



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO.298 OF 2018

FRANKLIN KAMATHI KAMAU.....PLAINITFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Applicant through a Notice of Motion dated 25th July 2018 seeks the following orders:-

a) THAT this application be certified as urgent and heard ex-parte in the first instance.

b) THAT pending the hearing and determination of this application, a temporary injunction do issue restraining the Respondent whether by itself its agents and or servants from appointing a receiver and/or in any way proceeding with the process of realizing its security whether by alienating, advertising for sale, offering for sale, selling, dealing, interfering, alienating, disposing and/or evicting the tenants on the suit property or in any manner whatsoever interfering with the Plaintiff's/Applicant's peaceful occupation and enjoyment of the suit property being all that property known as Nairobi Block 63/748.

c) THAT pending the hearing and determination of this suit, a temporary injunction do issue restraining the Respondent whether by itself its agents and or servants from appointing a receiver and/or in any way proceeding with the process of realizing its security whether by alienating, advertising for sale, offering for sale, selling, dealing, interfering, alienating, disposing and/or evicting the tenants on the suit property or in any manner whatsoever interfering with the Plaintiff's/applicant's peaceful occupation and enjoyment of the suit property being all that property known as Nairobi Block 63/748.

d) THAT costs of this application be provided for.

2. The application is premised on grounds numbers (a) – (i) on the face of the application and supporting affidavit of Franklin Kamathi Kamau sworn on 25th July 2018 and annexures thereto **FKK-1 – FKK-4**.

3. The application is opposed. The Respondent filed a Replying affidavit, dated 30th July 2018 sworn upon by Joseph Lule, and to which the Respondent has annexed annexures **JL-1 to JL-13**.

4. At the hearing Mr.Dennis Otieno learned Advocate held brief for Mr. Njogo for the Plaintiff/Applicant whereas Miss Kala learned Advocate appeared for the Respondent. The Plaintiff's/Applicant counsel filed written submissions on 29th November 2018 whereas the Respondent's submissions were filed on 28th November 2018.

Background/brief facts

5. The plaintiff who is the duly registered proprietor of Title Number Nairobi Block 63/748 entered into an agreement with the defendant for financial accommodation from time to time of an aggregate maximum principal of 105,000,000/-; which facility was secured by a charge dated 28th November 2013. On the strength of the charge the defendant disbursed to the plaintiff a sum of Kshs.27, 000,000/-, out which sum the plaintiff claims to have paid Kshs.17, 286,000/-.

6. The defendant failed to pay the loan facility as stipulated and upon the facility having fallen in arrears since 10th February 2016, that prompted the Defendant/Respondent to issue pre-listing notification upon the Plaintiff/Applicant pursuant to Regulation 50(1) (a) of the

Credit Reference Bureau Regulations; 2013; on 10th May 2016 and 13th February 2017 in respect of arrears of Kshs.70, 114/26 and Kshs. 1,287,891 respectively. That despite the notification, the Plaintiff/Applicant failed to regularize his accounts and has remained in default.

7. Following the failure by the Plaintiff/Applicant to regularize his account, the Defendant/Respondent Bank issued a 90 day Statutory Notice dated 28th June 2017 to the Plaintiff/Applicant pursuant to section 90 of the Land Act as read together with section 85 and 103 of the Land Act. Subsequently the Defendant/Respondent issued a 40 days statutory notice of sale dated 28th October 2017 upon the Plaintiff/Applicant. On 6th June 2018 in further reference to the statutory notice issued on 28th June 2017 the Defendant/Respondent issued a 40 day statutory notice of Appointment of a Receiver pursuant to section 96(2) of the Land Act. The Plaintiff/Applicant failed, refused and neglected to settle the sum owed, remained in default of the loan repayment but instead filed the present suit and application seeking interlocutory application pending determination in this matter.

8. I have very carefully considered the application before me, affidavit in support, Replying affidavit, counsel rival submissions and from the aforesaid the issue arising from determination in my view is one thus:-

Whether the Plaintiff/Applicant has satisfied the conditions for granting an order of injunction as sought in the application?

9. The principles to be considered in granting orders of injunction are now well settled in the decision of **Giella vs Cassman Brown (1973) E.A 358**. For injunction to be granted, first the applicant must show a prima facie case with probability of success; secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and lastly, if the court is in doubt, it will decide an application on the balance of convenience.

10. The Court of Appeal restated the principles in **Giella case in Nguruman Limited vs Ian Bonde Nielsen & 2 others, CA No. 77 of 2012**, together with the mode of their application 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."

11. The Court of Appeal further stated in **Kenya KCB Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86**, as follows;

"If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

12. A *prima facie* case in a Civil application was amply explained in the case of **Mrao vs First American Bank of Kenya and Two Others [2003] KLR 125**, as:-

"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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 as to call for an explanation or rebuttal from the latter."

13. Further the Supreme Court in India had the following to say on the phrases "**prima facie case**", "**irreparable loss**" and "**balance of convenience**" in dealing with case of **Dalpat Kumar & another vs Prahlad Singh & others, Air 1993 SC 276**, the phrases "**prima facie case**", "**irreparable loss**" and "**balance of convenience**" are not mere rhetoric phrases for incantation; they are important factors to be carefully weighed and considered in each and every case where an application for an injunction is applied for.

14. Upon perusal of the brief facts of this case and affidavit by the Plaintiff/Applicant, there is no dispute of the Plaintiff/Applicant having obtained a financial facility from the Defendant/Respondent. There is further no denial that as at the time of filing the suit the Plaintiff/Applicant was in arrears. The Plaintiff/Applicant assertion that he is ready, willing and able to clear the outstanding arrears of the proceeds with the payment of the outstanding loan do not mean he has established he has a prima facie case with probability of success. The Plaintiff/Applicant has in his affidavit alleged that the Defendant/Applicant has maliciously, illegally and unlawfully taken up the action it has by initiating the process of the sale of the suit property but it has in my view failed to prove any of the aforesaid allegations. I am therefore satisfied the applicant has not established that he has a *prima facie* case with probability of success.

15. On the issue of damages, the dispute pending before this court is on a commercial property with a known valuation; the loan facility is within the knowledge of both parties; the outstanding balance to the defendant is determinable, and in view of that, any loss that may be

occasioned as a result of the exercise of the Defendant/Respondent's statutory power to appoint a receiver is ascertainable and remediable by an award of damages. I have considered the affidavit in support of the Plaintiff/Applicant application, and I am not satisfied that he has demonstrated the irreparable injury if a temporary injunction is not granted. I have also considered that the statutory notices were issued to the Defendant/Applicant in accordance with the relevant provisions of the law and in accordance with the terms of the charge instruments, and therefore valid and enforceable. No illegality has been demonstrated or defect on the statutory notices to warrant this court exercising its discretion to tilt the balance of convenience in favour of the Plaintiff/Applicant.

16. Having considered the contents of the parties affidavits, I am not satisfied that the Plaintiff/Applicant in seeking equity has done equity and that he has come to equity with clean hands; in that he failed to meet his obligations under the charge instrument by defaulting in payment of the loan facility, for a long time, and as such I am not satisfied that he is entitled to an equitable relief. I find no merit in the Applicant's application dated 25th July 2018.

17. The upshot is that the Plaintiff/Applicant's application dated 25th July 2018 is without merit and is accordingly dismissed with costs.

Dated, signed and delivered at Nairobi this 24th day of January, 2019.

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J .A. MAKAU

JUDGE