



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MARAGA & MWILU, JJ.A.)

CIVIL APPEAL NO. 33 OF 2012

BETWEEN

SHIMMERS PLAZA LIMITEDAPPELLANT

AND

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

(Being an Appeal from the Ruling and or Orders of the High Court, Milimani Law Courts, Commercial and Admiralty Division, Nairobi given 27th January, 2012 by the Honourable Mr. Justice G.K. Kimondo in H.C.C.C. No. 895 of 2009)

in

HCC No. 895 of 2009

BETWEEN

SHIMMERS PLAZA LIMITEDAPPELLANT

AND

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. **SHIMMERS PLAZA LIMITED** (the Appellant) brings this Appeal on various grounds against what it considers misdirection and errors of fact and law made by the trial judge and seeks orders that that court’s refusal to grant an order of injunction be set aside and as a consequence thereof this court do grant orders of injunction in the terms sought in the disallowed application as herein-below set out:-

“1. THAT

2. THAT the Defendant be restrained by itself, its agents or servants from advertising, disposing off, offering for sale, alienating or otherwise dealing with

plaintiff's property known as Title No. I.R. 55525 (L.R. No. 1870/IX/128) situate in Westlands Nairobi pending hearing and determination of this application.

3. *THAT the Defendant be restrained by itself, its agents or servants from advertising, selling, disposing off, offering for sale, alienating, or dealing in any manner whatsoever with plaintiff's property known as Title No. I.R. 55525 (L.R. No. 1870/IX/128) situate in Westlands, Nairobi pending hearing and determination of this suit.*

4. *THAT Defendant be restrained from advertising, selling, disposing off, offering for sale by private treaty or public auction, alienating or dealing in any manner whatsoever against plaintiff's property known as Title No. 55525 (LR 1870/IX/128 pending hearing and determination of this application and suit by virtue of section 52 of I.T.P.A.*

5. *THAT*"

2. For the appellant we were told that the High Court judge failed to correctly exercise his discretion on the issues of interest, the validity of the charge, the attestation of the charge documents and on valuations of the security. We were told that the Respondent had altered the terms of the borrowing without notice and the defence was never amended so as to deny the appellant's averments in the plaint on the various issues now being raised, although the right to amend was reserved. The judge was blamed for not determining the issue of what sum interest was applied on as there were different figures given by the respondent and no account was made in respect of the correct payment by the appellant of Kshs.32m. It was further submitted that the respondent gave the wrong repayment sum of Kshs.22,735,341/= and further failed to disclose to the court that the appellant had made a further payment of Kshs. 10m.

3. Further submission for the appellant was that the court below did not consider the current value of the security as there was no updated valuation and further that the respondent had all along acted without candour, a fact which the court did not consider. Placing huge reliance on this court's ruling dated 15th March 2013 on the appellant's application under Rule 5(2)(b) of the Court of Appeal Rules, counsel for the appellant told us that we had already found that the appellant had an arguable case which, counsel added, would be rendered nugatory if this application is not allowed. Counsel further faulted the judge for overlooking the overriding objective which is to do justice. There was submission that the respondent had a very shallow defence which could not defeat the appellant's case and that a sale by private treaty is not to be allowed as the property could be sold for any amount.

4. The respondent's counsel described this appeal as an abuse of court process and saw the same as being used to refuse to pay a debt due. He cited the respondent's filing of multiple suits, to wit, HCCC 229/2001 and HCC 895/2009 none of which had been brought to trial, as an example of refusal to pay. He added that these cases have been in court for a long time without any amount of seriousness to getting them to be heard yet the loan(s) remained unserviced. He considered that the respondent's defence in the two cases mentioned above, which have since been consolidated, were very strong and that both the High Court and this court in an application under Rule 5(2) (b) had refused to grant injunctions and none should issue now. Counsel for the respondent, in his further submissions stated that the court had rightly found no contradictions in figures and further that account statements had been given to the appellant and these were never queried. He added that the interest rate was not disputed and similarly it was never varied. There was additional submission that the appellant had only paid three instalments of the term loan, the last payment being in 1998 and the amount now sought is not excessive as it is inclusive of interest. He asked us not to allow the appellant to hide under technical issues not to pay due debt.

5. For the respondent it was, further submitted that no limitation issues arose as statutory notices were issued during the timeframes allowed and such notices were soon followed by the

filing of the two suits above in the High Court. We were thus asked to reject this appeal.

6. This is an interlocutory appeal. The matters in contention are straightforward. It is not disputed that the respondent advanced the appellant a term loan. It is further not disputed that only three instalments out of a total of some twenty, were paid. The sum of Kshs. 10m paid as a security for the grant of an injunction was similarly not denied. There is no confusion about the statutory notice that gave rise to the latter suit within which the impugned ruling was made and which Ruling gives rise to this appeal. One issue that is loud and clear from the appellant and which it relied on to avail an injunction in its favour is that there were various sums of moneys claimed by the respondent and that there had been a variation of sorts. The judge below, rightly in our view, directed himself in resolving that issue. It has always been the position of the law that a dispute on the exact amount payable under a mortgage is not a ground to restrain the exercise of the mortgage's power of sale. See **J.L. LAVUNA & OTHERS CIVIL SERVANTS HOUSING CO. LTD. & ANOTHER CA. Nai 14/95** and **JOSEPH OKOTH WAUDI VS NATIONAL BANK OF KENYA CA. 77/2004 [2006]e KLR**.

It is to be noted that the appellant did neither deny the principal borrowing, nor the fact that only three out of twenty repayment instalments were paid. The appellant never denied default and despite stating that the property constituting the security was bringing in a substantial monthly income, there was no explanation as to why the repayment was stopped.

7. The judge's exercise of discretion can similarly not be faulted in light of his leaving matters that require the calling of evidence to determine, for the determination by the trial judge. The judge could not, at the interlocutory stage, determine that the execution of the charge was not properly attested to when on the face of the charge an advocate's name appeared and without having such advocate called to give evidence. Evidence would similarly have to be called to show that the contracted rate of interest was varied. At any rate, as we have stated, a dispute on the rate of interest will not avail the respondent an order of injunction restraining the exercise of a statutory power to sell. We find the judge not to be faulted for the exercise of his discretion and on our part do not see how the respondent dealt without candour, as alleged. The judge therefore correctly guided himself on what was his to do at the interlocutory stage and what to be left for determination by the trial judge.

8. As to whether or not the appellant has an arguable case was determined by this court in its ruling of 15.03.2013. What the appellant had to do before us and then what it did not do, is to satisfy us that its appeal would be rendered nugatory. Infact the reason the appellant failed to avail itself an order of injunction on 15.03.2013 is precisely that it sought none and further, it did not show that the failure to grant an injunction, even if one had been sought, would have rendered the appeal nugatory, the twin grounds of arguability and nugatory would have to be found to co-exist. The judge below found that no prima facie case was established and secondly that damages could infact be an adequate compensation as the appellant's guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent.

9. We are constrained to observe that the appellant cannot successfully evade a due debt by attempting to take cover behind irrelevant issues. The principal debt having been acknowledged and only a paltry repayment sum having been made and no valid ground having been raised to fault the judge below, this court cannot be used to aid in the avoidance of meeting due obligation(s). We find no merit in this appeal and dismiss the same in its entirety. The respondent shall have the costs of this appeal.

It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of December, 2013.

WANJIRU KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR