IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E036 OF 2020

BETWEEN

COS O SYSTEM SERVICES LIMITED ..... 1ST APPELLANT

JAMES NGUGI GACHUHI ..... 2ND APPELLANT

AND

SBM BANK LIMITED ..... RESPONDENT

***(Being an appeal from the Ruling and Order of Hon. A. M. Obura, SPM dated 30th April 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 768 of 2019*)**

JUDGMENT

1. This is an appeal against an order dismissing the Appellants' application seeking an injunction restraining the Respondent, a successor of Chase Bank ("the Bank"), from exercising its statutory power of sale.

2. According to the Plaint filed before the subordinate court, the 1st Appellant ("the Company") borrowed Kshs. 1,500,000.00 from the Bank upon security of a legal charge over a property; NGONG/NGONG/37487 ("the suit property") registered in the name of Margaret Njeri Warui who is a guarantor as well as a chargor. The 2nd Appellant pleaded that he brought the suit as the spouse of the chargor as he had a beneficial interest as the suit property was their matrimonial home.

3. The Company admitted that it faced financial challenges and at some point it sought indulgence from the Bank. In the meantime, the guarantor also paid some money to settle part of the liability. In due course, the Bank proceeded to take steps to exercise its statutory power of sale.

4. The Appellants filed suit claiming that the Company only owed the Bank Kshs. 2,555,000.00 part of which the chargor had paid Kshs. 445,000.00 therefore the Bank could not claim Kshs. 4,355,585.94 as this was in violation of the *in duplum* rule set out in **section 44A** of the ***Banking Act (Chapter 488 of the Laws of Kenya)***. They also complained that the Bank had not issued the requisite statutory notices under **sections 90, 96 and 97** of the ***Land Act, 2012***.

5. In the Plaint, the appellants sought a declaration that the intended exercise of the statutory power of sale by the Bank was illegal, null and void and a permanent injunction restraining the Bank from selling the suit property in exercise of its statutory power of sale.

6. The Plaint was accompanied by Notice of Motion dated 16th October 2019 seeking an interlocutory injunction under several provisions of the law among them **Order 40 rule 1** of the ***Civil Procedure Rules***. The application was argued interparties and by the ruling dated 16th October 2020, the trial magistrate dismissed the application on the ground that the appellants had not made out a prima facie case with a probability of success. The trial magistrate found as fact that the appellants had admitted being in arrears and that statutory notices issued by the Bank were not rebutted. The court also observed that there was a similar case between the parties; **Nairobi ELC Case No. 810 of 2015** which had been dismissed for want of prosecution and bringing the suit was therefore an abuse of the court process.

7. Before I deal with the substantive appeal, it is important to set out some broad principles applicable to this case. In the case ***Giella v Cassman Brown & Co Ltd*** **[1973] EA 358**, Spry VP before setting out the principles governing the grant of an order of injunction

summarized the extent to which the appellate court may interfere with the trial court's discretion as follows:

> *I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (**Sergeant v Patel [1949] 16 EACA 63**).*

8. The court then laid down the now established principles governing the grant of an interlocutory injunction as follows:

> *The conditions for the grants of an interlocutory injunction are now, I think well settled in East Africa. 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 doubts, it will decide an application on the balance of convenience.*

9. Although the Appellants set forth seven grounds of appeal in the memorandum of appeal dated 29th May 2020, the issue can be condensed into one issue and it is whether the learned magistrate erred in failing to find the Appellants had established the conditions for the grant of an injunction set out in the case of ***Giella v Cassman Brown*** **(Supra)**. The appeal was canvassed by written submissions.

10. The Appellants conceded in the plaint before the trial court that the Company was indebted. What they contended is that the Bank was claiming more than it ought to in breach of the *in duplum* rule. The trial magistrate was correct in noting that once the debt was admitted, then an injunction could not be issued on account of a dispute as to the amount. In this case, the issue of interest would only go to the extent of indebtedness. This principle is ingrained in our law and has been restated several times by our courts. In ***Joseph Okoth Waudi v National Bank of Kenya*** **CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR** the Court of Appeal stated that:

> *It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive. See **Halsbury's Laws of England Vol. 32, 4th Edition page 725** and **Lavuna &Others vs. Civil Servants Housing Co. Ltd. & Another Civil Appeal Nairobi No. 14 of 1995 (unreported). Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported)**.*

11. The substantial question for the court was whether the statutory power of sale had crystallized. In order to exercise its statutory power of sale, the Bank must issue a notice under **section 90** of the ***Land Act*** when the chargor defaults in any of its obligations under the charge. Such obligations include payment of interest or any other periodic payment or any part thereof due under the charge. If the chargor does not comply with the demand within 90 days after service of the notice, the chargee may proceed to sell the charged property after issuing subsequent notices. It is at this point that it is said the statutory power of sale has crystallized. Upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell under **section 96** of the ***Land Act***.

12. I hold that service of the statutory notice on the chargor is mandatory before the exercise of the power of sale. It is only upon service, that a chargor is notified of default of obligation under the charge and given the opportunity to exercise its right of the redemption (see ***Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others*** **[1995-1998] 2 EA 260**). Unless the chargor admits service of the statutory notice, the burden is on the chargee to establish service. In this case, neither appellant is the chargor. The chargor is Margaret Njeri Warui in whose name the suit property is registered. She did not swear any deposition that she had not been served with the statutory notice. Further, it is only the chargor who is the proper party to sue the Bank and who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively since it is the chargor who has a registered or proprietary interest in the land (see ***Nairobi Mamba Village v National Bank of Kenya Ltd*** **[2002] 1 EA 197**, ***Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd*** **CA Nai No 349 of 2003 (UR)** and ***Kenya Commercial Finance Company Limited v Afraha Education Society*** **[2001] 1 EA 86**).

13. This brings me to the issue of abuse of the court process alluded to by the trial magistrate. The chargor, Margaret Njeri Warui, had already filed a suit seeking an injunction to restrain the Bank from exercising its statutory power of sale; ***ELC Case No. 810 of 2015, Margaret Njeri Warui v Chase Bank Limited***. That suit was dismissed for want of prosecution. The application for injunction by the Appellants is an attempt to seek the same orders the chargor failed to obtain in her own suit, it is therefore an abuse of the court process.

14. I find and hold that the trial magistrate came to the correct conclusion that the Appellants had not established a prima facie case with a probability of success. I therefore make the following orders:

(a) I dismiss the appeal with costs to the Respondent.

(b) The interim orders in force are discharged forthwith.

(c) The sum of Kshs. 500,000.00 paid into court pursuant to the order of 28th September 2020 shall be released to the Respondent.

DATED and **DELIVERED** at **NAIROBI** this **18th day of JANUARY 2021.**

D. S. MAJANJA

JUDGE

Mr Odoyo instructed by Kipkenda and Company Advocates for the Appellant.

Mr Kazungu instructed by Okubasu Munene and Kazungu Advocates for the Respondent.