IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 6 OF 2018

BETWEEN

SAMUEL NJOROGE (suing on behalf of the Estate

of the late GEOFFREY GIKARU NJOROGE)....................APPELLANT

AND

WANJE HOLDING LIMITED..RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Mombasa (Yano, J.) dated 15th June, 2017

in

***E.L.C No. 307 of 2016.*)**

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JUDGMENT OF THE COURT

1. This is an appeal challenging the exercise of the learned Judge's (**Yano, J**.) discretion in declining to grant an interlocutory injunction sought by the appellant. As such, before we can interfere with the exercise of judicial discretion we ought to be satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and occasioned injustice. See this Court's decision in ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others*** *[2014] eKLR*.

2. The salient facts which gave rise to this appeal are that the appellant filed a suit in the Environment and Land Court (ELC) being **E.L.C No. 307 of 2016** claiming that the sale and subsequent registration of **Parcel no. MN/VI/2360** (suit premises) in favour of the respondent was null and void. He contended that the suit premises belonged to Geoffrey Gikaru Njoroge (deceased) whose estate he represented. The deceased and his family had been in possession of the same since the year 1977.

3. At the time of the purported sale, the ownership of the suit premises was subject of H.C.C.C No. 265 of 1996 between Kenatco Co. Ltd. (under receivership) and the deceased which suit is still pending. Therefore, in line with the doctrine of *lis pendens* the suit premises was not available for sale to the respondent. What was more, the respondent was aware of the appellant's interest in the suit premises as well as the pending suit. As a result, the respondent was not an innocent purchaser for value without notice. The sale of the suit premises through public auction was not above board.

4. The appellant also filed an interlocutory application praying for a temporary injunction restraining the respondent from developing, demolishing, transferring, sub-dividing, charging and/or dealing in any way with the suit premises. Apart from relying on the aforementioned grounds, the appellant also deposed that the respondent had fenced the suit premises and was in the process of demolishing structures thereon. He was never aware of the public auction and there was no suit between himself and the respondent wherein the respondent had been declared as the owner of the suit premises. As far as he was concerned, unless the order sought was granted the deceased's estate would suffer irreparable loss.

5. In response, the respondent's operations manager, Mr. Peter Waweru gave the sequence of how the suit premises was purchased in his affidavit. The respondent learnt that National Bank of Kenya Limited intended to sell the suit premises vide a public auction on account of a floating charge of Kshs.20,000,000 it had over the assets of Kenatco. After conducting due diligence which revealed that the title was clear of any encumbrances the respondent purchased the suit premises.

6. Thereafter, the respondent discovered that people had invaded the suit premises and filed suit at the ELC being ELC No. 168 of 2015 against National Bank of Kenya seeking vacant possession. The suit was allowed and with the aid of warrants of eviction issued therein, the respondent managed to evict the trespassers. It was after the said eviction that the appellant made an application seeking to be joined in the said suit; a mandatory injunction to be reinstated onto the suit premises and review of the judgment. The application therein was based on similar grounds as the injunction application in ELC No. 307 of 2016. Ultimately, the said application in ELC No. 168 of 2015 was dismissed.

7. The respondent also argued that the appellant had concealed the aforementioned suit thus was undeserving of the order sought. The respondent's title was clean and was not tainted with fraud. A search of the suit premises title disclosed that apart from the deceased registering a caveat on 2nd September, 1977 which was removed on 8th July, 1991 he had not registered any further interest thereon. In point of fact that since the removal of the said caveat the suit premises had been leased to third parties by Kenatco and the deceased had not raised any objection.

8. In any event, the appellant did not have any claim as against the respondent or over the suit premises. His claim, if any, lay against Kenatco and the available remedy would be damages. All in all, the appellant had not made a *prima facie* case to warrant the injunction sought.

9. In a ruling dated 15th June, 2017 the learned Judge dismissed the appellant's application with costs. It is this decision that has instigated the appeal before us wherein the appellant faults the learned Judge for finding that:

> ***a) The appellant had not made a prima facie case with a probability of success.***
>
> ***b) The appellant's loss could be quantified.***
>
> ***c) The balance of convenience tilted in favour of the respondent simply because it was the registered proprietor of the suit premises.***
>
> ***d) The appellant had failed to disclose a material fact.***

10. At the hearing Mr. Nyange appeared for the appellant while Mr. Wachira appeared for the respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

11. It was the appellant's contention that it was not necessary for it to establish title over the suit premises in order for a *prima facie* case to be made out. It was sufficient for the appellant to demonstrate that he had a bona fide question with respect to his interest in the suit premises. It was argued that the appellant was illegally evicted since he was not a party to ELC No. 168 of 2015. Furthermore, the suit premises was never registered as security for the loan advanced by National Bank to Kenatco.

12. Making reference to the case of ***Mawji vs. United States International University & Another*** ***[1976-80] 1 KLR 229***, the appellant submitted that the doctrine of *lis pendens* not only binds a litigant from transferring property which is subject of a suit but is also equally binding on anyone who derives title through the litigant. The effect is that the respondent's title is rendered subservient to the rights of the appellant. In that regard the High Court decision in ***Abdalla Omar Nabhan vs. The executor of the estate of Saad Bin Abdalla Bin Aboud & Another - H.C.C.C No. 63 of 2013 (unreported)*** was cited.

13. It was urged that it is not in every case where damages would be adequate that an injunction would be declined. There are other considerations that a court takes into account, for instance the conduct of the parties. If it is shown that a party has been high handed, like in this case where the appellant was illegally evicted from the suit premises, then an injunction would issue regardless of the fact that damages would be adequate. Additionally, there was nothing to stop the respondent from further transferring the suit premises to a third party to the detriment of the appellant.

14. The appellant faulted the learned Judge for concluding that the balance of convenience tilted in the respondent's favour. In the appellant's view, the balance of convenience titled in his favour since the deceased's family had been evicted from the suit premises which was their only residential home. The respondent did not demonstrate any prejudice or harm it would have suffered had the injunction been issued.

15. Lastly, the appellant also took issue with the learned Judge's finding that he had failed to disclose the existence of ELC No. 168 of 2015. The appellant maintained that it was not a party to the said suit and its application for leave to defend the same was denied by the court.

16. In opposing the appeal, the respondent argued that the appellant had not demonstrated a *prima facie* case. Conversely, the respondent opined that the doctrine of *lis pendens* only bound parties to a suit restraining either of them from disposing of a suit property. The respondent was not a party in H.C.C.C No. 265 of 1996 thus not subject to the doctrine. Nonetheless, there was no caveat or court order barring the sale of the suit premises.

17. On the balance of convenience, it was the respondent's position that on one hand, there was no evidence that the appellant was in possession of the suit premises. On the other hand, it was not in dispute that the respondent had taken possession and even commenced developing the same. Consequently, the balance of convenience tilted in favour of the respondent.

18. In conclusion, the respondent supported the learned Judge's decision and asked us to dismiss the appeal which it believed was devoid of merit.

19. We have considered the record, submissions made by counsel as well as the law. The principles upon which courts will grant an

injunction are settled. Those principles were succinctly set out in the oft quoted case of ***Giella vs. Cassman Brown*** ***[1973] EA 3*** as follows:

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

20. In considering whether the appellant met the above mentioned principles we are cognizant that this is an interlocutory appeal where the suit is still pending determination before the ELC. Therefore, we must refrain from making any determination on the issues in dispute to avoid prejudicing the pending suit. See ***David Kamau Gakuru vs. National Industrial Credit Bank Ltd*** ***[2002] eKLR***.

21. A *prima facie* case was defined by this Court in ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others*** ***[2003] eKLR*** 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."***

22. Taking into account the foregoing, we, like the learned Judge, are not convinced that the appellant had demonstrated a *prima facie* case with a probability of success against the respondent who is the registered proprietor of the suit premises. Even assuming the appellant had demonstrated a *prima facie* case, it has not been shown that any loss which may be suffered by the appellant is incapable of being compensated by damages. In the case of ***Director of Public Prosecutions vs. Justus Mwendwa Kathenge & 2 Others*** ***[2016] eKLR*** this Court underscored the importance of the two principles being established before an injunction is granted. In its own words the Court stated:

> "***It is, for instance, critical for courts to remember the sequence of consideration of the Giella (supra) principles, that even where prima facie case is established, an injunction will not be granted if the injury or damage to be suffered is not irreparable or is capable of compensation."***

23. We also find that the balance of convenience in our view, tilts in favour of the respondent. This is because it is common ground that the appellant is not in possession of the suit premises and the respondent has commenced development of the suit premises.

24. Last but not least, the importance of a litigant who wishes for the court to exercise its discretion in its favour to disclose all material facts cannot be gainsaid. The non-disclosure could warrant a court to not only decline to issue orders sought but also set aside any orders granted simply to protect the dignity of the court. This much was restated in ***Tiwi Beach Hotel Ltd vs. Stamp*** ***[1991] KLR 658*** where this Court had this to say about the effect of non-disclosure:-

> ***"It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point."***

25. It is crystal clear that the appellant had failed to disclose the existence of ELC 168 of 2016 more particularly, that apart from seeking joinder to the proceedings that he had sought a mandatory injunction on more or less similar grounds as the application subject of this appeal. He went ahead to depose that there was no suit between himself and the respondent which declared the respondent as the owner of the suit premises. It is not in dispute that the respondent obtained eviction orders on the basis of being the registered owner of the suit premises a fact which the appellant knew by virtue of filing an application to be joined in ELC 168 OF 2016.

26. Accordingly, we find no reason to interfere with the learned Judge's discretion which was sound. The appeal herein lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR