



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 70 OF 2010

Between

JACKSON K. RUTOAPPELLANT

AND

HAMCO K. LTD.RESPONDENT

(Being appeal from the Ruling and order of the High Court of Kenya at Nakuru (D. K. Maraga J) dated 28th October 2009

in

H.C.C.C. No. 183 of 2009)

JUDGMENT OF THE COURT

The respondent Hamco (K) Ltd. filed suit on the 29th day of June 2009 seeking protection of its proprietary rights over land parcel number **LR No. 498/533 IR No.66949/1** Eldama Ravine (suit land). They alleged that the appellant, Jackson K. Ruto, had encroached on the suit land.

Simultaneously with the filing of the plaint the respondent filed a chamber summons seeking to restrain the appellant from continuing with his acts of trespass on the suit land pending the hearing of the suit. The averments in the plaint were briefly that the appellant was on 29thMay,2009 found to have deposited building materials and engaged workers to carry out construction work on the suit land. The application expounded on those averments in a supporting affidavit but was opposed by a replying affidavit deposed by the appellant. On the 29th September, 2009 a consent was reached between the parties that the said application be disposed of by way of written submissions. These were duly filed. **D. Maraga J** (as he then was) after analyzing the facts delivered himself in a brief ruling thus:-

“I have considered these submissions. As I stated in my ruling of 30th July 2009 in this suit there is no proof that the defendant has completed construction and is running a school on the suit piece of land. If the submission by counsel for both parties that the grant and the certificate of lease copies of which have been exhibited relate to the same piece of land are correct, it is clear that this is a case of double allocation. Counsel for the defendant argues that the plaintiff having not developed

the piece of land within two years as required the commissioner of lands was perfectly entitled to revoke the allocation to it and re-allocate the land to the defendant. There is nothing on the record to show that that is what happened. If there is anything like that, the court will be told at the hearing. Before then I find that the plaintiff has made out a *prima facie* case and is entitled to the injunction sought and I accordingly grant it in terms of prayer 3 of this application.”

The appellant was aggrieved by that decision. He has appealed to this Court raising seven (7) grounds. It is alleged that the learned judge erred in law:-

- *by failing to rule on the appellants challenge to the legal competence of both the plaintiff's suit and the application for injunction dated 29th June 2009*
- *by holding that there was no evidence that the appellant was running a school on the suit piece of land*
- *by failing to hold that the burden of proving that the allocation to the plaintiff of the suit land by the commissioner of lands had not been revoked for failure to develop the allocated land within the stipulated time, (2) years lay with the plaintiff*
- *by finding that the respondent had made out a **prima facie** case for the grant of an order of injunction*
- *by failing to rule on whether or not damages would have constituted an adequate remedy, to the respondent.*
- *by failing to declare whether or not on the facts before him the balance of convenience lay in granting or refusing the order of injunction sought by the respondent.*
- *The decision of the learned judge was not supported by the facts placed before the superior court or the applicable law.*

On the hearing date learned counsel **Mr. Ogola H. J. Okeke** made representations on behalf of the appellant while learned counsel **Mr. Ochieng Gai** did so on behalf of the respondent.

Mr. Okeke urged us to allow the appeal on the grounds that the learned judge having acknowledged the appellant's challenge to the competence of both the suit as well as the interim application as laid, should have made a pronouncement on the issue in one way or the other. Second, the appellant had asserted in his deposition that he was running a school on the suit land, a deposition the respondent did not controvert by way of a further affidavit. The learned Judge had therefore no basis for doubting that the appellant was in fact running a school on the suit land.

Third the documents relied upon by the respondent to assert title to the suit land had a conditional lease which required him to develop it within two (2) years which he had not done over a period of 10 years. The learned Judge should not have ignored the appellant's submissions that the respondent's title could have been revoked in favour of the appellant's current documents.

Fourth, the learned judge was wrong to apply proof of existence of a *prima facie* case as the sole criteria for allowing the respondent's application for an injunction. Had he considered the other two equally important elements of adequacy of damages and the balance of convenience he would have found that the respondent was not entitled to an injunction on the facts.

To buttress his arguments **Mr. Okeke** relied on the case of **Oduor versus Agro Freight Forwarders (2002) 2 KLR 652** wherein the application would have been held uncontroverted after the respondent's incompetent replying affidavit was struck out had it not been for the presence on the record of grounds of opposition filed by the opposing party.

Counsel cited the case of **Affordable Homes Africa Limited versus Ian Henderson & 2 others, Nairobi Milimani HCCC No.524 of 2004** for the holding that in the absence of a board resolution sanctioning the commencement of the action by the company, the company was not properly before the court, and lastly,

the *locus classicus* case of ***Giella versus Cassman Brown & co. Ltd. (1973) EA 358*** on the ingredients for granting of injunctive relief.

In response to the appellant's submissions, **Mr. Gai** first urged us to dismiss the appeal on the grounds that the learned Judge properly found a *prima case* with a probability of success established in favour of the respondent as the same was backed up by the title documents. The respondent also held a current search certificate showing that the respondent's title was still intact, and there was no proof that it had been revoked.

Second, the learned judge was entitled to doubt the authenticity of the appellant's title documents as these had been registered under the now defunct Registered Land Act (RLA) while the registration system for Eldama Ravine Township was then under the now defunct Registration of Titles Act (RTA).

Third, there was sufficient evidence before the learned Judge to enable him rule as he did that the appellant was not running a school on the suit land but on an adjacent land.

Four, the learned judge considered the applicability of all the requirements necessary for the granting of an injunction and found all present irrespective of his failure to make a specific pronouncement on the other two. The element of existence of a *prima facie case* with a probability of success was well founded as the respondent exhibited title documents supported by a current search certificate. Payment of damages as compensation was rightly ignored as the learned judge was alive to the fact that sometimes, loss of land could amount to an irreparable loss. The balance of convenience also tilted in favour of the respondent as there were sufficient facts on the basis of which the learned Judge found that the appellant was running a school on an adjacent land and not on the suit land and it was therefore prudent in the circumstances to maintain the *status quo* and allow parties to ventilate the issues in controversy at the trial.

Five, all that the appellant had raised before the learned judge were mere technicalities and were rightly rejected.

This is a first appeal against an interlocutory ruling in which the learned Judge exercised his judicial discretion by granting injunctive relief. The principles governing the exercise of judicial discretion were well set out in the case of ***Githiaka versus Ndururi(2004) 2 KLR 67***. Such a discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the Court, that is to do justice to the parties before Court. The parameters for interference with the exercise of such a discretion were well put by the predecessor of this court in the case of ***Mbogo and another versus Shah (1968) EA 93***. The appellate Court must be satisfied that the Judge misdirected himself on some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the Judge was clearly wrong on the exercise of his discretion and that as a result there had been an injustice. See also **Madan JA** (as he then was) in ***United India Insurance Co. Ltd versus East Africa Underwriters (Kenya) Ltd [1985] EA 898***, where he expressed himself 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.”

We bear all the above in mind as we revisit the record. What the learned Judge was faced with were two competing pleadings that is a plaint and a defence on the basis of which the respondent had anchored an injunctive application and the appellant a replying affidavit in opposition to the said application. Both

sides had thus invited the learned Judge to perform the simple task of determining whether the respondent's application for injunctive relief had met the threshold set in the **Giella case** (*supra*).

The learned Judge found that either side had laid a claim on the suit land and that each was armed with supportive documents. In finding for the respondent that he had made out a *prima facie* case to warrant the relief sought, the Judge bore in mind that it was not possible on the basis of affidavit evidence to determine which of the two titles was the valid one.

Mr. **Okeke** has taken issue with this finding. It is his argument that since he had raised the issue of the competence of both the plaint and the interim application, the learned Judge should not have skirted it. It is correctly argued that the learned Judge skirted this issue. The question is whether he fell into an error by doing so. In ***David Kamau Gakiru versus National Industrial Credit Bank Ltd*** [2002] eKLR the Court made the following observations:

“At the outset we must point out that this being an interlocutory appeal and the suit is yet to be tried in the superior court, we will refrain from expressing our considered views on any issue which we think may arise in the intended trial”

We hold the same view that the learned Judge was right to skirt this issue as it went to the core of the main issues in controversy as between the parties before him.

We therefore find no basis for faulting the learned Judge on the stand he took. All that the respondent sought from the court at that point in time was the protection of his proprietary rights over the suit land by restraining the alleged acts of trespass at the instigation of the appellant pending the disposal of the suit. This had been made out by the exhibition of a certificate of title and a current search certificate showing that the respondent's title was still alive. Although the appellant raised the possibility of the respondent's title being liable for revocation on account of his failure to develop the suit land within two years of his allocation, proof of it was not before the Judge. It was not therefore wrong for him to rule that this would best be dealt with at the main trial.

We agree with Mr. **Okeke's** submission that there was no explicit pronouncement on the other consideration for grant of injunction. It is clearly borne out by the extract of the ruling set out above. The question we have to ask ourselves is whether it is mandatory that there should be a pronouncement on each of these. *Spry V. P.* in the same **Giella case** (*supra*) at page 360 paragraph E had this to say:-

“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 a balance of convenience (E.A. Industries versus Trufoods (1972) E.A. 420).”

The above was followed by the setting out of the elements under distinctive heads in the holding thus:-

“(iv) an applicant must show a prima facie case with a probability of success.

(v) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

(vi) when the court is in doubt it will decide the application on the balance of convenience.

This Court in a recent decision in ***Margaret Njoki Migwi versus Barclays Bank of Kenya Ltd Nyeri CA No. 68 of 2015*** approved the stand taken in ***Nguruman Limited versus Jan Bonde Nielsen & 2***

Others, CA No. 77 of 2012, as follows:

“In an interlocutory injunction application, the application has to satisfy the triple requirements to:

- i. establish his case only a prima facie level,***
- ii. demonstrate irreparable injury if a temporary injunction is not granted; and***
- iii. 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 versus 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 any 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.”

In the same **Margaret Migwi case** (supra) the court made the following observations:

“We think the approach by the High Court on this issue was erroneous in principle and the Court should have gone further to examine the two other two pillars as stated above. To paraphrase the Supreme Court of India in Dalpat Kumar & Another versus Prahlad Singh & Others, AIR 1993 SC 276, 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 an injunction is applied for.”

The High Court in this matter found that a **prima facie** case had been established. In view of the above authorities it should have gone further to examine the other two elements. As regards the issue of damages being an adequate remedy, it is our view that the subject matter being land, it was capable of being valued and compensated for in monetary terms (by way of damages). We are however of the view that no prejudice was suffered by the appellant by the learned Judge’s Order. The existence of two competing titles over the same suit land that needed verification called for an order for maintenance of the **status quo** pending determination as to which of the competing titles had primacy over the other. It was the most ideal order to make in the circumstances.

As for the balance of convenience, we find this was well served by the order of *status quo* granted as it was more convenient to both sides that the *status quo* be maintained pending determination as to which of the two competing titles was the rightful title for the suit land.

On the basis of the above reasons we find no merit in this appeal. We accordingly dismiss it with costs to the respondent both here and in the court below.

Dated and delivered at Nakuru this 14th day of April, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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