



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 509 OF 2002

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(An appeal from the Ruling/Order of Senior Magistrate's Court at Githunguri the Hon. Mr. S. B. A. Mukubwa delivered on 14th August, 2002 in SRMCC No. 38 of 2001)

THE CO-OPERATIVE BANK OF KENYA LTD1ST APPELLANT
WATTS ENTERPRISES2ND APPELLANT

V E R S U S

DICKSON N. KAGO1ST RESPONDENT
T/A D. N. KAGO & CO. ADVOCATE
KAGO GITAU.....2ND RESPONDENT

J U D G M E N T

On 24th August, 2001 the Respondents filed this suit at the Senior Resident Magistrates' Court at Githunguri to stop the 1st Appellant from selling land parcel No. Githunguri/Kimathi/1246 which had secured a loan that had been advanced. The loan was for KShs. 250,000/= advanced in December, 1997. The Respondents were saying they had fully repaid the loan by May, 2000 but that the 1st Appellant had refused to discharge the security and had instead instructed the 2nd Appellant, an auctioneer, to realize the security. The Respondents alleged the 1st Appellant had continued to charge arbitrary interest and it was the non-payment of the interest that had forced them to sue. The Respondents sought a declaration that the 1st Appellant was not entitled to realize the security since the loan had been fully repaid.

Along with the suit, the Respondents applied under **Order 39 rules 1(a) and 2** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for a temporary injunction to restrain the Appellants from advertising for sale by public auction, or in any other manner selling and/or alienating the suit land until the case was heard and determined. The application went before C.V. Odembo DMII (Prof) on 24th August 2001 who granted an interim injunction *ex parte* and directed that the same be heard *inter partes* on 7th September, 2001 by the Senior Resident Magistrate, Mukabwa. On 7th September, 2001 the 1st Respondent went before the Senior Resident Magistrate and indicated he had served the application. The Appellants did not attend. He asked that the order of injunction be confirmed

which was done.

On 24th September, 2001 the Appellants brought a motion under **Order 39 rule 4** and **section 3A** to have the injunction set aside and or vacated and to have the suit struck out with costs. The grounds were that the court did not have the pecuniary jurisdiction to entertain the suit as loan owing was KShs. 370,412/90 which was above the court's powers. Secondly, that the non-attendance by the Appellants for *inter parte* hearing was due to oversight and, lastly, that the Respondents had concealed the fact that the parties had in **RMCC No. 566 of 1990** at **Kiambu** recorded a consent over the repayment of the loan by the Respondent who had, however, breached the same by not paying. The proceedings in the Kiambu case were annexed showing the Respondents had on 4th February, 2000 acknowledged owing KShs. 294,808/25 with interest and had agreed to pay by instalments.

The proceedings show that the Respondents had on 22nd August, 2001 given notice to withdraw the Kiambu suit. 2 days later they filed the present suit at Githunguri. In the replying affidavit to the Appellants application, the 1st Respondent indicated the Kiambu suit had been withdrawn. However, he did not indicate that they had honoured the agreement to pay the outstanding loan.

In a Ruling delivered on 14th August, 2002 the Senior Resident Magistrate dismissed the motion. The court appreciated that the issue revolved around whether the whole of the loan had been repaid. Regarding jurisdiction, the court acknowledged, nor explicitly though, that the amount went beyond its jurisdiction but said since the Respondents sought only a declaratory order there was jurisdiction. The court did not deal with the fact of the Kiambu case or the consent entered into therein. Lastly, the court did not deal with the explanation by the Appellants why they had not attended the hearing of the injunction application *inter partes*.

The Appellants were aggrieved by this Ruling and preferred this appeal. The appeal was not defended.

Without following the order of the grounds as contained in the Memorandum of Appeal, this appeal can be resolved rather quickly. It is now settled that a person who makes an *ex parte* application to the court is under an obligation to make the fullest possible disclosure of all the material facts within his knowledge, and if he does make such a disclosure, then he cannot obtain advantage from the proceedings, and he will be deprived of any advantage he may have already obtained (**Omega Enterprises (Kenya) Ltd –Vs- Kenya Tourist Development Corporation & Others [1993] LLR 2525 (CAK)**). The record shows that the Respondents did not disclose that there had been a case at Kiambu between them and the Appellants over the same loan in which they had a contractual obligation contained in the consent to repay the loan by instalments. The plaint indicated that there was no pending suit between the parties since all previous suits had been withdrawn. The particulars of the withdrawn suit were not disclosed. The consent order was not disclosed. The plaint did not disclose they owed any money. These matters were not disclosed in the supporting affidavit to the application or at the *ex parte* hearing. The Respondents, I find, were guilty of material non-disclosure and have to be deprived of the injunction.

Under **Order 39 rule 3(1)** where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application *ex parte*, and (**rule 3 (2)**) grant an *ex parte* injunction. In the Court of Appeal decision above it was held that the recording of reasons by the court why it should hear the application *ex parte* is mandatory and that where the court fails to record the reasons and goes ahead to hear the application *ex parte* and to grant the injunction, the order is invalid and of no legal basis. The record shows that C. V. Odembo (DMII Prof) did not record reasons why he heard the application *ex parte* or granted the injunction *ex parte*. The orders issued were invalid and of no legal basis. There were no orders to confirm when the matter came for *inter parte* hearing on 7th September, 2001. In any case, the Senior Resident Magistrate was under a duty, despite the non-attendance by the Appellants, to require the Respondents to demonstrate that there were sufficient grounds in terms of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358** to justify the grant of an interlocutory injunction. He did not. The Respondents walked in and walked out, as it were, with the injunction. There was no legal basis for such an injunction.

On the merits of the application for injunction, what was in dispute was the amount owed and, if the 1st Appellant was exercising its statutory power of sale under the charge, the court does not normally grant an injunction in those circumstances (**Priscillah Krobought Grant –Vs- Kenya Commercial Finance Co. Ltd & Others, Civil Application No. 227 of 1995 at Nairobi**). Even if the fear was that the land would be sold, it was clear the same was a commodity for sale with known value which the 1st Appellant, a bank, was going to compensate in the event injunction was denied and the suit ultimately won. The Respondents were not at all entitled to any order of injunction. The balance of convenience would not tilt in favour of a party who has defaulted in loan repayment.

When the Respondents knew that the same dispute had been resolved between them by way of consent and filed the present suit (before another court) seeking the same orders, that was an abuse of the process of the court and the Senior Resident Magistrate ought to have struck out the suit (**Commercial Exchange Ltd And Another –Vs- Barclays Bank of Kenya Ltd, Civil Appeal No. 136 of 1996 (CAK)**).

I do not want to say the court did not have the pecuniary jurisdiction to handle the dispute.

In short, the appeal is allowed. The orders of the court dismissing the motion with costs are set aside and in their place there is an order striking out the entire suit and application with costs. Costs of appeal shall be paid by the Respondents.

**DATED, PRONOUNCED AND DELIVERED AT NAIROBI
THIS 26TH OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**