IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 195 OF 2014

BETWEEN

JARED SAGINI KEENGWE ……..…..…….…… APPELLANT

AND

WALTER ONCHWARI.....1ST RESPONDENT

EVALYNE ONCHWARI..... 2ND RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....3RD RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (Gitumbi, J.) delivered on 14th February, 2014)

in

E.L.C. Case No. 80 of 2013.)

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JUDGMENT OF THE COURT

Before the Environment and Land Court, Nairobi was a motion on notice by the appellant dated 14th January 2013, which sought orders to restrain the respondents respectively from disposing of all that property known as **Land Reference No. 189/5** situate at Nyayo Estate, Embakasi "*the suit premises*" pending the hearing of the application *inter partes* and or the main suit. He further prayed that the 1st and 2nd respondents be ordered to pay in court the rental income accruing from the suit premises pending the hearing and determination of the main suit.

The gravemen of the appellant's suit and hence the application was that on 30th November, 2010, the 1st respondent who is his brother in law offered to sell to him the suit premises at a consideration of Kshs.4,000,000/-. By the time the title documents were in possession of the 3rd respondent courtesy of the tenant-purchase scheme that it managed and administered. It was an express term of the agreement that the 1st respondent would hand over possession of the suit premises to the appellant on 1st December, 2010. However, this was not to be despite the appellant having met fully his part of the bargain. Apparently, there was a subsisting tenant that he was to take over. Towards this end, he opened an

account into which rental proceeds from the suit premises would be remitted and the 1st and 2nd respondents notified. Despite this arrangement, they failed to effect the transfer of the suit premises into his name and continued to receive rent out of the suit premises.

Both the suit and the application were contested by the 1st and 2nd respondents. Their case hinged on the fact that in the year 2010, they had a project in Westlands but ran into monetary winds. They approached the appellant to lend them a hand by way of a friendly loan. The appellant agreed to the request and purely for comfort and at the request of the appellant they executed an agreement showing that they had in fact sold the suit premises to him at Kshs.4,000,000/-though it was in fact worth Kshs.9.000,000/-.

The application was canvassed by way of written submissions and in a ruling dated and delivered on 14th February, 2014, **Gitumbi, J.** dismissed the application holding that the appellant had not established a *prima facie* case against the respondents, since he was relying on an agreement for which no stamp duty had been paid as required by **Section 19** of the Stamp Duty Act. Having found as aforesaid, Gitumbi, J. did not see the need to further interrogate whether the other considerations set out in the famous case of **Giella vs Cassman Brown [1973] EA 358** on the principles for granting interlocutory injunction.

The appellant was aggrieved by the ruling and proffered the instant appeal complaining that the Judge erred in dismissing the application, in not correctly applying the conditions set out in **Giella** (*supra*), in reaching erroneous conclusion that the case law did not entitle the appellant to the remedy of specific performance, determined the suit on an interlocutory application and finally in misinterpreting **Section 19** of the Stamp Duty Act.

At the hearing of the appeal only the appellant appeared. He had already filed written submissions though no directions to that effect had been given by **Sichale, J.A.** when the appeal came before her for directions on 10th August, 2016. He however elected not to highlight the submissions. In his submissions, the appellant stated that the Judge erred when she held that she had reviewed various decided cases and had found none that decided that a remedy of specific performance would also entitle one to the grant of an interlocutory injunction. Relying on the case of **Openda v Ahn [1984] KLR 208**, the appellant submitted that a condition precedent for specific performance of an agreement is that the purchaser must pay the purchase price to the vendor or such person as the vendor directs at the time and place of completing the sale, which had happened in the circumstances of this case. With regard to the stamp duty, the appellant submitted that the duty of the court was to direct that the document be stamped with the requisite stamp duty and that **Section 19(2)** of the Stamp Duty Act itself gave the court such powers. On **Giella**, the appellant submitted that he had met all the requirements for the grant of an interlocutory order of injunction.

We have considered the record of appeal, the ruling, the memorandum of appeal and submissions of the appellant. An injunction whether interlocutory or permanent is both an equitable and discretionary remedy although over time the courts have refined the considerations that go into informing the court faced with application for injunction. The celebrated case of **Giella** settled those principles almost 43 years ago and those considerations have held sway to date. They are, first, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

Did the court bear in mind these principles when it considered the application? Yes, indeed, as it made extensive reference to them. As a matter of fact, the Judge went further to explain what was meant by *prima facie* case. Referring to the case of **Mrao v First American Bank of Kenya Ltd & 2 others [2003] KLR 123** she opined that:-

> **"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

In holding that the appellant had not made out a *prima facie* case, the Judge considered whether the agreement for sale was subject to specific performance. She took the view that being an equitable remedy, specific performance would ordinarily be enunciated in case law. She went on to hold that her study of the relevant case law had not unearthed any specific precedent and on that basis found that the appellant was not entitled to injunction since the main prayer in the suit was for specific performance. Obviously, this was an error and a misdirection on the part of the Judge. The mere fact that a claim is hinged on specific performance does not mean, as the learned Judge implied, that such a party would not be entitled to an order of temporary injunction. There is a plethora of case law in which orders of temporary injunction have been granted on a claim based on specific performance. See for instance **Openda v Ahn** (*supra*), and even **Duncan Waithaka Ndegwa & Another v Signal Investments Limited**, **Nairobi High Court, ELC No. 522 of 2009** which was cited before her. It would appear to us that the learned Judge did not conduct her research properly and or diligently. In any event, this was not the right time or place to make such determination. This was an interlocutory application in which she was called upon to determine without making conclusive findings whatsoever that the appellant had made out a genuine and arguable case which need not succeed at the trial.

There was common ground that a sum of Kshs.4,000,000/- had been paid by the appellant to the 1st and 2nd respondents. The only point of departure was that according to the appellant, it was the agreed purchase price for the suit premises. But to the 1st and 2nd respondents, it was a friendly loan advanced to them by the appellant to assist them in the completion of their Westlands project. The injunction sought was to restrain the respondents from disposing of the suit by way of sale, transfer, charge, mortgage, lease or dealing with the suit premises in any manner inconsistent with the appellant's property rights and interest pending the hearing and determination of the suit. The injunction sought was therefore in the nature of maintenance of the *status quo* until the suit is heard and determined. It was therefore neither prejudicial nor could it have caused any hardship or discomfort to any of the parties. After all, the suit premises were rented out and none of the parties to the suit were residing therein.

Accordingly, we come to the conclusion that though the learned Judge kept at the back of her mind the principles applicable to the grant or denial of an interlocutory injunction, she completely misapprehended and or misapplied them.

With regard to stamp duty, the Judge once again misdirected herself in the manner she addressed the legal effect of an unstamped document, by determining the question with finality at an interlocutory stage.

The principles upon which this Court acts when it is interfering with the exercise of discretion by the lower court are well settled. The court will not interfere unless it is satisfied that the decision in question was clearly wrong because the learned Judge misdirected himself or because he considered matters which he should not have considered or failed to consider matters he should have considered. See **Mbogo & Another v Shah [1968] E.A. 93**.

In this appeal, we have been able to demonstrate that though the learned Judge was aware of the principles governing the grant of interlocutory injunctions, she totally and completely misdirected herself on them.

It is on this basis that we must now allow this appeal with costs. We set aside the order of dismissal of the application by the learned Judge. In substitution thereof, we allow the appellant's application dated 14th January, 2013 in terms of prayers 4, 5 and 6. The appellant too shall have costs of the application.

Dated and delivered at Nairobi this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR