



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO.21 OF 2014

BETWEEN

VIVO ENERGY KENYA LIMITED.....APPELLANT

AND

MALOBA PETROL STATION.....1ST RESPONDENT

TOTAL KENYA LIMITED.....2ND RESPONDENT

BUKHUNGU PETROLEUM LIMITED.....3RD RESPONDENT

TIMOTHY ASOMBA MALOBA.....4TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kakamega (Chitembwe J.) dated 11th April 2014

in

H.C.L & E.C.No 345 of 2013)

JUDGEMENT OF THE COURT

This is an interlocutory appeal from the ruling and order of the High Court of Kenya at Kakamega (***Chitembwe, J.***) dated 11th April 2014. For clarity and ease of reference we shall refer to the parties in the appeal as follows: the appellant, Vivo Energy Kenya Limited, shall be referred to as ***Vivo***; the 1st respondent, Maloba Petrol Station Limited, as ***Maloba Station***; the 2nd Respondent, Total Kenya Ltd, as ***Total***; the 3rd respondent, Bukhungu Petroleum Ltd, as ***Bukhungu***; and the 4th respondent Timothy Asomba Maloba, as ***Mr. Maloba***.

By the said ruling the learned judge granted an injunction restraining Vivo, Maloba Station and Mr. Maloba from interfering with Total's possession and operations on ***LR No. Kakamega Municipality/Block 1/548 (the suit property)*** until the hearing and determination of ***Kakamega High Court Land & Environment Case No. 345 of 2013***. Aggrieved by the ruling, Vivo lodged a notice of appeal the same day the ruling was delivered and followed it up by filing this appeal on 25th April 2014.

In our opinion, shorn of all semantics and obfuscation, the real question in this appeal is whether Total, in whose favour the learned judge issued the injunction, had satisfied the conditions for grant of an injunction, and in particular whether it had made out a *prima facie* case with a probability of success.

At the center of this dispute is the question, who between Vivo and Total, is entitled to possession of the suit property? Vivo claims that at all material times it had leased the suit property from Maloba Station, the registered proprietor, and was therefore entitled to possession because its lease was duly registered. On the other hand, Total stakes its right to possession of the same property on a prior unregistered lease agreement or agreement for lease between itself and Mr. Maloba, a director of Maloba Station.

The primary facts, which are not seriously disputed, may be stated as follows. Sometimes in 1986, Mr. Maloba was the holder of a letter of allotment in respect of a property that was then described as:

“Unsurveyed plot shown edged red on Plan Number TP 36/XI/166B attached to the letter of allotment Reference Number 31001/XI/105 of 27th November 1986 situate at Kakamega Town.”

It is common ground that the above narrative described the suit property. On or about 27th April 1987, Total entered into an *agreement for lease* with Mr. Maloba by which it was agreed that upon the title of the said unsurveyed plot being issued in Mr. Maloba's name, the parties would enter into a formal lease agreement by which Total would lease that property for a period of 25 years at a consideration of Kshs 500,000/- payable in advance. Annexed to that *agreement for lease* was a form of lease, which the parties agreed in the meantime, would regulate their relationship.

Pursuant to that arrangement, Total took possession of the suit property and installed thereon petroleum tanks, pumps and other equipment necessary to operate the business of a petrol station. At all material times, no formal lease was ever registered between Total and Mr. Maloba.

On 19th May 1989, the suit property was registered under the ***Registered Land Act, Cap 300*** (now repealed) in the name of Maloba Station, a limited liability company, rather than in the name of Mr. Maloba. It would appear that the relationship between Total and Mr. Maloba continued to be regulated as before, under the *agreement for lease*.

On 1st February 2005, Total and Mr. Maloba entered into what is described as ***“Supplemental Agreement Variation of Lease”*** by which the parties agreed to extend the term by an additional 5 years to 27th April 2017 at a monthly rent of ***Kshs 18,333.00***. It will be noted that at the time of this extension and variation, the suit property was registered in the name of Maloba Station, which was not a party to the Supplementary Agreement Variation Lease. As in the previous case, this new lease was not registered.

Matters came to a head on 18th November 2013 when Vivo, pursuant to a lease agreement of even date, leased the suit property from the registered proprietor, Maloba Station. The lease was to run for a period of 20 years with effect from 1st October 2013 at the rent of Kshs 20,400,000/- for the first ten years payable in accordance with an agreed schedule and an amount to be negotiated and agreed subsequently to cover the last ten years of the lease. This particular lease was duly registered on 18th November 2013, as was a charge of Kshs 20,400,000/- over the suit property in favour of Vivo. Thereafter Vivo took possession of the suit property.

What followed subsequently was a string of actions, one suit after another; one application after another. By a plaint dated 25th November 2013, Maloba Station commenced proceedings in the High Court at Kakamega (***HCE & LC No. 345 of 2013***) seeking, *inter alia*, an injunction to prohibit Total from interfering with the performance of the lease between it and Vivo. Simultaneously with the plaint Maloba Station also filed, under certificate of urgency, a Notice of Motion and prayed for an injunction to restrain Total from interfering with the operation or performance of the registered lease and an order for the maintenance of the status quo on the suit property pertaining to its occupation and use. On 25th November 2013, Chitembwe J. issued the interim orders in favour of Maloba Station.

Some 400 kilometers away in Nairobi, Total, by a plaint also dated 25th November 2013 filed a suit (**HCCC No. 498 of 2013**) against Maloba Station, Mr. Maloba and Vivo in which it sought *inter alia* a declaration that there existed a valid lease over the suit property in its favour up to April 2017. It also sought a declaration that it was entitled to uninterrupted and quiet possession of the suit property. Contemporaneously with the suit, Total applied for an injunction to restrain Maloba Station, Mr. Maloba and Vivo from interfering with its possession and operations on the suit property and a mandatory injunction to compel them to remove their equipment, stock or branding from the suit property.

On 27th November 2014, **Onyancha, J.** issued a temporary injunction restraining the defendants in the Nairobi suit from interfering with Total's possession and operations on the suit property pending *inter partes* hearing of the application. As of that date, there was therefore an untenable situation where two separate and essentially contradictory orders of the High Court were in force regarding the same property. Be that as it may, subsequently Total applied in the suit in Nairobi for the OCPD Kakamega to be directed to assist it in the enforcement of the order granted by Onyancha, J. For its part, Vivo applied for stay or setting aside of the orders issued by Onyancha, J.

Ultimately, on 3rd December 2013 the suit and the applications in Nairobi were transferred to Kakamega where they ought to have been filed in the first place. On 9th December, 2013 Bukhungu applied to be made a party in the suit in Kakamega and for an order allowing it to continue operating and trading on the suit property until the determination of the suits. Subsequently Chitembwe J. consolidated the suits and applications, before hearing and determining the same.

By his ruling the subject of this appeal, the learned Judge dismissed the application by Maloba Station and discharged the interim orders that he had granted in its favour. As regards the application by Total, the same was allowed while that by Vivo to set aside the interim orders that had been given in favour of Total was dismissed. The application by Bukhungu was allowed to the extent of its agreement with Total.

The memorandum of appeal by Vivo contains some 21 grounds of appeal challenging the entire ruling of the High Court. At the hearing of the appeal, **Mr. Ochieng Oduol** and **Mr. Steve Luseno**, learned counsel for Vivo clustered the grounds of appeal into seven grounds, faulting the learned Judge for making final determinations in an interlocutory appeal; for misapprehending the test for award of an interlocutory injunction; for misapprehending the doctrine of privity of contract; for misapprehending the concept of lifting the corporate veil and the circumstances under which it may be resorted to; for giving unregistered instruments primacy over a registered instrument; for committing procedural irregularities; and for misapprehending the test for granting a mandatory injunction at an interlocutory stage.

Mr. Tim Okwaro, learned counsel for both Maloba Station and Mr. Maloba and **Mr. Alex Thangei**, learned counsel for Total addressed the appeal in more or less the same format. For reasons that will become clear shortly, we do not feel constrained to pronounce ourselves on all the issues raised by the parties since this is an interlocutory appeal and the main suit is yet to be heard before the High Court. Indeed, at the hearing of this appeal, the parties prosecuted the same as if it was an appeal from the final judgment of the High Court and came perilously close to inviting us to make final and conclusive findings.

Vivo and Total prepared comprehensive written submissions, which were expounded and elucidated at the hearing of the appeal. On the first ground, Mr. Oduol submitted that the learned Judge had erred by making final determinations in an interlocutory application. What was before the

learned judge, counsel contended, was mere affidavit evidence upon which the court could only determine whether Total had made out a *prima facie* case, but not make final determinations. A final determination of the issues in dispute, it was urged, could not be made without a full hearing in which the evidence of the parties is tested by cross-examination.

Counsel submitted further that in his ruling, the learned Judge had made final and conclusive findings and determinations of fact, among them that Mr. Maloba had capacity and had in fact bound Maloba Station in the transactions; that Mr. Maloba was guilty of fraud; that the corporate veil of Maloba Station must be

lifted; that after lifting the corporate veil the learned Judge had concluded that Mr. Maloba was hiding therein; that Total had a valid lease which was enforceable against Maloba Station and Vivo; and that the unregistered lease between Total and Mr. Maloba took primacy over the registered lease between Vivo and Maloba Station.

On the test for grant of an interlocutory injunction, learned counsel submitted that although the learned Judge had correctly adverted to the principles as stated in **GIELLA V. CASSMAN BROWN [1973] EA 358**, he nevertheless completely failed to apply the principles in the application before him. Learned counsel lamented that after referring to the **GIELLA** principles, the learned judge had proceeded to cite **AMERICAN CYANAMID V. ETHICON LTD [1975] AC 396** which he erroneously stated had reduced the principles to be considered into two only, namely requirement of irreparable damage and the balance of convenience.

Relying on the decisions of this Court in **KENYA COMMERCIAL FINANCE CO LTD V. EDUCATION SOCIETY [2001] EA 86** and **NGURUMAN LTD V. JAN BONDE NIELSEN & 2 OTHERS**, Mr. Oduol argued that the three conditions for granting an injunction are considered sequentially, so that the second and third conditions cannot be considered once the first condition is not established. In the application before the High Court, counsel submitted, no *prima facie* case had been made out because the lease upon which Total's case was founded was not with Maloba Station, the registered proprietor of the suit property, but with Mr. Maloba, a separate legal personality. In addition it was contended, that lease was not registered, while on the other had there was a registered lease between the proprietor of the suit property and Vivo. It was also submitted that Total had no cause of action against Vivo and that in the totality of the circumstances of this case the learned Judge had erred by concluding that Total had established a *prima facie* case with a probability of success.

It was learned counsel's further or alternative submission that even if it were taken that a *prima facie* case had been made out, which Vivo strongly disputed, any loss or injury suffered by Total was not irreparable and could easily and adequately be remedied by an award of damages. It was submitted on the authority of the decision of this Court in **AMRITLAL V. CITY COUNCIL OF NAIROBI, CA NO 47 OF 1981** that where an award of damages constitutes an adequate remedy, an order of injunction cannot issue.

On privity of contract it was submitted that there was no privity of contract between Maloba Station, the registered owner of the suit property, and Total, whose purported lease was with a third party, Mr. Maloba.

Similarly, it was contended that there was no privity of contract between Total and Vivo, the lawful leasee of the suit property. In those circumstances we were invited to find that Total had no cause of action against Maloba Station and Vivo and that therefore Total could not and did not establish *prima facie* case to justify grant of an interlocutory injunction.

Regarding the lifting of the corporate veil, it was submitted that the learned Judge had totally misapprehended the purpose of the concept by purporting to lift the veil so as to fix liability on the company rather than perceiving the concept as a last resort measure, in appropriate cases, for demystifying the company and attaching liability on its directors or shareholders personally. The lifting of the veil, it was argued is the exception to the general rule; is a last resort remedy; is resorted to with great circumspection and in the present case, should never have been resorted to, let alone in an interlocutory application. The decisions in **PREST V. PETRODEL RESOURCES LTD & OTHERS [2013] UKSC 34** and **TRANSNATIONAL BANK LTD V. ELITE COMMUNICATIONS LTD, HCCC NO 2655 OF 1999** were relied upon in support of those propositions.

Vivo's further submission was that the learned Judge had blurred or ignored the fundamental distinction in law between Mr. Maloba as a director and shareholder of Maloba Station and Maloba Station as a separate and distinct legal personality. It was argued that in so far as the suit property was registered in the name of Maloba Station, Mr. Maloba the director and shareholder had no proprietary interest in that asset of the company, which he could transfer and vest in Total. The decisions in **MACAULA V. NORTHLIFE ASSURANCE CO LTD & OTHERS [1952] 94 LJ PC 155** and **A. L. UNDERWOOD**

LTD V. BANK OF LIVERPOOL & MARTINS [1924] All ER 230 were cited to bolster the submission.

The ruling of the learned Judge was next impugned on the ground that it had ignored on the one hand, a duly registered lease between Maloba Station, the registered proprietor of the suit property and Vivo and given primacy on the other hand, to a purported unregistered lease between Mr. Maloba, who had no proprietary rights over the suit property, and Total. Learned counsel contended that **section 47** of the repealed **Registered Land Act** required in mandatory terms that all leases for a period exceeding two years must among other things be registered. Without a registered lease as required under that provision, it was submitted, all that Total had was a contract *inter partes* which could not be enforced against or affect the rights of third parties like Vivo. The decisions in **GROSVENOR V. ROGAN-KAMPER (NO. 2) [1977] KLR 123**; **SAFARICOM LTD V. OCEANVIEW BEACH HOTEL & 2 OTHERS, CA NO NAI. 327 of 2009** and **NATIONAL OIL CORPORATION OF KENYA V. ROBERT OBEGI OBANDE & ANOTHER HCCC NO 94 OF 2014 (KISII)** were relied upon in support of the submission.

The other complaint by Vivo was that the learned Judge had committed or condoned various procedural improprieties. Among these was that on 28th March 2014 the learned Judge had issued *suo motu* order directing Maloba Station to furnish the court with information and evidence, which the court, rather than the parties, considered necessary. It was submitted that by that order, the learned Judge had abandoned his role as a neutral arbiter of the dispute as presented by the parties and descended into the arena of the conflict, thus vitiating the entire ruling.

It was also contended that the learned Judge had addressed and determined matters that had not been raised by any of the parties such as the issue of mandatory injunction, re-branding of the suit premises and the issue of award of final declaratory orders at the interlocutory stage. On the authority of **GALAXY PAINTS CO LTD V. FALCON GUARDS [2000] 2 EA 385** it was submitted that the court may only pronounce itself on the issues as framed by the parties or as left to it by the parties to decide. In the instant case it was submitted that the learned Judge had gone beyond those limits.

Lastly, regarding the mandatory injunction, it was contended that the learned Judge had granted what was in effect a mandatory injunction against Vivo at an interlocutory stage without any or any due regard to the principles that are applicable to grant of such injunctions. It was urged that the case before the learned Judge was the weakest of cases rather than the clearest of cases; that no special circumstances had been established to warrant grant of the mandatory injunction; and that there was nothing before the learned Judge to make him feel a high degree of assurance that at the trial it would appear that the interlocutory mandatory injunction had been rightly granted.

On the basis of the above grounds, Vivo implored us to find that the injunction by the High Court was erroneously granted, to allow the appeal with costs and to set aside the order of the High Court dismissing Vivo's application and allowing the application by Total and substitute therefor an order dismissing Total's application and allowing the application by Vivo.

Mr. Okwaro, learned counsel for both Maloba Station and Mr. Maloba supported the appeal and associated himself fully with the submissions made on behalf of Vivo. Learned counsel added that in his dealings with Total, Mr. Maloba had dealt in his personal capacity and did not and could not purport to bind Maloba Station, which is a separate legal personality. Counsel submitted that Mr. Maloba was ready and willing to pay back any amount of money found to be due and owing from him to Total.

Mr. Thangei strongly opposed the appeal and supported the finding and conclusions of the High Court. Counsel submitted that the learned Judge had not made any final determinations at the interlocutory stage because the formal extracted order merely granted a restraining and a mandatory injunction as had been prayed for by Total. Learned counsel also submitted that the learned Judge was quite aware that he was dealing with an interlocutory application in which he was required to exercise his discretion based on the facts of the case.

On the lifting of the corporate veil, it was submitted that Total had pleaded fraud on the part of Maloba Station and Mr. Maloba and had made extensive submissions in that regard and further that the learned

Judge had properly inquired into the pleaded fraud and concluded that there was sufficient evidence to justify lifting of the veil. Upon lifting the veil, it was submitted that the learned Judge had correctly held that Mr. Maloba could bind Maloba Station.

Mr. Thangei further submitted that there was evidence on record to satisfy the learned Judge that Mr. Maloba had signed the Variation Lease Agreement with Total; that he had received Kshs 1,099,980 from Total as rent to cover the period of extension of the lease; that Mr. Maloba had thereby bound Maloba Station through his representations to Total; and that Maloba Station was all along aware of the Variation Lease Agreement with Total, otherwise it could have evicted Total from the suit property. It was learned counsel's submission that relying on all that evidence, the learned Judge had properly concluded that Maloba Station and Mr. Maloba had acted fraudulently and on the authority of the judgment of this Court in **NASIR IBRAHIM ALI & OTHERS VS KAMLESH MANSUKHLAL DAMJI PATNI & ANOTHER, CA NO. 72 OF 1998**, the learned judge could not allow a company to be used as a vehicle for fraud.

Total's further submission was that Maloba Station and Mr. Maloba were barred by equitable estoppel from questioning the validity of the lease agreement between Mr. Maloba and Total. It was contended that Mr. Maloba, acting for and on behalf of Maloba Station, had made a clear and unequivocal representation to Total that the latter had a lease over the suit property until April, 2017; that representation was made with the intention that the same should be acted upon; and that Total, believing in the representation, had indeed acted upon it. The judgments of the former Court of Appeal for Eastern Africa in **NURDIN BANDALI V. LOMBANK TANGANYIKA LTD (1963) EA 304** and **CENTURY AUTOMOBILES LTD V. HUTCHINGS BIEMER LTD (1965) EA 304**; the High Court in **DOGE V. KENYA CANNERS LTD (1989) KLR 127** and this Court in **MACHARIA MWANGI MAINA & 87 OTHERS V. DAVIDSON MWANGI KAGIRI (CA NOS. 26 & 27 OF 2011 (NYERI))** were cited in support of that submission. Regarding the primacy that was given to the unregistered lease over a registered one, Mr. Thangei submitted that the learned Judge had committed no error by concluding that the unregistered lease was enforceable as against Maloba Station and Mr. Maloba. In his view Total had been in possession of the suit property from 1986 until 23rd November 2013 when Vivo attempted to move in by mounting its pumps and rebranding the petrol station. That occupation by Total, it was urged, was known to Vivo and amounted to an overriding interest within the meaning of section 30 of the repealed Registered Land Act. Consequently we were urged, on the authority of **MACHARIA MWANGI MAINA & 87 OTHERS V. DAVIDSON MWANGI KAGIRI** (supra), that Vivo's registered lease was subject to Total's overriding interest as the party in actual occupation of the suit property.

Lastly Mr. Thangei invoked the overriding objective now incorporated in the ***Civil Procedure Act*** and the ***Appellate Jurisdiction Act***, which enjoin courts to dispense proportionate, substantive and equitable justice. It was submitted that in arriving at his decision, the learned judge had properly invoked the overriding objective and could not be faulted in that regard. The decision of this Court in **AFRICAN SAFARI CLUB LTD V. SAGE RENTALS LTD, CA NO. 53 OF 2010** was relied upon for the proposition that the courts have to undertake a balancing act and place the contending parties on equal footing pending the hearing determination of their dispute on merit.

Bukhungu was not represented at the hearing of the appeal, and so we did not hear any submissions on their behalf. The record indicated that their advocates, ***Messrs. J. J. Mukavale Advocates*** were served with the hearing notice on 23rd July 2014 and again on 14th October 2014. No reason was given for their non-attendance.

We have anxiously considered the grounds of appeal, the illuminating submissions by all learned counsel, the list of authorities cited and the law. From the outset, we must reiterate 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 and as this Court has stated time and again, in an interlocutory appeal where the suit is yet to be tried in the High Court, this Court will refrain from expressing concluded views on any issue which it thinks may arise in the pending trial (See **BP (KENYA) LTD V. KISUMU MARKET SERVICE STATION, CA No. 25 of 1992** and **DAVID KAMA GAKURU V. NATIONAL INDUSTRIAL CREDIT BANK LTD, CA No. 84 of 2001**).

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. 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 the essence of this approach as follows, at page 908:

“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.”

(See also HASMUKH KHETSHI SHAH V. TINGA TRADERS LTD, CA No 326 of 2002).

Vivo Kenya’s first complaint, which we think is substantial and permeates all the grounds of appeal argued before us, is that the learned Judge purported to determine with finality some very contested issues between the parties on the basis of affidavit evidence at an interlocutory stage, so that the purpose of hearing the suit is no longer readily apparent. By all standards the ruling is unusually long for a ruling in an interlocutory application where the primary issue is whether the applicant has made out a ***prima facie*** case with a ***probability*** (not certainty) of success.

In HABIB BANK AG ZURICH V. EUGENE MARION YAKUB, CA NO. 43 OF 1982 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. DUNCAN OWOUR SHAKALI & ANOTHER, CA NO. 9 of 1997 when Omolo JA 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.”

Yet again in AGIP (K) LTD V. VORA [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

“With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.” (Emphasis added).

More recently in NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS CA NO. 77 OF 2012 this Court echoed the same sentiments 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.”

The ruling involved in this appeal runs into some 64 pages. As we have already noted, in the course of hearing the interlocutory applications, the learned Judge, quite unusually in our view, directed the parties to avail before the court evidence in the form of documents so as ***“to enable the court make its decision from an informed position”***. It is easy to understand in these circumstances why Vivo complains that the learned Judge engaged in a mini trial and effectively determined the entire suit on the basis of affidavit evidence without the benefit of a proper hearing entailing cross-examination of the witnesses.

Having carefully considered the ruling of the learned Judge, we are satisfied that the learned Judge erred by making several definitive and final conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination, the time tested device of testing the truth or falsity of evidence. Among those final conclusions by the learned Judge was that Mr. Maloba had acted for and on behalf of Maloba Station and could therefore legally bind the latter even though it was a separate and distinct legal personality; that there was no difference between Maloba Station and Mr. Maloba; that the directors of Maloba Station were aware of Maloba’s dealings with Total; that the Kshs 1,099,980 paid to Mr. Malobaby Total was advance rent rather than a personal loan; and that Mr. Maloba had acted fraudulently in the dealings culminating in this dispute.

The following random direct quotations from the ruling, in our view justify Vivo’s complaint that the learned Judge had determined contested issues with finality on the basis of affidavit evidence alone.

At page 44:-

“Given all the correspondences and business relationship between Total, the Company and Timothy Asomba Maloba, it is clear that the entire company is under the control of Mr. Timothy Maloba. I do find that Timothy Asomba Maloba is the alter ego of the company. The two are one and the same person.”

At page 53:-

I am satisfied that the issues relating to the determination of the lease of Total had not been dealt with to a final conclusion. Although there was no lease registered against the title in favour of Total, the fact that Total was in possession and carrying on business from July 2011 when the lease signed by the Company expired and no rent was demanded by the Company makes me to conclude that all the directors of the company were agreed to the fact that the lease had been extended for a further term of five years. I therefore find that the variation of lease document is enforceable against Maloba Total Petrol Station Company Limited its non-registration notwithstanding. The contention that the Company is the registered owner of the suit premises and has relinquished its rights to Vivo Energy cannot hold. The contention that Timothy Maloba could not bind the company is also an afterthought.”

At page 54:-

Timothy Maloba is the founder of the company and has all along behaved as if there was no company. His abrupt change of direction is tantamount to fraudulent behavior. His initial intention was manifestly genuine. His action is tantamount to a man abandoning his first wife after a second one

comes into his life.”

At page 55:-

“The other directors were aware of the extension (of the lease).”

At page 55:-

“It is my conclusion that although there is a registered lease in favour of Vivo Energy, the variation of lease document signed by Timothy Maloba does bind the company and therefore ranks in priority to Vivo’s lease.”

The conclusion, at an interlocutory stage, that Mr. Maloba’s conduct was fraudulent, is even more baffling to us. Although Mr. Thangei submitted forcefully that fraud was pleaded and that there was evidence on record upon which the learned judge could rightfully find fraud established, in our view the learned Judge was not justified in making such findings at an interlocutory stage. On the face of it, Total’s plaint pleaded breach of lease agreement against Mr. Maloba and Maloba Station and gave particulars of breach of lease.

Where fraud is alleged, it must be specially pleaded and particulars thereof given. That is what is required by Order 2 rule 10 of the Civil Procedure Rules, 2010. Way back in the 19th Century, ***Lord Penzance*** stated the principle thus, in ***MARRINER V. BISHOP OF BATH AND WELLS [1893] P. 146:***

“The court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.”

Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In ***R. G. PATEL VS LALJI MAKANJI [1957] EA 314***, at page 317 the former Court of Appeal for Eastern Africa stated that:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required:

And in ***RICHARD AKWESERA ONDITI V. KENYA COMMERCIAL FINANCE CO. LTD, CA No 329 of 2009*** this Court expressed itself on the issue as follows:

“Needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.”

(See also ***GUDKA V. DODHIA, CA NO. 21 OF 1980*** and ***KOINANGE & 13OTHERS V. KOINANGE (1996) KLR 23***).

Regarding *prima facie* proof of fraud, this Court stated thus in

CENTRAL KENYA LTD V. TRUST BANK LTD & 4 OTHERS, CA No 215 of 1996:

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.”

We would also wish to point out, as this Court stated in ***WESTMONTPOWER KENYA LTD V. FREDERICK & ANOTHER T/A CONTINENTAL TRADERS & MARKETING [2003] KLR 357***, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.

The other issue that has caused us considerable anxiety is whether the learned Judge was entitled to lift the veil of incorporation of Maloba Station at an interlocutory hearing and purely on the basis of affidavit evidence. Indeed the decision to lift the veil of Maloba Station's incorporation was based on the finding of fraud on the part of Mr. Maloba, which we have stated ought not to have been determined definitively on affidavit evidence alone. Forgetting for a moment the irregularities that we have noted above, was the learned judge otherwise right in granting the injunction in favour of Total? As regards the exercise of discretion to grant an injunction, this Court reiterated as follows in **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS** (*supra*):

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

These are the three pillars on which rests 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 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 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. 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 crossing the other hurdles in between.”

In the present case, before the learned Judge were two parties seeking injunctive reliefs in regards to the suit property. The first party's claim was founded on a purported lease with a party who *prima facie* was ***not*** the registered proprietor of the suit property. The second party's lease was *prima facie* ***with*** the registered proprietor of the suit property. The first party's lease was ***not*** registered, whilst that of the second party was ***duly*** registered. In our assessment of the affidavit evidence and without expressing a firm position, the learned Judge erred by giving primacy to the claim of the first party over that of the second party. Speaking for the Court in **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS** (2003) KLR 125 at 138, Bosire, JA. stated as follows regarding what constitutes a *prima facie* case:

“[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.”

We find in addition that the learned Judge did not properly address his mind to the question of whether an award of damages would have been an adequate remedy to the claim by Total. The second limb of the principles upon which an injunctive remedy is granted in our jurisdiction as set out in

GIELLA V CASSMAN BROWN & CO LTD (*supra*) stipulates that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer ***irreparable injury***, which would not be adequately compensated by an award of damages. In **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS** (*supra*), this Court stated as follows on irreparable injury or damage:

“On the second factor, that the applicant must establish that he “might otherwise” suffer

irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

We have not seen anything on record, with respect, that would suggest that damages could not have been an adequate remedy, particularly in view of Mr. Maloba’s insistence that he was ready, able and willing to pay any money that may be found to be due and owing to Total from him. On the contrary, Total’s loss and damage, if any, could be easily calculated and quantified to a cent.

The order of injunction granted to Total was in effect a mandatory injunction. This is because the learned Judge found that Vivo had moved into the suit premises on 23rd November 2013 and branded the same. As regards grant of a mandatory injunction, this Court has stated time without number that at the interlocutory stage a mandatory injunction will only be granted in clear cases or where special circumstances exist. In **KENYA BREWERIES LTD V. OKEYO [2002] EA 109** this Court stated as follows on interlocutory mandatory injunctions:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”

Meggary, J. gave the rationale of this approach as follows in **SHEPHERD**

HOMES LIMITED V. SHANDAHU (1971) 1Ch. 34:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”

Other than the fact that in our opinion, on the facts before the High Court, a case for mandatory injunction was not made out, the learned Judge did not advert at all to the principles applicable in granting such an injunction, which we think is indicative of erroneous exercise of discretion.

We have consciously avoided addressing all the other grounds of appeal raised by Vivo in this appeal because in our view, they are an improper invitation to make definitive and conclusive findings in an interlocutory appeal on matters that are still pending for hearing and determination by the High Court. We believe however, that we have said enough to indicate fundamental misdirection on the part of the learned Judge, which justifies our interference with the exercise of his jurisdiction. Accordingly, we make the following orders:

1. We allow this appeal and set aside the order dated 11th April 2014;
2. Total’s Notice of Motion dated 25th November 2013 is hereby dismissed with costs;
3. Maloba Station’s Notice of Motion dated 25th November 2013 is hereby allowed with costs;

4. Total shall pay the costs of this appeal to Maloba Station, Vivo and Mr. Maloba;
5. We make no orders on cost regarding Bukhungu who did not participate in the appeal; and
6. The pending consolidated suits before the High Court at Kakamega be heard and determined by a judge other than Chitembwe J.

It is so ordered.

Dated and delivered at Nairobi this 18th day of December 2014.

E. M. GITHINJI

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