



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, J.J.A.) CIVIL APPEAL NO.187 OF 2013**  
**BETWEEN**

**EDWARD GICHUNJI WAMBIRI.....APPELLANT**

**AND**

**HANNAH NJERI THUBI.....RESPONDENT**

***(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Koome, J.), dated 12th February, 2010***

**in**

**HCCC No.708 of 2009)**

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**JUDGMENT OF THE COURT**

[1] This is an appeal arising from the ruling of the High Court in which the court disallowed an application lodged by **Edward Gichunji Wambiri** (now the appellant) for orders of interlocutory injunction pending the hearing of a suit that he has filed against **Hannah Njeri Thubi** (now the respondent). The relief sought in the suit was an order restraining the respondent from dealing with property known as **LR No. Dagoretti/Riruta/5311** that is herein referred to as the suit property. She also sought an order for retransfer of the suit property back to him. The appellant who was previously the owner of the suit property, claimed to have transferred the property to the respondent pursuant to an agreement of sale entered into between him and the respondent, which agreement the respondent had breached by failing or refusing to pay the balance of the purchase price. The appellant was apprehensive that the respondent would dispose off the suit property, hence the prayer for the restraint orders.

[2] The appellant has raised 6 grounds of appeal contending *inter alia*, that the learned judge erred in law: in refusing to grant an injunction to the appellant after he had established a *prima facie* case; in holding that the appellant could be adequately compensated by an award of damages; and in failing to appreciate the damage that the appellant was likely to suffer from the actions of the respondent.

[3] On 20th April 2016 the appeal came up for hearing and it was agreed that the hearing of the appeal proceed by way of written submissions to be filed and exchanged by the parties, and thereafter highlighted before the Court. The parties were given timelines within which to file the written submissions. However, only the appellant filed his written submissions. Consequently the matter was fixed for highlighting of the submissions and the respondent was served with a hearing notice through his counsel, but again there was no attendance by the respondent.

[4] In his submissions the appellant relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KLR 125** for the circumstances in which a Court of Appeal can interfere with the exercise of discretion by a Judge in granting or refusing to grant an order of interlocutory injunction. These are: the Judge misdirecting himself on law; misapprehending the facts; taking into account considerations of which he should not have taken account of; failing to take consideration of matters he should take into account; or the decision of the learned judge being plainly wrong.

[5] The appellant argued that although the learned judge properly found that the appellant had established a *prima facie* case, he misdirected himself in coming to the conclusion that an award of damages could adequately compensate the appellant; that the learned judge failed to appreciate that the payment of the alleged purchase price was in dispute; and that the claim was one for rescission of the contract of sale.

[6] The learned judge was faulted for making premature conclusion regarding the payment of the purchase price that prejudiced the appellant's claim for re-transfer of the suit property on the basis of rescission of the contract by restricting the appellant to a claim for damages that the appellant had not prayed for. Relying on **Yego v Tuiya & Another (1986) KLR**, it was submitted that the interim orders that were sought were only intended to preserve the status quo pending the hearing and determination of the appellant's suit, but the conclusive determination made by the learned judge had the effect of prematurely disposing of the suit.

[7] It was contended that the learned judge failed to take into account the loss that the appellant was likely to suffer if the injunction was not granted, such as the loss of the suit property and the loss of opportunity to pursue his interest in the suit property. The case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd Civil Appeal No. 9 of 2001** was cited for the proposition that disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.

[8] In addition, it was argued that in accordance with the doctrine of *lis pendens* provided under **Section 52** of the Transfer of Property Act, the Court had the power in the general interest of public policy and effective administration of justice, to prevent the alienation of the suit property pending the adjudication of the matters before the court. In this regard the following authorities were relied upon. **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another Civil appeal No 44 of 2014**; **Mawji v US International University & Another (1976) KLR 185**; and **Bernadette Wangare Muriu v National Society Security Fund Board of Trustee & 2 others (2012) eKLR**.

[9] The learned judge was also faulted for failing to properly apply the principles enunciated in **Giella v Cassman Brown (1973) EA** even after making a finding that the appellant had established a *prima facie* case, and it being apparent that damages would not be an adequate remedy, and that the balance of convenience tilted in favour of the appellant.

[10] Finally, it was submitted that the learned judge erred: by changing the appellant's suit from a claim over the suit property to one for damages, when there was neither a claim nor a counterclaim for damages; and determining the application on matters that had not been pleaded. In this regard **Galaxy Paints Company Ltd v Falcon Guards Ltd Civil Appeal No 219 of 1998** was relied upon. The Court was therefore urged to allow the appeal.

[11] We have given careful consideration to this appeal. The application before the learned judge was one for interlocutory injunction pending the hearing of the appellant's suit. The principles for determining such an application are well known. Indeed the learned judge properly directed herself by referring to **Giella v Cassman Brown & Co Ltd** (supra); and **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra). In short, the appellant had firstly the obligation to establish a *prima facie* case with a probability of success; and secondly, to demonstrate that if the injunction was not granted he was likely to suffer irreparable loss in regard to which damages would not be an adequate remedy; and if the first two tests were inconclusive then the court would have to determine where the balance of convenience tilts.

[12] In applying these principles the learned judge stated thus:

***“This is a claim involving allegations of a breach of contract, the plaintiff claims to have rescinded the contract, and the defendant claims to have tendered the balance of the purchase price, is an order of injunction the appropriate remedy? The plaintiff’s claim obviously passes the first test, he establishes a prima facie case, that there was a contract, however for reasons that the balance of the purchase price was tendered, I find the plaintiff’s case can adequately be compensated by payment of damages. The plaintiff can reclaim the balance of the purchase price, which in any event is available. The defendant can retransfer the 0.02 hectares as per the agreement and the plaintiff can be paid damages as a result of the delay and inconvenience once proved. Accordingly the application for an interim order of injunction is disallowed.”***

[13] Although the learned judge did not go into a deep analysis, we concur with the finding that the appellant had established a *prima facie* case. The appellant’s claim that he had transferred the suit property to the respondent pursuant to the contract of sale was not disputed. The dispute was whether there was a breach of the sale agreement, and if so whether such breach would justify the appellant rescinding the contract of sale. The respondent maintained that the balance of the purchase price was tendered but rejected. These were issues that could not be determined at the interlocutory stage. Suffice to state that by demonstrating that he transferred the suit property to the respondent pursuant to a contract of sale, and that the respondent had not yet paid the full consideration, the appellant established circumstances upon which the court could infer the possibility of the appellant’s right having been violated such as to require an explanation from the respondent. Thus a *prima facie* case with a probability of success as defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (supra) was established.

[14] As regards the finding of the learned judge that an award of damages could adequately compensate the appellant, we find that in coming to this conclusion, the learned judge failed to consider the pleadings that were before her regarding the appellant’s claim. Therefore the learned judge did not appreciate that the claim did not include a prayer for damages nor did it include a prayer for the balance of the purchase price, nor was there any counterclaim or defence of tender in regard to the amount admitted to be outstanding by the respondent.

[15] We believe that had the learned judge taken these factors into consideration, she would have found that the claim was for retransfer of the suit property and that award of damages may not be adequate compensation. Moreover even considering the balance of convenience, since there was a dispute regarding the suit property, the balance of convenience tilted in favour of an order preserving the suit property during the pendency of the suit. For these reasons, we find that the learned judge did not properly exercise her discretion in rejecting the application for interlocutory orders.

[16] Accordingly, we allow this appeal and set aside the ruling dated 12th February 2010 and substitute thereto an order restraining the respondent, his agents or servants from alienating, selling, charging, or in any way interfering with the suit property by way of development or changing the status of the suit property, pending the hearing and final determination of HCCC No. 708 of 2009.

[17] In accordance with **Order 40 Rule 6** of the Civil Procedure Rules 2010, the interlocutory orders will lapse 12 months from the date hereof. The appellant must therefore take appropriate action to have the substantive suit heard and disposed of as soon as possible.

Those shall be the orders of this Court.

**Dated and delivered at Nairobi this 22nd day of September, 2017.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**GBM KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**