REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HC APPEAL NO. 32 OF 2018

(Formerly ELC APPEAL NO. 54 OF 2018)

SPRING BOARD CAPITAL LIMITED.....APPELLANT

DAVID KARUME BURUGU.....RESPONDENT

(Being an appeal from the Ruling of Hon. E.N. Makau (Ms), CM dated 19th October, 2018 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 4133 of 2018)

JUDGMENT

1. This is an appeal from the Ruling of Chief Magistrates Court (the trial court), Milimani **Hon E. N. Makau** (Ms) dated 19th October 2018, granting the respondent injunction pending the hearing and the determination of the suit. This appeal is filed against the determination of the interlocutory application

2. It is not denied in the trial court or before this court that the respondent obtain a loan from the appellant. The loan was secured by a legal charge over the respondent's property, **LR. No. GATAMIYU/KAMUCHEGE/1352** (Kiambu County). It is also not denied that the respondent defaulted in the repayment of that loan. There is indeed a handwritten letter, annexed to the appellant's replying affidavit filed before the trial court, where the respondent acknowledged default and requested for indulgence.

3. What is in contention and was alive before the trial court was whether the statutory notice served on the respondent complied with the law. The learned trial Magistrate in part by her Ruling stated that the burden lies with the chargee to prove service of the statutory notice, then proceeded to state thus:

> *"Under Section 90(1) if the charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in performance or observation of any covenant express or implied in any charge and continues to be in default for the result, the charge may serve the charger a notice in writing, to pay money owing or to perform and observe the agreement as the case may be".*
>
> *Section 90(2) provides for the contents of the notice.*
>
> *Section 90(3) provides for default in compliance within 2 months of service of notices power of sale of charge is provided in section 96 (1) in the case of Act Fast Security Limited versus Equity Bank (2014) eKLR (2014, the court held*
>
> *"...before exercising that power of sale, however, as above stated, the charge must give further notice as required under section 96(2).*
>
> *Failure to comply with these Mandatory Provisions of the Law alone is prima facie evidence that the application succeeds. Considering the above it is clear that the notification of sale was prepared and addressed to the plaintiff and posted, there is however no proof that, it reached the plaintiff. Absence of proof of service upon the plaintiff means the defendant has not discharged the burden of proof under section 107 of the Evidence Act.*
>
> *If this sale by public auction is not stopped then the plaintiff will suffer irreparable loss because his land will be sold.*
>
> *As such I find the Plaintiff/Applicant to have established a prima facie case against the defendant. He has met the threshold set out in the case of Giella versus Cassman Brown and I therefore allow the application in terms of prayer 3 of the Notice of Motion."*

4. The Court of Appeal in the case **Robric Limited & another v Kobil Petroleum Limited & another [2018] eKLR** considered the circumstances under which an appellant court will consider interfering with the trial court's discretion and had this to say:

> *"The circumstances under which an appellate Court can interfere with discretionary orders are well settled. See the case of* ***Mbogo & Another versus Shah [1968] E.A. 93,*** *where it was held at page 96 that:-*
>
> ***"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court 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 and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"***

5. The trial court was clear that the respondent needed to meet the principles of granting an injunction which were enunciated in the case **Giella v Cassman Brown Ltd [1973] EA 35**. That is that the respondent had to show a prima facie case with probability of success, secondly had to show that he would suffer irreparable loss if an injunction was not granted and thirdly if the court is in doubt it would decide the application on a balance of convenience.

6. The respondent did not, by his injunction application plead or show that he would suffer irreparable loss if an injunction was not granted. Rather it was the trial court that stated:

> ***"If this sale by public auction is not stopped then the plaintiff will suffer irreparable loss because his land will be sold."***

Those were not the respondent's words and the trial court erred to have imposed its views on the second principle of granting an injunction.

7. The trial court also erred to have shifted the burden on the appellant when the appellant had shown that it served both the statutory notice and the notification of sale by registered post. The registered post notifications show the respondent was served through post office box number 4427-00100 Nairobi. That is the same address the respondent used in his affidavit in support of his application. Further it must have been very clear to the learned magistrate that the respondent was aware his property was being sold by auction because he wrote the letter dated 27th April 2018 seeking indulgence.

8. The trial court ought have noted that the burden of proof shifted to the respondent to prove non service in the light of the above finding.

9. I am cognisant that the requirement of service of statutory notice as the law requires, that is Section 90 and 96 of the land Act 2012, is intended to protect the charger, such as the respondent. In this regard I rely on the case **Trust Bank Ltd v Eros chemist (2002) 2EA**:

> *"**In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period.***
>
> ***To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid. In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice."***

10. I am in agreement with the finding of the trial court that the fact the respondent presented a letter, which was unsigned, in support of his application, created a doubt on the sufficiency of the statutory notice. The trial court therefore cannot be faulted for having granted an injunction.

11. The trial court however should have heeded the caution of the court of appeal in the case of **National Bank of Kenya Limited v Shimmers Plaza Limited [2009] eKLR** where the court stated that if what is faulted is the sufficiency of statutory notice the chargee should be permitted to serve another statutory notice which complies with the law. This is what Court of Appeal in that case stated:

> ***"The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law."***

12. It is for that reason and in a limited way I will interfere with the discretion of the trial court.

13. Having made a finding that I will partially interfere with the trial court's discretion I will order each party to bear their own costs in this appeal.

CONCLUSION

14. The order of the court is that the appeal is allowed and I do set aside the order of injunction in terms given by the trial court and I substitute therefore the order of injunction as follows:

> *"The appellant be and is hereby restrained by itself or its authorised agent, servant or employee from selling, disposing or transferring the respondent's property **L.R. No. GATAMAIYU/KAMUCHEGE/1352** (Kiambu County) until such time as the appellant shall have served the respondent with another statutory notice which is valid and in accordance with the law.*
>
> *Each party shall bear their own costs of this appeal."*

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **30th** day of **APRIL,** 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30th** day of **April, 2020.**

MARY KASANGO

JUDGE