IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AZANGALALA, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 62 OF 2010

BETWEEN

DR. GEORGE GITAU WAINAINA……....……APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED……..1ST RESPONDENT

EPHRAIM WAMBUI MIANO……..……..…2ND RESPONDENT

A. M. MACHARIA……3RD RESPONDENT

(Appeal from the Ruling and the Order of the High Court of Kenya at Machakos (Lenaola, J.) dated 5th February 2010

in

HCCC No. 113 of 2009)

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JUDGMENT OF THE COURT

The appellant, **Dr. George Gitau Wainaina**, as plaintiff, filed Machakos HCCC No. 113 of 2009 where various reliefs were sought among this was that a statutory notice of sale issued by the 1st respondent, **Kenya Commercial Bank Limited** be declared null and void; that a permanent injunction be issued restraining the three respondents from dealing with a parcel of land known as L.R. No. Kajiado/Kaputiei/4302 (the correct description is Kajiado/Kaputiei North/4302); declaration that the appellant was the bonafide purchaser of the suit land and any other orders of the Court to meet the ends of justice.

Contemporaneous with the suit was an application by Chamber Summons filed under a Certificate of Urgency where more or less similar orders were sought.

What emerges from the Plaint, the application and the affidavits makes the suit filed before the High Court peculiar. We say this although the suit itself has not been heard but because of the nature of reliefs sought and the parties involved. It is undisputed that the 2nd respondent **Ephraim Wambui Miano**, is the registered proprietor of the said parcel of land L.R. No. Kajiado/Kaputiei/4302. He also owned another

parcel of Land L.R. No. Kajiado/Kaputiei/4303 and being desirious of obtaining bank facilities he approached the 1st respondent which granted him loans which were secured by charges which were created over those lands under the Registered Land Act (now repealed).

The 2nd respondent defaulted in payment of the loans and the lands became subject to an exercise of a statutory power of sale by the 1st respondent. It would appear that when the 1st respondent decided to exercise such power the 2nd respondent approached the 1st respondent for certain accommodation to ensure that the properties were not sold. That led to the following scenario.

By an agreement made in writing on 15th November, 2007, made between the 2nd respondent and the Appellant and drawn by the 3rd respondent, **A.M. Macharia** as advocate for both parties, it was agreed *inter alia* that the 2nd respondent would sell and transfer his title and interest in the two parcels of land for an agreed consideration of Kshs.5,000,000/=. It was agreed also that upon successful sale of the two parcels of land the sum of Kshs.1,400,000/= was to be paid to the 1st respondent through the 3rd respondent. There is evidence on record that the sum was paid by the 3rd respondent to the 1st respondent upon receipt of part of the purchase price from the appellant. Subsequently, the 1st respondent released and discharged L.R. No. Kajiado/Kaputiei North/4303. Upon demand to release the other title the 1st respondent rejected the demand stating that it could only do so upon payment of sums due in its books. Those sums were not paid. The 1st respondent therefore issued a statutory notice in excercise of its rights of sale.

That is the concatenation of events that led to the suit before the High Court.

We used the word peculiar earlier, and we do so again, because the suit was taken before the High Court by a party who despite the averments in the plaint was neither the owner of the subject property, nor the chargor of the same.

In a statement of defence presented by the 2nd respondent the appellant's claims were denied in total. It was even alleged in that defence that the agreement entered between the 2nd respondent and the appellant was vitiated as it was tainted with fraud and was made using duress and misrepresentation therefore making it unenforceable. As we have stated the suit is pending in the High Court and we should therefore not comment on its merits. The application was heard by Lenaola, J., who upon consideration found that no prima facie case had been made out to warrant the orders sought and the application was thus dismissed. That is what has provoked this appeal.

In the Memorandum of Appeal four grounds of appeal are set out. The appellant complains that the learned Judge erred in law and in fact in failing to consider the evidence on record in its entirety. In the second ground the learned judge is said to have erred in failing to consider and appreciate the supplementary affidavit by the 1st appellant sworn on 6th October, 2009 and thereby, through the said omission arrived at an erroneous decision. In the third ground the learned judge is faulted in law and fact by holding that the appellant had not satisfied the conditions for granting of an injunction in a case of such a nature. In the final ground the learned judge is said to have erred in law and fact, in considering extraneous matters and thus arriving at an erroneous decision.

When the appeal came up for hearing before us on 13th October, 2015 Dr. George Gitau Wainaina the appellant appeared in person while learned counsel Mr. Chrispin Wainaina appeared for the 2nd respondent. Although **Miss Akonga**, advocate was in court to appear for the 1st respondent, she was not prepared for the hearing and did not address us.

The appellant submitted that the learned Judge failed to consider the evidence on record in its entirety and also failed to consider the supplementary affidavit. The appellant thought that there had been misrepresentation by the 1st respondent and submitted that the judge was wrong in holding that the principles in **Giella v. Cassman Brown & Co Ltd. [1973] KLR 358** were not satisfied. For this he

prayed that he be granted the injunction denied him at the High Court.

Mr. Chrispin Wainaina opposed the appeal and thought that no grounds had been advanced to overturn the ruling of the learned Judge. According to the learned counsel the judge did not overlook any facts; he did not consider extraneous matters and did not fail to consider relevant matters. Counsel also pointed out that the subject land fell within the provisions of the Land Control Act (now repealed) and the consent of the relevant Land Control Board had neither been sought nor obtained, which would make any transaction void. In any event, concluded counsel, the piece of land subject of the dispute had a value which could be quantified and therefore damages would be an appropriate remedy.

Although in a first appeal such as this one, it is our duty to re-consider the evidence and come to our own conclusions, this was an interlocutory application and the main suit is awaiting hearing. We are only called upon by the appellant to find that the learned judge erred in exercise of discretion in the application that was before him where he refused to grant an injunction.

We have considered the record of appeal, memorandum of appeal, submissions made and the law.

After considering the material placed before him, the learned Judge found that the principles in **Giella v. Cassman Brown** (supra) had not been satisfied. He found as a fact that the appellant had engaged the service of the 3rd respondent who was an advocate and the sale agreement was executed with the 2nd respondent when the appellant knew that the title L.R. No. Kajiado/ Kaputiei North/4302 was not free from encumbrances. The learned judge considered the provisons of **Section 73(a)** of the **Registered Land Act** and came to the conclusion, correctly, we think, that the 1st respondent was entitled to exercise its statutory power of sale because neither the chargor nor the appellant had offered to redeem the charged property by paying the sum owed to the 1st respondent.

The granting of an interlocutory injunction is a matter of judicial discretion. (See **National Bank of Kenya Ltd & 2 Others v. Sam-Con Ltd [2003] KLR 462).** Therefore, this Court has to keep in mind that it can only interfere with the exercise of discretion by the lower court in exceptional circumstances. That principle is set out for instance in **United India Insurance Co. Ltd. v. East African Underwriters (Kenya) Ltd [1985] E.A 898,** at p. 908 where Madan J.A (as he then was) stated 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***
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> ***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."***

This discretion must be exercised in accordance with the defined legal principle set out in **Giella v. Cassman Brown & Co. Ltd.** (supra) where at p. 360 it is stated:

> ***"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… "***

This position has been developed through case law. Justice Hoffman in the English case of **Films Rover International v. Cannon Film Sales Ltd [1986] 3 All ER 772 at page 780-781** made this point

regarding the grant of

injunctive relief**:**

> ***"A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***

Hence, the Court in addressing an application for an interlocutory injunction should address the following questions:

i. Has a *prima facie* case with a probability of success been established?

ii. Does the applicant stand to suffer irreparable harm or damage?

iii. If in doubt, on which side does the balance of convenience lie?

In the case before him we are of the respectful opinion that the learned judge took the correct approach in dealing with the application. From his ruling it is evident that he stopped at the first question after finding that the appellant failed to establish a *prima facie* case with a probability of success. The learned judge was entitled not to delve into the other limbs having found that there was no prima facie case established by the appellant.

This Court in **Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others [2014] eKLR** elaborated the principle of sequential consideration of the limbs for injunction as follows:

> ***"……..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 yes, then the enquiry moves 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. 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"***

In **Habib Bank AG Zurich v. Eugene Marion Yakub (Nairobi Civil Application No. 43 of 1982) (UR)** this Court defined probability of success as follows:

> ***"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."***

Later, in **Mrao v. First American Bank of Kenya Ltd. & Two Others [2003] eKLR (C.A Civil Appeal No. 39 of 2002**), this Court expanded the definition of *prima facie* case as follows:

> ***"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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"***.

The learned judge in the matter appealed from, in considering whether a *prima facie* case with a probability of success had been established, correctly narrowed down on the main question by stating as follows:

> ***"The orders sought are really targeting the 1st Defendant which had given a notice of its***

intention to sell the suit property. Especially since the 2nd Defendant has no right to dispose of it as feared by the Plaintiff and as for the 3rd Defendant, as an advocate, he has no such right at all."

The learned judge exercised his discretion correctly and was right to find that the relevant principles on which injunctive relief is granted in an application such as was before him had not been met. This appeal has no merit and we dismiss it with costs to the 2nd respondent.

Dated and Delivered at Nairobi this 13th day of November, 2015.

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR