IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, HANNAH OKWENGU, & J. MOHAMMED, JJA.)

CIVIL APPEAL NO. 372 OF 2014

BETWEEN

JAMES MAINA……………………………………………….. 1ST APPELLANT

DANIEL MWANGI…………….…………………………….2ND APPELLANT

BEN KIPLAGAT KANGOGO………..……………………..3RD APPELLANT

DANIEL CHEGE……………….……………………………4TH APPELLANT

(All suing as officials of KONDOO CENTER SELF HELP GROUP)

-VERSUS-

ATTORNEY GENERAL…………….....…….……………… 1ST RESPONDENT

NATIONAL LAND COMMISION……....……….……..…2ND RESPONDENT

JOHN SINGOEI…………………………..………………3RD RESPONDENT

JOSEPH NGETIC…………………………...…………4TH RESPONDENT

PAUL GATHUO……….…………………………...…. 5TH RESPONDENT

(The 3rd, 4th and 5th Respondents sued as officials of KONDOO CENTER COMMITTEE)

(Appeal from the Ruling and Orders of the High Court of Kenya at Eldoret, Environment and Land Court (Munyao Sila J) dated 16th October, 2014

in

E.L.C Suit No. 452 of 2013)

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JUDGMENT OF THE COURT

1. This is an appeal filed by the appellants against the ruling of the Environment and Land Court *(Munyao Sila, J.)* dismissing their application for interlocutory injunction pending the hearing and determination of the suit that was filed simultaneously with the application filed in the Environment and Land Court (E& LC). The main issue arising from the appeal is whether the learned trial Judge properly exercised his discretion in declining to grant the appellants a permanent injunction as against the respondents pending the hearing of the suit.

2. By a plaint filed on 25th September, 2013, the appellants pleaded that from the year 1972, the appellants and other members of Kondoo Center Self Help Group were in occupation of plots of land described as **UASIN GISHU/KONDOO SCHEME/627** (*hereinafter referred to as the suit property*) located at Kondoo Trading Centre to which they maintained that they became owners by way of adverse possession having enjoyed uninterrupted occupation of the plot for a period of 35 years.

3. In the year 2004, Kondoo Trading Centre Self Help Group was formed to formalize ownership of the suit property and eventually, a physical development plan was developed and beneficiaries to the disputed property identified to pave way for allotment letters to be issued to them.

4. In the year 2007 and 2008, post-election violence erupted in the area with many members of the self-help group forced to flee the area. Members later returned once calm was restored only to find that the 3rd, 4th and 5th respondents as officials of Kondoo Center Committee had already claimed ownership over the disputed property. The appellants aver that since the year 2008, they have unsuccessfully tried to have the 1st and 2nd respondents help them resettle in the disputed property but that the 3rd, 4th and 5th respondents have been hostile to them and refused to vacate the premises and that the members of Kondoo Center Self Help Group have suffered loss and damage due to the above. The reliefs sought in the plaint were a permanent injunction restraining the respondents from evicting, trespassing, alienating, repossessing, leasing out or interfering with the appellants' quiet and peaceful enjoyment of the disputed property; a declaration that the appellants were entitled to possession and ownership of the disputed property among other Orders.

5. The appellants also filed a notice of motion under ***Order 40 of the Civil Procedure Rules, 2010*** together with the plaint seeking an interlocutory injunction restraining the respondents from taking the title over the suit property from the appellants and trespassing or interfering with the appellants' quiet and peaceful possession of the disputed property.

6. The appellants' application was opposed. The 1st respondent filed grounds of opposition and the 5th Respondent swore and filed a replying affidavit on behalf of the 3rd and 4th Respondents. In brief, the 3rd, 4th and 5th respondents stated that the disputed property was never at any time the property of Kondoo Centre Self Help Group; that the original owner of the property was the 5th Respondent 's grandmother, who then handed over the property to the public under the custody of the Burnt Forest Town Council; that in the year 2004, a splinter group emerged forming a self-help group and the individuals had no capacity to represent the majority of the members of the Community;

7. That after the post-election violence calmed down, a meeting was held wherein the appellants as members of Kondoo Trading Centre Self Help Group attended and one committee was formed to harmonize all members of both groups, and that this was to ensure the members were each allocated their plots, and (*annexed a copy of the minutes recorded for the meeting annexed as "SGK-1")*. The gist of the 3rd, 4th and 5th respondents ' affidavit was that the appellants were fully aware of plans being carried out to ensure all rightful beneficiaries were issued with letters of allotment to their respective properties. They therefore claimed that the appellants only filed the suit in the Environment & Land Court to convert public land into private land for their own selfish gain.

8. In response to the replying affidavit, the 1st appellant swore a further supplementary affidavit filed in Court on 21st July, 2014 and responded to the 3rd 4th and 5th's affidavit. The appellants re affirmed that the disputed property was possessed and utilized by members of Kondoo Trading Centre Self Help

Group. They further denied the allegations of ownership brought out by the 3rd, 4th and 5th respondents. They further denied that any meeting to harmonize the two splinter groups was ever held.

9. The learned judge having examined all the material placed before him, proceeded to determine the appellants' application and dismissed the same on the basis that the appellants' did not adduce any material demonstrating respondents had engaged in any illegal processes or that the process of vetting of persons entitled to be considered for allocation was flawed or even claiming wrongs done by the respondents without proof of the same. The learned judge held that the appellants did not prove a prima facie case with a probability of success and thus, did not deserve the injunction sought.

10. The appellants were aggrieved by that decision hence the interlocutory appeal filed before us. The memorandum of appeal raised 15 grounds in which the main complaint was that the learned judge failed to consider that the appellants had established a prima facie case on the basis of the evidence availed to the Court and therefore wrongfully exercised his discretion in rejecting the application.

11. The appeal came up for hearing on 12th June, 2017. Mr. Njue, learned counsel for the Appellants orally submitted that they had shown that they have a prima facie case with a probability of success as the appellants were in occupation of the suit property for over thirty years and had acquired a beneficial interest and rights over the suit property; that the appellants' parcels of land were identifiable and could be traced to each of the appellants; that the appellants had a part development plan prepared and approved when a legal gazette notice published on 31st January, 2006 and objections invited but no objections were raised. The appellants claimed that having lived on the suit property for 35 years and no objection having been raised to the part development plan, they had a legal right to the land.

12. On ground two of the appeal, the appellants submitted that the learned Judge erred in finding that the appellants were a splinter group as the appellants organized themselves as a group in 2007 while the respondents formed a group in 2010, five years later; that having recognized their existence as a group, the learned Judge should have gone ahead to protect their interests; that though the learned judge referred to the appellants' group as disgruntled, they still deserved to be heard and that the judge failed to appreciate that the 3rd, 4th and 5th respondents group did not exist before the post-election violence.

13. On submitting on grounds 4 and 5 of the appeal, counsel for the appellant reiterated the contents of the memorandum of appeal while on ground 6, Counsel submitted that the group formed did not consider the appellants. Mr. Njue finally concluded that since the dispute began in 2004, the learned judge misdirected himself by only taking into account matters that happened from 2009 and thus arrived at a wrong decision. Counsel maintained that the judge should have sought information on maintenance of status quo until the case is determined.

14. Learned counsel for the 1st respondent, Mr. Kuria, urged the Court to dismiss the appeal. He submitted that the appellants failed to establish any reasons why this Court should interfere with the discretionary power of the Environment and Land Court. He submitted that there are only five circumstances in which the Court of Appeal can interfere with discretionary orders namely; where the learned Judge misdirected himself; misapprehended facts; took into consideration matters he should not have taken into account; failed to take into consideration matters that he should have taken into account and lastly when the decision is plainly wrong. Mr. Kuria submitted that the appellants failed to establish any of these factors. Mr. Kuria concluded that the Court was dealing with an interlocutory application.

15. Learned counsel for the 3rd, 4th and 5th respondents, Mr. Magut, associated himself with the submissions made by Mr. Kuria and also relied on the two authorities filed by appellants' counsel. **Nguruman Ltd –vs- Jane Boude Nielsen & 2 Others [2014] eKLR** and **Mrao Ltd –vs- First American Bank of Keya Ltd & 2 Others [2003] eKLR**. He argued that the appellants had a duty to prove that there was a miscarriage of justice as in **Mrao's case** (*supra*) where it was held that ***"… a prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'…".*** He further submitted that the appellants did not reach the threshold of a prima facie case. Counsel submitted that the learned Judge found that there was evidence of a merger of two groups as the

two communities were merged into one and that the learned Judge properly exercised his discretion. Counsel urged that the appeal be dismissed with costs.

16. Mr. Njue responded to the submissions made by the respondents and submitted that the learned Judge misdirected himself in failing to find that the appellants had a right to be protected having lived on the disputed property for 35 years and that the Judge considered facts which he should not have considered as there was no evidence of a merger between the two splinter groups. Counsel maintained that the appellants' rights were infringed.

17. This being an interlocutory appeal, it means that there is a suit pending for hearing and determination at the Environment and Land Court scheduled for hearing on 19th June, 2017. The Court is therefore alive to the notion that it should refrain from making determinative findings on issues of fact as this would prejudice the pending suit.

18. The rules in granting of an injunction have well been enunciated in the case of **Giella –vs- Cassman Brown [1973] EA 358** at p. 360 where it was stated:-

> ***"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."***

19. The application before the learned judge having been one for interlocutory injunction, the learned judge exercised judicial discretion in refusing to grant the same. As a principle, an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court. The circumstances under which this Court will therefore interfere with the exercise of discretion by the trial court are limited and were well articulated by ***Madan, JA*** (as he then was) in ***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 acco unt of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

It was also said by **Sir Charles Newbold, P** in **Mbogo& Another -vs- Shah [1968] EA 98** 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 direction 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 direction and that as a result, there has been some misjustice."***

20. It is our view that the appellants failed to show how they would have suffered irreparable loss since they did not prove actual possession of the property as at the time of filing suit. Thus, not being the owners either registered, beneficial or otherwise of the disputed property, they failed to show how irreparable harm would be occasioned to them. All the appellants had to show was that they had a prima facie case by persuading the Court that there is a right of the appellants that was likely to be infringed if the Orders were not granted. Further, the appellants also failed to show how the balance of convenience was in their favor as they did not demonstrate any injustice they were likely to suffer by the learned judge failing to grant the injunction and thus the balance of convenience did not shift to their favour.

21. We agree with the submissions of Counsels for the 1st, 3rd, 4th and 5th respondents that the High Court was right in finding that the appellants did not meet the threshold required for granting an interlocutory application. The appellants could not invoke the provisions of Order 40 Rule 1 of the Civil Procedure Rules as there was no allegation that the suit property was in any immediate danger of being disposed of or adversely interfered with. It was said by the Supreme Court of India in **Darpat Kumar & Another –vs- Prahlad Singh & Others AIR 1993 SC 276** which was quoted with authority in **Margaret Njoki Migwi –vs- Barclays Bank of Kenya Ltd [2016] e KLR** that

> ***"…the phrases 'prima facie case', 'irreparable loss' and 'balance of convenience' are not mere rhetoric phrases for incantation; they are important factors to be carefully weighed and considered in each and every case where an application for injunction is applied for…".***

22. We find that the appellants proceeded to reiterate the facts of their case in the main suit and even came close to arguing the merits and/or demerits of the pending suit in the Environment and Land Court. The appellants therefore failed to show how the trial Judge erred as a matter of law.

23. From the foregoing, we find that this Court as an appellate Court has no reason to interfere with the Orders given by the learned Judge. For these reasons, the appeal is dismissed with costs to the 1st, 3rd 4th and 5th respondents.

Dated and delivered at Eldoret this 15th day of June, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J.MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR