**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME JJ.A)**

**CIVIL APPEAL NO 65 OF 2017**

**BETWEEN**

**RODGERS CHIRIBA NYAMBU.....1ST APPELLANT**

**GEORGE BARUA.....2ND APPELLANT**

**AND**

**GEORGE MADEMU MUNGA.....1ST RESPONDENT**

**DAVID MKOKA MUNGA.....2ND RESPONDENT**

**JOHANA BONDERA MUNGA.....3RD RESPONDENT**

**FRANKLINE SHIDA MUNGA.....4TH RESPONDENT**

***(Being an appeal against the Ruling and Order of the Environment & Land Court of Kenya at Malindi (Angote J) dated 16th September, 2016***

**in**

**ELC Case No. 169 of 2014)**

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**JUDGMENT OF THE COURT**

[1] This is an interlocutory appeal against an interim order of injunction that was issued on 16th September, 2016 by **Angote J**. By the said order, the 1st and 2nd appellants were restrained either by themselves, their agents, servants or representatives from trespassing onto, cultivating, or in any other way interfering with plot No 125 Vinagonei (suit property) pending the hearing and determination of the suit. We do not know whether the suit has been heard and determined, be that as it may, the appellants have challenged the order of injunction as they contend in the memorandum of appeal that the learned Judge determined issues of ownership of suit property to finality, through affidavit evidence and written submissions. Further the appellants state that the Judge failed to consider there were previous suits and proceedings before the Land Adjudication tribunals and for failing to appreciate that the appellants were not the persons who were cultivating the land.

[2] On the outset, it is necessary to state that the dispute over the suit premises between the families of the appellants and respondents has been raging for more than 50 years. The matter was back and forth before the Land Adjudication officer and Committee before it landed in the High Court as Misc. Appl. No. 28 of 2005. The appellants' application for judicial review of the orders on appeal before the Minister was unsuccessful. That is what culminated with Civil Appeal No. 236 of 2007 before this Court. As regards the judgment of this Court we find that the learned Judge aptly summarized the findings therein which we agree with as follows;

> ***"The decision of the Court of Appeal however did not set aside the award by the Committee, the Board and the Land Adjudication Officer. All the Court of Appeal did was to quash the decision of the Minister because there were no proceedings to show how the D.C sub-delegated his powers to a Mr. Chelimo Cheboi.***

***The Court of Appeal having set aside the decision of the Minister on 6th December, 2012, the Defendants were under an obligation to have the appeal re-heard by the Minister. There is no evidence before me to suggest that this was ever done.***

***Unless and until the Minister makes a decision that is contrary to the decisions of the Committee, the Land Arbitration Board and the Land Adjudication Officer, it is the Plaintiffs who should remain in possession of the suit land.***

***In the circumstances, I find and hold that the Plaintiffs have established a prima facie case with chances of success"***

[3] This appeal was ventilated by way of written submissions. Both **Mr Odongo** learned counsel for the appellant and **Mr Murage** holding brief for **Mrs Omondi** for the respondent adopted their written submissions and did not make any oral highlights. According to the appellants the Judge made a final determination when he posited that the respondents should remain in possession of the suit premises. In their view that was akin to determining ownership in an application that only sought an interim order of injunction. Since these were the same orders that were prayed for in the plaint, counsel for the appellant submitted that their case was prejudiced as the respondents obtained the same orders; whereas the land should not belong to anybody until the appellants have exhausted their appeals arising from the adjudication process. In this regard, the ruling by the learned Judge left no issues for determination in a formal hearing and that explains why the main suit was never fixed for hearing.

[4] Counsel further stated that the appellants were not to blame for failure to institute the appeal before the Minister; they referred to several correspondences addressed to the Office of the Chief Land Registrar and the Director of Adjudication who have not given an indication of when the appeal should be heard. Moreover the dispute involves other persons who were in occupation as the appellants are civil servants working and living away from the suit premises but the order of injunction affected other members of their families who derive a livelihood from the suit property.

[5] This appeal was opposed by the respondents. It was submitted that an order of injunction is discretionary and a Court of Appeal should not interfere with the exercise of a Judge's discretion unless it is satisfied that the Judge in exercising the said powers misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the whole case that the Judge was clearly wrong. To reinforce the above prepositions counsel made reference to this Court's decision in the case of **Nguruman Ltd v Jan Bonde Nielson & 2 Others [2014] eKLR**. It was the respondent's case that the Judge was satisfied that the appellants had established a prima facie case, and demonstrated that unless the order of temporary injunction was granted they would suffer irreparable loss. As matters stood and going by the decision of the Land Adjudication Officer dated 23rd March, 1999, which was never set aside, even by the Minister, the respondents were the owners of the suit land.

[6] Counsel for the respondents also referred to the provisions of Section 29 of the Land Adjudication Act that provides for a procedure of appeal before the Minister if anyone is aggrieved by the decision of the Adjudication officer and until that appeal is determined the respondents' occupation and use of the suit land cannot be divested. Further counsel argued that sometime in January, 2014 while the appellants appeal was pending before the Minister they or their agents unlawfully and without permission from the respondents entered the suit premises and started cultivating on the same and despite a demand letter requesting them to desist from further trespassing and committing acts of waste, they failed to do so and therefore the respondents filed suit contemporaneously with the notice of motion that sought temporary orders pending the hearing and determination of the suit. Counsel for the respondents urged us to dismiss the appeal.

[7] The above is the brief summary of the matter before us, which we have considered with some level of caution bearing in mind that this is an interlocutory appeal as the hearing of the suit on its merits before the High court is yet to take place. Accordingly and as this Court stated repeatedly, in an interlocutory appeal where the suit is yet to be tried this Court should refrain from expressing concluded views on any issue which it thinks may arise in the pending trial. In dealing with the notice of motion that gave rise to the impugned ruling, there is no doubt the Judge was exercising judicial discretion which we cannot interfere with unless we are satisfied that the discretion was not exercised judicially. In **MBOGO AND ANOTHER V. SHAH** [1968] EA 93, the court held as follows:- (as per Newbold. P.)

***"……. 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 Like all judicial discretions the same had to be exercised judicially."***

[8] We ask ourselves whether the High Court offended the principles stated in the **MBOGO** (supra) case and so many other cases including the Nguruman case (supra) which was cited by counsel for the respondents. The first issue to address is whether the order of injunction issued was final in nature and whether the order was not supported by evidence. In other words whether the Judge misdirected himself in appreciating the matters that were before him. It is common ground that the Judge was exercising discretionary powers when granting an order of injunction which is done according to the facts discernible from the evidence and the law. The respondents had a duty in this case to establish that the orders sought were deserved before the hearing and determination of the main suit. The principles that guide the court were long established in the oft' cited case of ***Giella vs Cassman Brown Co. Ltd 1973] EA 358*** where it was held that in order to grant the injunction as prayed the court must be satisfied that,

a. ***The applicant had established a prima facie case with probability of success;***

b. ***The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***

c. ***If the court was in doubt, the application would be determined on a balance of convenience.***

[9] Going by the material that was before the Judge did the respondents make out a prima facie case with a probability of success. In the case of **MRAO v. FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

> ***"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case 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."***

[10] In this case the Judge considered the copies of the various pleadings, rulings and judgments showing how the dispute over the suit premises had been before Tribunals and courts which litigation as alluded here above commenced in 1953 or there about. The Judge was convinced, and this has not been challenged by the appellants, that the Adjudication Committee of Majajani adjudication section of Kauma location awarded the suit land to the 1st respondent and this decision was upheld by the Arbitration Board on 26th November, 1993. This decision was upheld by the Land Adjudication officer by his decision dated 23rd March, 1999 which was appealed against before the Minister.

[11] The learned Judge found and rightly so that as matters stood until the decision of the Land Adjudication Officer is set aside, possession of the suit premises should remain as it was according to the determination of the Adjudication Officer. Although the Judge stated that the ownership remains with the respondents we do not think that fully determined the dispute but just reiterated what was demonstrated by the orders that were attached to the supporting affidavit. For this reason we hasten to add that if during the trial, the appellants are able to adduce evidence and to demonstrate their interests in the suit premises is greater, valid and better supported by facts and law than the respondents, nothing in our view stops the trial Judge from vacating the temporary orders that were issued based on affidavit evidence. We emphasize this was a temporary order pending the hearing and determination of the suit.

[12] For the foregoing reasons, we are satisfied that this appeal lacks merit as we find no justifiable reasons to depart from the preliminary findings and the orders issued by the trial Judge. Accordingly, we hereby dismiss the appeal with costs to the respondents.

**Dated and delivered at Mombasa this 27th day of June, 2018**

**ALNASHIR VISRAM**

**……**

**JUDGE OF APPEAL**

**W. KARANJA**

**……**

**JUDGE OF APPEAL**

**M. K. KOOME**

**……**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**