



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 27 OF 2019

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED.....APPELLANT

AND

JOCKBED NJERI MURIITHI T/A

NJESH ENTERPRISES..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. I. Orange, SRM dated 19th July 2017 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 194 of 2019)

JUDGMENT

1. The appellant appeals against the ruling and order of the trial court where the trial magistrate granted an interlocutory injunction restraining the appellant from selling the property, NGONG/NGONG/43419 (“the suit property”) in exercise of its statutory power of sale.

2. It was not disputed that the respondent charged the suit property to the appellant (“the Bank”) to secure a loan of Kshs. 2,000,000/- and an overdraft facility of Kshs. 1,500,000/- and a previous loan of Kshs. 1,308,038/-. When the Bank threatened to auction the suit property following default in repaying the loan, the respondent moved the subordinate court for an interlocutory injunction by a Notice of Motion dated 16th January 2019 made under **Order 40** of the **Civil Procedure Rules**. In the supporting deposition, the respondent complained that Bank had fraudulently instructed the auctioneers to sell the land for Kshs. 3,388,340.69 yet the suit property was likely worth more than Kshs. 9,500,000/-. She stated that the loan balance was not determined as the Bank had failed to supply her with the statement of account. She further complained that she had made substantial payments which were not reflected in the amount claimed and that the account was loaded with unknown arrears and interest making the loan balance astronomical. The respondent further narrated how she was unable to service the loan as her hotel business had been affected by election violence. She however deposed that the situation had improved hence she was willing to make payments on reasonable terms to enable her settle the arrears but the Bank was unwilling to accommodate her.

3. The Bank, through the replying deposition of its Recoveries Officer, Daniel Kimaiyo, opposed the application on the ground that the respondent had defaulted in paying the loan. He explained that in 2015

following the respondent's request to restructure the facilities, the Bank issued a letter of offer dated 24th June 2015 in which its accepted to restructure the outstanding sum of Kshs. 3,873,712.44 which would be repaid in 48 monthly instalments of Kshs. 113,790/- per month. It was also a term of the letter of offer that the Bank would not allow any further restructuring. The Bank stated that the respondent continued to default causing it to issue a 3-month statutory demand notice and a 40-day statutory demand notice dated 22nd May 2018 and 30th August 2018 respectively. Thereafter the Bank instructed Dreamscape Valuers to conduct a valuation of the suit property to determine the current market value of the property. According to the valuation report dated 14th January 2019 the market value of the property was Kshs. 2,000,000/-. The Bank contended that based on the material before the court, the respondent had not established a prima facie case with a probability of success.

4. After considering the deposition and parties' submissions, the trial magistrate concluded that the respondent had made out a prima facie case with a probability of success. The court further held that the respondent was likely to suffer loss if the injunction was not issued as she would lose her matrimonial home and would not be compensated by an award of damages. Finally, the trial magistrate concluded that the balance of convenience favoured the respondent as she was willing to pay any outstanding amount if given a reasonable time to make payment. In coming to this conclusion the trial magistrate referred to **section 104(2)** of the *Land Act, 2012* which empowers the court to extend the period of time for compliance with the statutory notice served under **section 90** thereof.

5. In submissions before this court, Counsel for the appellant, reiterated the grounds of the appeal set out in the memorandum of appeal dated 28th July 2019. The appellant contended that the trial magistrate erred in fact and in law by introducing issues that had not been pleaded and in particular raising the issue of **section 104** of the *Land Act, 2012* which had not been pleaded. The appellant pointed out that the trial magistrate erred in holding that the respondent had established a prima facie case with a probability of success despite the fact that the respondent had defaulted in servicing the loan and had even indicated that she was ready to pay the debt given time.

6. Counsel for the respondent supported the ruling. He urged that the respondent had established a prima facie case in three respects. First, that the valuation of the property was contested. Second, the Bank had not supplied the statements of account to prove the respondent's indebtedness. Finally, that the issue of interest due and claimed by the Bank was disputed. Counsel also pointed out that the respondent was a victim of harsh economic circumstances and the court was right to take into account that fact in granting the injunction.

7. This appeal concerns the exercise of discretion by the trial magistrate in granting an injunction. I am alive that all discretion must be exercised judiciously and in order to intervene in that discretion, the appellate court is guided by principal 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.

8. The trial magistrate correctly held that in order to succeed, a party seeking an interlocutory must satisfy three conditions set out in *Giella v Cassman Brown and Co., Ltd [1973] EA 358*. The first condition is that the plaintiff must show that he has a prima facie case with a probability of success. Second, that he stands to suffer irreparable damage which cannot be compensated by an award of damages. Last, if the court is in doubt on the first two conditions, it will decide the matter on the balance of convenience.

9. As to whether the plaintiff established a prima facie case, the trial magistrate did not clearly state or give reasons why he come to that conclusion. It was common cause that the respondent had taken out a loan and charged the suit property to the Bank. The respondent did not dispute the fact that she had defaulted in paying the loan. Her case that the Bank intended to sell the property at an undervalue and that

the interest was contested could not give rise to a prima facie case in view of her admission of indebtedness. The Bank's right to exercise its statutory power sale had accrued and was put in motion by issuing the relevant notices and valuation of the property. As regards the valuation, the respondent did not put forth a counter valuation to support her contention that the property was undervalued. In the circumstances, the trial magistrate erred in restraining the Bank from exercising its statutory power of sale when the respondent had admitted indebtedness and the prerequisites for exercising that statutory power of sale had been satisfied. I am fortified in my findings by various decisions of the Court of Appeal exemplified by the following passage in **Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR**:

It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive. See Halsbury's Laws of England Vol. 32, 4th Edition page 725 and Lavuna & Others vs. Civil Servants Housing Co. Ltd. & Another Civil Appeal Nairobi No. 14 of 1995 (unreported). Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported).

10. Since the respondent did not establish a prima facie case, the court inquiry as to whether she is entitled to an interlocutory injunction ends. The Court of Appeal held in **Nguruman Limited v Jan Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** that, "*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.*" For completeness of the record, I shall however consider the other conditions set out by the trial magistrate.

11. I find and hold that the trial magistrate erred in accepting the respondent's contention that she would suffer irreparable if the property were as sold as it was her matrimonial home. This was clearly a misdirection as the suit property was charged to secure the loan and the respondent was clearly aware that it would be sold in the event of default. Finally, also erred in holding that the balance of convenience favored the respondent who was already in default. The trial magistrate failed to consider that the debt would continue to escalate and probably render the security worthless if the injunction was granted and remained in force pending hearing and determination of the suit.

12. The trial magistrate referred to **section 104(2)** of the **Land Act, 2012** empowers the court to provide relief to the charger and it provides for cancellation, varying, suspending and or postponing the scheduled sale or extend the period for compliance by the charger or substitution of a different remedy other than outright sale. It is clear that the respondent did not specifically plead or invoke the provisions and the trial magistrate, while referring to it, did not state why the provision was relevant to consideration of the matter.

13. The totality of the facts before the trial court could not support the injunction sought by the respondent. She admitted that she was indebted to the Bank and the Bank had taken steps to realise the security. It could not be restrained by the court. The trial court erred as it failed to consider the facts of the case against the principles in **Giella v Cassman Brown (Supra)** hence this appeal must succeed.

14. I therefore allow the appeal, set aside the order of injunction granted on 19th July 2019 and substitute the order with one dismissing the respondent's Notice of Motion dated 16th January 2019. The appellant shall have the costs of the application and of this appeal.

DATED and DELIVERED at NAIROBI this 22nd day of NOVEMBER 2019.

D. S. MAJANJA

JUDGE

Mr Kittony instructed by Muraguri, Muigai, Waweru and Company Advocates for the appellant.

Mr Osoro instructed by Osoro Juma and Company Advocates for the respondent.