



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM:WAKI, NAMBUYE & KIAGEJ.J.A.)**

**CIVIL APPEAL NO. 1 OF 2015**

**BETWEEN**

**THE GOVERNOR**

**NYERI COUNTY GOVERNMENT .....APPELLANT**

**AND**

**BENSON KINYUA MWANGI.....RESPONDENT**

*(Appeal from the judgement and orders of the Environment and Land Court at High Court of Kenya at Nyeri (Justice Anthony Ombwayo) dated 16<sup>th</sup> October 2014)*

*in*

*E.L.C.APPEAL No. 17of 2014)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

By this appeal, the Governor, Nyeri County Government (sic) (the appellant) appeals against the judgment of the Environment and Land Court (Ombwayo J) rendered on 16<sup>th</sup> October 2014 by which the court reversed a decision of the Senior Resident Magistrate which had dismissed an application by Benson Kinyua Mwangi (the Respondent) seeking orders of injunction. The learned judge then proceeded to grant an injunction restraining the appellant and the Clerk of the Nyeri County Assembly **“from in any way evicting and/or interfering with the respondent’s quiet possession (sic) of all that property known as L.R AGUTHI/GATITU/662 and more specifically known as the Unity Bar and Restaurant”** pending the hearing and determination of the suit before the subordinate court.

The Respondent had filed suit in the subordinate court on 9<sup>th</sup> October, 2013 against the appellant and the Interim Clerk of the County seeking in the main a permanent injunction along the lines of the interim injunction simultaneously sought, the terms whereof we have set out. That suit still pends hearing and disposal before the subordinate court. The same as well as the interim application, is predicated on rather straight forward facts:- The respondent is the proprietor of the Unity Bar and Restaurant a business establishment run on premises originally leased by the defunct Nyeri County Council as landlord to one Christopher M. Gitu, since, deceased. The lease agreement was for a term of 6 years with effect from 1<sup>st</sup> October 2007.

By a Deed of Assignment executed on 8<sup>th</sup> June 2012 between one Jane Wangechi Tuchina, the administratrix of the estate of the said deceased and the respondent, the latter succeeded to the remainder of the lease by assignment. The defunct County Council of Nyeri acknowledged and accepted the said assignment and communicated its decision to the respondent vide a letter dated 11<sup>th</sup> February 2013. The Assignment was accepted subject to a number of conditions namely;

***“1. That the assignment is for the remaining period of the lease agreement.***

***2. That the assignee is bound by all the terms of the original lease agreement between Mr. Christopher M. Gitu and the County Council of Nyeri and more particularly the assignee will pay to the Council the requisite monthly rent.***

***3. The following documents form part of this assignment agreement;***

***(a) The renewal of lease agreement signed between Jane Wangeci (on behalf of Christopher M. Gitu) and the County Council of Nyeri.***

***(b) The agreement signed between Mrs Jane Gitu (on behalf of Mr. Christopher Gitu) and the assignee Mr. Benson Kinyua and counter signed by Muchiri Gathoni advocate.***

***4. That this assignment is only renewable upon renewal of the original lease”.***

As that lease period approached its end, the respondent received a letter dated 8<sup>th</sup> July 2013. It was from the County Assembly of Nyeri under the hand of its Clerk. Their letter advised the respondent *inter alia* as follows;

***“...records show that this tenancy agreement was for a period of six (6) years with effect from 1<sup>st</sup> October 2007”.***

***Subsequently (sic), this being the sixth (6<sup>th</sup>) year, you are hereby notified that the tenancy agreement expires on 30<sup>th</sup> September 2013. We shall not be renewing the agreement as we intend to take over the premises for the exclusive use of our Honourable Members. We therefore request that you vacate the premises by the end of the day, 30<sup>th</sup> September 2013”***

In seeking to injunct the appellant and the clerk, the respondent averred before the Subordinate Court that he stood to suffer **“great injustice were his tenancy to be terminated as threatened”** because he had done repairs and renovations to the premises with the agreement of the County Council assessed at Kshs.131,625 and was also, **“in the progress (sic) of doing renovations amounting to Kshs.404,307.00”** and **“the intended termination with (sic) therefore be grossly unfair, illegal and will amount to depriving of (sic) my property arbitrarily”**

The application for injunction was opposed by way of replying affidavits while the suit itself is opposed by way of a written statement of defence. After hearing argument on the motion, the learned Magistrate, after referring to the *locus classicus* on matters injunction, **GIELLA –VS-CASSMAN BROWN** [1973] EA 338, dismissed it, holding in relevant part, as follows;

***“Going back to the principles set out in the above quoted case first an applicant must establish a prima facie case with a probability of success. In this case I find that there are no new terms other than those in the original lease which expired based on that fact alone. I find that a prima face case has not been established. Secondly the damages to be suffered are those that can be compensated because what is left is for the applicant to prove that he can be compensated. I have analyzed this application carefully I find that since the lease expired the balance of inconvenience is on the respondents. The applicant cannot claim an equitable remedy without a lease, the expenses***

***incurred by him can be adequately compensated. I am satisfied that based on the principles set***

*out in the case of GIELLA VRS CASSMAN BROWN & CO. LTD, the application is not merited. The same is dismissed. Each party is ordered to cater for their own costs”.*

The respondent, unhappy but undeterred, appealed that decision and found favour with the learned Judge. Tables having turned, it was the appellant’s turn to grieve and he has in the Memorandum of Appeal averred that the learned Judge erred and “**occasioned a miscarriage of justice**” by;

- **deciding the appeal on an unpleaded and unargued ground that the National Land Commissions, had not donated power to deal in County land to the County Executive Committee, Assembly or Board.**
- **disregarding the provisions of the lease as an existing contract saved by the Urban Areas and Cities Act whereunder the tenancy expired by affluxion of time.**
- **holding that the County Assembly Service Board could only terminate the assignment with the express permission of the National Land Commission.**
- **finding that the respondent would suffer irreparable loss by reason of having invested in renovations.**
- **setting aside the lower court’s dismissal of the injunction application and holding that the respondent had established a prima facie case warranting injunction orders.**

Arguing the appeal before us, the appellant’s learned counsel Mr. Wahome Gikonyo posited that this appeal raised a fundamental issue on whether or not county governments can deal with tenancies. He criticized the learned Judge for holding that the County Government could not deal with county land without express donation of authority to it by the ( NLC) yet the NLC had no jurisdiction over the suit property over which the County held a title as the registered proprietor. The property was therefore alienated land and not public land falling under the power of the NLC. He referred to Section 58 of the Urban Areas and Cities Act, No. 13 of 2011 and blamed the learned Judge for making no reference to it and not bearing it in mind in his judgement. That provision is as follows;

*“ Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting land or any other matter affecting assets, liabilities or property belonging to any local authority whether moveable, immovable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law”.*

Mr. Gikonyo submitted further that by dint of that section and together with the County Government Act, the County Assembly is a part of the County Government, a body established by law, and was therefore empowered and perfectly entitled to issue a notice to terminate, or more precisely put, to remind the respondent of the imminent termination of the tenancy. He asserted that the learned Judge fell into error by holding that the clerk could not issue such notice, which was, in the Judge’s view, a preserve of the County Land Management Board and then only upon express donation by the NLC.

On the question whether the learned Judge properly considered the law on injunctions, counsel complained that the notorious principles laid down four decades ago in **GIELLA –VS- CASSMAN BROWN**, were impermissibly ignored by the learned Judge who made no reference at all to the case, which the learned Magistrate had properly and faithfully applied. Other than failing to demonstrate a prima facie case, the lease having already expired, the respondent failed, in counsel’s contention, to show by any evidence that he would suffer irreparable harm. The learned Judge was therefore in plain error, he submitted, in finding and holding that he would, when all the evidence showed that the renovations done or to be done were clearly quantifiable and could be well-compensated in monetary terms.

In brief opposition to the appeal, Mr Ng’ang’a learned counsel for the respondent submitted that the learned Judge was correct in making reference to Article 62 (2) of the Constitution and the role of the

NLC. He argued further that whereas the respondent's overpayment of rents to the appellant is not disputed, he should by reason thereof be allowed to remain in the premises until he exhausts the sums he expended on effecting renovations thereto. Counsel urged us to dismiss the appeal.

In his reply to those submissions, Mr. Gikonyo referred us to Section 33 of the 6<sup>th</sup> Schedule to the Constitution and, asserting that the County Government of Nyeri was the successor to the Nyeri County Council, posited that there was no lacuna calling for the involvement of the NLC in the matter as the Judge erroneously supposed.

Mr. Gikonyo concluded his submissions by asserting that the letter of 8<sup>th</sup> July 2013 from the Clerk to the respondent was not a notice but a reminder that the lease was due to expire on 30<sup>th</sup> September 2013 and would not be renewed. The position therefore was that the lease terminated by effluxion of time and an injunction was unmerited.

This being an interlocutory appeal with the main dispute before the parties still pending determination before the Magistrate's Court, we exercise a necessary caution so as to avoid making final pronouncements on the matters in contention, that would have the effect of improperly appearing to determine the said issues that are before the proper forum which would thereby be embarrassed. We shall therefore limit ourselves to the central issue of whether or not the learned Judge was correct in reversing the learned Magistrate's rejection of the application for injunction, and proceeding to grant it himself.

The grant or refusal of an injunction is a matter that lies in the discretion of the court. That discretion is a judicial one, however, and is exercised judicially and judiciously in accordance with settled principles, and not capriciously or idiosyncratically. The guiding principles are those enunciated in the case of **GIELLA –VS- CASSMAN BROWN**, which, as we have noted clearly, the learned Magistrate applied her mind to in rejecting the respondents' application for injunction.

What the learned Judge had before him on appeal was a challenge to the Magistrate's exercise of discretion.

Appellate courts are necessarily slow to interfere with first instance discretionary decisions. They interfere only where it is shown that the lower court has erred in principle or has considered issues it ought not to have considered or has failed to consider what it ought to have considered. Interference is warranted when a decision is so plainly and completely wrong or aberrant that no reasonable court properly directing itself to the facts and the law, could have excluded it. Sir Charles Newbold in **MBOGO & ANOTHER –VS- SHAH** [1968]EA.93 at 95 succinctly captured the proper approach an appellate should take;

*“.....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 discretion has misdirected himself on 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 discretion and that as a result there has been misjustice”.*

That is the path this Court treads when considering an appeal from a first instance judge's refusal to grant an injunction. It is the same power the learned Judge herein was required to exercise, with like circumspection, when dealing with the appeal against the learned Magistrate's decision. It is apposite to cite with approval and apply *mutatis mutandis* the sentiments of this Court in **EXPORT PROCESSING ZONES AUTHORITY –VS- KAPA OIL REFINARIES LTD & OTHERS** NAIROBI CIVIL APPEAL NO. 190 OF 2011;

*“....as an appellate Court this Court has a limited function on an appeal from the grant or refusal of an injunction granted under Section 63(c) and (e) of the Civil Procedure Act and Order 40 rules (1) and (2) of the now Civil Procedure Rules 2010. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the High Court*

*Judge's exercise of his discretion and must not interfere with it merely upon the ground that this Court could have exercised*

*the discretion differently”.*

See also UNITED INDIA INSURANCE CO. LTD –VS- EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985]EA 898 and VIVO ENERGY KENYA LIMITED –VS- MALOBA PETROL STATION LIMITED & 3 OTHERS [2015] eKLR.

Upon a careful perusal of the Judgment of the learned Judge, we do not see that he had these principles in active contemplation when he dealt with the appeal before him. Rather, he seems to have proceeded as if he was dealing with a first instance application for injunction and exercised an independent discretion instead of interrogating whether the Magistrate had properly exercised hers.

From the record before us, we cannot but conclude that the learned Magistrate properly appreciated the principles for the grant of interlocutory injunctions. There appears to have been a clear basis upon which she found that a *prima facie* case had not been made out considering that the lease had expired by effluxion of time. That aspect renders moot the whole argument whether what was issued by the Clerk was a notice or a mere reminder that the lease was coming to an end.

The learned Magistrate was also quite correct in resolving the second limb of GIELLA –VS- CASSMAN BROWN in the appellant’s favour for the reason that the respondent was apprehending loss that was not only quantifiable, but was in fact expressed in shillings and cents, and therefore perfectly capable of being compensated monetarily in any event. We think the learned Judge was clearly in error to hold that the respondent would suffer irreparable loss considering that, as this Court stated in NGURUMAN LTD –VS JAN BONDE NIELSEN & 2 OTHERS CIVIL APPEAL NO. 77 OF 2012;

*“ an injury is irreparable when there is no standard by which their amount can be measured with, reasonable*

*accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy”.*

On the basis of the foregoing alone, and deliberately avoiding making firm determinations on all the other issues that the trial must decide, we find and hold that this appeal succeeds.

The judgement of the Environment and Land Court is set aside with the result that the ruling and order of the trial Magistrate dismissing the respondent’s application for injunction is reinstated.

The appellant shall have the costs of this appeal and of the appeal before the Environment and Land Court.

*Dated and delivered at Nyeri this 20<sup>th</sup> day of May 2015.*

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**