Case Number:	Civil Appeal 77 of 2012
Date Delivered:	04 Apr 2014
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	William Ouko, Patrick Omwenga Kiage, Kathurima M'inoti
Citation:	Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	CIVIL SUIT NO. 332 OF 2010
Case Outcome:	Appeal allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 77 OF 2012

BETWEEN

NGURUMAN LIMITED …….....……..…….. APPELLANT

AND

JAN BONDE NIELSEN ……..……. 1ST RESPONDENT

HERMAN PHILIPUS STEYN *also known as Hermannus Phillipus Steyn* …2ND RESPONDENT

HEDDA STEYN ……..……..……..……. 3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Nairobi (G.V. Odunga, J.) delivered on 30th March, 2012

in

CIVIL SUIT NO. 332 OF 2010)

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JUDGMENT OF THE COURT

The sole issue raised in this interlocutory appeal is whether the learned Judge of the High Court (Odunga, J.) in granting the 1st respondent's prayer to restrain the appellant by an order of temporary injunction properly exercised his discretion or whether he misdirected himself in some matter and arrived at a wrong decision. Put differently, this court is being asked to determine whether the 1st respondent presented a *prima facie* case with a probability of success before the High Court; whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in favour of the 1st respondent. See **Giella V. Cassman Brown** [1973] EA 358. Ordinarily, this Court would not express any concluded view on the dispute between the parties and must not also form a distinct impression as to the merits of the suit at this stage since such determination is reserved for the trial court after the interlocutory appeal has been disposed of. More restraint is called for in this appeal in view of the various pending suits which include Nkr. HCCC No. 103 of 2009, Nkr. HCMCA No. 52 of 2009 and Nkr. HCCC No. 120 of 2010 involving the parties herein or some of them and respecting the suit property No. NAROK/NGURUMAN/KAMORORA/1. The dispute has also given rise to a Criminal Case No. 3603/2010, **R. V. Philipus Steyn & 17 others** at Kibera Law Courts.

Before adverting to the origin of the dispute it is appropriate to reiterate that before this Court can interfere with the exercise of a discretion of a judge, it must be shown that the judge has either erred in principle in his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong, or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it. These are the words of Sir Charles Newbold, P. expressed in this often-cited **Mbogo & Another V. Shah** [1968] EA 98 decision as follows:

"…….a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

This *dictum* underlines what is well settled in our laws that as an appellate court this Court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the Judge in the court below and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently. See **Export processing Zones Authority V. Kapa Oil Limited & 6 others,** Civil Appeal No. 190 of 2011.

The background to the dispute giving rise to this appeal, as expressed in the pleadings, may briefly be stated thus: The 1st respondent brought an action against Herman Philipus Steyn (the 2nd respondent) and his wife, Hedda Steyn (the 2nd respondent) as well as the appellant, Nguruman Limited, a limited liability company, in which the two and another are directors, claiming that in 1986 the 2nd respondent invited him (the 1st respondent) to invest in the 3rd respondent through which they would establish an uber-exclusive tourist camp at Ol Donyo Laro on the suit property. Following that invitation, the 1st respondent maintains that he committed resources by providing finances and architectural designs for the construction of the camp.

As the construction proceeded the 1st respondent engaged the services Mr. James Bristow, an English solicitor and a Kenyan advocate, Mr. Anthony Gross to formalize the partnership between the 1st and 2nd respondents by converting the appellant as their corporate vehicle through which the tourism safari business on the camp and elsewhere would be conducted and to draw a business plan for all the projects involving the 1st and 2nd respondents.

In one of the meetings held on 30th August 1989 with the lawyers, the 2nd respondent intimated that he was in the process of acquiring some shares in the appellant company some of which would be apportioned to the 1st respondent on a 50:50 ratio between the two of them. Based on this understanding, the 2nd respondent averred, he made further investment in the joint venture by purchasing an air craft (Cessna 404), which was later on sold by the 1st respondent for account of the joint venture. The two extended their investment to Oltukai Mara Cottars Ltd. to be effected in the name of the 2nd respondent. Once again, the 1st respondent provided finances for this additional investment. In the meantime, the 1st respondent continued to improve the suit property which was at the time being managed by the son of the 2nd and 3rd respondents as an employee of the partnership. Because of his engagement in other businesses in Europe, the 1st respondent did not return to Kenya until 1999. He and his son Peter Bonde Nielsen were encouraged by the 2nd respondent to take an active role in the management of the camp. The 2nd respondent further suggested to the 1st respondent that it was prudent to incorporate a company to manage the camp.

Pursuant to this, the 1st respondent incorporated Ol Donyo Laro Estate Limited. As he did so, some ten years after they agreed to formalize their partnership in the camp business, no steps had been taken in that direction. What followed the incorporation of Ol Donyo Laro Estate Limited was frustration and sabotage by the 2nd respondent. He limited the operation and movement of the 1st respondent within the camp; he rejected the earlier proposal that the camp be managed through a company; he denied the 1st respondent the opportunity to apply for licence to operate the camp as a tourist lodge; and he insisted that the camp be dismantled.

In order to resolve these issues, the 1st respondent commenced a series of negotiations with the 2nd respondent which culminated in an understanding that Ol Donyo Laro Estate Limited would provide the day to day management of the camp including the maintenance of roads and airstrip in the suit property, and management of the nature reserve including wildlife. It was further agreed that the affairs of the partnership in the appellant company would be regularized by the 2nd respondent transferring 50% of his shares in the appellant company to the 1st respondent. With the dispute resolved and fresh hope of formalizing the joint venture, the 1st respondent continued to remit funds to the 2nd and 3rd respondents upon their request ostensibly towards the partnership arrangement; that in 2000 the camp was refurbished and improved at a great expense through Ol Donyo Laro Estate Limited, to the acknowledgment of the 2nd respondent; that Ol Donyo Laro Estate Limited continued to improve the road network by grading the roads within the suit property, putting up a rangers' camp and generally improving the entire infrastructure of the suit property; that Ol Donyo Laro Estate Limited advanced to the 2nd respondent Kshs. 1 million towards some legal fees in addition to some US $1,907,333 remitted to the 1st and 2nd respondents between 2002 and 2007; that in total, the 1st respondent contended, Ol Donyo Laro Estate Limited and himself spent US $ 14m; that Ol Donyo Laro Estate Limited employed over 500 rangers in order to enhance the value of the camp and the suit property. In addition, the company in discharge of its social responsibility set up microfinance facility, business training and bursaries for children.

Despite all this, the 2nd respondent once again began to harass the 1st respondent. Starting with a letter dated 17th November 2008 and addressed to the 1st respondent's son, Peter Bonde Nielsen, in which the 2nd respondent pronounced several restrictions on the 1st respondent's rights over the suit property and the camp. By those restrictions, the airstrip was closed, safaris to the camp banned, Ol Donyo Laro Estate Limited excluded from the management of the camp and entirely from the suit property. In furtherance of the foregoing and through the instigation of the 2nd respondent, the appellant company instituted Nakuru HCCC No. 103 of 2009 against the 1st respondent claiming that he and his employees, Ol Donyo Laro Estate Limited and its directors were trespassers on the suit property and seeking orders to restrain them from accessing the property. Stung by the turn of events and in view of his financial commitment and investment in the property the 1st respondent also instituted Nrb. H.C. Milimani Commercial Civil Suit No. 332 of 2010 against the 2nd and 3rd respondents and also the appellant company for:

"(A) A declaration that there is a partnership between the plaintiff and the 1st defendant on a 50:50 basis.

(B) That the veil of the 3rd defendant be lifted.

(C) Upon lifting of the veil aforesaid, it be declared that the shares held by the 1st defendant and the 2nd defendant in the 3rd defendant are held on constructive trust as to 50% for the plaintiff and as to the remainder for the 1st and 2nd defendants.

(D) That an order that the 50% of the shares held by the 1st and 2nd defendants in the 3rd

defendant be transferred to the plaintiff.

(E) That accounts be taken of all the partnership assets and upon the taking of the said account, any amount found to be due be paid back into the partnership.

(F) FURTHER OR IN THE ALTERNATIVE upon taking of the accounts, the amount found to be due, be paid to the plaintiff.

(G) The 1st and 2nd defendants be restrained by injunction from using the corporate veil to interfere with the plaintiff in his participation in management or operation of any of the partnership assets including Nguruman Limited.

(H) That the 1st defendant be restrained from interfering with the plaintiff in the common management of the partnership assets.

I. **That payment of US $1,917,333 being monies had and received by 1st and 2nd defendants to the use of the plaintiffs together with interest thereon at court rate as prayed at paragraph 30.**

(J) Costs of this suit together with interest thereon.

……..”

Simultaneous with the plaint, the 1st respondent brought a motion on notice from which this appeal has arisen, praying:

“3. THAT pending the inter-partes hearing of this application, the Honourable Court do issue an interlocutory injunction restraining the defendants, their agents, employees and/or nominees from interfering with the plaintiff’s homestead commonly known as Ol Donyo Laro.

4. THAT pending inter-parties hearing of this application, the Honourable Court do issue mandatory injunction compelling the defendants, their agents, employees and/or nominees to restore all water supply to Ol Donyo Laro homestead and to repair forthwith all damage to the Airstrip commonly known as the Ol Donyo Laro Airstrip.

5. THAT pending inter-parties hearing of this application, the Honourable Court do issue mandatory injunction compelling the defendants, their agents, employees and/or nominees to remove forthwith all camps established on the 26th August 2010 around the Ol Donyo Laro Airstrip.

6. That pending inter-parties hearing of this application, the Honourable Court do issue mandatory injunction compelling the defendants, their agents, employees and/or nominees to allow the plaintiff/applicant to participate in the management or operation of any of the partnership assets including all the parcel of land comprised in the Title No. Narok/Nguruman Kamorora/1 (the property) whether by himself or through his agents, employees and/or nominees.

7. That pending the inter-parties hearing of this application, the Court do issue an interlocutory

injunction restraining the defendants, their agents, employees and/or nominees from interfering with the plaintiff's homestead commonly known as Ol Donyo Laro.

8. That pending the hearing of this suit, the Honourable Court do issue an interlocutory injunction restraining the defendants, their agents, employees and/or nominees from interfering with the plaintiff's homestead commonly known as Ol Donyo Laro.

9. That pending the hearing of this suit, the Honourable Court do issue mandatory injunction compelling the defendants, their agents, employees and/or nominees to allow the plaintiff/applicant to participate in the management or operation of any of the partnership assets including all that parcel of land comprised in the Title No. Narok/Nguruman Kamorora/1 (the property) whether by himself or through his agents, employees and/or nominees.

10. That the Honourable Court be pleased to give such further or other orders and directions as it may deem fit and just to grant.

11. That the Court be pleased to grant any such or further order which is fit and expedient in the circumstances of this suit.

12. That the defendants bear the costs of this application."

The application was resisted by the 2nd and 3rd respondents and the appellant company all denying the existence of any joint venture in either the camp or in Oltukai Mara Cottars Limited and insisting that any dealing by the 1st respondent or Ol Donyo Laro Estate Limited in the suit property in which the appellant company is the registered proprietor, was illegal; that any claim relating to the 2nd respondent's shares in the appellant company was barred by limitation of time; that the 1st respondent was not entitled to US $1,907,333 which they maintained was never requested for.

The motion was canvassed before Odunga, J. who upon consideration of the material presented by way of affidavit evidence was persuaded that the 1st respondent had demonstrated a *prima facie* case with a probability of success at the hearing against 2nd, 3rd respondents and the appellant company; that in view of the circumstances of this dispute an award of damages would not be sufficient compensation to the 1st respondent and; that the balance of convenience was in favour of the 1st respondent. In allowing prayer 8 set out above, and having correctly demarcated his jurisdiction in dealing with an interlocutory application for an order of injunction, the learned Judge expressed the following opinion, which because of its importance to our decision in this appeal we must reproduce *in extenso*. Relying on the definition of *"prima facie case"* in **Mrao Ltd. V. First American Bank of Kenya Limited & 2 Others** [2003], KLR 125 he said:

"What I have to determine here is whether on the material presented, this court properly directing itself can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. The plaintiff's case is that the 3rd defendant in its present form was conceived from a joint venture between the plaintiff and the 1st defendant. It is his case that the 1st defendant was at one point the majority shareholder of the 3rd defendant which shares he held both for himself and the plaintiff before he transferred the same to the 2nd defendant, his wife. It is not contested that the 2nd defendant is the wife of the 1st defendant as well as the averments that the 2nd defendant is now the majority shareholder in the 3rd defendant a clout, she acquired courtesy of the 1st defendant's magnanimity. The 3rd defendant's position is that he, 3rd defendant, is a separate legal entity and therefore arrangement between the 1st defendant and the plaintiff should not affect the 3rd defendant.

However, it is well established that in deserving cases, courts of law are empowered to unmask the veil of incorporation……

There are also copies of correspondences *(sic)* **purportedly emanating from the 1st defendant and a reading of the same show, *prima facie* at least, that there was a relationship in existence between the plaintiff and the 1st defendant which relationship went beyond the ordinary principal and agent. There are implied indicators that the two had some venture one way or another. What else would someone make out of the employment of such phrases as "and you are the only counterpart for me"" I am not saying conclusively that there was a partnership. What I am saying is that the evidence on record shows that the relationship ran deeper than suggested by the defendants. The 3rd defendant, however, would have nothing to do with this relationship since it is a different person and was not privy to the on goings** *(sic)* **between the two friends-turned-foes.**

A company registered under Cap 486 is, of a course, a distinct legal entity from the shareholders. However, that incorporation, as already stated above may be unmasked. When the same is done, the individuals behind the company are revealed and according to the plaintiff, when that revelation comes out it will be clear that he is also part and parcel of whatever constitutes the 3rd defendant. That however, will await the main suit."

The learned Judge also found that owing to the fact that the 2nd and 3rd respondents only filed grounds of opposition as opposed to a replying affidavit, the allegations made against them by the 1st respondent remained unrebutted and are *prima facie* true. With regard to irreparable injury and balance of convenience, the learned Judge held the view that whereas the apprehended injury was quantifiable in this dispute, there were, on the suit property third parties consisting of about 500 employees and their families whose livelihoods were likely to be adversely affected if an order of injunction was not granted. Finally, the learned Judge found, on that consideration, that the balance of convenience was in favour of the maintenance of *status quo* pending the hearing and determination of the action, and allowed prayer 8 (set out earlier) of the motion to the effect that pending the determination of the suit, the 2nd, 3rd respondents and the appellant company be restrained by an order of injunction from interfering with the 1st respondent's homestead commonly known as Ol Donyo Laro.

This order did not take into account that Ol Donyo Laro is within NAROK/NGURUMAN/KAMORORA/1 the suit property which measures nearly 70,000 acres and seemed to suggest that the 2nd, 3rd respondents and the appellant company were excluded from the entire parcel of land. It became necessary, as a result, to clarify the extent of the application of the order on the ground, hence the appellant's application dated 3rd September 2012. In his ruling rendered on 10th December, 2012, Mabeya, J. declined to delimit the 1st respondents *"homestead"* known as Ol Donyo Laro arguing that the court was ill-equipped and lacked expertise to do that. He, however, modified the earlier order issued on 30th March 2012 by Odunga, J. by allowing the appellant unrestricted access into and out of any and every part of the suit property except the portion comprising the 1st respondent's homestead.

We note that the modification also failed to define the extent of the "homestead" with the result that the protagonists are in occupation of the suit property and the hostilities stirred by the past tension persist. The appellant company was aggrieved by the interlocutory orders issued by Odunga, J on 30th March 2012 and brings this appeal to challenge that decision relying on 34 grounds, which Mr. Ahmednasir, learned Senior Counsel for the appellant condensed and argued but which we have further summarized as follows:

i. That the plaint as well as the application did not disclose any cause of action against the appellant company.

ii. The learned Judge misconstrued what amounts to *prima facie* case with a probability of success.

iii. The application did not meet the threshold in **Giella V. Cassman Brown & Co. Ltd** [1973] EA 358.

iv. The learned Judge erred in failing to find that the appellant company as the registered owner of this suit property existed as a distinct are separate entity from the 2nd and 3rd respondents.

v. The learned Judge erred in finding that the 1st respondent established *prima facie* the existence of a partnership.

vi. The learned Judge erred in holding that the appellant company acquired the suit property for the benefit of the 1st respondent out of the partnership funds.

vii. The learned Judge failed to find that the claim by the 1st respondent over a portion of the suit property amounted to dealing in agricultural land under the provisions of Land Control Act which required the consent of the relevant Land Control Board as the 1st respondent is a non-Kenyan citizen.

viii. The court below failed to give effect to the appellant's absolute legal proprietorship over the suit property in terms of the provisions of the Registered Lands Act.

ix. The court failed to find on the material presented by the appellant that the 1st respondent's claim was in the category of a derivative action by the 1st respondent who is a director of Vanderbilt Kenya Limited, which fact, although material, the 1st respondent is guilty of failing to disclose.

x. There was no material placed before the court below to warrant the lifting of the veil of incorporation since the 1st respondent's claim was only over shares in the appellant, and,

xi. The interlocutory injunction was granted in error after the learned Judge's finding that the 1st respondent could be compensated by an award of damages; and on the basis of balance of convenience of non-parties to the suit.

Mr. Nowrenjee learned Senior Counsel representing the 2nd and 3rd respondents argued only two points; that the learned Judge erred in resorting to his inherent powers when there were statutory provisions on the question before him and in which the 1st respondent made a conscious decision to specifically cite **Order 39 Rules 2** and **3** and not **Rules 1** and **4**.

The second point urged by counsel was based on the provision of **order 40 Rule 6** of the Civil Procedure Rules, 2010 to which both Odunga and Mabaya JJ alluded to by reminding the parties to bear in mind the timelines set under the provision. Counsel submitted that the injunction granted on 30th March 2012 had lapsed as the suit upon which it was granted has not been determined within a period of 12 months from the date of the grant of the interlocutory injunction. Accordingly, counsel argued, the interlocutory injunction granted on 30th March 2012 lapsed on 29th March 2013. Indeed, Mabaya J. in his aforesaid ruling set the road map for the hearing of the main suit by directing parties to engage in pre-trial procedures within 90 days from the date of his ruling. We were urged to declare the question of injunction from which this appeal was brought moot as the substratum on which it was issued has not been fulfilled, namely that the suit would be determined with 12 months.

Responding to the arguments raised by the appellant and those by the 2nd and 3rd respondents, Mr. Oraro, learned Senior Counsel urged us to ignore the submissions on mootness as they were made from the bar; that as a matter of fact the 1st respondent has filed an application in the High Court seeking to extend the time; that in any case the 1st respondent has not been idle as there having been several interlocutory applications touching on the suit that has not made it possible to proceed with the main suit; that the High Court itself has been entertaining these applications despite the provisions of **Order 40 Rule 6** aforesaid.

Finally, on the issue of mootness, learned counsel submitted that a temporary injunction under **rule 6** does not lapse automatically as is the case with *ex parte* injunction under **rule 4 (3)** where there is express declaration that an *ex parte* injunction shall automatically lapse if within three days from the date of issue the application and pleading will not have been served on the party sought to be restrained. A party in whose favour an interlocutory injunction has been issued is entitled under **Article 50** of the Constitution to be heard before the order of injunction, a vested right, can be taken away.

On the main appeal learned counsel submitted that the 1st respondent established the existence of a relationship, a constructive trust resulting from that relationship; that he also demonstrated that he made significant investment towards the joint venture; that the learned Judge correctly found, on evidence, that there was a *prima facie* case with a probability of success based on various letters from the 2nd respondent to the 1st respondent; that since the investments by the 1st respondent were hidden behind the appellant company, the corporate veil had to be lifted; that the court cannot look the other side in a clear case where the 2nd respondent, using the appellant company wants to unjustly enrich himself at the expense of the 1st respondent.

We acknowledge the industry of all counsel and the brilliant presentation of their arguments, a true reflection of their status as Senior Counsel.

Because the question of mootness does not, in our view, present serious issues for the reasons we shall shortly show, we shall deal with it first. Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing **rule 6** aforesaid in the 2010 **Rules** was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. **Rule 6** of **order 40** was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders. A neighbouring example to demonstrate this will suffice. In Tanzania, their **order 38 rule 3** of the Civil Procedure Rules provides that an interlocution injunction can only be in force for a period not exceeding six months unless extended by court. The extension on the other hand is restricted to period which in aggregate must not exceed one year. The extension, the rule provides, will be upon the court being satisfied that the applicant has diligently been taking steps to settle the matter complained of and that the extension is in the interest of justice, necessary or desirable. Again, it provides that for the order of injunction to be discharged, varied or set aside, it has to be on application by an aggrieved party. Because the matter of mootness was raised in the course of arguments and in view of the explanation by Mr. Oraro that there is pending before the High Court an application that may address this question, it is safe to say no more on it.

Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion.

Once more, we remind ourselves that in considering this appeal, it would be both premature and prejudicial to the rights of the parties to make any conclusive pronouncements on matters either of fact or law, while the suit where such merits will be decided is still pending.

The application that has given rise to this appeal was brought on 30th August, 2010, some few days before the publication and coming into force of the 2010 Rules. It was brought under the provisions of

the **Order XXXIX Rules 2** and **3** of the repealed Civil Procedure Rules and the only issue arising from it that is relevant for the purpose of this appeal is the order restraining the appellant company from interfering with the 1st respondent's *"homestead commonly known as Ol Donyo Laro"* - Ol Donyo Laro *"homestead"* as we noted earlier is located within the 70,000 acre suit property. It is common ground that the entire suit property is registered in the name of the appellant company as its sole proprietor. It is also not in dispute that the directors of the appellant company include the 2nd and 3rd respondents. Further, it is not denied, on the basis of the copies of some letters relied on by the 1st respondent that there was some not-very-well-defined relationship between the 1st respondent on the one hand and the 2nd and 3rd respondents on the other hand. It is not for us as it was not for the learned Judge of the High Court to define or determine that relationship. The role of the learned Judge was merely to consider whether the principles for the grant of an injunction at that stage were met. There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since **Giella** case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

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.

"*Prima facie"* is a Latin phrase for *"at first sight"*, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "*a serious question to be tried"*, "*a question which is not vexatious or frivolous"*, *"an arguable case"* have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the **American Cyanamid Co. Ethicon Ltd** [1975] AC 396 is a case in point. The meaning of *"prima facie case*", in our view, should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in **Ramanlal Trambaklal Hatt V. Republic** [1957] E.A. 332.

Recently, this court in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 fashioned a definition for *"prima facie case"* in civil cases in the following words:

"In civil cases, a *prima facie* case is a case in 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but 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 adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

How do all these principles, conditions and guidelines relate to this appeal" A temporary injunction would issue under **Order XXXIX** of the repealed Civil Procedure Rules in the following instances: If it is proved that while a suit is pending determination any property in dispute in the suit is in danger of being wasted, damaged, alienated or wrongfully sold in execution of a decree by any party to the suit, or the other party intends to remove or dispose of his property to avoid execution; or where the other party threatens to commit a breach of contract or other injury arising out the contract or related to a property or right.

The 1st respondent's application, for citing **rule 2** of **Order XXXIX** was predicated upon the last ground, that there is a suit for restraining the rest of the parties in this appeal from committing a breach of contract or committing any injury. **Rule 3** also cited in the application dealt with *ex parte* application for injunction, clearly inapplicable to the matter under consideration. In granting a temporary injunction, the court acts in aid of the legal right so that the property may be preserved in *status quo.* The question

that must necessarily arise is whether on the facts and in the circumstance of the application for injunction there was *prima facie* case and if so between which parties"

As the basis of his claim, the 1st respondent made three broad allegations; that he committed resources by providing finances and architectural designs for the construction of the camp and funds for eventual construction; that he purchased an aircraft for the joint venture and when it was later sold by the 2nd respondent, the proceeds were invested in the joint venture; that he remitted funds to the 2nd and 3rd respondents upon their request to be used in the partnership, specifically that between 2002 and 2007 he remitted to the two US $ 1,907,333; that he used his money to improve the facilities and infrastructure in the camp and on the suit property.

The funds were remitted either by himself personally or through a company, Ol Donyo Laro Estate Limited, in which he was a director. It is his case that in addition to US $ 1,907,333 he spent on the joint venture a whooping US $ 14,000,000 (equivalent today to Kshs. 1.2 billion) to manage the camp, pay salaries for workers, develop and improve the road network. Since the property on which he spent such colossal sums of money belongs to the appellant company and since he paid some of the money directly to the 2nd and 3rd respondents who had the majority control over the appellant, and in view of the evidence that it was the 2nd respondent who lured him to invest in the manner he did, the 1st respondent contends that he is entitled to a 50:50 ratio ownership of the appellant company's assets. What *prima facie* evidence did he present to the High Court in proof of this claim" He traced the movement of the 2nd respondent's shares in the appellant company to the 3rd respondent at some point in time in order to manipulate the truth regarding the 1st respondent's shares.

Secondly, the 1st respondent relies on copies of letters written by the 2nd respondent suggesting the existence of a partnership. In particular, he has identified the following passages in the letters:

"The time has come for me to keep you up with the latest. Our fax is uninstalled as we await a secondhand, automatic switchboard in these very expensive new offices we moved into across the road. At the height of things, when all systems were 'go' – maybe 20 weeks occupance in Old'Laro. Kiwyu, Cottars Camp, our farm below and maybe Bosekovic etc……

Olduvai Camp will not take much more to complete. Ngare Keti could be made nice. We have planted quite a number of trees there since your last visit-a good number of fruit trees, like avocado. Our staff quarters need construction. Nothing much has happened in these places lately, but part of the reason in going over them lies in revisiting the idea of organizing some sort of tourist circuit there. It will be low occupancy, relatively up market. We need to offset the constant expenditure costs in some way or another. As I come closer to the end of the battle of procuring the Ngm shares, accordingly, I am proportioning my time to Ngm only, and then, with some luck, some day, the balance payments will move away from deep red towards black."

In another letter, the following is extracted:

"Ol Donyo Laro can only be used as your personal, private retreat like your personal yatch (do you remember we talked about that). It must remain closely, managerially attached to everything else in Nguruman Ltd. You have to have time for your place; you must look after it and have time to help deal with many regular problems."

The 1st respondent also relies on this other passage from yet another letter;

"I am well aware that Peter is not necessarily versed with what it takes to run or manage a

difficult place like Ol Donyo Laro, (for whoever might attempt running O'Laro separately will have to be a seasoned, senior person who can not only meet and negotiate with difficult tribesmen but also level with D.O, D.C., P.C., OCPD, PS, amongst other things) but he was the only person available in the family to represent you. And you are the only counter-part for me….

Nguruman is still sandwiched between two strong opposing Ministers the one openly reviling us mzungus for owning Maasai land both waiting eagerly for us to make a single serious mistake. As long as this situation prevails, one should for the time being avoid any additional exposure that would arise by officially establishing a tourist destination there no matter the chances of success may seem."

While it is not denied by the 2nd respondent that these letters emanated from him and while it is clear to us as it was to the learned Judge of the High Court that there was some sort of a relationship between the 1st and 2nd respondents, we have not however seen any material to conclude *prima facie* that that relationship was one of partners or persons engaged in a joint venture or even of trust.

The 1st respondent is portrayed as a global businessman. We do not think that a person with such a background and exposure would rely on passages in letters, the terms of which are not clear, to prove investing millions of dollars. Were the remittances in cash" No copies of bank statement or wire transfer or real time gross settlement (RTGS) slip, no copies of document to prove the purchase of a whole aircraft, a copy of a payroll for workers, copies of logbooks for vehicles were produced as a basis for the existence of a *prima face* case. Where is the nexus that the funds advanced to the 2nd respondent ended up in the appellant company" Were the funds provided by the 1st respondent in his personal capacity or was it Ol Donyo Laro Estate Limited that provided the funds". It was the duty of the 1st respondent to, *prima facie,* identify clearly what he himself personally paid to the 2nd respondent as what was paid by Ol Donyo Laro Estate Limited, a separate entity from him, can only be claimed by that company. What role, if any, did Vanderbilt Kenya Limited play in the whole transaction"

While we have abstained from expressing any firm views on the *prima facie* evidence presented in the High Court, we are of the view that that evidence did not discharge the burden. There is every possibility – only a possibility, that the 1st respondent may indeed have cogent evidence beyond the letters. He may indeed have the relevant documents to prove at the trial, on a higher scale of balance of probabilities, that indeed the 2nd and 3rd respondents received funds from him which are traceable to the appellant company. He may have evidence that unequivocally defines his relationship with the other respondents; that he paid contractors who built the camp and those who graded the road; he may in fact have documents relating to the purchase of the Cessna plane. The burden cast on the 1st respondent at this stage was, in our view, simple, dischargeable by merely producing copies of these documents and did not entail calling witnesses. That is how we think the standard of *prima facie* is proved. It is a standard, as was explained in the **Mrao** case (supra), higher than an arguable case. The learned Judge was certainly in error for insisting that the 2nd and 3rd respondents had to prove that they did not receive the funds when the burden was on the 1st respondent to prove on a *prima facie* basis that they received.

The learned Judge having appreciated that there were issues raised as to the applicability of the Law of Contract Act, the Land Control Act, the Partnership Act and the Companies Act ought to have gone a step further to inquire whether there was a *prima facie* evidence of compliance. He merely concluded that:-

"Unless the same are resolved in favour of the plaintiff, the plaintiff's case may collapse. Again, as rightly submitted by the 3rd defendant, there is no tangible evidence as yet in terms of accounts with respect to the plaintiff's contribution. That evidence….will come at the hearing.

Therefore it is clear that there are several grey areas which will have to be covered in this suit before the same can be determined."

Although the learned Judge said all these things when considering the prayer for a mandatory injunction, it is clear to us that the above statement was a misdirection by the learned Judge. The question he was expected, for example, to ask was whether the 1st respondent had presented *prima facie* evidence on accounts regarding his contribution to the applicant company, the crux of the dispute being hinged on that contribution. What the learned Judge did was to prematurely pierce the corporate veil at an interlocutory stage and without *prima facie* evidence.

Copies of the letters relied on by the 1st respondent and accepted by the learned Judge did not meet the threshold of "*prima facie* case". They comprise of updates on general terms, dealing with planting of trees, organization of tourist circuit, marketing strategy, among other ordinary things. We ourselves do not understand why such updates were necessary but the onus was on the 1st respondent to explain the circumstances. The suit property was not the only property to which reference was made in those letters. Kiwiyu, Cotters Camp, Olduvai Camp, Ngare Camp, among others were mentioned in relation to various updates. Some of the letters allude to management as opposed to ownership, partnership or a joint venture. The 2nd respondent and the appellant company, having intimated that as far as they were concerned, the 1st respondent was only managing the camp, it was for the latter to rebut that by presenting the *prima facie* evidence that we have alluded to earlier.

On irreparable injury we turn to what constitutes the 1st respondent's claim. In his affidavit in support of the application for temporary injunction, he avers:-

"3. That as evidenced by the said plaint, the dispute between the parties herein concerns my claim for 50% in a partnership between myself and the 1st defendant and my claim is for 50% of the shares in the 3rd defendant.

……..…

23. That among the assets of the third defendant in which I have a 50% share is all that parcel of land comprised in the Title No. Narok/Nguruman/Kamorora/1."

In the plaint, apart from certain declaratory orders, he seeks in the alternative payment by the 1st and 2nd respondent of US $ 1,917,333 as money had and received, 50% share in a partnership between himself and the 2nd respondent and the taking of accounts in all the partnership assets.

But the best summary of the 1st respondent's claim is expressed in his further affidavit filed in the High Court in this matter on 10th November, 2011, where he stated:-

"3. THAT my claim is <u>not for an interest on the land</u> as wrongly presumed by the deponent in the reply. <u>My claim is predicated on the existence</u> of a partnership between myself and the 1st defendant in respect of which, on the invitation of the said defendant, I agreed to participate in the establishment of up market tourist camps part of which were to be developed on the property of the 3rd defendant known as NAROK/NGURUMAN/KAMORORA/1 (the property). <u>The shares of and development on the 3rd defendant's property were part of the acquisitions of partnership assets financed by me through the 1st defendant.</u> It is in respect of the same and I have made the claim in the suit herein.

……..

My claim does not arise out of a claim of an interest in the property as suggested. My claim is in respect of equal ownership of the assets of the partnership part of which comprise the shares of the 3rd defendant and equal participation in the development and management of the partnership assets. The 1st defendant is hiding behind the veil of incorporation to avoid the obligation he owes to me in the joint venture." (Our emphasis).

The 1st respondent was quite clear that his claim had nothing to do with the suit property. It was about shares in the appellant company. His contribution to the company assets, including improving the property (the camp) was on the basis of funds supplied by him.

The learned Judge considered the requirement of irreparable injury and found as a fact that the 1st respondent's claim was capable of being quantified hence damages would be sufficient compensation. He unfortunately did not stop there as he ought to have done in view of such clear finding. He went on to say:

"With respect to the issue of irreparable loss, I am aware that the general position of the courts of equity has always been, that in determining whether to exercise its discretionary power to grant an equitable remedy, a court will not grant the remedy where the result would necessitate a breach by the respondent or defendant of a prior contract with a third party, or would compel the respondent (defendant) to do that which he is not lawfully competent to do and the applicant must show that in seeking the relief, he does not call upon the other party to do an act which he is not lawfully competent to do… Whereas, the damage may be quantified, the fact that the source of livelihood of third parties and their families are likely to be adversely affected in the meantime unless the injunction sought is granted, is not totally far-fetched and, in my considered view, does tilt the balance of convenience in favour of the maintenance of the *status quo*."

We are ourselves satisfied that the 1st respondent did not show *prima facie* that he might himself otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Can a claim for shares in a company be attached to a particular company asset" Temporary injunction should never issue when an action for an award of damages would adequately compensate the injuries threatened or caused.

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1st respondent's 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US $ 1,917,333 alleged advanced to the 2nd and 3rd respondents, and US $ 14 million allegedly used in the management and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial.

In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.

The learned Judge, even after relying on the two leading authorities for the grant of a temporary injunction, **Giella** and **Mrao** cases (supra), appears to have lost sight and acted with material irregularity in the exercise of his discretion by granting undeserved injunction against a party not shown to him to have any links with or played any role between the 1st and 2nd respondents. We must interfere with that exercise of discretion which was clearly wrong as the learned Judge misdirected himself on the

application of the principles for the grant of temporary injunction.

Wherefore we allow the appeal and set aside the ruling and order dated 30th March 2012. The 1st respondent shall pay the costs of this appeal to the appellant as to the 2nd and 3rd respondents.

Dated at Nairobi this 4th day of April 2014.

W. OUKO

……

JUDGE OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

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

REGISTRAR