



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 346 OF 2013

CONSOLIDATED WITH

CIVIL APPEAL NO. 347 OF 2013

BETWEEN

BROOKSIDE STUDIOS LIMITED 1ST APPELLANT

YELLOW HORSE INNS LIMITED..... 2ND APPELLANT

AND

A.A. KAWIR TRANSPORTERS LIMITED.....1ST RESPONDENT

PHILMA FARM PRODUCE & SUPPLIERS LIMITED.....2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

CITY COUNCIL OF NAIROBI 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

(Appeals from the rulings & orders of the High Court of Kenya at Nairobi (Gitumbi, J) dated 20th September, 2013 In ELC NOs. 746 & 747 OF 2011)

JUDGMENT OF THE COURT

1. Before us are two interlocutory appeals, **BROOKSIDE STUDIOS LIMITED** is the appellant in **CA NO. 346 of 2013** whereas **YELLOW HORSE INNS LIMITED** is the appellant in **CA NO. 347 of 2013**. Both appeals were consolidated and the appellants will hereinafter be referred to as the 1st and 2nd appellant respectively.

2. Aggrieved by the rulings and orders of Gitumbi, J, who dismissed their separate applications for temporary injunctive relief, both appellants separately appealed against the said rulings and orders. By an order of this court made 1 on 19th January, 2015, the two appeals were consolidated as the facts and parties are the same save for the appellants and the suit properties which are different. It is notable that there has been a multiplicity of suits and applications in the Environment and Land Court [ELC] and in this Court relating to the suit properties.

3. The genesis of **CA No. 346 of 2013** as can be discerned from the plaint dated 22nd December, 2011 is that Brookside studios Limited [the 1st appellant] is the registered proprietor of a parcel of land known as LR No. 209/11803/3 comprised in a Grant registered at the Land Titles Registry in Nairobi as No. I.R 70835/1 [hereinafter referred to as the suit property]; It is alleged that on or about 5th August, 2011, the 3rd and 4th respondents colluded with the 1st respondent to have a Grant in respect of the suit property issued to the 1st respondent on the basis of a purported letter of allotment by the 3rd respondent dated 2nd November, 1995; that this was in total disregard of the 1st appellant's title aforesaid. It is further alleged that the 1st appellant is the rightful and lawful proprietor of the above suit property; that the 1st appellant holds

a duly registered Grant and that invaders unknown to them moved to the suit property in a bid to evict the 1st appellant's employees.

4. This invasion prompted the 1st appellant to file in the ELC Case No. ELC 746 of 2011 seeking interim injunctive relief to restrain the respondents from divesting their proprietary rights in the suit property and vest them in the 1st respondent. The ELC declined to grant the interim reliefs sought.

5. Aggrieved by that decision, the 1st appellant appealed to this Court and filed a Memorandum of Appeal raising several grounds of appeal against the 2nd decision of the learned Judge. It was the 1st appellant's contention *inter alia*, that the learned Judge erred in law and fact by:

i. dismissing the 1st appellants' injunction application on the ground that there was intense contention as between the various claimants of the suit property known L.R No. 209/11803/3 in total disregard of the fact that the 1st appellant is the only one with a duly registered title to the suit property;

ii. Failing to appreciate and/or consider at all the fact that the 1st appellant's title to the suit property was protected under the provisions of the Registration of Title Act, Cap. 281 (now repealed);

iii. Failing to appreciate the fact that the 1st appellant had demonstrated that it had a prima facie case with a probability of success;

iv. Failing to consider the effect and import of the injunctive order issued by this honourable court on 4th March, 2011 in Civil Application No. NAI 281 of 2010.

6. The 1st appellant seeks the following orders:

1. The appeal be allowed with costs to the 1st appellant.

2. The order of the ELC of 20th September, 2013 in the said ELC No. 746 of 2011 be set aside.

3. The ruling and the order of the learned Judge of 20th September, 2013 be set aside and be substituted therefore with an order that the 1st appellant's Chamber Summons application in the ELC dated 22nd December and filed in court on 23rd December, 2011 respectively be allowed with costs to the 1st appellant/original plaintiff.

4. Such other or further orders as this honourable court may deem just in the circumstances of the case.

7. The genesis of **CA No. 347 of 2013** can be discerned from the amended plaint dated 30th December, 2011 is that **Yellow Horse Inns Ltd** [the 2nd appellant] is the registered proprietor of a parcel of land known as LR No 209/11803/2 comprised in a Grant registered at the Land Titles Registry, Nairobi as No. IR 112602/1 [hereinafter referred to as the suit property]; that on or about 19th November, 2011 unknown people invaded the suit property and attempted to evict the 2nd appellant's workers; that on or about 5th August, 2011, despite the fact that the 2nd appellant had a duly registered title to the suit property, the 3rd and 4th respondents colluded with the 1st respondent to have a grant in respect of the suit property issued to the 1st respondent.

8. The invasion prompted the 2nd appellant to file in the ELC, Case No. ELC 747 of 2011; seeking interim injunctive relief to restrain the respondents from divesting their propriety rights in the suit property and vest them in the 1st respondent. The learned Judge declined to grant the interim reliefs sought.

9. Aggrieved by that decision, the 2nd appellant filed a Memorandum of Appeal raising several grounds of appeal against the decision of the learned Judge. It is the appellant's contention, *inter alia*, that the learned Judge erred in law and fact by:

i. dismissing the 2nd appellants' injunction application on the ground that there was intense contention as between the various claimants of the suit property known L.R No. 209/11803/2 in total disregard of the fact that the 2nd appellant is the sole holder of a duly registered title to the suit property;

ii. Failing to appreciate and/or consider at all the fact that the 2nd appellant's title to the suit property was protected under the provisions of the Registration of Title Act, Cap. 281 (now repealed);

iii. Failing to appreciate the fact that the 2nd appellant had demonstrated that it had a prima facie case with a probability of success;

iv. Failing to consider the effect and import of the injunctive order issued by this honourable court on 4th March, 2011 in Civil Application No. NAI 280 of 2010.

The 2nd appellant seeks the following orders:

5. The appeal be allowed with costs to the 2nd appellant.

6. The order of the ELC of 20th September, 2013 in the said ELC No. 747 of 2011 be set aside.

7. The ruling and the order of the learned Judge of 20th September, 2013 be set aside and be substituted therefore with an order that the appellant's Chamber Summons application in the ELC dated 22nd December and filed in court on 22nd December, 2011 respectively be allowed with costs to the 2nd appellant/original plaintiff.

8. Such other or further orders as this honourable court may deem just in the circumstances of the case.

Submissions by counsel

10. The consolidated appeals before us were prosecuted by way of written submissions as well as oral highlighting. Learned counsel Mr A. B. Shah, was lead counsel to Mr. Kimondo Mubea for the appellants; learned counsel Mr Jared Mituga appeared for the 1st respondent while learned counsel Thande Kuria appeared for the 3rd and 5th respondents. The 4th respondent was represented by learned counsel Benjamin Makokha. On the part of the appellants, Mr A. B. Shah relied on the written submissions, list of authorities and the response to the respondent's submissions. We shall elaborate further on the said submissions herebelow.

11. Mr Mituga, Mr Thande and Mr Makokha also relied on the written submissions filed on behalf of their respective clients. Mr Makokha submitted that the appellants produced titles to the suit premises but the learned Judge ruled that ownership to the said suit premises was contested; that counsel for the appellants was under the mistaken belief that title under Registration of Titles Act [now repealed] is *prima facie* evidence of ownership; that proof of ownership can only be evidenced by records from the Lands Registry. Mr Mituga in support of Mr Makokha's arguments submitted that there were no developments on the suit premises.

12. In their written submissions, the 1st and 2nd appellants submitted *inter alia* that the appellants are the registered proprietors of the suit properties; that the titles registered in favour of the appellants are not forgeries and were legally acquired; that Mr. Wilson Gacanja who was the Commissioner of Lands at the material time swore affidavits confirming that the appellants were allotted the respective suit properties; that Mr. Gacanja signed the original Grants in respect of the suit properties; that the appellants hold duly registered Grants issued under the provisions of the Registration of Titles Act (now repealed); that the same were protected under **Section 23(1)** thereof; that the said provisions are now enacted under **Section 26(i) of the Land Registration Act, 2012**; that by dint of the said provisions, the appellants enjoy sactify of title; that the learned Judge failed to consider the appellants' submissions and thereby arrived at a wrong decision.

13. Counsel for the appellant further submitted that the learned Judge failed to follow the doctrine of precedent by failing to take into consideration that this Court had issued an injunction in favour of the appellants in Civil Applications 6 No. Nai 280 of 2010 and Nai 281 of 2010 restraining the respondents or any other person from *inter alia* alienating, entering into or subdividing or interfering with the suit properties pending the hearing and determination of Civil Appeal No. 116 of 2011, and that the learned Judge demonstrated bias against the appellants as she completely ignored the undisputed affidavit evidence that the 1st respondent intended to sell the suit properties once it was issued with a parallel Grant which had been prepared and was only awaiting registration; that this would defeat the purpose of the appellant's case; that there was a sale agreement on record between the 1st respondent and prospective purchasers. Counsel urged us to allow the interlocutory appeals with costs certified for two counsel and remit the suits to the ELC for hearing on merit before any Judge of the ELC other than Gitumbi, J and that the suit properties remain in possession of the appellants until the hearing and determination of the suits.

14. The 1st respondent submitted that it is the lawful owner of the suit property; that the 3rd and 5th respondents have maintained that the 1st respondent is the *bona fide* owner of the suit property and have declared the appellants' purported title documents fraudulent; that the 4th respondent has also denied issuing the appellants with its purported letters of allotment; that it filed a Defence and Counterclaim contending that the appellants' suits together with its Notice of Motion were totally defective and incompetent as the suit had been filed without authority and/or a resolution by the directors authorizing the institution of those proceedings; that the objection and counterclaim are yet to be canvassed; that the affidavits sworn by Mr. Wilson Gacanja do not add value to the appellants' case and have no probative value that a title 7 challenged on grounds of fraud cannot be indefeasible and conclusive; that this Court has no jurisdiction to hear and determine this appeal as the appeal arises from a suit and an application instituted without a board resolution and authority of the directors; that the appellant has failed to establish a *prima facie* case to warrant the success of this appeal. Counsel urged us to dismiss the appeal with costs, remit the matter to the ELC to allow the parties canvas the issues in contention regarding ownership of the suit properties.

15. The 3rd and 5th respondents submitted that the 3rd respondent filed a replying affidavit by S.K. Mburugu, Principal Land Administration Officer at the Ministry of Lands, Housing and Urban Development detailing the process in which the title to the 1st respondent was issued in respect of the suit property. Counsel urged us to remit the matter to the ELC for determination on its merits.

Determination

16. We have considered the record, written submissions filed on behalf of the parties, oral submissions by counsel, authorities filed by the parties and the law.

17. The appellants have respective Grants in their favour in respect of the suit properties. The appellants are aggrieved as the 3rd respondent herein, the Commissioner of Lands, sought to issue parallel grants to the 1st respondent, AA Kawir Transporters Limited in respect of the suit properties.

18. Aggrieved by the 3rd respondents' actions, the appellants sought injunctive relief to restrain the respondents divesting the appellants of their respective properties and vest them in the 1st respondent. The ELC dismissed the applications seeking the said injunctive reliefs. 8

19. In dismissing the said applications, the learned Judge held:

“There is no question in my mind as to the fact that the ownership of the suit premises is under very intense contention as between the various claimants thereto being the plaintiff, the 1st and 2nd defendants. Going by the evidence supplied so far and the information supplied to this court by the parties involved, it emerges that it is not possible to determine on a prima facie basis, who is the legitimate owner of the suit premises at this interlocutory stage. This will have wait until full trial of this case. Hence, at this stage of the proceedings, this court finds that the plaintiff/applicant has not established a prima facie case.”

20. In view of the fact that these are interlocutory appeals where the suits are pending hearing and determination before the ELC, we must restrain from making any determinative views on the issues in dispute to avoid prejudging or prejudicing the pending suits. See **David Kamau Gakuru versus National Industrial Credit Bank Ltd.** CA No. 84 of 2001.

21. We must also take cognizance of the principle that in granting or refusing to grant an injunction, as a general rule, an appellate court will not interfere with the exercise of discretion by the trial court. The circumstances under which this Court will therefore interfere with the exercise of discretion by the trial court are limited and Madan, JA (as he then was) succinctly stipulated them in the case of **UNITED INDIA INSURANCE CO. LTD V. EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] E.A 898**, 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. 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.”

22. The principles on which the courts will grant an injunction are trite. This Court restated those principles in **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, together with the mode of their application as follows:

“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. allay 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 is 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 a 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.” (Emphasis added).

23. The principle provides a three-stage test involving a sequential enquiry that the learned Judge was expected to test the facts before her. (See **EXPORT PROCESSING ZONES AUTHORITY V KAPA OIL REFINERIES LIMITED & 6 OTHERS [2014] eKLR**). The three stages are 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 & OTHERS, CIVIL APPLN NO. 142 OF 1999 [2001] 1 EA 86.1**

25. In **HABIB BANK AG ZURICH V EUGENE MARION YAKUB, CA NO. 43 OF 1982 (Unreported)** the Court of Appeal considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudicate the main suit at that stage since proof is only required at the hearing stage.”

26. In **NATIONAL BANK OF KENYA V. DUNCAN OWOUR SHAKALI & ANOTHER, CA NO. 9 OF 1997** Omolo JA stated:

“The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

In her ruling, the learned Judge properly directed herself on the test to be applied and cited *Giella v Cassman Brown [1973] E.A 358* as follows:-

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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. (E.A. Industries V. Trufoods, [1972] E.A. 420.)

27. It is notable that there were rulings in respect of the same matter by this Court in Nai 280/2010 and 281/2010. Both of these were decisions by this Court under Rule 5(2)(b) of this Court's Rules. As submitted by learned counsel for the appellants, both rulings related to the same *substratum* as the instant appeal.

28. Counsel for the appellants submitted that the contents of the rulings dated 4th March, 2011 were brought to the notice of the learned trial Judge at the time of hearing of the interlocutory applications on merits giving rise to the instant appeals. In counsel's view, the rulings were not given the necessary weight as at the time of the learned Judge's decision to withhold the reliefs sought.

29. This Court in CA Nai 270 of 2013 as consolidated with CA Nai 269 "A" of 2013 found merit in the applications for injunction and granted the injunction on 14th February, 2014 pending the hearing and determination of Civil appeal No. 346 of 2013 and Civil appeal No. 374 of 2013. This Court found that there were several arguable grounds in support of the grant of the temporary injunction sought.

This Court stated:

"We have identified issues for interrogation on the appeal/intended appeal as follows. One, whether the applicants are non suited on account of alleged lack of authority to initiate litigation; two, whether the learned trial Judges' ruling should have borne in mind this Courts protective injunctive orders granted in both applications Nai 280 of 2010 and Nai 281 of 2010 both of which were brought to her attention, considering that these had shielded the applicants proprietary rights pending the hearing and determination of the intended appeal, which had not crystallized as at the time the learned trial Judge delivered her rulings. Three, whether or not the presumption of innocence or otherwise in the Criminal proceedings initiated against the applicants should have been another factor which should have tilted the scales of justice towards the granting of a preservative order. Four, whether the very fact that the issue of ownership of the subject suit properties was hotly contested by several claimants and the fact that it was not clear to the Court as to who was the owner or was in possession should have been sufficient reason even as a sole reason for the learned Judge to grant a preservative order pending the disposal on merit of the pending litigation. Five, whether the learned trial Judge should not have put matters to rest after discounting the major ingredient for granting or with holding of an injunctive relief, but should have gone further to consider the applicability or otherwise of the other two equally important ingredients for the granting of this relief, apply these to the facts before her and then proceed to determine whether consideration of these two ingredients would have tilted the balance of scales of justice in favour of the applicants for the reliefs they sought before her."

On the nugatory aspect, this Court found:

"Turning to the issue of the intended appeal being rendered nugatory should the applicants succeed on their appeal, it has been argued by the 1st respondent that the subject suit properties can be valued and compensated for in terms of money. We have no quarrel with that considering that the subject suit properties are land, and are capable of being valued and compensated for in monetary terms. However, the circumstances displayed herein call for a restraint in making a move in that direction. The reason being that in a situation where ownership and possession is being hotly contested by several claimants, the possibility of ownership falling prematurely into the hands of a party who may ultimately not be adjudged the rightful owner at the conclusion of the litigation cannot be ruled out. The net result of such a situation arising is that the applicants if ultimately adjudged the lawful and rightful owners may very well have to undergo great expense if not inconvenience to pursue other persons for the recovery of ownership or monetary value. In the result, we find the second limb, namely, that the intended appeal may be rendered nugatory if the orders sought are not granted in the event that the applicants succeed in it also made out."

30. It is evident from the extract of the judgment that we have quoted that the learned Judge found that from the record it was not possible to determine on a *prima facie* basis who is the legitimate owner of the suit properties at the interlocutory stage. In the learned Judge's view, this determination should await the full trial of this case.

31. The learned Judge found that the appellants failed to establish a *prima facie* case and having so found, saw no reason to further interrogate whether the other 2 conditions set out in the *Giella case* have been met. Having found that it was not possible to determine on a *prima facie* basis who is the legitimate owner of the suit properties, in the circumstances of this case, the learned Judge erred by not interrogating the three considerations laid down in

Giella (supra). The learned Judge declined to grant an injunction when she had found that pending the hearing and determination of the suits on merit, it was not possible to determine the legitimate proprietors of the suit properties. The appellants had submitted that the 1st respondent had signed a Sale Agreement to dispose of the suit properties by way of sale.

32. In the circumstances, the learned Judge did not properly exercise her discretion as she failed to take into consideration relevant factors which she should have. On this account, we come to the conclusion that we are entitled to interfere with the exercise of discretion by the learned Judge.

33. This court in the case of GEORGE ORANGO ORAGO V GEORGE LIEWA JAGALO & 3 OTHERS, (2010) eKLR stated:

“The purpose of an injunction is to conserve or preserve the subject matter/property pending determination of a suit concerning the property.”

34. We find that in the circumstances of these appeals, the learned Judge erred by declining to grant the injunction sought. Accordingly, these appeals are allowed and we order as follows:

1. That the rulings and orders dated 20th September, 2013 in respect of ELC Nos. 746 and 747 of 2011 be and are hereby set aside.

2. That a temporary injunction do issue to restrain the respondents and/or their agents from alienating, entering into, subdividing, taking possession and/or interfering with the suit properties or registering a grant/title or any other document in favour of the 1st respondent or any other person pending the hearing and determination of the substantive suits, in the High Court.

3. That the substantive suits be heard in the High Court by any Judge other than Gitumbi, J., on priority basis.

4. Costs of the appeals to the appellants.

Dated and delivered at Nairobi this 3rd day of March, 2017 .

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.