IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & MWILU, JJ.A)

CIVIL APPEAL NO. 46 OF 2011

BETWEEN

KENYA PIPELINE COMPANY LIMITED…….....…..……
APPELLANT

AND

STANLEY MUNGA GITHUNGURI…….....…….……...
RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Honourable Lady Justice H. Okwengu) dated 10th December 2010)

in

ELC NO. 395 OF 2010)

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JUDGMENT OF THE COURT

1. This is an interlocutory appeal from the ruling and order of the High Court of Kenya at Nairobi dated 10th December 2010 delivered by the **Honourable Lady Justice H. Okwengu** (as she then was). By the said ruling and following an interlocutory application by the respondent, the learned judge granted leave to the respondent to erect a fence and a gate for entry and exit into the easement area, avail keys to the appellant for access to the premises and upon the applicant erecting the gate and fence the appellant be restrained from removing or destroying the gate and fence pending hearing and determination of the suit. The judge also issued an injunction restraining the appellant from excavating digging or laying any new pipes pending the hearing and determination of the suit.

2. Aggrieved by the ruling, the appellant lodged a notice of appeal on the very same day the order was issued on 16th December 2010 and followed it up by filing this appeal on 8th March 2011. The memorandum of appeal lists 14 grounds of appeal that gravitate around the learned judge's exercise of her discretion in granting the orders sought in the respondent's application.

3. The appellant approached this court for relief under **rule 5(2)(b)** whereupon this court, differently constituted, issued an order on 18th March 2011 staying the injunction order granted by the trial judge in favour of the respondent.

4. Briefly, the relevant facts are that the respondent is registered as a proprietor of leasehold interest of the property known as LR No.12389 situated in Karen (hereinafter the property). Sometimes in September 1991, the respondent granted an easement over a portion of the property to the appellant permitting the appellant to lay pipes as part of the respondent's mandate to transport petroleum products from Mombasa to Western Kenya in the context of serving the public and the entire East African region at a consideration of Shs.151,000/= Sometimes in the year 2003, the respondent's gate and part of the perimeter fence were pulled down and the appellant brought excavators for the purpose of laying down additional pipes on the property. The respondent then filed suit in the high court seeking, *inter alia,* a permanent injunction restraining the appellant from laying any new pipes and for a determination on the nature and extent of the easement and damages. In the same breadth, the respondent sought interlocutory remedies to restrain the appellant from continuing to lay cables and further sought leave to erect a fence and gate and give keys to the appellant for the access by the appellant's representatives over the easement area. The ruling on the respondent's application seeking interlocutory reliefs is now the subject of this appeal.

5. At the hearing before us, **Mr. Fredrick Ngatia,** learned counsel for the appellant, made oral arguments in support of the appeal. In his submissions, learned counsel took us through the relationship between the appellant and the respondent relating to the dispute in a chronological manner since the easement was made in 1991. **Mr. Ngatia** submitted that there was a dispute when the gate was removed in the year 1993 but the same was amicably resolved when the gates were replaced and the appellant given keys to facilitate access by its officers. According to counsel, the trial judge misdirected herself on adjudicating on the removal of the gate and issuance of keys as that issue was no longer alive at the time of the proceedings. Learned counsel further argued that the trial judge misdirected herself in granting leave for the respondent to erect a fence on the property which already belongs to the respondent. Learned counsel contended that the appellant's action of laying a second pipeline on the property was within the easement that was in existence.

6. Learned counsel informed us further that pursuant to this court's ruling under **rule 5(2) (b)** the appellant has since laid the pipeline on the property and urged us to allow the appeal while dismissing the application in the high court. Counsel referred us to the appellant's list of authorities filed before this court on 24th June 2015 in support of his arguments. We were referred to the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** in support of the contention that a *prima facie* case that needs to be established is more than an arguable case. Counsel cited **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** to support his contention that courts do not grant an injunction without considering the other two limbs of damages and balance of probabilities. In abundance of caution learned counsel referred us to **Kamau v Kamau [KLR (E&L)I] 105** and the **Black's law dictionary 8th edition** for the definition of an easement.

7. We did not have the advantage of hearing from the respondent despite service of the hearing notice having been made by this court to the firm of **Wambo & Company Advocates,** on record for the respondent. From the record, the said firm did act for the respondent at the high court.

8. In our opinion, devoid of any antics, the real issue for our determination in this appeal is whether the respondent had satisfied the conditions for grant of interlocutory injunction as set out in **Giella V Cassman Brown & Company Limited (1973) EALR 358** so as to deserve the injunctive reliefs as were issued by the learned trial judge.

9. From the outset, we must reiterate what we have said time and again that this is an interlocutory appeal and that the hearing of the suit on merits before the High Court is yet to take place. Accordingly, in an interlocutory appeal where the suit is yet to be tried in the High Court, this court will refrain from expressing conclusive views on any issue which it thinks may arise in the pending trial (See **David Kama Gakuru V. National Industrial Credit Bank Ltd, *CA No. 84 of 2001)***. The granting of an interim injunction is an exercise of statutory and judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially. In **United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd *[1985] E.A 898,*** Madan J.A. (as he then was), aptly explained at page 908, the essence of this approach 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."

10. The principles for the grant of interlocutory injunctions set out in the **Giella v Cassman Brown case** (supra) where the court (Spry V.P. held at page 360 as follows:-

"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 the balance of convenience (E.A. Industries -Vs- Trufoods (1972) EA 420.)"

11. Those are the three-stage sequential enquiry that the learned Judge was expected to test against the facts before him. If the answer to the question whether the respondents had a *prima facie* case was in the affirmative, then the enquiry would move to the second stage – whether damages would be an adequate remedy. If the answer to this second question is no, then the enquiry becomes one of deciding where the balance of convenience lies. (see **Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others [2014] eKLR)** These stages are 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 & Others, Civil Application No. 142 of 1999 [2001] 1 EA 86.1**

12. These principles are well known and applied in Kenya as noted by Spry V.P. in the **Giella v Cassman Case (supra).** The learned judge of the high court must have been satisfied that the respondent had made out a prima facie case, this forming the basis upon which the injunctive relief was granted in the respondent's favour. **Mr. Ngatia** for the appellant contends that there was no case, let alone a prima facie one that was established from the facts presented before the trial court. We have reviewed the record and seek to answer whether a prima facie case was made out in favour of the respondent at the time the application was determined by the high court.

13. In ***Habib Bank Ag Zurich V. Eugene Marion Yakub, CA NO. 43 OF 1982 (unreported)*** this court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

The same caution was repeated in **National Bank Of Kenya V. DuncanOwour Shakali & Another,** ***CA NO. 9 of 1997*** when Omolo JA (as he then was) stated:

"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

More recently, this Court echoed the same sentiments in **Vivo Energy Kenya Limited V Maloba Petrol Station Limited & 3 Others [2015] eKLR** following the decision in **Nguruman Limited Case *(supra)*** in the following terms:

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

14. We note that the existence of an easement is common ground, the easement having been acknowledged by the pleadings and correspondence on record by both parties. The main contention is whether the substratum of the suit being the replacement of the fence and gate was in issue at the time when the respondent made the application which was subsequently determined by the high court. It is evident that by a letter dated 8th April, 1993 the respondent requested to be allowed to repair the gate at a cost of Shs.98,500/-. By a letter dated 29th August, 1994, the respondent accepted receipt of the repair sum of shs.98,500/= in reimbursement of the repair costs, clear evidence that the fence was repaired to the respondent's satisfaction. This position is confirmed by paragraphs 10 and 11 of the respondent's supporting affidavit sworn on 24th August, 2010. However, through a letter dated 10th September 2003, the respondent made a fresh complaint to the appellant regarding removal of gates by the appellant's agents and by a letter dated 30th March 2004 handed over the keys to the gate to the appellant to facilitate the access by the appellant's representatives. The appellant accepted the keys vide its letter dated 2nd April 2004. This complaint made through the letter dated 10th September 2003 is what has been captured in paragraph 7 of the plaint as the basis of the claim. From the foregoing, it is clear in our mind that when the keys were being forwarded to the appellant by the respondent, a gate was in existence.

15. We also bear in mind that the application by the respondent before the high court was filed on 24th August 2010. In paragraph 16 of the respondent's affidavit in support of the application for temporary injunction, the respondent concedes that the defendant replaced the gates though the appellant's inspectors continued to leave the gates open necessitating the granting of keys to the appellant in terms of the letter dated 30th March 2004.

The respondent therefore sought to erect another gate and fence on the premises and claim the cost from the defendant as per paragraph 23 of the supporting affidavit aforementioned. The parties proceeded to explore the possibility of an out of a court settlement. However, through a supporting affidavit sworn by the respondent subsequently in support of a certificate of urgency application to have the application heard by court, the respondent at paragraph 10 stated as follows:

> ***"10. THAT recently the defendant have (sic) proceeded to remove the said fence and brought back Tractors and excavators and are even packing (sic) on the said portion of my land …."***

16. In response, the appellant through paragraph 3 of its supplementary affidavit deponed by **Jenaro G. Ithinji** denies the removal of the fence erected by the respondent and further states as follows:

> ***"…The actual position is that the fence was erected on the way leave in such a way that it can be opened and closed as need arises as the ongoing works progress."***

This averment in our view is consistent with the position we have stated above as to the existence of a fence, gate and keys to facilitate the entry and exit into the property. The same position was restated by Mr. Magut learned counsel for the appellant at the trial before the high court. Moreover, in paragraph 6 of the said supplementary affidavit, there is an indication that the parties' representatives and advocates visited the property on 22/09/2010 and concurred that the destruction of the gate referred to by the plaintiff happened before the suit was presented. This position was not rebutted at the hearing of the

application or at all

17. Having considered the facts on record, it is clear in our minds that by the year 2010 when the respondent brought its interlocutory application for determination before the high court, there existed a fence and a gate accessible by use of keys. The respondent did not specify in his certificate of urgency application what removal or how recent the removal of the fence had occurred. This general omission is likely to have led the trial judge to believe that the removal of the fence had occurred during the pendency of the suit thereby the urgent need to address the same through grant of injunctive relief. That was a misdirection. Accordingly and in terms of our mandate on a first appeal as set out in **Rule 29(1)** of this Court's Rules, namely, to re-appraise the evidence and to draw inferences of fact, we infer that the substratum of the suit was not in existence at the time of determination of the application for interlocutory relief. Consequently, no prima facie case had been established on a balance of probabilities.

18. Turning to the second principle of the **Giella vs Cassman Brown Case**(supra), relating to irreparable injury that cannot be adequately compensated in damages, the respondent submitted that the portion covered by the easement is in the middle of the Plaintiff's land and therefore damages would not be adequate remedy. This submission is, with respect, inconsistent with the prayer (c) of the plaint which seeks damages. The Court of Appeal also had occasion to deal with a similar issue in **Muiruri vs Bank Of Baroda (Kenya) Ltd** ***K.L.R 2001 183 at page 188*** where, while dealing with an injunction relating to land, it said:-

> ***"Besides, 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"***

We agree that land matters are very emotive and loss may not ordinarily be adequately compensated by way of damages. However, there is consistent evidence on record that not only did the appellant acquire the easement over the respondent's suit for shs.151,000/= but also the respondent was compensated with shs.98,000/= in reimbursement for repairs made to the fence and gate of the property. In addition, the respondent has averred in paragraph 15 of his supporting affidavit dated 12th October 2012 that he is not opposed to the appellant's activities geared towards achieving vision 2030 which we construe to include the laying of cables provided they are done within the law. This in our mind and on a balance of probabilities confirms that the respondent in principle was agreeable to the activities of the appellant on the respondent's property and the respondent can be adequately compensated in damages which can be assessed by the trial court if the appellant is found to have been in breach of the terms of the easement.

19. As already stated, we do not find it necessary to delve into the merits or otherwise of the nature and extent of the easement at this stage, that being a matter for the trial court's determination. See **Trade Agrain Limited v. Awal Limited [2004] eKLR**. It is for this reason and we expect that learned counsel appreciates that we shall not consider submissions or case law cited by him in this respect at this juncture.

20. We are of the view that the trial judge was unwittingly led by the respondent into leaving out of account some factors which should have been considered in making her determination and thus erred in her ruling. We have also considered the present status of the property following this court's earlier decision under **rule 5(2)(b)** of this court's rules. Learned counsel for the appellant indicated that pipelines have since been laid on the property.

21. Taking the totality of the circumstances we have considered, we allow the appeal, set aside the High Court ruling and order of Lady Justice H. Okwengu (as she then was) dated 10th December, 2010 and substitute therefor an order dismissing the respondent's chamber summons application dated 24th August, 2010 with costs. We order that the appellant shall have the costs of this appeal.

Dated and delivered at Nairobi this 25th day of September, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

……..…

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR