



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO 95 OF 2012

BETWEEN

JOHN MUSYOKA MUSEMBI (suing as the legal

representative of the estate of NASON MUSEMBI

MUSOMBA (DECEASED).....APPELLANT

AND

HENRY MULI KISENGA.....RESPONDENT

(an appeal from the ruling of the High Court of Kenya at Machakos (Ngugi, J.)

dated 27th February 2012

in

High Court Civil Case No 141 of 2011)

JUDGMENT OF THE COURT

The appellant and his brother entered into a sale agreement with the respondent in respect of the property known as Machakos/Konza/North Block1/1125 (the suit property) which on 1st April 1992, was registered in the name of Nason Musembi Musomba, the deceased. The respondent paid the full purchase price and took possession of the suit property. Later, intent on recovering the title to the suit property from the respondent, the appellant filed suit against him; that suit is still pending in the High Court. The appellant also filed an application for an order of injunction to bar the respondent from any dealings with the suit property pending the hearing and determination of the suit.

The appellant alleged that neither he nor his brother had any legal capacity to deal with their deceased father's estate as neither of them held a grant to the estate, and that the sale agreement entered into by the parties had become void for failure to comply with sections 6 and 7 of the Land Control Act. That law requires that consent from the Land Control Board be procured before the sale and transfer of any agricultural land.

In response, the respondent, while admitting the averments of fact made by the appellant, refuted the argument that the sale agreement was void. He claimed that he had paid the full purchase price of KShs 200,000.00 to the appellant; that he took over possession of the property from the appellant; and that notwithstanding the absence of consent from the Land Control Board, he had acquired the suit property by way of prescription and adverse possession.

The appellant's application for temporary injunction was dismissed by the High Court in the following terms:

“what is clear, in addition to the balance of convenience tilting in favour of the [respondent] though is that the [appellant] does not deserve any equitable remedy. He has not come to the Court with clean hands. He is barred from seeking equitable relief by the Clean Hands doctrine. He does not deserve the Court's favourable exercise of its discretion. The inequitable conduct of the [appellant] relates directly to the obligation sought to be enforced.

Hence the clean hands doctrine applies with particular force here.”

The appellant was dissatisfied with the failure of the trial court to exercise its discretion in its favour and consequently filed the present interlocutory appeal. In essence, the appellant is aggrieved by the decision of the trial court refusing to grant him the orders sought in his application.

In an interlocutory appeal, such as this one, the Court cannot make definitive findings before the facts are canvassed in the High Court. We have however considered the application, and the oral submissions of counsel in a bid to perform our duty as a first appellate court, which, as was succinctly stated by this Court in *Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212* is to:

“[first], reconsider the evidence, evaluate it itself and draw its own conclusions Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

Making a decision whether or not to grant an injunction is an exercise based on discretion, and the primary question we will be asking ourselves is whether or not the trial judge exercised his discretion in a manner that warrants our interference. This Court will not easily interfere with the exercise of discretion by the High Court unless it is clear that it has not been properly exercised. As was stated by this Court in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR (Civil Appeal No. 21 of 2014)*:

“The granting of an interim injunction is an exercise of 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.”

It is with these principles in mind that we now consider if the learned judge improperly exercised his discretion. The principles on the grant of injunctions have long been settled. In the often cited case of *Giella Versus Cassman Brown And Company Limited (1973) EA 358* the Court held that:

“The conditions for the grant of an interlocutory injunction are now 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”

This Court reiterated the need for an applicant seeking an injunction to establish those principles in *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR (Civil Appeal No 77 of 2012)* where it was held that:

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

to;

(a) establish his case only at a prima facie level,

b. demonstrate irreparable injury if a temporary injunction is not granted, and

c. ally (sic) any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests (sic) 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.”

In the instant appeal, the High Court in determining the first limb, that is whether or not the appellant had presented a prima facie case, rendered itself as hereunder:

“... the Plaintiff’s case is based on legal arguments arising from the provisions of the Land Control Act and the Law of Succession Act. The Defendant’s case is based on our jurisprudence on the equitable right of one who has purchased land but failed to obtain Land Control Board consent to either rely on the doctrine of trust or adverse possession as against the seller. The Defendant’s position is made a little more tenuous in this case because the sellers did not in fact hold title to the land. For all intents and purposes, the parties were intermeddling in the estate of the deceased. It is not clear who, between the Plaintiff and the Defendant, would hold sway in their respective legal arguments.”

A ‘prima facie case’ as was stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR (Civil Appeal No 39 of 2002) 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.

...

a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

In *Nguruman Limited v Jan Bonde Nielsen & 2 others* (*supra*), the Court further proclaimed that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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.”

In the present appeal, the appellant admits entering into an agreement for the sale of the suit property, and receiving a down payment for it, but claims that the sale has since been voided by the fact that the relevant statutory consents were not procured. The relevant statutory consents to transfer were to be obtained by the appellant.

The respondent on the other hand, has claimed that he paid the full purchase price for the parcel of land and thereafter took possession of the property, and that in any event, as he has been in occupation of the property for a long period of time, he has obtained title thereto by prescription.

The fact that the appellant has not denied receiving money for the purported sale calls into question the veracity of his claims that he had no authority to sell the suit property. We are alive to the fact that the suit property is registered in the name of the deceased, and thus, it has not been shown that that the appellant presented a prima facie case that either he or the estate would be deprived of the property. The applicant has not shown that he has a legal or equitable right that should be protected by injunction.

The appellant has also not shown that he is in danger of suffering irreparable injury. In *Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)* it was held that:

“... 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 may appear at that stage.”

The property is still registered in the name of the deceased, and there is therefore no danger that the respondent would act in a manner that would interfere with the legal title to the property. In any event, we are of the view that even if the appellant was to suffer any loss, such loss would easily be recompensed by an award of damages.

Another factor that militates against the appellant is the fact that he does not deny the sale of the land or receiving the money from the respondent, and we agree with the learned judge that the appellant does not have clean hands, and therefore is not entitled to the equitable remedy he seeks. Discretionary remedies such as injunctions cannot be used to perpetuate deceit and injustice.

Ultimately, the balance of convenience does not favour the appellant who failed to show that the trial judge exercised his discretion wrongly. No case was made for us to interfere with the decision of the learned judge. In the result, we dismiss this appeal with costs to the respondent.

Dated and delivered at Nairobi this 6th day of November 2015

M. KOOME

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR