



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 513 OF 2012

STEPHEN MUCHAI GITHINJI PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD..... DEFENDANT

RULING

1. Having delivered a Ruling on 19 March 2013 as to the admissibility or otherwise of the Defendant's Supplementary Affidavit dated and filed herein on the 12 February 2013, what is left for determination by this Court is the Plaintiff's Notice of Motion dated 27 November 2012. That Application was brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as under **Order 50 Rule 1** of the *Civil Procedure Rules, 2010*. The Application sought Orders by way of temporary injunction to restrain the Defendant from selling, whether by public auction or private treaty, or otherwise disposing of or interfering with the Plaintiff's ownership of the piece of land known as L. R. No. 8226/95, Nairobi (hereinafter "the suit premises") pending lodging, hearing and determination of an intended application in the Court of Appeal. It also requested that the temporary injunction should be granted pending appeal. The Application was brought upon the following grounds:

“(a) By an application dated 10th August 2012, the Plaintiff sought injunctive orders pending interpartes hearing and pending hearing and determination of this suit.

(b) The application was heard and dismissed by this court on 20th November 2012.

(c) The Plaintiff has preferred an appeal against the said ruling by filing a notice of appeal which appeal is not frivolous as shown by the draft memorandum of appeal annexed to the supporting affidavit.

(d) That while the appeal is intended, the Plaintiff is apprehensive that the Defendant will move in to dispose of the suit property thereby rendering the intended appeal nugatory and a mere academic exercise.

(e) That the balance of convenience tilts towards preserving the suit property the subject matter of this suit and the intended appeal.

(f) It is therefore in the interest of justice that the orders sought be granted”.

2. The Plaintiff’s said Application was supported by his Affidavit also dated 27 November 2012. The Affidavit repeated the Grounds in support of the Application and noted that the Plaintiff had filed Notice of Appeal in respect of the Ruling delivered by this Court on 20 November 2012. The deponent’s stressed that he intended to raise and argue the following grounds of appeal:

“(a) That the learned judge erred in law and in fact in failing to rule on the validity of the charge document despite the appellant’s submissions.

(b) The learned judge erred in law and in fact in failing to hold the respondent had applied unlawful interest and other charges on the loan account.

(c) The learned judge erred in law and in fact in holding that the respondent was at liberty to vary the rate of interest “within the maximum limits” which limits were not defined or specified.

(d) The learned judge erred in law and in fact in failing to hold that the respondent was not under obligation to inform the appellant of any intended variation of rate of interest.

(e) The learned judge erred in law and in fact in failing to rule on the validity of the instructions by the respondent to M/S Nguru Auctioneers and notification of the sale thereof.

(f) The learned judge erred in law and in fact in making a finding that the appellant had not established a case for granting of the orders sought.

(g) The learned judge erred in law and in fact in failing to make a finding on the provisions of the Land Law in relation to issuance of notices provided for therein prior to an intended sale of the suit property.

(h) The learned judge erred in law and in fact in dismissing the application for injunction.

(i) The learned judge erred in law and in fact in failing to consider the appellant’s submissions on the issues raised in the application.

(j) The learned judge erred in law and in fact in holding that the appellant had failed to satisfy the principles in *Giella versus Cassman Brown*”.

3. On 28 November 2012, this Court granted a temporary injunction as prayed as regards the suit property pending the determination of this Application before Court. The Remedial Officer of the Defendant bank, one **Julius Gikonyo** swore a Replying Affidavit on 10 December 2012. He drew attention to the fact that the Court record would show that the Plaintiff had not controverted any of the depositions as contained in the deponent’s Replying Affidavit sworn on 14 September 2012. The deponent had also been advised by his advocates on record that the intended Appeal by the Plaintiff did not raise any arguable grounds for determination by the Court of Appeal. Mr. Gikonyo, at paragraph 5 of his Replying Affidavit, detailed that the Plaintiff had defaulted in the payment of facilities advanced to him by the Defendant bank in the sum of Shs. 46,005,107.60 which had been outstanding as at 30 November 2012. The deponent annexed to his said Replying Affidavit a copy of the Plaintiff’s statements of his account held with the Defendant bank. Finally, the deponent noted that the Plaintiff had not paid a single cent since obtaining exparte injunctive orders in August 2012, despite the fact that the suit property generated rental income of over Shs. 450,000/- per month.

4. The Plaintiff swore a Supplementary Affidavit on 21 December 2012. He noted that the failure to respond to the Defendant's position in relation to Mr. Gikonyo's said Affidavit sworn on 14 September 2012, did not in any way mean that the averments contained therein were admitted. He stated that the dispute between the Defendants and himself related to the levying of interest and bank charges imposed by the Defendant on the loan, which dispute was pending before this Court and is the subject of the intended Appeal. He maintained that by his signing of the letter dated 30 January 2012, it had been intended that he and the Defendant would re-commence their business relationship on a clean slate and on the understanding that the Defendant was required to withdraw its statutory notice dated 21 December 2011, which the Defendant had failed to do. He also noted that the estimate by the Defendant of the value of the suit property had been put at Shs. 48 million but in his view the same was worth Shs. 88 million and he would crave the leave of this Court to seek an independent valuation thereof. Further, the Plaintiff annexed to his Supplementary Affidavit, a copy of the Application that he had filed before the Court of Appeal dated 7 December 2012. That Application sought an injunction in relation to the suit property pending the filing, hearing and determination of the intended Appeal. The deponent did not inform this Court as to the outcome of the said Application before the Court of Appeal.
5. It should be noted that the said Julius Gikonyo swore and filed a further Affidavit on 12 February 2013. That Affidavit was filed without the leave of this Court and was struck out accordingly on 19 March 2013. However leave was sought and granted to the Defendant on 19 March 2013, to file a Further Affidavit which it did so on 19 April 2013. That Further Affidavit was again sworn by Julius Gikonyo and was said to be supplementary to his said Affidavit sworn on 10 December 2012. The deponent noted that when the Plaintiff's Application before Court dated 27 November 2012 came up for hearing on 1 February 2013, the Plaintiff's advocates were not in court. The Application was therefore stood over generally allowing the first Defendant bank to execute a sale agreement in respect of the suit property as between itself and the 2nd Defendant, Afri-Sine Ltd. Mr. Gikonyo informed the Court that the property had been sold for Shs. 64 million and the second Defendant had paid a deposit as regards thereto of 10% being Shs. 6,400,000/- on 2 February 2013. He noted that the Defendant bank had opted to sell the suit property by way of private contract as the purchase price obtained was Shs. 18,000,000/- higher than the Open Market Value of the same. He believed that in view of the Agreement for Sale as entered into, the Plaintiff's equity of redemption had been extinguished thereupon.
6. The second Defendant who had joined the fray, filed Grounds of Objection to the Plaintiff's Application before Court which detailed the following grounds:

“1. The application is frivolous, vexatious and lacks merit and should be dismissed with costs.

2. The applicant having failed to pay the loan and having continued to be in default is not entitled to the discretionally orders of this court.

3. The 2nd defendant has purchased the suit property and the 1st defendant has already exercised its right of sale, there is no substratum in the suit and damages would be an adequate remedy in the unlikely event that the plaintiff succeeds in the suit.

4. The intended appeal lacks merit and no irreparable damage would be suffered by the plaintiff.

5. The 2nd defendant should not suffer prejudice by the plaintiff's suit by virtue of section 99 of the Land Act which affords him;-

- a. **Not to answer for any loss, misappropriation or non-application of the purchase money paid.**
- b. **No obligation at all to enquire whether there has been a default by the 1st defendant or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.**

6. The orders sought by the plaintiff are aimed at perpetuating a breach of its obligations in the charge documents and further interfere with the 2nd defendant's freedom of contract and perpetrate a breach thereof.

7. The plaintiff's application should be dismissed with costs".

7. Mr. Kariuki for the Plaintiff submitted before this Court on 26 April 2013. Having pointed out the details of the Application and the Affidavits in support thereof, counsel detailed that the main issue to be raised in the Court of Appeal was the validity of the Charge document as between the Plaintiff and the first Defendant. The second issue was whether the first Defendant was at liberty to vary the rate of interest "up to its maximum limit" as ruled by this Court in its said Ruling of 20 November 2012. The question being raised before the Court of Appeal was just how the maximums were set up as under normal banking practice or set under the law? Further, there was a question of whether the first Defendant had complied with **section 44** of the *Banking Act*. Such was in connection with the first Defendant being required to determine whether the loan was performing or not and the failure of the first Defendant to inform the Plaintiff of the amount owed and the interest thereon. Another matter being raised before the Court of Appeal was whether **section 90** of the *Land Act (2012)* had been complied with, such requiring the first Defendant to issue notices in connection with the non-compliance by the Plaintiff. Further, the suit premises were occupied by tenants and the first Defendant ought to have complied with the provisions of the Land Act by issuing notices to those tenants, which was not done. This Court had also found that the Plaintiff had been held out not to be in a position to pay the amounts owed to the first Defendant, such finding being disputed by the Plaintiff. Finally the Court had erred in not finding that the suit property was worth much more than the amount owed by the Plaintiff to the first Defendant. Counsel also submitted as regards the matters that had taken place on 1 February 2013 in connection with the said Sale Agreement to the second Defendant. He noted that the first Defendant had alleged that the Plaintiff's equity of redemption had been extinguished. The Plaintiff took exception to the way that the sale was conducted as the Orders issued by the Court on 27 November 2012 were in place. The issue of the validity of the sale would be addressed at the appropriate time. However, the Statement of the Plaintiff's account as annexed to the Further Affidavit sworn by Mr. Gikonyo, quite clearly showed that the deposit was paid in respect of the sale and credited to the account of the Plaintiff on 2 February 2013, when the fresh injunctive Orders were in place.
8. As regards the first Defendant's Grounds of Objection, Mr. Kariuki submitted that such had no bearing on the Application before court. In terms of the Agreement for Sale to the second Defendant, the first Defendant had no locus as regards that transaction and it had no business stating that there were no valid Grounds of Appeal. However, it appeared from the said Further Affidavit, that the second Defendant seems to have sought the protection of **section 99** of the *Land Act*. Such would not be helpful to it as the Plaintiff had made serious allegations of fraud and illegality in respect of the sale. Counsel then referred to the authorities filed by the Plaintiff on 16 January 2013 more particularly **Alliance Media Kenya v World Duty Free Complex Ltd HCCC No. 678 of 2004 (unreported)** and **Muchemi v Barclays Bank of Kenya Ltd HCCC No. 339 of 2011**. Finally, Mr. Kariuki noted that the suit property was not the Plaintiff's matrimonial home but it was a substantial investment.
9. In response, Mr. Issa for the first Defendant noted that the grounds as regards the Application filed in the Court of Appeal were immaterial to the Application before this Court. He referred to the well-known authority of **Madhupaper International Ltd v Kerr (1985) KLR 840** in relation to the circumstances in which this Court may grant an injunction pending appeal. He noted that the Ruling of 20 November 2012 involved a finding that the Plaintiff was not entitled to an injunction to prevent the sale. The matter of the status quo had changed since that Ruling and as a result of the Agreement for Sale dated 1 February 2013, the Plaintiff no longer had an equity of redemption so far as the suit property was concerned. The next point raised by counsel for the first Defendant was that since the Plaintiff had obtained injunctory Orders, he had not paid any monies towards the redemption of the Charge over the suit property held by the first Defendant. Since the injunction was put in place, the suit property would have generated between Shs. 3 and 4 million available for repayment but that nothing had been paid. Counsel also noted that the re-scheduling

that had been agreed to as between the Plaintiff and the first Defendant was made without prejudice to the Bank's statutory power of sale. The Plaintiff had failed to honour the rescheduling by way of instalments of Shs. 739,915/- per month. In fact, the Plaintiff had paid nothing towards the loan that he had taken from the first Defendant and the statement of his Account showed a balance of Shs. 46,000,000/- as at 30 November 2012 which was accruing interest at over Shs. 700,000/- per month, the effect of which would have the account standing it well over Shs. 50 million at the present time.

10. For these reasons, counsel submitted that the first Defendant was perfectly entitled to sell the suit property to the second Defendant. To this end, the Court was referred not only to the **Madhupaper** case but also to the classic authority on the subject being **Erinford Properties Ltd versus Cheshire County Counsel (1974) 2 All ER 448**. The circumstances pertaining in those cases were the same as the matter before Court. Mr. Issa was of the view that it would be wrong to grant the injunction pending appeal as it would cause more harm than it would cure. He also referred to the second Ruling in relation to the case of **Muchemi v Barclays Bank of Kenya Ltd HCCC No. 339 of 2011**. Between the first and second Rulings in that case, not a shilling had been paid by the plaintiff therein, similar circumstances to the matter before this Court. Finally, counsel referred to the case of **Uhuru Highway Development Ltd v Central Bank of Kenya Civil Appeal No. 36 of 1996 (unreported)**.
11. Mr. Muturi on record for the second Defendant adopted the first Defendant's submissions and relied upon its Grounds of Objection filed on 19 April 2013. There was no dispute that the second Defendant had purchased the suit property. He pointed out that the Plaintiff's remedy, if any, was in damages not in equitable relief. To allow the Plaintiff's Application before Court would not serve any purpose as the first Defendant had validly exercised its statutory power of sale. He pointed out that there was a valid contract of sale entered into and that the orders being sought would only perpetuate a breach of that contract. He also reiterated that the Plaintiff had not paid a single shilling to redeem the suit property even prior to the re-negotiation of the facility with the first Defendant. Finally, Mr. Muturi noted that the second Defendant had not been served with the Plaintiff's Notice of Appeal but it was a necessary party.
12. Mr. Kariuki in his reply to the submissions of the Defendants noted that the first Defendant had stated that it had exercised its statutory power of sale under the provisions of **section 126** of the *Transfer of Property Act*. The Plaintiff maintained that these provisions did not apply and that the power could only have been applied under **section 90** of the *Land Act 2012*, which the first Defendant had not invoked. The Charge executed by the Plaintiff ought to have complied with the provisions of the Land Act and consequently there was no power under the Transfer of Property Act. Finally, Mr. Kariuki referred to the authorities put before court by the first Defendant and noted that the majority of them were in relation to the Court of Appeal, which has a different bearing on jurisdiction from this court, as to the granting of an injunction pending appeal.
13. The reasons put forward by the Plaintiff in support of his Application for injunction pending the hearing of this suit dated 10 August 2012 have already been addressed by this Court in its Ruling dated 20 November 2012. Such include the validity of the Charge documents, the statutory power of sale not being exercisable, as well as the breach of the provisions of the Banking Act. I find that in the present Application, the Plaintiff has not put forward anything new. However, an interim injunction pending appeal is a different animal to an injunction pending hearing of the suit. In this regard, I take into account the finding of **Madan JA** (as he then was) in **Butt v The Rent Restriction Tribunal Civil Appl. Nai No. 6 of 1979** as follows:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another which in his opinion will be a better remedy will become available to the applicants at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from

being nugatory, per Brett L. J. in *Wilson v Church* (No. 2) 12 Ch D (1879) 454 at p. 459. In the same case, Cotton L. J. said, at p. 458:

‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory’

Megarry J., as he then was, followed Wilson (supra) in *Erinford Properties Ltd v Cheshire County Council*, (1974) 2 All E. R. At p. 454, and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant the stay were special circumstances of the case so require.”

14. With the above observation, it would not be necessary for this Court to consider further the **Erinford Properties** case in that it was already adopted as above by Madan J.A. Of the other cases put forward for the consideration of this Court by the Plaintiff I did not glean much assistance from the case of **Kenon Ltd v Giro Commercial Bank Ltd HCCC No. 789 of 1999** nor indeed **Njagi J’s** Ruling in the **Alliance Media Kenya** case as that involved a stay in winding up proceedings rather than an injunction pending appeal. Similarly, in the first Ruling of my learned brother **Mabeya J.** he extensively quoted from the **Erinford Properties** decision as per the Court’s inherent jurisdiction as well as **Halsbury’s Laws of England, 4th Edition, Volume 32 para 75** and the finding in **Lavuna & Ors v Civil Servant Housing Company Ltd** (1995) LLR 336. To my mind, it is the point as raised in the second decision of **Mabeya J.** in **Muchemi v Barclays Bank of Kenya Ltd & Anor. (2012) eKLR** which gave this Court more assistance in its decision as to whether to grant an injunction pending appeal, always bearing in mind that such exercise of discretion in this Court, is different from that as exercised by the Court of Appeal. At page 2 of his Ruling dated 28 September 2012, the Judge had this to say:

“12. Whilst I am alive to all the foregoing, what is disturbing is that ever since the order of 8th September, 2011 was made not a penny has been received by the 1st Defendant. There is no material before me to show that there has been any effort at all to either comply with the order of Hon. Njagi J or to make any repayment at all. I believe and I should state here and now that if there was any scintilla of evidence of any effort of either to deposit the amount ordered, or repayment to the 1st Defendant of any sum or negotiation with any other financier to take over the facility from the 1st Defendant or any other like effort on the part of the Plaintiff to deal with the 1st Defendant and the debt in good faith, this court would not have hesitated to grant the Plaintiff a life line to save its valuable property. Indeed, it would have been within the discretion of the court to vary the terms of the injunction into something less stringent than they are. Had there been any effort to pay or any payment at all, taking into consideration the value of the suit property, this court was willing to bend backwards and accommodate the Plaintiff. However, there was no evidence to show that there was the alleged attempt to settle the matter at Kshs. 350 million as submitted by Mr. King’ara.

13. All in all, everything points towards the Plaintiff coming to equity without doing equity. It does not give proposals how it intends to settle the undisputed debt, it only wants to enjoy the injunction whilst the 1st Defendant is out of pocket to the tune of the amount claimed. I think the justice of the matter demands that the application be refused”.

15. I find considerable similarities as between the **Muchemi v Barclays Bank** case and the matter before me. Paragraph 6 of the Replying Affidavit of **Julius Gikonyo**, the first Defendant’s

Remedial Officer, dated 10 December 2012 is very clear in that it reads:

“6. THAT, the Plaintiff has not paid a single cent since obtaining the ex-parte injunctive orders in August 2012 despite the fact that the suit property generates income of over Kshs 450,000.00 per month. The last payment by the Plaintiff was in June 2012.”

If the suit property was the Plaintiff's residential premises/ matrimonial home then the position in this case may have been somewhat different. However, it is clear that the suit property is residential premises let out to tenants, generating income. Nowhere in the Plaintiff's Supplementary Affidavit dated 21 December 2012 has there been any mention of the Plaintiff repaying the amount borrowed from the first Defendant. I agree with the sentiments expressed by my learned brother **Mabeya J.**, as above, that he who comes to equity must do equity and I think that the justice of the matter demands that the Plaintiff's Notice of Motion dated 27 November 2012 must be refused.

16.As a result, I dismiss the said Notice of Motion dated 27 November 2012 with costs to the first Defendant. As the second Defendant merely adopted the submissions of the first Defendant herein, I make no order as to the second Defendant's costs as against the Plaintiff.

DATED and delivered at Nairobi this 17th day of June, 2013.

J. B. HAVELOCK

JUDGE