IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 8 OF 2015

BETWEEN

HASSAN HURI …….....…..1ST APPELLANT

ABDULRAZAK HURI IBRAHIM……...2ND APPELLANT

AND

JAPHET MWAKALA…….……...……..RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Mombasa (Mukunya, J.) dated 20th June 2014

In

ELC No.239 of 2013)

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JUDGMENT OF THE COURT

The origin of this dispute are two letters of allotment in respect of land parcel **L.R.No.1956/348 – VOI MUNICIPALITY,** both issued on the same day – 6th November, 1998 – one to Japheth Mwakala, the respondent and the other to Linda Wavinya Kilonzo, not a party to this appeal but named as the 1st defendant in the suit. The latter, subsequent to the allocation and after obtaining a grant of lease, transferred the property to Hassan Huri (the 1st appellant) who in turn has transferred it to Abdulrazak Huri Ibrahim (the 2nd appellant).

The respondent brought an action against the three for a declaration that the title in respect of the property issued to the 1st appellant and the subsequent transfers were illegal, null and void. He also prayed for the cancellation of the title, and a permanent injunction against the 2nd appellant to restrain him from interfering or dealing with the property. For their part the appellants argued that the original proprietor, Linda Wavinya Kilonzo obtained a good title upon being issued with a grant; that the appellants were *bona fide* purchasers; that the question of ownership of the property was finally determined in HCCC **No.384 of 2009**, **Hassan Huri** v **Venance Mwashigadi & Jasper Mwashena**, where the 1st appellant

was declared the lawful owner of the property. That decision, we note, however was challenged in this Court and was the subject of Civil Appeal **No.34 of 2013**, which confirmed the decision of the High Court.

Along with the plaint the respondent brought an application for an order of temporary injunction to restrain the appellants together with the other named respondents (Linda Wavinya Kilonzo & Chief Land Registrar) from selling, disposing of, transferring or constructing upon the suit property until the suit is heard and determined. The application was based on the averments already adverted to, namely that the respondent was on 6th November, 1998 issued with an allotment letter, whose terms, including payment of requisite fees, were met; that all that remained was for the Commissioner of Lands to issue him with the document of title; that all along he was assured that this would be done in due course; that to his surprise, in July 2013 he learnt that the title to the very property had been issued to Linda Wavinya Kilonzo who had subsequently transferred it; that the property was not available for allotment after the letter of allotment was issued to the respondent and the requisite payment made; that the allotment together with assurances constituted legitimate expectation on the part of the respondent; and that the present purchaser has embarked on the development of the property which if not stopped would be prejudicial to the respondent's interest. Only the appellants filed a defence and opposed the application and argued that both the Municipal Council of Voi (at the time) and the Ministry of Lands had confirmed in writing that the property was allotted to Linda Wavinya Kilonzo; that the letter of allotment in the respondent's possession was not genuine; that it was incredible for the respondent to have been granted an allotment letter in 1998 and did nothing to get the title until 2013; that in any case the court in **H.CCC No.284 of 2009** also confirmed the 1st appellant's registered proprietorship hence the present suit was *res judicata*. With that affidavit evidence and the oral arguments on the application for a temporary order of injunction, the learned Judge (Mukunya, J) in a terse ruling of less than three pages held that whether or not it was lawful for the Commissioner of Lands to issue another letter of allotment after that of the respondent was not for him to determine in the application. That a consideration of:-

> ***"…that point determines the suit … Evidence on this issue shall no doubt be canvassed at the trial."***

On the next question he found that the present suit was not *res judicata* **Msa HCCC No.384 of 2009** as the parties were different and the issues in dispute between the parties were not determined. In conclusion the learned Judge stated;

> ***"I am convinced from the documents placed before me by the applicant that the balance of convenience favours the applicant. I grant him the orders he has applied with costs"***

This finding has been challenged in this appeal on four (4) ground which were argued before us by Mr. Omondi, learned counsel for the appellant in two clusters, namely; that the Judge failed to be guided by the well-established principles enunciated in the *locus classicus* case of **Giella v Cassman Brown & Co.Limited (1973) E.A 358** by merely addressing the last principle without being satisfied as to the *prima facie* status of the case presented or whether an award of damages would suffice in the circumstances. Secondly, that on the affidavit evidence presented to court the learned Judge erred in failing to find that under **section 23** of the Registration of Titles Act (now repealed) a certificate of title is *prima facie* evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, a position reiterated in **section 26** of the Land Registration Act. It was further submitted that the learned Judge failed to properly apply section 7 principles, on *res judicata* as set out in section 7 of the Civil Procdure Act and in particular Explanation (6) thereof. But in the opinion of Mr. Mwakisha, learned counsel for the respondent, the learned Judge was considering an interlocutory application and was not expected to make any conclusive findings; that the Giella principles were applied although in scanty manner; that confronted with two rival claims to the same property, the learned Judge, doing the best he could, made a plausible decision in balancing the convenience of the situation and the parties; that a Judge is not precluded in an application for injunction to consider the balance of convenience without recourse to the other two principles. Learned counsel further submitted that the learned Judge properly found that *res judicata* did not apply.

As we consider this appeal we bear in mind two cardinal points; that it arises from an interlocutory application; that the suit upon which the rights and interests of the parties will be determined after oral hearing is still pending. In that regard, in deciding this appeal we are restrained from making any definitive findings of either fact or law that may embarrass the fair trial of the pending suit. The second point to note is that the grant or refusal to grant an interlocutory injunction involves the exercise of judicial discretion. Such discretion, it has been held, must be exercised on sound reason in order to do justice to the parties before the court. The exercise of the discretion will, however be interfered with by an appellate court if the judge has misdirected himself in some matter and as a result arrived at a wrong decision or if it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been *mis injustice*. (See **Mbogo** v **Shah** (1968) E.A 93.)

Bearing in mind these two points, it is settled beyond debate that in this jurisdiction since the decision in **Giella** (Supra) case, fourty one (41) years ago, an interlocutory injunction will only be granted upon satisfaction of the principles laid down in the leading judgment of Spry, V-P. Those principles have been stated and the decision cited invariably in all the arguments and decisions in applications for injunction. Indeed the arguments before the learned were confined to those principles. Mr.Mwakisha, in presenting the respondent's case before the High Court, though not specifically citing the case, submitted that the respondent had presented a *prima facie* case with a probability of success; that the subject matter of the dispute being land, a sentimental commodity, an award of damages would not sufficiently compensate the respondent and that the balance of convenience a tilted in favour of the respondent. Mr.Omondi, on the other hand, specifically submitted that the principles in **Giella** & **Cassman Brown** had not been (recorded erroneously as had been) met.

Although it has been stated before that the three principles in **Giella** must be approached and applied sequentially, so that the second and third conditions must not be considered once the first condition is not established, the courts have traditionally considered all the conditions, one after the other. For instance a court will have a finding on the existence of a *prima facie* case, then proceed to determine whether damages would be adequate compensation *in lieu* of injunction and finally the balance of convenience. We reiterate this Court's recent decision in **Nguruman Ltd v Jan Bonde Nelson & 2 others**, Civil Appeal No.21 of 2014(UR)

> ***"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 v Afraha Education Society (2001) Vol.I 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 adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant's claim may 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 hurdles in between."***

In the matter before us, although the learned Judge's attention was drawn to the triple requirements before the grant of an injunction not only did he fail to cite in his terse ruling the very well-known authority but completely ignored the sequence of consideration and took the easier option by deciding the application only on the balance of convenience.

Without deciding the question of ownership of the suit property because we cannot do that in this appeal, faced with the *prima facie* affidavit evidence presented by both sides of the dispute, the learned Judge erred and ought not to have issued an order of injunction.

We say no more, save to conclude that the learned Judge did not exercise his discretion on sound reason as he misdirected himself on the applicable principles with the result that his decision was plainly wrong. We must, as a result interfere with it.

Accordingly the appeal succeeds. The order of the High Court granting a temporary injunction pending determination of the suit is set aside and is substituted with an order dismissing with costs to the respondents the application dated 28th October, 2013.

The appellant will also have costs of this appeal as well as costs in the High Court.

Dated and delivered at Mombasa this 19th day of June, 2015

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR