



**Cooperative Bank of Kenya Limited & another v Aberdare Steel and Hardware Limited
(Civil Appeal 122 of 2018) [2022] KEHC 11043 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 122 OF 2018
MM KASANGO, J
JULY 27, 2022**

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED 1ST APPELLANT

VIEWLINE AUCTIONEERS 2ND APPELLANT

AND

ABERDARE STEEL AND HARDWARE LIMITED RESPONDENT

*(Being an appeal from the Ruling and Order of the Chief Magistrate's
Court at Kiambu (Hon. S.K. Arome, RM) dated 30th August, 2018))*

JUDGMENT

1. This is an appeal from a Ruling on an interlocutory application filed before the Kiambu Chief Magistrate's Court.
2. As the first appellate court, this Court is guided by long line of decisions such as the case *Gitobu Imanyara & 2 others vs. Attorney General* (2016) eKLR as follows:-

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
3. The trial court had before it two applications. The first in time was filed by the respondent and was dated 15th May, 2017. By that application, the respondent sought two main prayers: that is, an interlocutory order for the appellant to render to the respondent true accounts of the loan issued by



appellant to the respondent; and an interlocutory injunction to issue restraining the appellant from advertising for sale or disposing to third party property LR NO. 14870/263 (the suit property).

4. The background of the appeal is that the appellant, Co-operative Bank of Kenya Limited granted the respondent, Aberdare Steel & Hardware Ltd a loan facility for sum of Kshs.32,000,000. The loan facilities were secured guarantee by Solomon Ndibui Ngechu (hereafter Solomon) and by a charge over the suit property. The suit property is registered in the name of Solomon.
5. I will re-emphasize and state that the suit property is registered in the name of Solomon. Solomon is not a party into his suit.
6. The application filed by the respondent for injunction before the trial court was premised on the ground that the respondent faithfully repaid the loan facilities without default, yet the appellant intended to sell the suit property, in exercise of its statutory power of sale, without serving Solomon with statutory notices.
7. The second application was filed by the appellant before the trial court and was dated 12th July, 2017. By that application, the respondent sought an order of striking out the respondent's suit. The application to strike out was based on the grounds that the respondent had previously instituted similar proceedings against the appellant; namely Nairobi High Court HCCC 92 of 2016 Aberdare Steel & Hardware Limited v s. Co-operative Bank of Kenya Limited and before Chief Magistrate's Court Thika CMCC 330 of 2016 Aberdare Steel And Hardware Limited vs. Co-operative Bank of Kenya Limited.
8. The application is also based on the ground the trial court lacked pecuniary jurisdiction.
9. The trial court, by its Ruling dated 23rd August but delivered on 30th August, 2018, granted the respondent interlocutory injunction and in so doing, stated thus in that impugned Ruling:-

“ Guided by the conditions for the grant of an interlocutory injunction as set out in the case of *Giella Cassman Brown*(1973) EA 358 (sic). I am satisfied that if the injunction is not granted the applicant residential house will be sold. This will cause irreparable injury reason being this is a home from where he organize and manage his business to repay the loan, accordingly suffering connected to the selling of the residential house cannot be compensated by an award of damages. In conclusion, the applicant (the respondent) has satisfied one condition which I will grant for a period of one years. Failure the (sic) 1st respondent (the appellant) to proceed with sale without further reference to the applicant (the respondent) one year from the date of this Ruling.

Analysis

10. Before proceeding further, it is important to state that the trial magistrate in granting the orders set out above for injunction, was exercising discretion. This court is required to trend with care when before interfering with the trial court's discretion. It is beneficial to consider what the Court of Appeal stated in this regard in the case *Nguruman Limited vs. Jan Bond Nielsen & Others* (2014) eKLR, as follows:-

“ Before advertng 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. Shab* [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.’”

11. Although the trial court was considering two applications in its impugned Ruling it only considered the Respondent’s application for injunction. As a consequence that impugned Ruling was one sided.
12. I have considered the written submissions of the appellant and respondent and I am indeed grateful for their industry.
13. The respondent was required to meet or satisfy the principles of granting an injunction enunciated in the case *Giella vs. Cassman Brown* (1973 (1973) E.A. 358, that is the respondent was required to show prima facie case with a probability of success; was required to show it would suffer irreparable harm; and if the court is in doubt of the two requirements above, the court is required to decide on that application for interlocutory injunction on a balance of convenience. An applicant is required to satisfy the above triple requirements in order to succeed. This is what was held by the Court of Appeal in the case [*Peter Kairu Gitu Vs. Kcb Bank Kenya Limited & Another*](#)(2021) eKLR thus:-

“I am guided by the decision in *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*, Ca No. 77 of 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction 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) allay 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.”

14. The trial court however very tepidly considered the aforesaid principles in application to the fact presented by the respondent. I call to remembrance the quotation of the impugned Ruling of the trial court hereinabove.
15. Although the trial court was of a view that the appellant’s exercise of its statutory power of sale in selling residential house would lead to irreparable harm I beg to be permitted to criticize that holding of the trial court. It is now accepted that once a party offers its property as security for a loan it has the effect of turning that property into a commodity of sale. See what the court stated in the case *Peter Kairu Gitu Vs. Kcb Bank of Kenya Limited*(supra) thus:-

“Courts have on numerous occasions expressed their positions regarding mortgage over family/matrimonial property and I am happy to refer to HCCC Number 82 of 2006 *Maltex*



Commercial Supplies Limited & Another v Euro Bank Limited(In Liquidation) where the court observed that: -

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

16. Similarly, in *Maithya v Housing Finance Co. of Kenya & Another* [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows: -

‘Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.’”
16. As stated before, the respondent was required to satisfy the three principles of granting an injunction as stated in the case *Giella vs. Cassman Brown*(supra). The suit property as stated before is registered in the name of Solomon. Solomon was not a party in the trial court. Solomon secured the loan facilities granted by the appellant to the respondent by charging his property, the suit property. It logically follows that the respondent not being the registered owner of the suit property failed to show a prima facie case with probability of success and most importantly failed to show it would suffer irreparable harm. It remained that the only party who would suffer irreparable harm, if at all, would be Solomon. On that premise alone, that the respondent has no proprietary claim over the suit property the application for interlocutory injunction by the respondent ought to have failed.
17. The appellant’s application clearly shows that the respondent had filed previous suits in Nairobi High Court and at Thika Chief Magistrate’s court. The trial court even though the evidence of the existence of those suits was provided by the appellant failed to interrogate whether indeed the respondent was in breach of Section 6 of the *Civil Procedure Act*, which forbids a court proceeding with a matter in issue in a previous instituted suit. Had the trial court exercised its mind to what was presented before it, it would have undoubtedly reached a conclusion, as I do that the suit before it was an abuse of the court process in view of the suits filed by the respondent over the same issues in the case before the trial court. Again, had the trial court considered the appellant’s application and replying affidavit, it would have noticed that the loan facilities represented by the charge instruments was beyond its pecuniary jurisdiction. Section 7(1) of the Magistrates’ Court Act provides that a Chief Magistrate can exercise jurisdiction over matters whose value is Kshs.20million. The charge instruments which were before the learned magistrate S.K. Arome, RM clearly showed the subject matter before that court was over Kshs.32 million. The trial court had no jurisdiction to entertain the action before it and ought to have struck the action. Jurisdiction is the authority to decide a matter. This is what was held in the case *Owners of The Motor Vessel M.v. “lilian S” Vs. Caltex Oil (kenya) Ltd* (1989) thus:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

Disposition

18. The judgment of this Court is that this appeal succeeds as follows:-
- a. The trial court’s Ruling is hereby set aside and the Notice of Motion dated 15th May, 2017 is dismissed with costs.
 - b. The Notice of Motion dated 12th July, 2017 is allowed and accordingly, the Kiambu CMCC No. 247 of 2017 is struck out with costs.
 - c. The appellant is awarded the costs of this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice

For Appellants:- Ms. Thiru H/B Kenneth Wilson.

For Respondent:- N/A

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

