IN THE COURT OF APPEAL OF KENYA

> ***"1.	The plaintiff is the only registered owner of all the parcel of land known as Eldoret Municipality Block 12/424.***
>
> ***2.	The 2nd defendant did obtain title No. Eldoret Municipality Block 12/218 ostensibly resulting from Block 12/424 and has had it sub-divided into 6 portions and allegedly sold Block 12/461 to the 1st defendant who has began (sic) construction work on the said parcel and if not restrained the plaintiff stands (sic) suffer irreparable harm and loss."***

That application was heard by the superior court (Dulu, J) on 12th January, 2004 and in a Ruling given on 13th January, 2004 the superior court dismissed the application, and rendered itself, in part, as follows:

> **"It is apparent that this is a case that relates to titles that were issued by the Commissioner of Lands to different persons, which appear to be contradictory on their face. The plaintiff is arguing that his title is the genuine title while the second defendant is also arguing that her title is the genuine title. It is therefore quite difficult for the plaintiff to establish that he has a superior right to that of the 1st and 2nd defendant in this case. He seeks an injunction against both. On the basis of the case of *Giella vs Cassman Brown [1973] E.A. 358* I find it difficult to conclude that the plaintiff has a prima facie case with probability of success, when you weigh his position against other title holders. If the other parties did not have titles to the land then the balance of convenience would be in his favour."**

It is that ruling that is the subject of this appeal. The appellant has outlined five grounds of appeal as follows:

> ***"1.	The Learned Honourable Judge erred in law and fact in arriving at the said decision without taking into consideration the entire laid down principles for granting a temporary injunction.***
>
> ***2.	The Learned Honourable Judge erred in law and fact in failing to grant an injunction against the 1st Respondent despite the affidavit of service on record.***
>
> ***3.	The Learned Honourable Judge erred in law and fact in not granting the injunction against the 1st and 2nd Respondents despite an acknowledgement of rival titles.***
>
> ***4.	The Learned Honourable Judge erred in law and fact in delivering a judgement at an interlocutory stage rather than a ruling.***
>
> ***5.	The Learned Honourable Judge erred in law and fact by completely misdirecting himself by introducing extraneous matters despite the weight of evidence and submission adduced by the Appellant."***

In his submissions before this Court, Mr. Chemitei, learned counsel for the appellant, admitted that there were two title deeds issued in respect of the suit land, one to the appellant, and the other to the 2nd respondent, but argued that the superior court ought to have granted restraining orders to preserve the suit land; that there were two other suits pending in the superior court relating to the suit land where restraining orders had indeed been granted; and that in refusing to grant the injunction sought, the superior court made "final" orders at an interlocutory stage.

Mr. Gicheru, learned counsel for the 1st and 2nd respondents, argued that the 1st respondent was never actually served with the suit papers in the superior court but had appeared at this Court because it was served with the hearing notice and, therefore, no orders could be made against him, without giving him the opportunity to be heard. He relied on the cases of *Ali Bin Khamis as administrator of the estate of Khamis Bin Suleman (Deceased) vs Salim Bin Khamis Kirobe, Juma Bin Ali, Juma Bin Ali as administrators of the estate of Mwana Juma Binti Suleman (Deceased) [1956] 23 EACA 195* and *Nsubaga & Another vs Mutawe [1974] EA 487*. He urged this Court not to make any orders that would affect his client. In any event, he argued, that the title issued to his client was prior in time to the one issued to the appellant.

Mr. L. N. Muiruri, learned counsel for the 3rd and 4th respondents, submitted that although his clients were not parties to the suit in the superior court, he was able to confirm that the Land Commissioner had since recalled the title deed issued to the appellant, as the same had been erroneously issued, and further that the suit land had been sub-divided and new titles issued on 10th September, 2003.

The superior court correctly applied the case of *Giella vs Cassman Brown [1973] E. A. 358* when it declined to grant the

injunction sought. Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella case (supra)* the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.

In arriving at its decision, the superior court was guided by two important factors – that the title issued to the appellant was later in time, and subsequent to the one issued to the 2nd respondent, and that the suit land had already been sub-divided, and that, as the superior court stated, the appellant's position "had to be weighed against (the position of) other title holders." Clearly, as the record indicates, the suit land had been subdivided as of 10th September, 2003, and any orders of injunction issued would have been in vain. This does not mean that the superior court made a "final" decision at an interlocutory stage. There was simply no basis for the superior court to grant an injunction on the basis of the material presented to it, and we are unable to fault it in the manner it exercised its discretion.

Accordingly, and for reasons stated, we find no merit in this appeal, and dismiss the same with costs to the respondents.

Dated and delivered at Eldoret this 12th day of November, 2010.

R. S. C. OMOLO
…………………………..
JUDGE OF APPEAL

E. M. GITHINJI
…………….…………
JUDGE OF APPEAL

ALNASHIR VISRAM
…………...………….
JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR