



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 95 OF 2018

CO-OPERATIVE BANK OF KENYA LIMITED..... 1ST APPELLANT

LEAKEY'S AUCTIONEERS. 2ND APPELLANT

VERSUS

BONIFACE K. MWEGA..... 1ST RESPONDENT

SARAH BONFACE.....2ND RESPONDENT

(Being an appeal from the ruling of Hon. (Mr.) Mburu at Milimani Commercial Courts' on 23rd January, 2018 in CMCC No. 41 of 2018)

JUDGMENT

1. Boniface K. Mwega and Sarah Boniface, the 1st and 2nd Respondents respectively filed an action against Co-operative Bank of Kenya Ltd and Leakey's Auctioneers, the 1st and 2nd Appellants herein before the Chief Magistrate's court vide the Plaint dated 9th January, 2018.

2. In the aforesaid plaint the Respondents sought for judgment as followings: -

i) an order that the only repayable sum from the overdrawn amount is only the principal amount and nothing more.

ii) An order permanently restraining the bank from treating the overdrawn amount as a loan, overdraft and or financial facility thus attracting interest and other similar bank charges be issued against the 1st Defendant.

iii) An order directing the 1st Defendant to immediately delist the Plaintiffs with the Credit Reference Bureau.

iv) An order permanently restraining the 1st and 2nd Defendants from attaching the property referred to as L.R No. NGONG/NGONG/43218 due to interests that have illegally accrued from the overdrawn amount which were erroneously deposited in the Plaintiff's account without their authorization.

v) An order permanently restraining the 1st Defendant from treating the Asset Finance Facility together or as one with the overdrawn amount.

vi) General damages for breach of contract and the illegal listing with the Credit Reference Bureaus.

vii) Costs of this suit together with interest thereon.

viii) Any such other or further relief as this Honourable Court may deem appropriate to be made.

3. The Appellants filed a joint statement of defence to deny Respondent's claim.

4. The Respondents filed the motion dated 9th January, 2018 in which they sought for the following orders inter alia: -

a) That this application be certified urgent and the same be heard in the first stance on priority basis and service thereof be dispensed with in the first instance for reasons of urgency.

b) that this Honourable court be pleased to grant a temporary injunction against the 1st and 2nd Defendant/Respondents by themselves, their agents, servants, employees and and/or other persons(d) whomsoever acting on their behalf, be restrained from transferring, selling off through an auction or through whatever such means the parcel of and known as L.R. No. NGONG/NGONG/43218 EMMANUEAL AREA – KISERIAN-KAJIADO pending the hearing and final determination of the application filed herein.

c) That this honourable court be pleased to grant a temporary injunction against the 1st Defendant/Respondent by itself, its agents, servants, employees and/or other persons(s) whomsoever acting on its behalf, be restrained from charging the loan facility secured by the applicants using the old interest rates instead off the new rates which became operational on the 14th September, 2016 after legislation capping such interest rate spending the hearing and final determination of the application filed herein.

d) That this honourable court be pleased to grant a temporary injunction against the 1st Defendant/Respondent by itself, its agents, servants, employees and/or other person(s) whomsoever acting on their behalf, be restrained from treating the amounts of Kenya Shillings Six Hundred Thousand (Kshs.600,000/-) which were erroneously banked, deposited and/or put in the Plaintiff's account by the Defendant as a loan and or bank overdraft and charging interests and other bank charges thereon pending the hearing and final determination of the application file herein.

e) That this honourable court be pleased to grant a temporary injunction against the 1st Defendant/Respondent by itself, its agents, servants, employees and/or other person(s) whomsoever acting on their behalf, be restrained from transferring, selling off through an auction or through whatever such means t he parcel of land nos as L.R. No NGONG/NGONG/43218 IMMANUEL AREA – KISERIAN – KAJIADO pending the hearing and final determination of the suit filed herein.

f) That this honourable court be pleased to grant a temporary injunction against the 1st Defendant/ Respondent by itself, agents, servants, employees and/or other persons(s) whomsoever acting on its behalf, be restrained from charging the loan facility secured by the Applicants using the old interest rates instead of the new rates which became operational on the 14th September, 2016 after legislation capping such interest rates pending the hearing and final determination of the suit filed herein.

g) that this honourable court be pleased to grant a temporary injunction against the 1st Defendant/ Respondent by itself, its agents, servants, employees and/or other person(s) whomsoever acting on its behalf, be restrained from treating the amounts of Kenya Shillings Six Hundred Thousand (Kshs.600,000/-) which were erroneously banked, deposited and or put in the Plaintiff's account by the Defendant as a loan and or bank overdraft and charging interests and other bank charges thereon pending the hearing and final determination of the application suit herein.

h) That the costs of this application be provided for.

5. The Appellants filed grounds of opposition and the replying affidavit of Jama Osiro to oppose the motion. Hon. D. W. Mburu, learned Principal Magistrate heard and determined the motion in favour of the Respondents.

6. In other words, an order of injunction was issued to restrain the Appellants by themselves, their agents, servants and employees from transferring and selling off the parcel of Land known as L.R. No. Ngong/Ngong 43218 Emmanuel Area – Kiserian – Kajiado pending the hearing and final determination of the suit.

7. The Appellants were aggrieved by the grant of the order hence they preferred this appeal and put forward the following grounds: -

(i) That the learned magistrate erred in fact and in law in allowing the Respondents' application seeking for a temporary injunction to restrain the 1st and 2nd Appellants and their agents, servants, employees and/or any other person working under them from transferring, selling off through an auction or through whatever such means the parcel of land known as L.R. NO. NGONG/NGONG 43218 EMMANUEL AREA – KISERIAN – KAJIADO pending hearing and determination of the suit.

(ii) That the learned magistrate erred in law and fact in finding that the 1st and 2nd Respondents had met the conditions for grant of temporary injunction in view of the facts of the case before him.

(iii) That the learned magistrate erred in law and fact in failing to fully or at all consider the grounds of grant of a temporary injunction as set out in the classic case of Geilla Vs Cassman Brown in allowing the application by the 1st and 2nd Respondents to restrain the 1st and 2nd appellants from selling the suit property.

(iv) That the learned magistrate erred in law and fact when he found that the 1st and 2nd Respondents have a prima facie case with a probability of success.

(v) That the learned magistrate erred in law and fact in failing to critically analyze substantive issues raised by the 1st and 2nd Appellants in their submissions in opposition to the 1st and 2nd Respondents application for temporary injunction.

(vi) That the learned magistrate erred in law and fact in failing to find that the 1st Appellant can exercise its statutory power of sale since it has a legally acquired security over the suit property and the 1st and 2nd Respondents are in default of the agreement between the parties.

(vii) That the learned magistrate erred in law and fact in failing to fully or at all consider that the 1st and 2nd Respondents have failed to repay the money advanced to them y the 1st Appellant.

(viii) That the learned magistrate erred in law and fact in failing to fully or at all consider that a dispute as to amounts should not stop a mortgagee from exercising its statutory power once the same has arisen.

(ix) The learned magistrate erred when h ignored the evidence of the appellant thus arriving at a wrong decision.

8. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
9. Though the appellant put forward a total of nine grounds of appeal I am convinced that the main ground which commends itself for determination is whether the learned Principal Magistrate was justified to grant the order for temporary injunction.
10. I have re-evaluated the grounds submitted before the trial court. I have also considered the rival written submissions and the authorities cited before this court.
11. It is the submission of the Appellants the Respondents did not establish a prima facie case to be entitled to be given an order of injunction.
12. It was pointed out that the 1st Respondent repaid the mortgage facility for sometime but started to default on his payments thus falling due.
13. It is also submitted that the 1st Respondent has arrears on the mortgage finance facility and the loan period has since lapsed. It is said that the 1st Appellant notified the 1st Respondent of the default but has failed to remedy, thus forcing the 1st Appellant to issue various statutory notices for redemption of the mortgage facility.
14. The 1st Appellant further stated that the 1st Appellant instructed the 2nd Appellant to recover the outstanding mortgage finance facility from the 1st Respondent. The 1st Appellant stated that the 2nd Respondent issued the statutory notices upon the 1st and 2nd Respondents in compliance with the provisions of the Land Act No. 6 of 2012 before realizing the charged securities. It was pointed out that the respondents acknowledged receipt of various statutory notices in respect to the outstanding mortgage finance facility only and not the overdraft facility, which also remains unpaid.
15. The 1st Appellant also stated that as of 16th August, 2017, the outstanding mortgage finance facility stood at ksh.1,741,806/42 which fact the Respondents did not deny. The 1st Appellant further stated that it erroneously deposited a sum of Ksh.600,000/- in the Respondent's account 011453161102500 but notified the Respondents of the error the same day but the Respondents instead withdrew the money thus making the amount an overdraft which the Respondents have failed to repay.
16. The 1st Respondent stated that it consolidated the two facilities since the letter of offer and charge document gave it power to do so to enable it recover all the outstanding monies due.
17. It is the 1st Appellant's argument that the 1st Respondent having overdrawn his Diaspora Jamhuri account held by the 1st Appellant, he is under an obligation to repay the same.
18. For the above reasons, the Appellants argued that the Respondent did not establish a prima facie case to be entitled to a temporary order of injunction.
19. The Appellants further argued that the damage which may arise can be compensated by way of damages hence the Respondents failed to show that they would suffer irreparable damage.
20. The Respondents on the other hand have stated that they were able to show the trial court that they had a prima facie case with a high probability of success. They pointed out that they were able to show that the 1st Appellant erred when it arbitrarily charged punitive interest on the amount it erroneously credited their account.
21. They also submitted that they were able to show that the 1st Appellant erred when it consolidated the amount it regarded as an overdraft with the mortgage facility.
22. It was also argued that the Respondents were able to show the trial court that the 1st Respondent did not issue the mandatory statutory notice of sale before moving auction the mortgaged property.
23. The Respondents stated that they were able to prove before the trial court that they would suffer irreparable loss if the order for injunction was denied. It is stated that no amount of damages would be adequate payment of sentimental value of the property.
24. In his ruling the learned principal magistrate stated that the claim for interest was disputed by the Respondents. it was also stated that the decision to treat the amount erroneously credited as an overdraft facility and charge interest thereon was an issue in dispute.
25. The other issue which the learned principal magistrate picked up is whether the 1st Appellant was justified in consolidating the

two facilities. The trial magistrate came to the conclusion that the Respondents had established a prima facie case with a probability of success.

26. It is also the holding of the trial magistrate that the Respondents would suffer irreparable loss if the 1st Respondent was not restrained from selling the mortgaged property.

27. After a careful consideration of the rival submissions and after re-evaluating the arguments made before the trial court, I have come to the conclusion that the decision by the learned Principal Magistrate to grant an interlocutory order of injunction should not be disturbed.

28. I am satisfied that the Respondents were able to show that they had a prima facie case with high chances of success. It is not in dispute that the 1st Appellant erroneously credited a sum of Ksh.600,000/- into Respondent's Diaspora Account.

29. It is also not in dispute that the aforesaid amount was overdrawn by the Respondents and has not been repaid despite several demands by the 1st Appellant.

30. Some of the issues which will have to be determined at the trial include first, whether the 1st Appellant was entitled to treat the overdrawn amount as an overdraft facility.

31. Secondly, whether the 1st Appellant was right to consolidate the overdraft amount with the outstanding mortgage sum.

32. Thirdly, whether the 1st Appellant was entitled to charge interest on the consolidated sum and at what rate of interest.

33. In humble view, the above issues show that the Respondents have a prima facie case with high chances of success.

34. I am satisfied that the Respondents have shown that unless the order for temporary injunction is granted they would suffer irreparable loss.

35. There is evidence that the 1st Appellant consolidated the '**overdraft**' amount and the outstanding mortgage sum. The entire amount was recalled at once.

36. In my view, the 1st Appellant's action to consolidate the "overdraft" facility with the mortgage facility may frustrate the Respondents equity of redemption and that they may lose the mortgaged property through a forced sale in exercise of the appellants statutory power of sale.

37. With respect, I agree with the Respondent's argument that no amount of damages can repay the sentimental value the respondents have over the mortgaged property.

38. In the end, I find no merit in this appeal. The same is dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent