IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 45 OF 2017

BETWEEN

GERALD KAIRU GICHERU.....APPELLANT

AND

AGNES WANJIKU KAIRU.....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Nyeri (L. N. Waithaka, J) dated 16th December, 2016

in

ELC Case No. 22 of 2016)

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JUDGMENT OF THE COURT

This appeal arises from circumstances that are unusual but not exceptional. The parties are still husband and wife since December 1987. They have children who are all adults. They have real and moveable properties. As fate would have it however, they are not on talking terms anymore and do not live together. They have joined battle on the properties acquired during the marriage, but none of them seems to be interested in going to court for dissolution of the marriage. Instead, they entered into an agreement on 4th August, 2007 which, on the face of it, allowed the wife to collect half the rent accruing from two of their properties: **L. R. No. Tetu/Unjiru/1657 (plot 1657)** and **Plot No 393 Block I**, near Green Hills Hotel, Nyeri, on which ten residential units were developed for renting.

The agreement appears to have worked for about eight years. But the wife says it was breached in December 2015 by the husband who stopped the two tenants in plot 1657 from paying the rents to her, thus rendering her destitute. She then went before the Environment and Land Court **(ELC)** in February 2016, pleading the agreement and seeking its enforcement. Contemporaneously, she filed a notice of motion seeking orders that the husband, his servants and or agents *'be prevented by injunction from collecting rents or in any way interfering with the respondent's use of half of the premises, the houses and development therein in land parcel number TETU/UNJIRU/1657 until the disposal of the suit.'* She also sought to be allowed to continue collecting the rent from the two tenants, and an order securing the property from alienation before the suit is heard.

The husband admitted that the agreement pleaded existed but denied its enforceability asserting that he signed it under duress. He also admitted that he had stopped the wife from collecting the rent from the two tenants but explained that it was because the purpose for allowing her to collect the money was no longer in existence. The purpose was for payment of fees for their children who had since completed their university education. All along, he contended that the properties were registered in his name and he had every right to decide what to do with them. Furthermore, he pleaded, the marriage between the two was subsisting and therefore the wife had no cause of action in the main suit.

After hearing the parties, the trial court **(L. Waithaka, J.)** was persuaded, in line with the principles in the cases of ***Giella vs Cassman Brown & Company Ltd*** ***[1973] E A 358*** and ***Mrao Limited vs First American Bank Kenya Ltd & 2 Others*** ***(2003) KLR 125,*** that the wife had established a *prima facie* case; that damages were not a viable option; and that, even if the court was in doubt, the balance of convenience tilted in favour of granting the injunction. The injunction was granted and an order made for the main suit to proceed. It did not proceed and is still pending.

The husband is now before us challenging the order for temporary injunction. He has all along appeared in person to urge his case while the wife is represented before us, as she was before the ELC, by learned counsel **Mr. H. K. Ndirangu.** The husband, now the appellant, raises six grounds which he summarized in written submissions, and briefly highlighted in oral submissions. He contends, in the main, that the trial

court erred in evaluating affidavit evidence on ownership of the property which was clearly his own through purchase; that the respondent was still collecting rents from another property registered in his name and was not destitute; and that the purported agreement relied on in the suit was null and void because he was forced to sign it at gun point by the respondent's relatives.

In oral submissions, Mr. Ndirangu opposed the appeal on the ground that the orders made were proper and there was no evidence that the agreement relied on was invalid or obtained through duress.

We have considered the appeal which really calls on us to interfere with a discretion which the trial court was perfectly at liberty to make. Ordinarily, such discretion cannot be lightly interfered with on appeal save on clear principles establishing that in exercising the discretion, the trial court was clearly wrong, misdirected itself or acted on matters it ought not to have acted upon or failed to take into account considerations which it should have taken into account and that it ultimately arrived at a wrong conclusion. See ***Mbogo & Another vs Shah (1968) E A 93.***

In the case of ***United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR,*** Madan, JA (as he then was) summarized the principles as follows:-

> ***"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 at first instance, would or might have given different weight to that given by the judge to the various factors in the case. (It) 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 considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

In the matter before us, the trial court was alive to the principles applicable in considering whether to grant the injunction sought or not. It considered the first test in the ***Giella case (supra)*** whether a *prima facie* case had been shown and found it was. The basis of the finding was the written agreement which was exhibited and admitted by the appellant. The only contention was that the agreement was vitiated by duress but that was a matter for trial in the main suit. As regards the second test, the court was of the view that damages were not an adequate remedy since the suit related to land. In abundant caution, the court also considered the balance of convenience and found in favour of the respondent.

We find very little in the appellant's grounds of appeal and submissions to persuade us that the discretion of the trial court was exercised in error. It seems to us that the appellant was seeking final findings of fact relating to acquisition and ownership of the properties in dispute and the distribution of the income accruing therefrom. This being an interlocutory matter, the trial court was precluded from making final findings of fact, which are dependent on evidence tested in cross examination. The trial court cannot hold a mini trial or examine the merits of the case closely. In the case of ***Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] eKLR***, this Court stated:

> ***"The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

As far as we can see, (since the appellant has not included the pleadings in the record of appeal), the basis of the suit is the agreement dated 4th August, 2007 whose existence is not denied in the affidavits on record. It is instead sought to be avoided by pleading vitiating factors which are incapable of determination at the interlocutory stage. It was prudent therefore to preserve the suit property and the validity of the agreement pending the hearing of the main suit. The discretion of the trial court was thus properly exercised.

Finally, and for the guidance of trial courts, this Court has refined the construction and application of the ***Giella case*** principles in the ***Nguruman Limited case (supra)*** and there is no harm in reiterating them here, thus:-

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
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> ***(a) establish his case only at a prima facie level,***
>
> ***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***(c) alley any doubts as to (b) by showing that the balance of convenience is in his favour.***
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> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

For the reasons stated above, this appeal is lacking in merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 11th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR