IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 115 OF 2011

BETWEEN

YELLOW HORSE INNS LIMITED.....APPELLANT

AND

NDUACHI COMPANY LIMITED.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

JOHN KICH AYIECHO.....3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Mbogholi, J.), dated 30th November, 2010

in

ELC No. 347 of 2009)

Consolidated with

Civil Appeal No.116 of 2011)

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JUDGMENT OF THE COURT

This appeal demonstrates that the problem for which the Commission of Inquiry on Irregular and Illegal Allocation of Land *(the Ndungu Commission)* was appointed to resolve has refused to go away. According to the Commission in its report of 2004, more than 200,000 title deeds were illegally created and registered between 1963 and 2002 alone. This number must have risen since the report was presented as disputes arising from such allocation or acquisition of land have continued to inundate the courts. Even as everyone hoped that with the subsequent promulgation of the Constitution in 2010 this problem would be firmly and with finality determined, the realities of double allocations of land continue to sink.

At the heart of this dispute are two properties, L.R No. 209/11803/2 and L.R No. 209/11803/3 (the suit properties). The 1st appellant has a title to the former while the 2nd appellant has one for the latter. On 16th July, 2009, both appellants separately instituted actions against the respondents. Since the two suits

were filed by the same firm of advocates, Kimondo Mubea & Co. Advocates, they bear marked similarities in content.

The appellants claimed that the 2nd and 3rd respondents had, through collusion, allotted to the 1st respondent the suit properties as the rateable owner. In their respective suits they prayed for a declaration that the purported allotment be declared illegal and by an order of permanent injunction, the respondents be restrained from alienating, entering, subdividing or interfering with the suit properties. In the meantime they applied by summons in chambers that, pending the determination of the matters raised in the main suit, the court to consider issuing a temporary order of injunction to preserve the suit properties.

By two separate rulings on each application delivered on 30th November, 2010, **Mbogholi, J.,** dismissed with costs both applications. Obviously aggrieved by that, the appellants separately moved to this Court under **Rule 5(2) (b)** of the Court's Rules for a temporary injunction pending the filing and determination of their intended appeals. The temporary reliefs were issued by the Court on 4th March, 2011, in the following terms;

> **"2. THAT an urgent injunction do issue forthwith restraining the respondents by themselves, their agents, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit property known as L.R. No. 209/11803/3 in any manner whatsoever and/or making any document of title and/or any lease relating to the suit property in favour of the 1st Respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended appeal.**
>
> **3. THAT a temporary mandatory injunction do issue directing and/or commanding the 2nd and the 3rd Respondents to unconditionally and forthwith reinstate the name of the Applicant as the rateable owner of the suit property known as L.R. No. 209/11803/3 in the Valuation and Rates records kept and held by the 2nd Respondent in respect of the suit property and to forthwith call for cancellation any document purporting to convey the ownership of the suit premises to the 1st Respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended appeal."**

The appellants subsequently, once more, lodged two appeals, each raising 12 separate grounds. The two appeals were consolidated before hearing. Leading Mr. K. Mubea, Mr. A.B. Shah, learned counsel for the appellants briefly highlighted the written submissions and urged us to find that the learned Judge committed an error of law and fact in dismissing the appellants' summons for injunction without regard to the relevant principles.

Though duly served with the hearing notice, none of the respondents appeared before us when the appeal came up for hearing. They also did not comply with orders directing parties to exchange written submissions ahead of the hearing.

Being an interlocutory appeal and bearing in mind that the main suit is pending determination on merit before the court below, our consideration of the complaints raised in the appeal will be circumscribed and we are restrained from expressing any determinative views on the issues in dispute to avoid embarrassment to the trial court.

In rejecting the appellants' application for injunction, the learned Judge was exercising a judicial discretion, which we can only interfere with in specific circumstances. **Madan, JA** (as he then was) in **United India Insurance Co. Limited, Kenindia Insurance Co. Limited & Oriental Fire & General Insurance Co. Limited V. East African Underwriters (K) Ltd.** Civil Appeal No. 36 of 1983 characteristically identified some of those circumstances thus:

> **"EXERCISE OF DISCRETION;**

Is of daily occurrence in the courts. The principles upon which the exercise of the court's discretion should take place have been repeatedly stated; nevertheless mishaps continue to occur. So I state the principles again.

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."

In light of the foregoing, we have considered the invitation by the appellants to overturn the decision of the High Court for failure to properly apply the well-known principles on injunctions pronounced in such landmark decisions like **Giella V Cassman Brown & Co. Ltd** (1973) EA 358, **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (2003) KLR 125 and **Vivo Energy Kenya Ltd V Maloba Petrol Station** Civil Appeal No. 21 of 2014. We hold the following view on the appeal.

Although, as it were, an old hat, we reiterate the strictures enunciated in **Giella V Cassman Brown & Co. Ltd**, that;

"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 -VS- TRUFOODS** (1972) EA 420."

The Court in **Giella** identified three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

Explaining what amounts to *prima facie* case, the Court in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (supra) said;

"I would say that in civil cases 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". (*per Bosire, JA*)

The three pillars are to be applied sequentially. We paraphrase the *ratio decidendi* in **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86 and **Nguruman Limited V Jan Bonde Nielsen & 2 others** Civil Appeal No. 77 of 2012 where the sequence of those conditions were elucidated. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a *prima facie* case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no 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 and the matter ends there. Only where there is doubt as to whether a *prima facie* case is made out or as to the adequacy of the remedies in damages that the question of balance of convenience would arise. It must follow from this that the existence of a *prima facie* case does not permit the applicant to "leap-frog" to an injunction directly without crossing the other second, and probably the third hurdles in between.

That should be enough on the law relevant to the issues before us.

We are concerned in this appeal, as we have alluded, with the question whether, in rejecting the applications, the learned Judge erred by misdirecting himself in law; misapprehending the facts; taking account of considerations of which he should not have taken account; and failing to take account of considerations of which he should have taken account. In other words, we must determine whether the learned Judge improperly exercised his discretion.

The appellants approached the court below with their respective copies of the lease to assert their ownership of the suit properties following adverse claims and competing interests over the same properties by the 1st and 2nd respondents. On the other hand, the 1st and 2nd respondent exhibited letters of allotment. The 3rd respondent who, at the time material to this appeal was the 2nd respondent's Acting Chief Valuer, for his part presented a letter issued to him by the Commissioner of Lands alleging that the leases to the appellants in respect of the suit properties were forgeries.

Relying on the latter evidence presented by affidavit of the 3rd respondent, the learned Judge was convinced that the applications for injunction were bereft of merit, for failure to demonstrate a *prima facie* case. Ultimately, he held, in respect of the 1st appellant's application that;

> **"The Commissioner of Lands is the custodian and also the only issuing authority under whose hand all documents flow. If the said officer states that the documents held by the plaintiff are forgeries then, that is not a matter that can be taken lightly. On the other hand, a letter of allotment does not confer title to any party and therefore also the 1st defendant cannot rely on the said letter of allotment to claim title thereon….Whatever the case, the order that commends itself is the preservation of the subject matter in the name of the 2nd defendant."**

The learned Judge gave a similar consideration to the application brought by the 2nd respondent and naturally reached the same conclusion. Satisfied with his finding that the appellants had failed to establish a *prima facie* case, the learned Judge found no purpose in considering the other two principles in **Giella V. Cassman Brown & Co. Ltd** (supra), in accordance with the sequence we have set out above.

The learned Judge having expressed a firm view on the legal force of a letter of allotment and the nature of a title acquired under the Registration of Titles Act, strangely found that the appellants' application did not disclose a *prima facie.* The learned Judge acknowledged that;

> **"On the other hand, a letter of allotment does not confer title to any party and therefore also the 1st defendant cannot rely on the said letter of allotment to claim title thereon. ….I am alive to the provisions of Section 23(1) of the Registered Titles Act Cap 281 Laws of Kenya. However, I cannot close my eyes to the very serious allegations that the titles held by the plaintiff are said to be forgeries. That alone would show that the plaintiff did not have a *prima facie* case with a probability of success. The 1st defendant on the other hand holds a temporary occupation license upon the suit property said to be owned by the 2nd defendant. Whatever the case, the order that commends itself is the preservation of the subject matter in the name of the 2nd defendant."**

Section 23(1) of the repealed Registration of Titles Act provided that the certificate of title issued by the registrar would be;

> **"…..taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party".**

This contrasts with **section 26(1)** of the Land Registration Act, 2012 which also recognizes such a title but as a *prima facie* evidence of ownership and endorses the person named in the certificate of title as the proprietor of the land as the absolute and indefeasible owner. In proving a case on a *prima facie* basis between a registered certificate of title and a letter of allotment or a temporary occupation licence, the law dictates that the holder of a certificate of title ought to be accorded dominance over the rest.

Whereas the 3rd respondent relied on the letter from the Commissioner of Lands, the appellants maintained that the certificates they held were original and genuine.

While the learned Judge himself explicitly acknowledged that it was unsafe for him to **"delve any deeper in the matters because there are competing interests in respect of the said property"**, in the end the learned Judge engaged in what would appear to be a mini-trial on a controverted affidavit evidence. The letter from Commissioner of Lands, did not specify who the holder of the forged certificate was. That was important determination in view of the numerous claims over the suit properties. It was therefore a suitable question for the trial. But of additional significance is the fact that, as at 2nd July 2009 the 2nd respondent was demanding payment of property rates of the suit properties from the appellants, signifying an acknowledgment of them.

We reiterate what this Court (O'Kubasu, Onyango Otieno & Nyamu, JJ.A.) said on a **Rule 5(2)(b)** application by the 1st appellant arising from the impugned ruling, that;

> **"Thus taking a broad view of justice in the circumstances of this case, we do not think we can ignore the fact that the applicant has been in possession since 1996 and has exhibited a title under the Registration of Titles Act (Cap. 281 Laws of Kenya). It is this title which is being challenged and the applicant has produced documents to show that it has been a rateable owner. It has to be pointed out that a dispute has arisen because the applicant has discovered that the respondents were interfering with the title and purporting to allocate the suit premises to the 1st respondent. That being the case it will be arguable whether the learned judge was entitled to make an order to the effect that the property would be in the name of the 2nd respondent."**

We believe that that should suffice to show that the learned Judge erred in failing to see the *prima facie* evidence presented by these facts.

On the irreparable loss, purely on the sheer numbers of those claiming ownership of the suit properties, the appellants' apprehension was not without reasonable concern. Their fears arose from the manner the 2nd respondent was issuing letters of allotment. Yet it was the same 2nd respondent that the learned Judge granted the duty of "preserving" the suit properties.

With the numerous claims, including those by six individuals in **Constitutional Petition No. 194 of 2011** based on letters of allotment, **ELC Case No. 747 of 2011**, **ELC Case No. 746 of 2011, J.R No. 398 of 2013** and a pending criminal case in **Criminal Case No. 6283 of 2012**, there was sufficient evidence that if the appellants were denied an injunction the suit properties would be put beyond their reach. In the circumstances of this case, we doubt that an award of damages would suffice as a remedy to the appellants. The learned Judge did not properly exercise his discretion for failing to carefully interrogate the affidavit evidence before him.

See concurrent conclusions on similar facts by this Court, differently constituted (Visram, Koome & J. Mohammed, JJ.A.) in **Brookside Studios Limited & Another V. A A Kawir Transporters Limited & 4 others** Civil Appeal No. 346 of 2013**.**

In the result, we find merit in this appeal. We accordingly allow it and order that the rulings of the High Court dated 30th November, 2010 be set aside and in their place we substitute an order restraining the respondents, their agents or servants from alienating, selling, charging, or in any way interfering with the suit property by way of development or changing its status, pending the hearing and final determination

of **H.C.C.C. No. ELC. No. 346 of 2009** and **ELC. No. 347 of 2009**. The appellants will have the costs of this appeal.

Dated and delivered at Nairobi this 17th Day of November, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR