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Njiru v Nawiri Sacco Limited & another (Civil Appeal E037 of 2021) [2022] KEHC 3155 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3155 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E037 OF 2021

LM NJUGUNA, J

JUNE 29, 2022

BETWEEN

ELIAS MUTURI NJIRU .... APPELLANT

AND

NAWIRI SACCO LIMITED .... 1ST RESPONDENT

GIANT AUCTIONEERS .... 2ND RESPONDENT

JUDGMENT

1. The appellant herein approached this court by way of an appeal vide a memorandum of appeal dated 30.09.2021 and wherein the appellant challenges the ruling in the Co-operative Tribunal at Nairobi in Case No. 177 of 2021 dated the 02.09.2021. In the said memorandum of appeal, the appellant raised nine (9) grounds of appeal wherein he faulted the decision by the Tribunal and in the end prayed that the appeal be allowed and the following orders be made:

   i) The appeal be allowed.

   ii) That the ruling made by the learned magistrate be set aside.

   iii) Costs of the appeal be borne by the respondents.

2. The appellants' case is that he is a member of the 1st respondent and that on or about 27.08.2019, the 1st respondent loaned him Kshs.2,500,000/= and that he used his Land Parcel No. Ngandori/Kirigi/T143 as security for the loan. That he diligently serviced the loan until when Covid 19 pandemic hit the country and grossly affected his business and thus rendered it difficult for him to continue servicing the said loan.

3. That as a result, the 2nd respondent vide instructions from the 1st respondent proceeded to advertise Ngandori/Kirigi/T143 for sale which action was unprocedural and illegal as they did not serve him

with summons, court order or any written notice outlining the money owed and asking him to rectify the default.

4. The 1st respondent on its part averred that the appellant was advanced a loan of Kshs.2,500,000/= and deposited title to land parcel No. Ngandori/Kirigi/T143 as sucurity for the said loan.

5. That the appellant failed to pay as per the agreement and requested to be given time following which, he was given repayment break of 6 months to resume repayment in September, 2020 which he failed to honour and demand notice was issued.

6. As a result of the default, the 2nd respondent under the instructions of the 1st respondent proclaimed the security and issued redemption notice of 45 days dated 24.11.2020. That on the 8.01.2021, the appellant requested for a further reprieve and was given a grace period of 3 months to clear the loan arrears and update his monthly installments which request he failed to honour as a consequence of which, the 1st respondent issued a notification of sale of the charged property to recover the loan.

7. The appellant filed a claim before the Tribunal and an application dated the 08.04.2021 in which he sought an order to stay the sale by public auction but the application was dismissed vide a ruling delivered on the 02.09.2021, hence the appeal herein.

8. The appeal was canvassed by way of written submissions wherein the appellant submitted that the Tribunal did not exercise its discretion properly by not granting orders for stay of sale by public auction of charged property know as Land Parcel No. Ngandori/Kirigi/T143 pending the hearing and determination of the substantive claim. It was submitted that the 1st respondent never followed the laid down procedure as provided for in Section 90 of the *Land Act* which is a mandatory section before realization of a charged property and as such, it was argued that the appellant had demonstrated a prima facie case. Reliance was placed on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* 2003 eKLR 125.

9. That the learned magistrates failed to appreciate that the appellant would suffer irreparable harm should Land Parcel No. Ngandori/Kirigi/T143 be sold by the 2nd respondent during the pendency of the claim. It was submitted that the conservatory orders sought were meant to preserve the substratum of the claim pending the hearing and determination of the claim. That the sale of the charged property would inflict great injustice to the appellant given that he stands to lose his dwelling place permanently if the 2nd respondent were to sell the charged property. Reliance was made on the case of *Paul Gitonga Wanjau v Gathuthi's Tea Factory Company Ltd & 2 others* 2016 eKLR. It was the appellant's submission that no amount of damages could compensate the loss he would incur should he succeed in the substantive claim and therefore, he urged this court to allow the appeal and set aside the ruling dated 02.09.2021.

10. The respondents on the other hand submitted that the appellant being a member of the 1st respondent, requested for a loan from the 1st respondent who proceeded to advance a loan facility of Kshs.2,500,000/= on 27.08.2019. That the appellant deposited as security, title to Land Parcel No. Ngandori/Kirigi/ T143 which was charged in favour of the 1st respondent. It was submitted that the appellant failed to abide by the payment terms of the agreement having been given a repayment break of six (6) months of which he was to resume payments in the month of September, 2020 which he equally dishonoured. That the 2nd respondent under the instructions of the 1st respondent proclaimed the security and issued redemption notice of 45 days dated 24.11.2020. That on 09.03.2021, the 2nd respondent under the instructions of the 1st respondent issued a notification of sale over the charged property to recover the aforesaid loan.

11. It was their case that due process was followed and as such, the appellant has approached this court with unclean hands. It was submitted that the appellant never made any prima facie case to deserve the orders sought in reference to the case of Giella v Cassman Brown (supra). That the appellant did not prove the probability of success of his case to warrant the granting of the orders sought and that courts should not issue injunctive orders to assist a party who has admitted having breached express terms of a contract by defaulting in loan repayment. Further, the respondents submitted that the appellant has filed the appeal herein without attaching the order being appealed against which is contrary to Order 42 Rule 13(4) of the *civil Procedure Rules*. That the omission was fatal to the entire appeal herein and in the end, this court was urged to strike out the entire appeal on a point of law.

12. I have definitely analyzed the evidence which was tendered before the tribunal, the grounds of appeal and the respective submissions of the parties herein and it is my considered view that the main issue for determination is whether the appeal is merited.

13. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. [See the case of *Selle & ano. v Associated Motor Boat Co. Ltd* [1968] EA 123]. However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. [See *Mwanasokoni v Kenya Bus Service Ltd*. [1982-88] 1 KAR 278 and *Kiruga v Kiruga & another* [1988] KLR 348].

14. Before determining the appeal herein on its merit, the respondents have raised an issue that this appeal is incompetent in the manner filed given that the appellant has failed to annex the certified order being appealed against contrary to the provision of Order 42 Rule 13 (4) of the *Civil Procedure Rules*. I will proceed and deal with the issue first.

15. To answer the Respondent's argument, I am guided by the finding of the Court of Appeal in the Case of [*Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata*]() Civil Appeal No. 63 of 2016 [2017] eKLR where it was held:

> " starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules...
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> ...the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:
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> "The word "decree" has been defined by the Civil Procedure Act Cap 21 to include judgment. Infact the Civil Procedure Act as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up".
>
> This is the essence of the proviso to the definition of the term "decree". According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court; consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice the Appellant suffered with the omission of the certified copy of the decree in the record of appeal. We do not discern any."

[Also See *Kenya women Micro Finance Ltd v Martha Wangari Kamau*[2020].

16. Whereas it is true that the appellant failed to annex a certified copy of the decree, he did attach a certified copy of the ruling which would suffice in the absence of a certified copy of the order. Further, it has not been shown what prejudice the respondents suffered by the failure to annex the certified copy of the order. I therefore find that the appellant's failure to annex the certified copy of the order cannot be a basis for striking out of the appeal.

17. Turning to the substantive issues herein, the appellant sought before the trial court stay orders pending the determination of the application and further the claim.

18. The law on granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides:-

" Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

19. The conditions for consideration in granting an injunction were settled in *Giella v Cassman Brown & Company Limited* (1973) E A 358;

" First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

20. The first question I must answer is whether the applicant has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*[2003] eKLR as follows:

" 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."

21. The appellant avers that he has been in continuous occupation of the Land Parcel No. Ngandori/Kirigi/T143 and that he dwells on the said piece of land and that the 1st respondent never followed the laid out procedure in Section 90 of the *Land Act* which section is mandatory before the realization of a charged property.

22. Section 90 of the said *Land Act* No 6 of 2012 provides as follows:-

    1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

    2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—

    a) the nature and extent of the default by the chargor;

    b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months (emphasis court), by the end of which the payment in default must have been completed;

    c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

    d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

    e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

23. In the Demand Notice dated 14.10.2020, the 1st respondent wrote to the appellant as follows;

    " We refer to a loan granted to you by the society and note that you have failed to service the debt as per the agreement despite our several reminders for the payment of overdue /arrears facility dated 27.03.2017...."you have not honoured your obligation and neither have you come up with an acceptable repayment proposal..."

24. Reading the contents of the said demand notice dated 14.10.2020 against the provisions of Section 90 of the *Land Act*, it is evident that the said notice clearly indicated that the outstanding amount of arrears as at the time was Kshs.2,435,205/=. The appellant was given seven (7) days within which to pay the outstanding arrears failing which the 1st respondent would proceed with legal action to forward the name of the appellant to external debt collector for auction.

25. It appears that the appellant did not pay the arrears within three (3) months provided for by the law from the said notice wherein legal action was to be taken against him as had been indicated by the 1st respondent.

26. The court notes that though the demand notice dated 14.10.2020 gave the appellant 7 days within which to pay the arrears, the 1st respondent did not take any adverse action against the appellant until after the expiry of three months noting that the statutory notice is dated 9.03.2021 in which the appellant was given (45 days) as required under Section 96(2) of the *Land Act*. In my view, the 1st respondent complied with the timelines as enumerated under Sections 90(2)(b) and 96(2) of the *Land Act*.

27. Upon the appellant failing to rectify the default within the three (3) months as stipulated in Section 90(2)(b) of the *Land Act*, the Respondent's right to realize the securities crystallized as provided in Section 96(1) of the *Land Act*. The same provides as follows:-

> " Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land."

28. The forty five (45) days' notice by M/S Giant Auctioneers dated 09.03.2021 in my view was proper and further, the date of the newspaper in which the subject property was to be sold by public auction dated 29.03.2021, suffices in accordance with Rule 15 (d) and (e) of the Auctioneers Rules 1997. The same provides that:-

> " Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—
>
> (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
>
> (e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement."

29. As earlier stated, the principles guiding the grant of orders for injunction are well settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (*Supra*). These are that the applicant has to demonstrate that it has established a prima facie case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt, then it shall decide the application on a balance of convenience.

30. Going further, deep sentimental attachment to a security is also not a ground for granting of an injunction for the reason that once a chargor offers such property as security for a facility advanced to him, then he risks the same being put up for sale in case of default. In this respect, this court is not persuaded that the appellant has demonstrated that he would suffer irreparable loss in the event the 1st respondent exercises its statutory power of sale. [See *Kaimuri Nceene v Peter Kailemia Amburukua* [2021] eKLR].

31. In view of the above, the balance of convenience tilted in favour of the respondents in not having an injunction granted and this is so since, the appellant has approached the court with unclean hands having entered into an agreement with the 1st respondent of which he proceeded to breach. Further,

I hold the view that he did not established a prima facie case with a probability of success and the Tribunal did not err by failing to grant the sought for injunction.

32. For the foregoing reasons, the upshot of this judgment is that the appeal herein is not merited and the same is hereby dismissed but with no order as to costs.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2022.

L. NJUGUNA

JUDGE

..for the Appellant

...for the Respondents

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