IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, MUSINGA & KIAGE, JJ.A)

CIVIL APPEAL NO. 231 OF 2010

BETWEEN

CITY COUNCIL OF NAIROBI.....APPELLANT

AND

WOOLWICH INVESTMENTS LTD.....RESPONDENT

(Appealfrom the Ruling and order of the High Court of Kenya

at Nairobi(Mbogholi Msagha, J.) dated 18th February, 2010

in

HCCC No. 462 of2009)

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JUDGMENT OF THE COURT

By this appeal the appellant, the City Council of Nairobi (now defunct) seeks to overturn the decision of the High Court (Mbogholi Msagha, J.) made on 18th February, 2010 granting an interim injunction restraining the sale of the respondent's property known as LR 330/357 situate along Gitanga Road, Nairobi, over alleged arrears of rates. The order was made pursuant to an application filed simultaneously with a suit that challenged the threatened sale complained of as improper and illegal for various grounds which appeared on the face of the application as including;

> "2. The defendant's statutory power of sale under the Rating Act over the suit property LR No.330/357 has not arisen.
>
> 3.The purported intention to sell the suit property has no legal basis as the defendant has not complied with the mandatory provisions of the Rating Act.
>
> 4.The purported intention to sell the suit property is not proper as no valid notices in law have been issued and cannot therefore entitle the defendant to exercise its alleged power of sale of the suit property.
>
> 5. No notice and/or notification of sale has been served upon the plaintiff pursuant to Section 15(d) and (d) of the Auctioneers Rules (1997); and
>
> 6. The defendant has over the yea.rs applied erroneous rates on the plaintiff's property which rates are harsh, oppressive unconscionable and are in the circumstances highly prejudicial to the plaintiffs."

After considering the application, the replying affidavit in opposition thereto and the submissions that were filed by counsel for the parties, the learned Judge found that a prima facie case with a probability of success had been made and that the principles enunciated in GIELLA vs. CASSMAN BROWN [1973] EA 358 for grant of injunction, though he did not mention the case expressly, (as he indeed did not have to), had been satisfied. He noted in particular that there was doubt whether appropriate notices had been effectively served since the affidavit before him was to the effect that a process server had gone and affixed the documents at the gate of the suit premises which were old, dilapidated and uninhabited. Stated the Judge;

> "This mode of service adopted by this process server, to say the least, is very unsatisfactory. Having sworn an affidavit to the effect that the suit property was uninhabited and dilapidated there is no way the plaintiff was expected to have known of any process that was going against it. The provisions of law cited herein above provide that service could have been done by any mode authorized by any rules made under the Civil Procedure Act. The best way in the circumstances of this case to have effected service was by way of advertisement in the local press. Why the defendant elected to use the mode so used is perplexing and would suggest that there is more than meets the eye in this case."

In its memorandum of appeal filed in this Court, the appellant charges that the learned Judge fell into error in granting the injunction; in holding that there was no proper service; in finding that the respondent had properly moved the court for injunctive relief; in suomotu denying that the rates court had unlimited pecuniary jurisdiction and required enhancement by the Chief Justice; in finding that a prima facie case had been established and in tying the appellant's hands from exercising its statutory obligations under the Rating Act.

In granting the injunction as he did, the learned Judge was undoubtedly exercising a judicial discretion which, though wide and unfettered, must be exercised judicially and judiciously in accordance with well-laid down principles. In the matter of injunction, as we have stated, the learned Judge outlined and considered the age-old principles in GIELLA vs. CASSMAN BROWN (supra). When a party appeals against a decision lying in the discretion of the judge, he essentially asks us to interfere therewith but we are slow to do so and circumspect in our approach, remembering always that the discretion lies with the first instance judge and not ourselves. We would not interfere merely because had we been considering the matter ourselves we might or even would have arrived at a different conclusion. We would interfere only if, as was aptly stated by the former court in MBOGO vs. SHAH [1968] EA 93 at p96 (per President Sir Charles Newbold);

> "We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways to enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. 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 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. "

In the present appeal it is complained that the learned Judge did not go beyond a consideration of the first limb of GIELLA vs. CASSMAN BROWN (supra) and appears to have straight ahead granted the injunction once he found the prima facie case established. It is contended that the learned Judge ought to have considered the other grounds as well, namely, the inadequacy of damages as a remedy, as well as the balance of convenience, for which submissions this Court's decisions of HASSAN HURI & ANOR vs. JAPHETH MWAKALA [2015] eKLR and NGURUMAN LTD vs. JAN BONDE NIELSON & 2 OTHERS were cited.

Whereas it would seem that the learned Judge did not engage in a detailed analysis of the other grounds, it is clear from a reading of the entire ruling that he had those other principles actively in mind. His approach seems to have been, and we cannot fault him for it, that notice not having been effected, the power of sale had not accrued and any threatened sale being ipso facto unlawful and breach of the law, had to be stopped. We are of the same persuasion. See AIKMAN vs. MUCHOKI [1984] KLR 353.

Given that view of the matter, we think that the learned Judge properly exercised his discretion and we have not been given a basis upon which we can properly invalidate his decision.

This appeal lacks merit and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 7th day of December, 2018.

ASIKE MAKHANDIA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR