application is therefore forward looking. In other words, it looks to the future and not to the past.

From his own supportive facts on the record, what the appellant came to court to forestall had already taken place. He was therefore asking the Court to reverse that situation to the pre 31st October, 2012 period before he was suspended and then subsequently expelled.

In the result, we find no fault in the conclusions reached by the Judge as the same was within the principles crystallized by case law. See **Stanley Kirui versus Westland Pride Limited [2013] eKLR** which held *inter alia* that "the Court cannot injunct what has already happened; ***Mavoloni Company Ltd versus Standard Chartered Estate Management Ltd Civil Appeal No. 266 of 1997 [1997] LLR 5086***, that an injunction cannot be granted once the event intended to be injuncted has been overtaken by events. Lastly, **Esso Kenya Ltd versus Mark Makwata Kiye Civil Appeal No. 69 of 1991**, where it was stated that an injunction cannot issue to restrain an event that has already taken place.

The Judge next considered the element of irreparable loss which she discounted, simply by stating that she did not see how the appellant would suffer irreparable harm if excluded from a social Clubs' membership pending the hearing and determination of the suit. This is what senior counsel has termed a determination in finality. We think otherwise. The reason is that, as submitted by the respondent, the Club membership vested no proprietary rights in the appellant, a position not countered by the appellant. This being the correct position, the Judge's remarks, did not in our view amount to a decision in finality. There was room left for the appellant to quantify the loss and if proved at the hearing to seek compensation for the same and where appropriately established an appropriate remedy would definitely flow from the Court.

Turning to the last pillar of a balance of convenience, we find it tilted in favour of the respondents. The supportive facts the respective parties relied upon in support of their opposing interests called for the status quo then prevailing as at that point in time, when the appellant sought the Courts' intervention to prevail pending the hearing and determination of the suit, which status quo was that the appellant had already been suspended and subsequently expelled from the Clubs membership. It was the merit disposal of the suit that would determine whether due process had been followed in the said suspension and subsequent expulsion of the appellant from the Club or not and then decide on an attendant appropriate remedy if any.

Turning to matters of alleged breach of the appellant's rights, creation of an impression defamatory of the appellant as well as the failure of

the Judge to invoke the overriding objective principle enshrined in sections **1A, 1B** and **3** of the Civil Procedure Act, in aid of the appellant's course, it is our view that these too had no application to the granting or otherwise of the injunction then sought. Applying them would have gone contrary to the now crystallized principle that the threshold to be met by any party seeking an interlocutory injunction is that set by the **Giella versus Cassman Brown case** (supra). We therefore find no error in the Judge's failure either to interrogate or apply them as these were not part of the principles of law she was obligated to apply when determining the application then before her.

The upshot of the above is that, we find nothing to suggest that the Judge exercised her discretion injudiciously when she withheld the injunction from the appellant. There is therefore no justification for our interference. The appeal has no merit. The same is dismissed with costs to the respondents both on appeal and at the High Court.

Dated and Delivered at Nairobi this 25th day of May, 2018.

P.N. WAKI

……..

JUDGE OF APPEAL

R.N. NAMBUYE

……..……

JUDGE OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar.