REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO.110 OF 2018

NIC BANK KENYA PLC .....1ST APPELLANT

AUCKLAND INVESTMENT.....2ND APPELLANT

VERSUS

RUTH GATHONI KAHITI.....RESPONDENT

(***Being an appeal from the Ruling of Hon. N. Gesora Chief Magistrate delivered on***

the 14th February 2018 in Milimani CMCC 6795 of 2017)

JUDGMENT

1. This appeal emanates from a ruling delivered by Mr. Gesora Chief Magistrate Nairobi on 14/02/2018 granting a temporary injunction to restrain the appellants from proceeding with the process of realizing the security given pending the hearing and determining of the suit.

2. The background of the matter is that the respondent filed Milimani CMCC No.6795 of 2017 against the appellants, vide a plaint dated the 20th September 2017 and as amended on the 26th September 2017. The respondent sought a declaration that the repossession undertaken on the 7th of September 2017 was illegal. She also sought an order directing the 1st and 2nd appellants to deliver possession of the motor vehicle of the respondent (the suit property) and an order restraining the 1st appellant from demanding payment of instalments that were not yet due.

3. The appellants filed a defence and denied the claim. They explained how the 1st appellant had advanced the respondent a credit facility for purchase of a motor vehicle and she had defaulted in payment of the agreed instalments. That the balance as at 13th November 2017 was Kshs 2,137,282/= which continues to earn interest.

4. As a result the appellants commenced the process of attaching the respondent's motor vehicle so as to secure the 1st appellant's interests as per the chattels mortgage agreement. The respondent on the other hand filed an application dated 4/10/2017 before the trial court and sought a temporary injunction to restrain the appellants from proceeding with the process of realizing the said security pending the hearing of the suit. The application was allowed and the orders sought therein granted.

5. The appellants being aggrieved by the decision instituted this appeal through Onyikwa & Co. Advocates raising the following grounds:

> ***a)*** *That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's application for injunction dated 4/10/2017*
>
> ***b)*** *That the learned trial magistrate erred in law and fact in failing to determine the respondent's application for injunction dated 4/10/2017 based on the well laid down principles in law.*
>
> ***c)*** *That the learned trial magistrate erred in law and fact in failing to hold that the respondent had not established a prima facie case with a probability of success.*
>
> ***d)*** *That the learned trial magistrate erred in law and fact in granting an injunction to the respondent, when the respondent is an admitted defaulter.*
>
> ***e)*** *That the learned trial magistrate erred in law and fact in failing to address the principle of loss/damage to be suffered in making*

a determination on the application for injunction.

f) *That the learned trial magistrate erred in law and fact in granting the respondent an unconditional injunction without taking into consideration that the agreement between the parties created a continuing obligation.*

g) *That the learned trial magistrate erred in law and fact in misdirecting himself on the principles for grant of an injunction.*

6. In support of the said application the respondent swore an affidavit dated 4th October 2017.She deponed that in April 2015 she entered into an asset finance agreement with the 1st appellant for the purchase of motor vehicle registration no. KCC 360 Q. She annexed a copy of the chattels mortgage agreement (RGK-1) which showed how payments were made. She further deponed that she used the said motor vehicle for commercial purposes and heavily relied on the income to generate the monthly instalments.

7. She further averred that due to the economic difficulties that were experienced during the general elections she was unable to pay the instalment that was due in September 2017 and the appellant repossessed her vehicle claiming instalments for two months which was not true as she only owed the instalment for September 2017.

8. In opposing the application, the 1st appellant's assistant manager legal services Mr. Kenneth Mawira swore on a replying affidavit on 16th November 2017. He averred that the vehicle was jointly registered in the names of the 1st appellant and the respondent to safeguard the interests of the 1st appellant as the financier and with the aim of transferring the same to the purchaser wholly upon completion of payment as agreed in instalments. He deponed that the repayment of the loan was not dependent on the respondent's business or nature of work the respondent was engaged in.

9. Further that the respondent is a defaulter and terming the appellants action as punitive is not premised on any legal basis. He deponed that if the court granted the respondent the prayers sought it would amount to denying them their legal rights under the agreement as well as the law.

10. Directions were given that the appeal be canvassed by way of written submissions. The respondent on the other hand did not file her submissions even after the court communicated to her advocate by way of an email done by the deputy registrar dated 9th of August 2021 giving them seven (7) days to comply.

11. Mr. Onyikwa for the appellants gave brief facts of the matter and identified two issues for determination as follows:

i. *Whether the legal principles for grant of an injunction were considered by the trial magistrate in the determination of the application dated 4/10/2017. (Grounds Number 2,3,5 and 7 of the memorandum of appeal).*

ii. *Whether the ruling of the trial court on the application dated 4/10/2017 was erroneous. (Grounds 1,4 and 6 of the memorandum of the appeal.)*

12. On the first issue, counsel submitted that courts are guided by the case of **Giella v Cassman Brown (1973) EA 358** which set out the following principles for grant of an interlocutory injunction:

· *The applicant must establish a prima facie case with a probability of success.*

· *The applicant must establish that in a case the interlocutory injunction is not granted, he is likely to suffer irreparable injury which would not adequately be compensated by an award of damages.*

· *In a cases where the court is in doubt of either of the above an application for an interlocutory injunction ought to be determined on a balance of convenience.*

13. Counsel relied on the case of **Mrao Ltd v First American Bank of Kenya and 2 Others (2003) eKLR** where a prima facie case was defined as follows:

"In civil cases, a prima facie case 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 more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

14. He submitted that the suit motor vehicle was jointly registered in the names of the 1st appellant and the respondent so as to secure the 1st appellant's interests and that the ownership could only pass to the plaintiff upon settlement of the loan facility. He further submitted that the said chattel mortgage agreement did not have any provision for waiving of the payment on the loan when the respondent was experiencing a financial crisis and that it was not pegged on the suit motor vehicle being operational.

15. Counsel contends that the respondent admitted that she had defaulted in payment. Under clause 9 of the Chattel mortgage agreement dated 8/4/2015 the 1st appellant was entitled to repossess the suit motor vehicle with or without due notice. He further contends that the appellants were entitled to repossession of the suit motor vehicle and dispose it off by any means of their choice so as to realize the defaulted instalments.

16. He relied on the case of **Aberdare Investment Limited v Housing Finance Co. of Kenya and another (1992)2 EA1** where it was stated:

> *"The choice of remedy for recovery of unpaid loan under a mortgage is that of the mortgagee and the mortgager cannot tell the mortgagee to take such action as may suit the mortgagor"*

17. Counsel further submitted that the appellant was exercising its statutory rights under the said chattel mortgage agreement and it being a contractual case the courts role is to interpret and not vary the terms of the agreement. On this counsel relied on the case of **Orion East Ltd v Eco Ban [2015] eKLR** where it was held that:

> *"In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case, not only to the strength of the applicant but also to the strength of the defence advanced by the respondent then make an appropriate order."*

18. He contends that the trial magistrate was wrong in his holding by making a decision that was tantamount to taking the appellant's rights away despite being in an agreement with the respondent. Further that the court had no legal basis to protect a defaulter. He argued that the 1st respondent did not establish a prima facie case against the appellant.

19. On whether the respondent was likely to suffer irreparable injury which would not be adequately compensated by an award of damages counsel relied on the case of **Haslington Limited v African Banking Corporation Limited (2019) eKLR where the court held:**

> *"Once a chattel is charged to secure a debt under a contract the chargor must surely contemplate the eventuality that the property could well become a commodity for sale in the event of default in repayment. On all accounts, the value of the property is capable of ascertainment and the bank capable of making recompense. Besides, where as in this case, the chargor, has not mustered proof of a prima facie case within the required threshold, irreparable injury cannot arise as it is in default."*

20. Counsel further submitted that the 1st appellant is a financial institution which is well capable of compensating the respondent in case there is any loss suffered by her and in that regard therefore the award of damages would suffice as adequate compensation. At the same time the argued that the respondent would not have suffered any irreparable harm.

21. On the issue of whether the application for interlocutory injunction ought to be determined on a balance of convenience the counsel submitted that as at 13/11/2017 the respondent was in arrears of Kshs.2,137,282.78/= which continued to accrue interest till payment full. The balance of convenience therefore titled in favour of the appellant since the respondent is an admitted defaulter. It is counsel's submission that the trial court failed to consider the legal principles for grant of an injunction in the circumstances.

22. On the second issue, counsel submitted that the agreement created a continuing obligation on the respondent's part to ensure settlement of the loan facility, in default of which the appellant would realize the security offered by the respondent being the suit motor vehicle as per the terms of the said agreement.

23. He cited ***Order 40 rule 7 of the Civil Procedure Rules 2010*** and asked this court to set aside the impugned orders. He relied on the following cases:

> ***a)*** *Nairobi HCCA No. 485 of 2016 Ameli Inyangau & Partners Advocates and 2 Others v Francis Mutua T/a Kamburu Service Station*
>
> ***b)*** *Kajiado HCCC No. 47 of 2018 Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited*

24. No submissions were filed for or by the respondent

Analysis and Determination

25. This is a first appeal and this court has a duty to re-consider and re-evaluate the evidence on record and arrive at its own conclusion. In doing this the court must remember that unlike the trial court it did not see or hear the witnesses and give an allowance for that. *See*

> **(i) Abok James Odera T/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. advocates [2013] eKLR.**
>
> **(ii) Selle v Associated Motor Boat Co. Ltd 1968 E.A 123.**

26. I have considered the record, the grounds of appeal, the submissions, the authorities cited as well as the law. The central issue for consideration is whether the trial court exercised its discretion in a judicious manner in allowing the respondent's application for temporary injunction to restrain the appellants from proceeding with the process of realizing the said security pending the hearing and determination of the suit.

27. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed to consider a material point or circumstances material in the said matter.

28. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that: -

"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

29. Subsequently, Madam JA (as he then was) in **United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd vs East African Underwriters (K) Ltd (1985) eKLR** developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members for that of the trial court. He stated:

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following mattes are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong."

30. On the issue of whether the trial magistrate should have granted an injunction pending hearing and determination of Nairobi CMCC No. 6795 of 2017, this court observes that the grant of an injunction is a discretionary power exercised by the trial court. The application (prayer for injunction) was specifically brought under Order 40 Rules 1,2 and 4 of the civil procedure rules.

Order 40 Rules 1 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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;*

(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."*

31. From the above provisions, it is clear that a party that feels like their property is in danger or at the risk of being sold can file an application for an injunction in order to protect it until disposal of the suit or even further. In this case the respondent feared that the appellants wanted to sell her vehicle before the suit before the trial court could be determined. She claimed that the vehicle was her only source of livelihood and she was determined to pay for the balance.

32. On the hand the 1st appellant which is a financial institution stated that they had a chattel mortgage agreement with the respondent of which she was to pay back the loan on a monthly basis but had defaulted. After the default the 1st appellant who had joint ownership with the respondent went for the vehicle to dispose of it to offset the loan.

33. Having found that the trial court had the jurisdiction and power to grant an injunction in order to meet the ends of justice, the question that arises is whether the trial court exercised its discretion judiciously and not capriciously, and secondly, whether this court as an appellate court should interfere with that discretion and if so on what basis.

34. The Court of Appeal in **Child Welfare Society of Kenya vs Republic, Exparte Child in Focus Kenya & AG & Others [2017] eKLR** per Waki, Nambuye & M'noti JJA, citing **Mbogoh & Another vs Shah [1968] EA 93** on the power of the appellate court in matters of discretion exercised by the court below held as follows:

"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."

35. For his part, the Court President, **Sir Charles Newbold** in the said Mbogoh case stated:

"For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of 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 the discretion and that as a result there has been a misjustice."

36. In his Ruling delivered on 13th February 2018 the learned trial magistrate gave reasons for the grant of the orders he gave. This is what he stated at page 2 of the Ruling:

"The terms of the repayment are clear as set out in the agreements. It is also clear that the plaintiff defaulted in repaying the monthly instalments in August 2017. I hold that as a result of the default the 1st respondent was entitled to the repossess the suit motor vehicle. It is the manner in which the repossession was done that is in issue. The applicant complains that the motor vehicle was repossessed in fragrant disregard to the provisions set out in Rule 12 of the Auctioneers Rules 1997. I note that the respondents

were silent or how the process of repossession was affidavit undertaken. Indeed, no exhibits were annexed to the replying affidavit to demonstrate that the said provisions were complied with. This omission goes to the substratum of the process of recovery and I hold as such."

37. The learned trial Magistrate clearly set out the reasons why he allowed the application. It is not only about the default of the instalments. There is a procedure for repossession which must be complied with as pointed out by the learned trial Magistrate. Since the appellants acted in defiance of Rule 12 of the Auctioneers Rules of 1997 the trial court had to come to the rescue of the respondent in exercise of its discretion. Having assessed all that is on record, the law, decided cases and how the application was handled by the learned trial Magistrate I find no good reason to make this court interfere with the Ruling dated 13th February 2018. The upshot is that the appeal lacks merit and is dismissed with costs. The Ruling dated 13th February 2018 is upheld. The original file to be returned to the lower court.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE