



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 15 OF 2019

BETWEEN

PETER KIHARA.....APPELLANT

AND

CONSOLIDATED BANK OF KENYA1ST RESPONDENT

PURPLE ROYAL AUCTIONEERS 2ND RESPONDENT

(Being an appeal from the Ruling of Hon. P.N. Gesora, CM dated 17th May 2018 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 7416 of 2017)

JUDGMENT

1. The Appellant has filed an appeal with the court challenging the ruling of the Subordinate Court dated 17th May 2018 dismissing his application seeking an injunction restraining the 1st Respondent ('the Bank') from exercising its statutory power of sale over his property LR/Nairobi/Block 119/1072 ("the suit property").
2. The facts giving rise to the suit before the Magistrates Court are as follows. By a Letter of Offer dated 12th September 2013, the Bank agreed to extend a term loan facility of KES 3,100,000.00 to the Appellant secured by a First Legal Charge over property LR. No. Escarpment/Kinari/Block I/823. The Appellant sought and was granted a new term loan of KES 8,200,000.00 by the Letter of Offer dated 20th November 2013. The new facility was secured by a Charge over the suit property. The loan was to be repaid over a period of 60 months by installments of KES 221,838.00 per month inclusive of interest.
3. The Appellant defaulted in making repayments to the Bank. He claimed that the Bank had failed to debit the monthly repayment amounts causing his account to accrue penalties and interest. On 21st September 2017, the Appellant issued a Promissory Note number PKN002 to the Bank. Although Bank accepted and received it, the Appellant complained that the Bank proceeded to advertise the suit property on 25th September 2017 in the Daily Nation for sale on 12th October 2017. The Appellant claimed that the Bank arm-twisted him to pay a sum of KES 3,000,000.00 in order to stop the sale with a promise that it would reconcile his accounts.
4. The Appellant filed suit together with the application subject of this appeal seeking, inter alia, an injunction to stop the intended sale of the suit property. After hearing the application, the trial magistrate declined to stop the sale stating, among other reasons, that the Appellant had admitted his indebtedness and that the Bank has complied with the law regarding the exercise of its statutory power of sale. The Appellant, being aggrieved, by this decision has not filed this appeal. The appeal which was disposed by way of written submissions though the record only contains those of the Respondents.
5. I have gone through the record and the Bank's submissions. The Appellant has challenged the discretion of the trial magistrate hence the appellate court will only interfere within the parameters set out in ***Mbogo and Another v Shah [1968] EA 15 where it was held that:***

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

6. In the seminal case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**, 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.

7. More recently, the Court of Appeal in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** reiterated the settled principles in **Giella v Cassman Brown (Supra)** 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.

8. As to what constitutes a prima facie case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR** explained that it 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 grounded on the cause of action as pleaded by the Appellant in his Plaint and supported by the depositions before the court and he had the burden of showing that his rights in the suit property were threatened or had been violated by the Bank’s intended exercise of its statutory power of sale in the manner pleaded.

9. The Appellant admits that he is indebted to the Bank but then faults it for not debiting his account within the first six months of receiving the loan and for not accepting his proposed payment plan and promissory note. The records shows that the Appellant admitted its indebtedness by the letters 2nd March 2015, 14th October 2015, 23rd February 2016 and 10th January 2016. Further, the Appellant issued a Promissory Note dated 21st September 2021. In this respect, I agree with the decision cited by counsel for the Respondent, **Muturi Njoroge and 2 Others v Barclays Bank of Kenya Limited ML HCCC No. 141 of 2017 [2017] eKLR** that a promissory note is an acknowledgment of debt coupled with a promise or undertaking to pay and does not substitute or replace the debt. Since the debt is admitted, it follows that the Bank was entitled to initiate the process of realizing the suit property by issuing the requisite statutory notices to the Appellant. I do not hear the Appellant challenging any impropriety of the Bank in this process, thus, it follows that the notices were properly, legally and procedurally issued and served upon the Appellant meaning that the Bank’s statutory power of sale has crystallized.

10. Based on the undisputed fact that the Appellant admitted that indebtedness and the Bank issued the statutory notices, I find and hold that the Appellant failed to establish a prima facie case with a probability of success and no injunction could be granted in his favour. Let me also add that the fact that the Appellant disputed the extent of indebtedness did not guarantee him an injunction order as this court and the Court of Appeal have held in numerous occasions that a dispute on accounts or amount owing is not a basis for the grant of an injunction (see **Lavuna & Others v Civil Servant Housing Co. Ltd (1995) LLR 336 (CAK)**, **Stars & Gartens Restaurant & another v National Bank of Kenya Limited MLD HCCC No. 2 of 2018 [2019] eKLR** and **Koileken ole Kipolonka Orumoi v Mellech Engineerign and Construction Limited and 2 Others ML HCCC No. 545 of 2015 [2015] eKLR**).

11. The Appellant has failed to demonstrate that the trial magistrate failed to exercise his discretion judicially or that he relied on extraneous and irrelevant matters to warrant this court’s interference. On the contrary, I find that trial magistrate relied on the correct laid down principles set in **Giella v Cassman Brown (Supra)** in arriving at the right conclusion that the Appellant did not merit an injunctive order.

12. This appeal is dismissed with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Mr Okatch instructed by Okatch and Partners Advocates for the Appellant.

Mr Kigata instructed by Wamae and Allen Advocates for the Respondents.