



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. 19 OF 2019

JOHN NG'ANG'A MUIGAIAPPELLANT

-VERSUS-

JITEGEMEA CREDIT SCHEME LIMITEDRESPONDENT

(Being an appeal against the Ruling delivered on 20th June 2019 by Honourable E. Wanjala (Miss) (SRM) in Nairobi Milimani CMCC No. 2491 of 2019)

JUDGMENT

1. The Appellant herein, **John Ng'ang'a Muigai**, who is the plaintiff before the Lower Court, sued the respondent seeking, *inter alia*, orders of permanent injunction to restrain the respondent from selling, alienating or otherwise interfering with his quiet possession of LR No. Muguga/Gitaru/1929(hereinafter "**the Suit Property**").
2. Concurrently with the plaint, the Appellant also filed an application seeking interim orders of injunction to restrain the respondent from selling, auctioning, transferring or otherwise dealing with the suit property pending the hearing and determination of the suit.
3. The facts of the case are that sometime in September 2015, the Appellant entered into a guarantee and indemnity contract with the respondent wherein he guaranteed a sum of Kshs 8 million advance to a borrower one **Francis Njenga Kabuu** for which the suit property was charged as security. The loan was however not repaid as agreed thereby leading to the respondent's decision to exercise its statutory power of sale thus precipitating the filing of the suit before the lower court.
4. Through a ruling delivered on 20th June 2019, the lower court dismissed the Appellants application dated 10th April 2019 thereby precipitating the filing of the instant Appeal and application dated 11th July 2019 seeking orders of temporary injunction to restrain the respondent from selling, auctioning or transferring the suit property pending the hearing and determination of the appeal.
5. The respondent opposed the application through the replying affidavit of its Operations Manager **Ms Nancy Wanjiru Njue** who avers that the loan procured by the Appellant remains unpaid to the tune of Kshs 5,723,000 despite the loan being rescheduled and several demands being sent to the appellant.
6. She avers that all the requisite statutory notices were sent to the Principal Borrower and the Appellant before the respondent decided to exercise its statutory power of sale.
7. She further avers that in the circumstances of the case, the learned trial Magistrate did not err in dismissing the Appellant's application for injunction.
8. Parties canvassed the appeal by way of written submissions which I have carefully considered. The main issue for determination is whether the Appellant has made out a case for the granting of the orders sought in the Appeal.
9. The principles governing the granting of interlocutory injunction were set out in the landmark case of **Giella v Cassman Brown & Company** [1973] EA 358 and reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 others** CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

10. In the instant case, it is not disputed that the respondent advanced a loan facility to the principal borrower for which the appellant herein charged the suit property as a guarantor for the said loan.
11. It was further not disputed that the Principal Borrower defaulted in the loan repayments thus precipitating the respondent’s exercise of its statutory power of sale.
12. As I already noted in this judgment, this is an interlocutory appeal from the trial court’s ruling on the subject of injunction. The main dispute between the parties is still pending determination before the Lower Court. In this regard, this court will be cautious in determining this appeal so as not to interfere with the jurisdiction of the trial court which will ultimately hear the main suit.
13. The Appellant’s case is that the respondent did not serve him with the mandatory statutory notices while the respondent contended that all the requisite notices were sent to the Appellant.
14. I have perused the respondent’s annexure “**JCS 3**” to the Replying Affidavit and I note that they comprise notices sent to the Appellant and the Principal Borrower at different times. I note that the said notices were duly received by the Appellant herein as shown by his letter dated 21st March 2019 and signatures in acknowledgment of the notices. I am therefore not satisfied that the Appellant claim that he was not served with notices is plausible.
15. Be that as it may, courts have held that lack of or improper service with statutory notices cannot stand in the way of a charge exercising its statutory power of sale.
16. The appellant also contended that the respondent has not undertaken the mandatory valuation of the suit property and that there is real risk that the suit property will be sold at an under value not reflective of the current value.
17. The appellant also contended that the guarantee and charge between the parties are null and void to the extent that the Appellant was not given proper explanation over the same as he never appeared before an advocate who prepared a false certificate in terms of Section 45 of the Land Registration Act.
18. I also note that the Appellant had, in his letter dated 21st March 2019 protested that he was never issued with a copy of the alleged signed guarantee and charge documents.
19. I have perused all the documents produced by the respondent as annexures in response to the instant application and the earlier application before the trial court and I note that in both instances, the respondent did not attach copies of the charge and guarantee documents.
20. In my considered opinion, these are very crucial documents that form the basis of the respondents exercise of the statutory power of sale. I find that the absence of the said documents, which would have directly linked the Appellant to the loan in question lends credence to the Appellant’s claim that there is more than meet the eye in the entire loan transaction. I however find that the issue of the validity of the loan agreement between the Appellant and Respondent herein is an issue that can only be determined, with certainty/finality, by the court that will ultimately hear the merits of the main suit. For the reasons that I have stated in this ruling, I find that the applicant has made out a case for the granting or the temporary injunction pending the hearing and determination of the suit.
21. I therefore allow the appeal with orders that the costs of the appeal shall abide the outcome of the main suit before the trial court.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Watitu for Appellant.

No appearance for Respondent.

Court Assistant: Sylvia.