REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 406 OF 2013

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

2. EXCELLENCE INTEGRITY SERVICES……2ND APPELLANT

VERSUS

KANUT ODONGO OKETCH……..RESPONDENT

RULING

1. Before this court is a notice of motion dated 31st July, 2014. The Appellant essentially seeks the following orders:

a) That pending the hearing and determination of this appeal, this court be pleased to vary the order issued by Hon. F.W. Andayi (SPM) on 2nd July, 2013 in the following terms:-

i. The injunction order issued by the court be conditional upon the Respondent herein (1) depositing in a joint interest earning account or in court the sum of KShs. 6,000,000/- being the principal amount of the sums owing to the 1st Appellant and (2) settling the auctioneers fees accruing from the aborted auction;

ii. In the alternative to (a) above, the injunction order issued by the court be conditional upon the Respondent herein paying the scheduled monthly installments due to the 1st Appellant [from a date to be determine by the court] by virtue of facility documents executed in favour of the 1st Appellant; and

iii. In default of complying with (a) or (b) above, the 1st Appellant will be at liberty to proceed and exercise its statutory power of sale over the property known as Land Reference No. Nairobi/Block/82/815.

b) That in the alternative, this court be pleased to make a declaration that the injunction granted by Hon. Andayi on 2nd July, 2013 has been discharged by operation of the law and by virtue of the provisions of Order 40 Rule 6 of the Civil Procedure Rules.

2. The grounds upon which the motion is premised are that the 1st Appellant issued various financial facilities to Peter Omolo Opador T/a Maendesia Agencies (“the borrower”) upon his request; that the said facilities were secured by the Respondent’s guarantee (in the form of a charge over the property known as L.R. No. Nairobi/Block/82/815) to repay the said facilities to the 1st Appellant on demand all sums of money which shall be owing by the borrower upon the latter’s default; the borrower owes the 1st

Appellant a sum of KShs. 7,989,315.40 outstanding as at 17th March,2012 which continues to accrue interest at contractual rates on the arrears; despite being given various accommodations, requests and demands by the 1st Appellant, the borrower has defaulted in paying the sums as and when they fell due and as at 17th March, 2012, was in arrears of KShs. 7,989,315.40 which sum continues to accrue interest at contractual rate on the arrears until payment in full.

3. The 1st Appellant advertised the charged property for sale by public auction but the sale did not go on as the Respondent obtained a temporary injunction in Nairobi CMCC No. 2759 of 2012. This injunction was confirmed pending the hearing and determination of the suit by a ruling delivered on 2nd July, 2013; that simultaneously with the filing of the said suit, the Respondent's wife, Esther Achieng Juma, in a bid to forum shop and as a clear abuse of the court process, filed constitutional petition in Nairobi Petition No. 220 of 2012. That that petition was dismissed by Majanja J., on 5th November, 2012; that the ruling by Hon. Andayi supports the 1st Appellant's assertion that the borrower's accounts with the bank are in arrears and the Respondent has conceded unequivocally that he offered his property as security by way of a charge to the 1st Appellant; the respondent has obtained an injunction restraining the 1st Appellant from selling or in any way interfering with the property L.R. No. Nairobi/Block 82/815 the subject matter of his guarantee, pending the hearing and determination of the Respondent's suit which could take a long time to conclude; that in the meantime, the 1st Appellant is not receiving any payments on the loan account. The respondent and or his family continue to enjoy the use of the charged property in spite of the legal obligations he entered into while executing guarantees in favour of the 1st Appellant; that the borrower and Respondent in this matter have on numerous instances, as indicated above and better particularized in the supporting affidavit, misled the 1st Appellant and are keen on frustrating the 1st Appellant from recovering amounts owed to it; that on the basis of the colossal sum involved, the 1st Appellant is apprehensive that the existing charge over the property will soon become an insufficient security against the increasingly accruing debt in which event the 1st Appellant will be permanently deprived of the refund of its facilities thereby leading to a severe financial loss unless this court intervenes; that no payments are being received on account and on the basis of the borrower's default, the 1st Appellant's guarantee should be called upon to settle the borrower's debt to the 1st Appellant and therefore make monthly installments of the amount claimed or deposit the principal in court. That the 1st Appellant's advocates have reached out to the Respondents advocates to pursue an amicable settlement of the matter but that cue has not been taken advantage of by the Respondent.

4. In response to the application the Respondent swore a replying affidavit on 27th February, 2015. He lamented that the application is oppressive and that the loanee may not be able to deposit KShs. 6,000,000.00 in an account as required by the 1st Appellant. That the loanee entered into an agreement as to the mode of paying off the loan arrears; that the loanee has been paying the loan as per the agreement alluded to; that it is not true that the 1st Appellant is not receiving any payment. That he is not in a position to pay the amount because he has no means to do so and because the loanee is already servicing the loan; that if the 1st Appellant sells his house, his family shall become homeless and destitute. That they shall as a result suffer irreparable loss and damage that will not be compensated even if the loanee later pays off the entire loan.

5. I have considered the application, the affidavits, submissions by parties as well as the applicable law. The court's duty in an application for injunction is to examine the entire circumstances of the case in deciding whether or not to grant an injunction based on the traditional principles in the celebrated case of **GIELLA vs. CASSMAN BROWN** to wit:-

a) Has the Applicant established a prima facie case with high chance of success?

b) Will the Applicant suffer irreparable damages unless an injunction is issued and

c) Where does the balance of convenience lie?

See the decision of Mabeya J in **Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where he cited Ojwang Ag. J (as he then was) in the case of **Suleiman vs Amboseli Resort Ltd (2004) eKLR 589** as follows:-

> ***'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-***
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> ***'…….counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***
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> ***Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.***
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> ***i. Is there a prima facie case….***
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> ***ii. Does the applicant stand to suffer irreparable loss …..***
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> ***iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice……***

6. The Respondent has contended that the property in question is of a unique nature i.e. matrimonial property. In **Julius Mainye Anyega Vs. Eco Bank Limited [2014] eKLR** the court expressed itself as follows:

> ***"The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;***
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> ***"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".***

7. In **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139** where

Honourable Nyamu, J. stated as follows:

> ***"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities…loss of the properties by sale is clearly contemplated by the parties even before the security is formalized".***

8. And a work of the court in **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** in the rendition below:

> ***"On matrimonial home***
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> ***It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically Sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better. The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home. Now let me consider the substantive issues herein."***

9. The fact that the charged property is a matrimonial home alone will not suffice as a ground of granting an injunction as long as the chargee has fully adhered to the law. However, I note that the orders sought in this motion are similar to the grounds on the memorandum of appeal. The appeal herein seeks to challenge the injunctive orders granted by the trial magistrate. The said orders were granted pending the hearing and determination of the suit which suit is still pending. By asking this court to vary the orders issued by the trial court, it's tantamount to asking the court to hear the appeal prematurely. The application ought to have been made before the trial court and not in the appeal.

10. The court has also noted that the Appellants have lamented about the delay in prosecuting the suit. It is noted that the original file was forwarded to this court on the 16/1/2014 and since then the Appellants have not taken any steps to prepare the appeal for hearing not even filing the record of appeal. They cannot, therefore, blame the respondent for delay in prosecuting the case yet the respondent would not be in a position to do so when the lower court file is in this court for purposes of the appeal. It is almost three years since the appeal was filed and having failed to take any action, the Appellants have themselves to blame for the delay.

11. This court has had a chance of reading the two authorities relied on by the Appellants and it is noted that in **Civil Appeal No. 77 of 2012**, the Court of Appeal was hearing the appeal challenging injunctive orders that had been issued by the High Court and it delivered its judgment which is a different scenario from the case before me. In **Civil Suit Number 157 of 2012** the court was dealing with an application to discharge the injunction in a suit that was pending before it.

12. In the upshot, I find that the application dated 31st July, 2014 has no merits and it's hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 28th day of November, 2016.

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L NJUGUNA

JUDGE