Chogi's Garage Limited v Peers Oasis Park Holdings Limited & 2 others (Environment and Land Appeal E022 of 2021) [2023] KEELC 43 (KLR) (18 January 2023) (Judgment)

Neutral citation: [2023] KEELC 43 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E022 OF 2021

JO MBOYA, J

JANUARY 18, 2023

BETWEEN

CHOGI'S GARAGE LIMITED ..... APPELLANT

AND

PEERS OASIS PARK HOLDINGS LIMITED ..... 1ST RESPONDENT

OASIS PARK MANAGEMENT COMPANY LIMITED ..... 2ND RESPONDENT

NEO WESTEND LIMITED ..... 3RD RESPONDENT

((Appeal from the Ruling and Order of the Chief Magistrates Court of Kenya at Milimani Commercial Court by Honourable E. Wanjala (PM) delivered on 19th day of March 2021 in Civil Suit No.E5145 of2020).)

JUDGMENT

INTRODUCTION AND BACKGROUND:

1. The Appellant herein filed and/or lodged a suit vide Plaint dated the September 17, 2020. For clarity, upon presentation of the said Plaint, same was registered and assigned as Milimani CMELC Case No E5145 of 2020.

2. Contemporaneous with the filling of the said suit, the Appellant took out and filed Notice of Motion Application dated the September 17, 2020 and in respect of which the Appellant sought various reliefs.

3. Given that the subject appeal touches on and concerns the determination of Notice of Motion Application dated the September 17, 2020, it is appropriate to reproduce the reliefs that were sought at the foot thereof.

4. For convenience, the reliefs that were sought at the foot of the Application under reference are as hereunder;

    i. That this application be certified as urgent, be heard on a priority basis and service be dispensed with in the first instance.

    ii. That pending interparty hearing of this application, the Honourable court be pleased to issue a temporary injunction restraining the Respondents and/or their agents from removing the grill and the gate at the Applicant's backyard on Apartment B1 erected on LR No 330/1342 along Gitanga close in Lavington.

    iii. That pending interparty hearing of this suit, the Honourable court be pleased to issue a temporary injunction restraining the Respondents and/or their agents from removing the grill and the gate at the Applicant's backyard on Apartment B1 erected on LR NO 330/1342 along Gitanga close in Lavington.

    iv. That pending the hearing and final determination of this suit, the Honourable court be pleased to grant a Permanent injunction against the Respondents and anyone claiming under them, from interfering with the Applicant's quiet possession of Apartment B1 erected on LR No 330/1342 along Gitanga close in Lavington.

    v. That the officer commanding Kileleshwa Police Division be and is hereby directed to assist in the enforcement of the orders above at the apartment known as Apartment B1 erected on LR No 330/1342 along Gitanga close in Lavington.

    vi. That the costs of this Application be provided for.

5. Upon being served with the said application, the Respondents herein duly filed their responses vide Replying affidavit sworn on the October 9, 2020 and Further Replying affidavit sworn on the January 26, 2020, (but the year appears to be erroneous).

6. Subsequently, the application dated the September 17, 2020, whose details have been enumerated in the preceding paragraph, was thereafter heard and disposed of vide ruling rendered on the March 19, 2021, whereupon the application was dismissed with costs.

7. Needless to state, that upon the dismissal of the said application, the Appellant herein felt aggrieved and dissatisfied. Consequently, the Appellant proceeded to and filed the subject Appeal.

8. Vide the Memorandum of appeal dated the March 31, 2021, the Appellant has raised various grounds of appeal. For clarity, same are reproduced as hereunder;

    i. That the learned trial magistrate eerred in law and in fact by delving into substantive issues and making finally concluded views of the dispute at the preliminary stage without first hearing the case thereby prejudicing the Appellant.

    ii. That the learned trial magistrate erred in law and in fact by rendering herself conclusively on the issue of legality of the Appellant's gate and grill without hearing thereby condemning the Appellant unheard.

iii. That the learned trial magistrate erred in law and in fact by assuming that clause 3.5.2 of the lease dated May 28, 2013 require a mandatory written consent/ documentary approval of the 2nd Respondent.

iv. That the learned trial magistrate erred in law and in fact by disregarding the Appellant's pleadings on getting approval of the 2id Respondent through its principal officer by the name of Winnic Chepkurui.

v. That the learned trial magistrate erred in law and in fact by disregarding the evidence that the Appellant's structures are old, having been erected six years ago.

vi. That the learned trial magistrate erred in law and in fact by failing to make a determination on whether or not the Respondents were precluded by the principle of estoppel from denying that consent was obtained.

vii. That the learned trial magistrate erred in law and in fact by failing to make a determination on the issue of legality of the demolition notice issued by the 3rd Respondent despite being raised by the Appellant in its pleadings.

viii. That the learned trial magistrate erred in law and fact by failing to appreciate that the damage likely to be suffered by the Appellant is not capable of being quantified in monetary terms and may therefore be irreparable.

ix. That the learned trial magistrate erred in law and in fact by failing to appreciate that one of the cardinal principles in Giella v Cassman Brown is the preservation of the subject matter of the suit and that by failing to maintain status quo, the subject matter of the suit might be destroyed.

x. That the learned trial magistrate erred in fact by failing to appreciate that the nature of the Appellant's suit may warrant a site visit by the court thus necessitating the need for status quo to be maintained.

xi. That the learned trial magistrate erred in law and in fact by failing to appreciate that there is absolutely no prejudice to be suffered by the Respondents if an order for injunction is granted as sought.

9. Suffice it to state that the subject appeal came up for directions and the Parties herein agreed to canvass and dispose of the appeal by way of written submissions.

10. Pursuant to and in line with the agreement,(details in terms of the preceding paragraph), counsel for the Appellant proceeded to and filed written submissions dated the November 9, 2022 whilst the Respondent filed written submissions dated the November 5, 2022.

11. It is imperative to state and underscore that the two sets of written submissions forms part and parcel of the record of the court. Consequently, same shall be taken into account whilst crafting this Judgment.

Submissions By The Parties:

a. Appellant's Submissions:

12. Counsel for the Appellant herein filed written submissions dated the November 9, 2022 and in respect of which same has raised and highlighted three pertinent issues for consideration. In this regard, it shall

be taken that the Appellant has abandoned the rest of the Grounds contained in the Memorandum of Appeal.

13. First and foremost, learned counsel for the Appellant has submitted that the learned magistrate fell in error in finding and holding that the Appellant required the consent of the 1st and 2nd Respondents prior to and before erecting the impugned grill and the consequential gate at the Appellant's backyard.

14. Further more, counsel added that the learned Magistrate misconstrued and misapprehended the import and tenor of clause 3.5.2 of the Lease agreement dated the May 28, 2013.

15. In any event, counsel has added and contended that clause 3.5.2 of the Lease agreement is not one of (sic) the Clauses in respect of which a written consent of the 1st and 2nd Respondents was required or envisaged.

16. On the other hand, counsel has also submitted that the learned magistrate was also in error by failing to find and hold that indeed the Appellant procured and obtained the verbal consent and approval of the 2nd Respondent through the 2nd Respondent's Principal officer, namely, Winy Chepkurui.

17. In view of the foregoing submissions, learned counsel for the Appellant has therefore submitted that the learned Magistrate therefore fell in error in dismissing the application for temporary injunction, under the guise that no written consent was procured and obtained, yet same was not a requirement under the Lease.

18. Secondly, learned counsel for the Appellant has submitted that the learned magistrate erred in fact and in law in finding and holding that the loss, if any, that the Appellant would be bound or disposed to suffer, would be compensable in monetary terms.

19. Put differently, it was the Appellants contention that the learned magistrate erred in law in finding and holding that the Appellant was not disposed to suffer Irreparable loss.

20. In view of the foregoing, counsel has added that the learned magistrate therefore misapprehended the nature and kind of damage that the Appellant was bound to suffer, in the event that the impugned gate and grill were demolished prior to the hearing and disposal of the suit.

21. Thirdly, counsel for the Appellant has submitted that Appeal beforehand is meritorious on account on the fact that the gate and grill complained of, were installed with the consent/approval of the 2nd Respondent.

22. Additionally, counsel has also submitted that the Respondents herein were also barred and prohibited by the Doctrine of estoppel from contending that the impugned gate and grill had been installed without their consent/approval, yet same were aware of the existence of the gate and grill for over six years.

23. Furthermore, counsel for the appellant also submitted that the learned magistrate also erred in law in failing to pronounce himself on the legality on the impugned demolition notice, which was issued by a stranger, read the 3rd Respondent.

24. In view of the foregoing submissions, counsel for the Appellant has therefore implored the Honourable court to find and hold that the ruling and order of the learned magistrate rendered on the March 19, 2021, was erroneous and thus ought to be set aside, varied and quashed.

25. Other than the foregoing, counsel for the Appellant has also invited the court to proceed and allow the appeal and by extension, allow the Notice of Motion Application dated the September 17, 2020.

26. Be that as it may, it is important and appropriate to point out that Learned counsel for the Appellant has neither cited nor relied on any case law, in ventilating the submissions highlighted.

b. Respodents' Submissions:

27. Vide submissions dated the November 25, 2022, counsel for the Respondents has highlighted and raised three issue for due consideration and determination.

28. The first issue that has been ventilated relates to whether the Appellant established and proved a Prima facie case before the learned magistrate, to warrant the grant of the orders of temporary injunction.

29. In this respect, counsel for the Respondents has submitted that the Appellant proceeded to and erected a gate and grill, which effectively annexed and alienated a portion of the common areas, albeit without the written consent of the 1st and 2nd Respondents.

30. Moving on, counsel added that by dint of clause 3.5.2 of the lease agreement, it was incumbent upon the Appellant to procure and obtain prior written consent, in the event that same was desirous to undertake any additions or alterations to premises in question.

31. Premised on the foregoing, counsel for the Respondents submitted that in the absence of the requisite consent, which was a pre-requisite condition, the Appellant herein did not establish a prima facie case before the magistrate.

32. Additionally, counsel has submitted that the Appellant herein had also contended that same had procured and obtained the oral consent/approval of the Respondent prior erecting the impugned gate and grill.

33. To this extent, counsel for the Respondents has submitted that it was therefore incumbent upon the Appellant to lay before the court prima facie evidence of the said oral consent or approval procured from one, namely Winy Chepkurui.

34. Be that as it may, it was the submissions of learned counsel that the Appellant failed to tender or adduced before the Magistrate any such evidence, either on a Prima facie basis or at all.

35. In view of the foregoing submissions, counsel has submitted that the learned magistrate was therefore correct in finding and holding, albeit on a prima facie basis that clause 3.5.2 was relevant and applicable to the erection of the impugned gate and grill.

36. Secondly, counsel for the Respondent has submitted that the lease in favor of the Appellant herein relates to and only confers ownership rights to the Appellant, as pertains to the premises comprising of Apartment B1 and not otherwise.

37. Further and in addition, counsel submitted that the said lease did not confer any exclusive rights to the Appellant over common areas and spaces, the backyard not excepted.

38. Owing to the fact, that the Appellant's rights did not extend to the common areas, counsel for the Respondents therefore submitted that the Appellant would not be disposed to suffer any loss arising from the removal of the impugned gate and grill.

39. Nevertheless, counsel proceeded to and added that in the event of any loss arising from the restorative exercise, then such loss would be ascertainable, quantifiable and thus compensable in monetary terms.

40. In a nutshell, counsel for the Respondents has submitted that the learned magistrate was therefore right in finding and holding that the loss, if any, to be suffered by the Appellant, was compensable in damages.

41. Thirdly, counsel for the Respondent has submitted that the impugned gate and grill were erected and installed, contrary to and in contravention of the terms of the lease agreement. In this regard, counsel has highlighted that the said action constituted a breach of the lease/contract.

42. Having been in breach of the terms of the lease/contract, it was contended that the Appellant was therefore not entitled to an equitable remedy.

43. On the other hand, counsel reiterated that the Appellant herein did not satisfy nor prove the requisite conditions stipulated and underlined in the case of *Giella v Cassman Brown & Co Ltd [1973]EA 358*.

44. Based on the foregoing, counsel has therefore contended that the Appellant herein was not entitled to an order of temporary injunction in the manner sought before the magistrate's court.

45. In support of the foregoing submissions, counsel for the Respondents has cited and relied on various decisions inter-alia, *Naresh Chandra Govindji Shah & Another v Shree Management Ltd & 4 Others [2019]eKL*R, *Kyangoro v Kenya Commercial Bank Ltd & Another [2004]1KLR 126* and *Caliph Properties Ltd v Barbell Shamra & Another [2015]eKLR*.

Issues For Determination

46. Having reviewed the Memorandum of appeal, Record of appeal as well as the depositions that were placed before the Magistrate's court and having considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;

    i. Whether or not the Appellant required a Written consent from the 2nd Respondent prior to and before erecting the impugned gate and grill at the backyard and whether or not the finding of the learned magistrate was erroneous.

    ii. Whether the loss, if any, to be suffered by the Appellant was quantifiable and compensable in damages, either as held by the magistrate or otherwise.

    iii. Whether the Appellant has placed before honourable court sufficient and credible reasons to warrant interference with the exercise of discretion by the Learned Magistrate in terms of the impugned ruling.

Analysis And Determination

Issue Number 1

Whether or not the Appellant required a written consent from the 2nd Respondent prior to and before erecting the impugned gate and grill at the backyard and whether or not the finding of the learned magistrate was Erroneous.

47. The Appellant herein mounted the suit before the chief magistrate court, together with an application for temporary injunction, wherein same sought for various, albeit numerous reliefs.

48. Be that as it may, the Appellant's contention before the Chief magistrate's court as pertains to the impugned gate and grill, which same had erected, was threefold.

49. Firstly, the Appellant had contended that owing to various security concerns and all sorts of nuisance(s) which were being occasioned by new tenants within the suit property, same duly notified the Respondent and thereafter the Respondents acquiesced to the Appellant putting up a grill gate at her backyard.

50. For clarity, it was the Appellant's contention that Respondents herein acquiesced to the erection of the impugned grill and gate, which are now the subject of the instant matter.

51. The other limb of the Appellant's claim and upon which same sought to procure the orders of temporary injunction was that the Respondents were estopped vide the Doctrine of estoppel from disputing the erection of the impugned gate and grill.

52. Other than the foregoing, the Appellant had also contended that the erection of the gate and the grill did not fall within the purview of clause 3.5.2 of the lease agreement.

53. Essentially, it was therefore the Appellant's case that same did not require a written consent of the Respondents, to be able to install the impugned gate and grill at her backyard.

54. Suffice it to point out that it is the Appellant herein who had raised the various issues before the chief magistrate's court and thereby sought to procure an order of temporary injunction based on same.

55. Having made the assertions, which have been enumerated in the preceding paragraphs, it was certainly incumbent upon the Appellant to prove and establish the various claims, albeit on prima facie basis, to be able to procure an order of temporary injunction.

56. I beg to state and reiterate that the burden of establishing the various assertions, which were made by and on behalf of the Appellant laid on the shoulders of the Appellant and not otherwise.

57. Indeed, it is upon the prima facie proof of the said claims that the chief magistrate would have discerned the existence or otherwise of a prima facie case, which is a pre-requisite condition to warrant the grant of an order of temporary injunction.

58. To vindicate the foregoing statement and essentially that it behooved the Appellant to establish the existence of a prima facie case, it is imperative to take cognizance of the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*, where the court stated and observed as hereunder;

> '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.'

59. It is also important to state that whereas a court dealing with an interlocutory application for temporary injunction is not called upon to make any precipitate findings, on facts or law, but it suffices to underscore that the court must form some degree of persuasion as to the probability of success of the Applicant's case.

60. I beg to repeat that the court dealing with an interlocutory application is not competent to make precipitate findings, on facts and points of law. In this regard, the decision of the Court of Appeal in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others [2018] eKLR*, is succinct and apt.

61. For coherence, the court stated and observed as hereunder;

> 23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1* 'it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.' This Court expressed a similar view in *Mbuthia v Jimba Credit Finance Corporation & another [1988] KLR 1* where it was held that 'the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.'

62. Having taken into account the holdings in the case law cited in the preceding paragraphs, it is therefore appropriate to ascertain whether indeed the Appellant herein established a prima facie case before the Chief magistrate's court, either as required or at all.

63. In my humble view, the process of ascertaining whether or not a prima facie case had been established or otherwise, required the learned magistrate to form a prima facie opinion on the relevance, applicability or otherwise of clause 3.5.2 of the lease agreement.

64. Indeed, it is evident that the learned magistrate was aware of his obligation and duty in trying to ascertain the existence of a prima facie case.

65. In this regard, the learned magistrate appreciated the relevance of clause 3.5.2 of the lease agreement albeit on a prima facie basis and same found that in the absence of the requisite consent, the Appellant did not establish a prima facie case.

66. In my humble view, the assessment by the learned magistrate and the conclusion arrived at, namely, that the Appellant had not established a prima facie case was fair, reasonable and correct, albeit on a prima facie basis.

67. Suffice it to point out that after finding and holding that no prima facie case had been established or proved, the learned magistrate went further and held that the court cannot grant orders to the Applicant to protect an illegality.

68. I must concede that the choice of words that were employed and applied by the learned magistrate beyond the finding that no prima facie case had been established, appear to have gone beyond what ought to have been spoken to whilst dealing with an interlocutory application.

69. Be that as it may and having contextualized the entire paragraph wherein the learned magistrate addressed the issue of prima facie case, I am prepared to find and do hereby hold that the impugned words including/ containing the statement that the court cannot grant orders to the Applicant to protect an illegality was a misnomer.

70. To my mind, having found and held that no prima facie case had been established and proved, the learned magistrate was therefore obliged to decline to grant the orders of temporary injunction.

71. To this end, the it is appropriate to state and reiterate the position taken by the court of appeal in the case of *Kenya Commercial Finance Co Ltd v Afraha Education Society [2001] Vol 1 EA 86*, where it was observed as hereunder;

> ' 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.'

Issue Number 2

Whether the loss, if any, to be suffered by the Appellant was quantifiable and compensable in damages, either as held by the magistrate or otherwise.

72. Having come to the conclusion that the Appellant had neither established nor proved a prima facie case, it was not incumbent upon the learned magistrate to venture and address whether or not the Appellant would suffer irreparable loss.

73. Suffice it to point out that it is trite and established that the conditions for grant of an order of temporary injunction are sequential and hence if the Applicant has failed to established the 1st condition, namely, prima facie case, then one need not venture to the second condition.

74. In this regard, the holding in the case of Kenya Commercial Finance Co Ltd v Afraha Education Society [2001] Vol 1 EA 86, is apt and succinct.

75. For clarity, the court stated as follows;

> 'If prima facie cases 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.'

76. Nevertheless, in respect of the matter beforehand, the learned magistrate also proceeded to and addressed his judicial mind as to whether or not the Appellant had laid before the court evidence of irreparable loss.

77. To the contrary, the learned magistrate found and held that the loss, if any, would have been quantifiable and compensable in damages. In short, the magistrate found that no evidence of Irreparable loss had been established.

78. For coherence, it is the foregoing finding that the Appellant did not establish that same was disposed to suffer irreparable loss that has been assailed by counsel for the Appellant.

79. Before venturing to address whether or not the Appellant was disposed to suffer Irreparable loss, it is important to understand the meaning, scope and tenor of irreparable loss.

80. In this regard, I beg to adopt and reiterate the meaning and tenor of irreparable loss that was underlined and underscored by the Court of appeal in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR*, where the court stated and observed as hereunder;

> ' 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 face, 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.'

81. Taking into account the description and definition of what constitutes irreparable loss, it is my humble finding and holding that no evidence, other than generalized statements, was tendered by the Appellant.

82. In any event, I have found and held elsewhere herein before that the finding and holding that the Appellant had not established a prima facie case, was sufficient to dispose of the Application before the Chief Magistrate's Court.

83. In a nutshell, it is my finding and holding that yet again the conclusion that was arrived at by the learned magistrate, in finding and holding that no evidence of Irreparable loss had been established, is with humility, correct.

Issue Number 3

Whether the Appellant has placed before honourable court sufficient and credible reasons to warrant interference with the exercise of discretion by the Learned Magistrate in terms of the impugned ruling.

84. What was before the learned magistrate was an application for temporary injunction, the grant or refusal of which was a matter of discretion of the said court.

85. Granted that in the exercise of his/her discretion, the honourable magistrate was called upon to act judiciously, reasonably and to take into account all the requisite/obtaining circumstances, in arriving at his/her decision.

86. In this respect, the learned magistrate calibrated on the relevance, applicability or otherwise of clause 3.5.2 of the Lease agreement and formed a prima facie opinion that same required the consent of the Respondents.

87. Further and additionally, the learned magistrate also formed an opinion on a prima facie basis that no such written consent had indeed been availed or tendered by the Appellant.

88. Having calibrated on the various aspects/perspectives of the Appellant's case, in terms of the application September 17, 2020, the learned magistrate came to the conclusion that the Appellant was not entitled to an order of temporary injunction.

89. In arriving at the foregoing position, the learned magistrate was exercising judicial discretion. In this regard, it would therefore be incumbent upon the first appellate court to respect and defer to the decision of the learned magistrate unless circumstances exists to warrant interference.

90. To this end, I beg to point out that prior to and before interfering with the exercise of discretion of the court of first instance, the Appellate court must adhere to and establish circumscribed principals, which were demarcated and underscored in the case of *Price & another v Hilder [1984] eKLR*, where the Court of Appeal stated and observed as hereunder;

> 'The law on the matter is now settled. The English case of The El Amria [1981] 2 Lloyds Law Reports page 119 at page 123 as per Brandon LJ, which has been applied in Kenya, has comprehensive principles that are accepted as applying to an application concerning the exercise of a judge's discretion. The leading local decision is the case of Mbogo v Shah [1968] EA page 93 in which De Lestang VP (as he then was) observed at page 94:
>
> > ' I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'
> >
> > It would be wrong for this Court to interfere with the exercise of the trial judge's discretion merely because this Court's decision would have been different.'

91. Guided by the foregoing excerpt, I beg to state that I have not discerned any aspect where the learned magistrate failed to take into account the necessary facts or took into account erroneous issues, in arriving at and reaching the impugned conclusion.

92. Save for the statement that the court cannot grant orders to the Applicant to protect an illegality, which I have held to be a misnomer, it is my humble decision that the learned magistrate correctly exercised his discretion in declining and thereafter dismissing the impugned application.

93. Before departing from the issue herein, it is also imperative to note and underscore that the impugned application had also sought for an order of Permanent injunction. Consequently, the grant of the impugned application would effectively have determined the entire suit, albeit at an interlocutory stage.

94. To this end, I am inspired by the words of Hon Justice Maraga J (as he then was) in the case of the *Headmaster Kiembeni Baptist Primary School & another v Pastor Of Kiembeni Baptist Church [2005] eKLR*, where the court stated and observed as hereunder;

> ' I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also Shah v Shah [1981] KLR 374'.

Final Disposition:

95. Having dealt with and evaluated the issues that were outlined in the body of the Judgment, I come to the conclusion that the appeal beforehand is devoid and bereft of merits.

96. On the contrary, I find and hold that the Learned Magistrate appreciated and correctly applied the applicable principles established in the case of Giella v Cassman Brown & Co Ltd [1973] EA 358 before declining to grant the orders of temporary injunction which were being sought for, primarily because the Appellant had not established a Prima facie case with probability of Success.

97. Consequently and in the premises, the Appeal herein be and is hereby Dismissed with Costs to the Respondents.

98. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson - Court Assistant.

N/A for the Appellant

N/A for the Respondents