IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 92 OF 2017

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED.....APPELLANT

AND

CATHERINE KANINI KIOKO.....1ST RESPONDENT

SWABIHA ALAMIN.....2ND RESPONDENT

RUWEYA ALI MWINYI.....3RD RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court at Mombasa (Omollo, J.) dated 31st August, 2017

in

E.L.C NO. 159 of 2016)

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JUDGMENT OF THE COURT

1. This appeal is against the exercise of the learned Judge's (**Omollo, J.)** discretion in granting orders of injunction in favour of the 1st and 2nd respondents herein as against the appellant (Co-operative Bank of Kenya Limited) and one Ruweya Ali Mwinyi (the 3rd respondent) in an interlocutory application.

2. The brief background of the matter culminating into the present appeal can be summarized as follows:-

> Catherine Kanini Kioko and Swabiha Alamin (1st and 2nd respondents respectively), purchased property known as **Plot No. 9071/II/MN** (suit premises) from one Ruweya Mwinyi, the 1st defendant in the suit before the High Court, and 3rd respondent in the appeal, sometime between 26th May, 2001 and 26th January, 2005. The 3rd respondent failed to transfer the same to the 1st and 2nd respondents. That notwithstanding, the two respondents proceeded to develop the property and constructed permanent buildings thereon, and they continued to pay the appropriate land rates.

3. However, sometime in the year 2010, the 3rd respondent borrowed money from the appellant herein and charged the Title for the suit premises as security for a loan facility of Kshs.5,000,000. He then failed to service the loan, and so the Bank proceeded to serve the requisite notices of intention to realise the security. One thing led to another and the 1st and 2nd respondents saw their property in the local newspapers being advertised for sale.

4. They therefore moved to the Environment and Land Court (ELC) vide **Civil Suit No. 159 of 2016** seeking three orders as hereunder:-

> ***(a) An injunction to restrain the defendants by themselves or their servants or agents from selling or in any other manner whatsoever interfering with plot No. 9071/II/MN and plot No. 9086/II/MN.***
>
> ***(b) An order compelling the 1st Defendant to transfer the Plot No. 9086/II/MN and Plot No. 9071/II/MN to the 1st and 2nd***

plaintiffs respectively failing which the Registrar of Titles to effect the same accordingly.

(c) An order compelling the 1st defendant to discharge the charges dated 21st January, 2010 against Plot Nos. 9086/II/MN and 9071/II/MN respectively failing which the Registrar of titles to effect the same.

5. An interlocutory application was also filed in which the 1st and 2nd respondents sought in the main an order that;-

"That injunction do issue restraining the defendants by themselves or their servants, agents from selling, evicting or in any other manner whatsoever from interfering with Plot Nos. 9071/II/MN and 9086/11/MN pending the hearing and determination of this suit."

An affidavit sworn by the 1st respondent reiterated the facts as we have summarised them above. The application was opposed by the appellant herein on grounds that the 3rd respondent was the registered owner of the suit property; that he had charged the same as security for a loan facility of Kshs.5,000,000; that before dispatching the loan the respondent had conducted due diligence and confirmed the ownership of the suit property from the register at the lands office; that there were no registered encumbrances and that any rights the 1st and 2nd respondents were claiming were not noted in the register.

6. The learned Judge heard the parties on the application and applied the relevant law after which she rendered the Ruling now impugned. It is important for us to quote a pertinent part of that Ruling here verbatim for purposes of this judgment. The learned Judge expressed:

"Be that as it may, the suit is still at an interlocutory stage and evidence is required to prove the averment that the properties were unlawfully charged in the absence of a caveat restricting their registration. In the case of NGURUMAN LIMITED VS JAN BONDE NIELSEN & 2 OTHERS (2014) eKLR quoted by the 2nd Defendant defined a prima facie case as "one in which the material presented to 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 explanation or rebuttal from the latter…" In this case, the Applicants' interest on the suit properties though not registered but their physical possession has not been disputed. They have demonstrated how they acquired the interest by annexing the contract between them and the 1st Defendant.

From the dates in the contract, they are the first in time and their being in possession, the law accords them some recognition under the provisions of sections 36(2), "nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract" and 28(b) and (h) of the Land Registration Act and section 96(3)(h) of the Land Act, 2012, "Any other person known to have a right to enter on and use the land or the natural resources in, on or under the charged property by affixing notice at the property." The applicants have questioned the notices issued to the 1st Defendant thus challenging the exercise of statutory power of sale which then to me raises some triable issues. Thus the Applicants have shown a prima facie case with a probability of succeeding as against the Defendants.

On the principles of irreparable harm that cannot be compensated by an award of damages, the Applicants did not submit on the same. In the Affidavit in support the Applicant merely deposed that they will suffer substantial loss without expounding why the same cannot be compensated by an award of damages. They have not satisfied me on this limb as well. The Plaintiffs further submitted that the balance of convenience tilts in their favour. That the injunction should be granted to preserve the Suit Property pending the hearing and determination of the suit. Indeed this is the intention for granting temporary orders of injunction but the balance of convenience must be weighed against the interest of all parties to the suit. The 2nd Defendant has deposed that the loan is not being serviced and the same may outstrip the value of the properties charges. The 2nd Defendant's explanation sounds more plausible in the circumstances.

However on the basis of the sections of the law quoted above and on the basis that the 2nd Defendant is agreeable to have the injunctive orders granted subject to the plaintiffs giving them an undertaking in the sum of Kshs.7 million by way of bank guarantee; I would allow the application. Consequently, I do hereby grant the application in terms of prayer (c) of the motion on condition that the Applicants do provide a written undertaking as to damages to be filed in Court for the sum of Kshs. 7,000,000/= within Thirty (30) days of delivery of this ruling. In default, the injunction automatically lapses. The costs of the application do abide the outcome of the suit."

7. In brief, the learned Judge made a finding that the 1st and 2nd respondents had established a *prima facie* case with a probability of success as against the appellant. She nonetheless found that the 2nd principle of irreparable loss had not been proved, but went on to hold that it was necessary to preserve the suit property pending the hearing and determination of the suit. In granting the order, the learned Judge noted that the appellant was agreeable to the said orders being granted subject to them giving an undertaking in the sum of Kshs.7 million by way of bank guarantee. Instead of ordering that the undertaking be in the form of a bank guarantee, the learned Judge asked the respondents to make a written undertaking.

8. We understand this appeal to be against that last portion of the order. Had the learned Judge ordered the 1st and 2nd respondents to post the bank guarantee, we believe the appellant would not have challenged the said Ruling. The appellant nonetheless moved to this Court and relying on 6 grounds of appeal in its memorandum of appeal dated 31st October, 2017 urges this Court to set aside the said Ruling and dismiss the 1st and 2nd respondents' notice of motion dated 22nd March, 2013 with costs.

9. The appeal was canvassed by way of written submissions with the appellant filing its submissions on 9th April, 2018, and the 1st and 2nd respondents filing their response on 18th April, 2018. In its submissions, the appellant has raised issues relating to the main suit which has yet to be determined by the ELC. Among such are the issues of service of statutory notices (Ground 1); application of the Land Act No. 6 of

2012 retroactively; registration of the ownership interest. The appellant faulted the learned Judge for taking the submissions it made in the alternative to be a concession on its part to accept an undertaking in place of its statutory power of sale. All in all, the material placed before the learned Judge was not sufficient for her to grant the orders of injunction prayed for.

10. On the other hand, the respondents in opposing the appeal submitted that the learned Judge was right in finding that a *prima facie* case had been established; that the respondents' occupation of the suit property constituted a right; and that the balance of convenience was in their favour as they had constructed a permanent building on the property.

11. On our part, we have carefully considered all these submissions along with the contents of the record of appeal before us. As stated earlier, this appeal is from an interlocutory order of the ELC. The main issues posed in the plaint and defence are yet to be ventilated and canvassed before that court. In an application such as this, we must be circumspect and eschew making any final determinations that might embarrass the court below. We must allow the court seized of the matter to hear and determine those substantive issues, then if any party is aggrieved, they can move to this Court on a substantive appeal for our determination. Issues as to whether there was proper service of notices; which law was applicable; whether there was fraud or not are matters we cannot discuss for purposes of this judgment.

12. As we stated at the beginning of this Ruling this appeal is against the exercise of discretion by the learned Judge of the ELC. We must therefore be guided by the time honoured principles that address this issue as set out in the *locus classicus* case of **Mbogo v. Shah** [1968] EA 93 in the words of **Sir Charles Newbold P**.

> ***"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise 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."***

Did the learned Judge consider any extraneous matters that she ought not to have considered in order to arrive at her Ruling? We note that she was satisfied that the 1st principle in **Giella v. Cassman Brown** [1973] EA 358 had been satisfied. We have no issue with that. The problem appears to be on the next limb on irreparable loss which cannot be remedied by an award of damages. According to the learned Judge, the respondents only made averments on that issue in the affidavits but did not address the court on the same.

13. The third issue on balance of convenience appears to have been resolved in favour of the 1st and 2nd respondents as they had been in occupation. That was the correct position in law. However, according to the appellant, the 3 principles in ***Cassman Brown*** need to be addressed individually and sequentially. Since the *'middle'* one as it were, was not established then the court ought not to have proceeded to the next principle and she therefore ought to have dismissed the application. What we need to address is whether the learned Judge misdirected herself by granting the injunction notwithstanding that the 2nd limb of the Cassman Brown principle had not been established. The learned Judge based her determination on the fact that it was necessary to preserve the suit property pending the hearing of the main suit. She brought into play ***"balancing the interest of all parties to the suit"***, and this balancing is what rested at the point which happened to be in favour of the 1st and 2nd respondents. Was the learned Judge wrong in preserving the property?

14. In our view, failure by the respondents to submit on the 2nd limb should not have been held against them. There was no dispute from the deponents in the affidavits that the 1st and 2nd respondents had carried out extensive serious developments on the property in question. Any question or orders of compensation were the appellant to be found with no fault would be against the 3rd respondent. Would he have been able to compensate the other respondents for these developments? We need not answer that question. This is a point that was not addressed by the 1st and 2nd respondents, and that is why the court expressly stated that no submissions were made on that issue.

15. We note that, as held by this Court in the ***Nguruman case*** (supra), the 3 principles are sequential. We however note that the 3rd principle of balance of convenience only comes in "When in doubt". Would there be any doubt if the first 2 principles were crystal clear? The answer is no. The doubt arises when the court is doubtful as to whether or not the 2 principles have been proved. In this case, it was evident that it was doubtful whether or not irreparable loss had been established and that is why the learned Judge fell on the 3rd principle of *'balance of convenience'*. We do not fault the learned Judge at all for finding that the property in question needed to be preserved pending hearing and determination of the suit. Declining the order of interim injunction would have rendered the rest of the case moot as the respondents' property would have been sold when the circumstances surrounding the matter would dictate that the same be preserved pending the weighty issues raised in the main suit. We agree with the learned authors of ***Halsbury's Laws of England, 4th Edition at paragraph 953*** where they state:-

> ***"It is not necessary that the courts should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and the status quo should be preserved until that question can be disposed of… An interlocutory injunction (a quia timet injunction) will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent or where mischief of an overwhelming nature is likely to be done."***

16. We do not find any misdirection on the part of the learned Judge in the manner she arrived at the decision to preserve the property. We are not therefore persuaded that the order should be vacated in its entirety.

17. Nonetheless, we note that part of the reason the learned Judge gave for allowing the injunction was that the appellant was *"agreeable"* to the orders being granted subject to some conditions. We note that the appellant had asked for a bank guarantee but the learned Judge asked the respondents to give written undertakings. In our view, their written undertaking is only as good as the paper it was written on. We say so because such a piece of paper would not yield much in terms of enforcement or recovery of the money by the appellant in the event the court was to finally rule in its favour. The court ought to have required an undertaking that would also factor in the interests of the appellant.

18. For this reason, we find that this appeal succeeds in part. We find no reason to vacate the order of injunction. We nonetheless find that the undertaking needs to be interfered with. For that reason, we vacate the part of the Order that required the respondents to provide a written undertaking as to damages, and substitute thereof an order that the appellants either deposit a bank guarantee for Ksh.3,500,000 or in the alternative that the Ksh.3,500,000 be deposited in an interest earning joint bank account in the names of counsel for the appellant and 1st and 2nd respondents within 60 days from the date of this judgment failing which the order of injunction will automatically lapse. We also order that in view of the partial success of the appeal, each party to bear its own costs of this appeal.

Dated and delivered at Mombasa this 12th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR