



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, WAKI & KIAGE, JJA)**

**CIVIL APPEAL NO. 202 OF 2014**

**BETWEEN**

**ECOMIL PASAG CO. LIMITED.....1ST APPLICANT**

**SAMUEL MUIRU GICHUGU.....2ND APPLICANT**

**PETER NJUGUNA KIMANA.....3RD APPLICANT**

**AND**

**UAP INSURANCE CO. LIMITED.....RESPONDENT**

*(An Appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Havelock, J.) dated 29<sup>th</sup> May, 2014*

*in*

*H.C. C. C. No. 110 of 2013)*

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**JUDGMENT OF THE COURT**

1. This is an interlocutory appeal. The parties in the main suit before the High Court are locked in a dispute over a performance guarantee for a contract which was to be performed in Rwanda with the Ministry of Agriculture (**MINAGRI**). The plaintiffs in the suit aver that they paid a premium and executed legal charges over two properties in Kenya in consideration of the defendant issuing the performance guarantee to MINAGRI, but none was issued. Instead, at the request of the plaintiffs, a Rwandese company known as **CORAR** issued the required performance guarantee. The plaintiffs seek a declaration that no liability arose between them and the defendant for want of consideration. They also seek permanent injunctions to stop the defendant from threatening to auction their properties since the charges were without any legal or factual basis.

2. On the other hand, the defendant in that suit contends that it is the one which arranged with CORAR, as its quasi agent, for issuance of the performance guarantee to MINAGRI upon execution of a Reinsurance Guarantee Policy between them. The Rwandan contract was subsequently cancelled by MINAGRI, allegedly due to the plaintiffs' default, and CORAR was called upon to make good the performance guarantee. In turn, the defendant reimbursed CORAR and was, therefore, entitled to enforce the agreement between it and the plaintiffs by demanding payment at the pain of enforcing its statutory power

of sale of the charged properties.

3. In a rejoinder made in a further affidavit and in their written submissions before the High Court, but not expressly pleaded in the plaint, the plaintiffs contended that the purported execution of a Reinsurance Guarantee Policy between the defendant and CORAR was illegal as there were no approvals from Insurance Regulators in Rwanda and Kenya, as by law required. The defendant could not therefore benefit from an illegality and no court of law would enforce it.

4. As the parties await to unravel that conundrum at the hearing of the suit through oral evidence and cross examination, the Plaintiffs, who are now the appellants before us, filed a notice of motion on 20<sup>th</sup> March, 2013 seeking temporary injunctory relief under **Order 40 Rule 1** of the **Civil Procedure Rules 2010** (the Rules). They sought the following substantive order:-

***“2. THAT an order of temporary injunction be issued restraining the defendant whether by itself, agents, servants and any other person acting on its behalf or claiming through it, from selling, advertising for sale, transferring and/or dealing with the Second and Third Plaintiffs' properties Title No. Ruiru/Ruiru East Block 1/Githunguri/3039 and Title No. Ndumberi/Riabai/1572 in any manner whatsoever pending the hearing and determination of this suit.”***

5. The application fell before **Havelock J.** for hearing but the parties agreed to have it disposed of through written submissions. The learned Judge examined all the affidavits on record and considered the respective written submissions of counsel. In the end he dismissed the application on 29<sup>th</sup> May, 2014 on the ground that the appellants had failed to show a *prima facie* case so as to merit injunctive relief.

6. In doing so, the learned Judge stated as follows:-

***“It is evident that both parties in this matter have not been sincere in their depositions. On the one hand, the Respondent, who claims to have issued the Performance Guarantee, also alleges that the same was issued by CORAR on the strength of its Reinsurance Guarantee Policy. However, that is refuted by the letter dated 21<sup>st</sup> November, 2011. On the applicants' part, they contend that they were the ones that approached CORAR for the Performance Guarantee after MINAGRI rejected their first Performance Guarantee by First Assurance Co. Ltd. This was evidenced in the same letter dated 21<sup>st</sup> November, 2011 but which they later denied vide the letter dated 9<sup>th</sup> May, 2012.”***

7. The judge further found that the appellants had not approached a court of equity with clean hands as they “*are not being forthright in their application, which is marred with half truths and what amounts to blatant lies*”. He condemned the appellants as having “*indiscriminate disregard of the integrity of the Court and wanton and callous manner in which they had conducted themselves.*” It is that decision that provoked the appeal before us.

8. Eight grounds are listed in the memorandum of appeal, but learned counsel for the appellants **Mr. K. M. Mwangi** condensed them into three issues which may be summarized:-

***i) Whether the discretion of the trial court should be interfered with.***

***ii) Whether the applicants met the requirements for grant of a temporary injunction.***

***iii) Whether the application should have been allowed.***

9. Counsel urged those grounds as one, essentially answering to the question whether the principles in the *locus classicus* case of ***Giella v Cassman Brown & Co. Ltd [1973] EA 358*** had been satisfied. He submitted, quite correctly, that the grant of an injunction is equitable relief which is in the discretion of the trial court. Nevertheless, he submitted, this Court is at liberty to interfere with that discretion if it was

not exercised judiciously. He cited the case of **United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd [1985] KLR 898** where Madan JA stated thus:

***“The Court of Appeal 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.”***

10. In this case, urged counsel, all those omissions were made by the trial court and therefore this Court should interfere. Firstly, he argued, a *prima facie* case had been established by the appellants since liability which was central to the case had already accrued. They had shown that the respondent had not issued any performance guarantee to MINAGRI and yet they had served notices on the appellants to realize securities which they had no legal or factual basis to act on. Furthermore, the trial court found that the respondent had no support for its assertion that it had paid any monies in respect of the performance guarantee and lacked candour in that respect. The true position could only be proved at the hearing but a *prima facie* case had been established to warrant the grant of an injunction.

11. Mr. Mwangi further submitted that the second test in the **Giella case**, that of irreparable loss, was also satisfied because land is a very scarce resource and if the appellants’ land was sold no other similar land would be available. The main suit would thus be rendered irrelevant. In support of that submission, he cited the case of **Hashmukhlal Virchand Shah & 2 Others v Investment & Mortgages Bank Ltd [2014] eKLR** which was an application under **Rule 5 (2) (b)** of the Rules of this Court, and is thus distinguishable. Finally, on the balance of convenience, counsel submitted that the trial court was in error not to consider it since it was obvious that if the properties were auctioned, the appellants would suffer more than the respondent would if it waited longer for payment of Ksh. 20 million which it was demanding. In addition, if an injunction was granted, the security would still be there until the hearing of the case is completed. At all events, added counsel, this was a proper case for the application of the common law doctrine of

*Lis pendens* which was applied by this Court in **Naftali Ruth Kinyua v Patrick Thuita Gachure & Another [2015] eKLR**. The doctrine was urged as an issue in that appeal (unlike here) and the Court stated as follows:-

***“Given these circumstances, it goes without saying that the learned judge should not have disregarded the adjudicative support of the doctrine of lis pendens in considering the injunctive relief sought, if for no other reason, than for preserving of the suit property until the suit was finally heard and determined.”***

12. In response to those submissions, learned counsel for the respondent, **Mr. P. Saende**, submitted that the applicants had not discharged the onus on them to establish a *prima facie* case before talking about irreparable loss or balance of convenience. As the respondent had submitted before the trial court, there was no dispute that the appellants had sought financial accommodation from the respondent and willingly offered the two properties as security. They lawfully executed legal charges over those properties which were perfected and they were fully aware of the consequences of charging those properties. The respondent, he contended, was prepared to prove that it was responsible for the performance guarantee given by CORAR pursuant to a lawful process. He referred us to a letter written by the appellants’ counsel on 9<sup>th</sup> May, 2012 asserting that the performance guarantee was made by CORAR on instructions of the respondent without the appellants’ knowledge. They could not therefore turn around and lie that they were the ones who contacted CORAR. Counsel further asserted that the appellants were well aware of all this and that is why they never demanded any refund of the premium they had paid or sought return of the security documents until the notice for exercise of statutory power of sale was made by the respondents about one year later. Seeking an injunction by advancing half truths was thus a desperate attempt to postpone the inevitable. At all events, concluded counsel, damages were an adequate remedy in this case even if a *prima facie* case existed, and therefore an injunction would not issue.

13. In a brief rejoinder, Mr. Mwangi submitted that the trial court did not properly consider the documents laid before it by the appellants and was in error in making final and conclusive factual findings, especially on the conduct of the appellants without hearing oral evidence.

14. We have considered the appeal, the documents on record and the submissions of counsel as we must on a first appeal. There is no dispute about our task in an interlocutory appeal as this, which questions the exercise of judicial discretion. The principles are well laid out in the case of ***United India Insurance Co. Ltd (supra)*** and we might add the equally ageless ***Mbogo & Another v Shah [1968] EA 93***, where the parameters for interference with the discretion of a trial court were also delineated, thus:-

***“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court 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 and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”***

15. As correctly surmised by both counsel, the main issue is to consider whether the trial court properly considered the guiding principles in the ***Giella case***. These were restated by this Court in the case of ***Nguruman Ltd v Jan Bonde Nielsen & 2 Others C A No. 77 of 2012***:

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

***(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.***

***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 v 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.”***

16. The trial court was alive to this approach and cited the ***Giella case*** for guidance. It proceeded to analyse the documents on record before coming to the conclusion that the parties on both sides were less than candid. The onus, however, was on the appellants to establish a *prima facie* case which the trial court did not find in view of the doubtful credibility of the facts put forward to support their case. We are told by the appellants that this approach was erroneous since the documents were truthful and were not carefully considered. We are also told that it was erroneous to make a conclusive finding on the character and conduct of the appellants without orally hearing them.

17. There may well be a valid ground for complaint about making conclusive findings on character and conduct, as the trial court did in the manner reproduced in paragraph 7 above, without having seen and heard the parties testify. Final findings of fact and conduct are in any event left to the trial court after the

hearing in the main suit, and this has long been held by the courts. See **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 Others [2015] eKLR**. We think, however, that the trial court did not make final conclusions of fact when it considered whether a *prima facie* case had been established. It examined and weighed the vital documents relied on by the appellants and found them wanting even for support of a *prima facie* case. This was particularly with respect to the assertion that it was the appellants who arranged for the performance guarantee with CORAR when on their own showing in documents, they did not. This is the cornerstone of their case that the respondent did not earn the right to rely on the agreement signed between them for realization of the two securities.

18. What amounts to a *prima facie* case was examined in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** at pages 137 and 138 where Bosire, JA. stated as follows:

***“..It is a case in 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...[it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”***

We have re examined the documents put forward by the appellants and we are not persuaded that there was no basis for the view taken by the trial court. A *prima facie* case was not established and therefore the trial court had no obligation to examine the other tests stated in the **Giella case**. That is our finding in this appeal.

19. We may, nevertheless, add in *obiter dicta* that even if there was a *prima facie* case, there can be no argument that damages are an adequate remedy in this case. We do not buy the argument put forward by the appellants that the two parcels of land were unique and irreplaceable. They were offered as security in a commercial transaction and the consequence of alienation was anticipated if there was default. The value is quantifiable and there is no evidence that the respondent is incapable of paying the damages if the main suit ultimately succeeds.

20. The upshot is that this interlocutory appeal is for dismissal and we so order. The costs shall be borne by the appellants.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2017.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**