



REPUBLIC OF KENYA



Gulf African Bank Limited & another v Sawa Allied Investments Limited (Environment and Land Appeal E11 of 2021) [2022] KEELC 12573 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E11 OF 2021
JM MUTUNGI, J
SEPTEMBER 27, 2022**

BETWEEN

GULF AFRICAN BANK LIMITED 1ST APPELLANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS

AUCTIONEER 2ND APPELLANT

AND

SAWA ALLIED INVESTMENTS LIMITED RESPONDENT

(An appeal from the Ruling of the Chief Magistrate's Court at Nakuru delivered by Hon. K.I Orange (PM) on 5th March 2021 in CM ELC suit No. 155 of 2020)

JUDGMENT

1. This appeal is against the ruling delivered by Hon KI Orange PM on March 4, 2021 in Nakuru CM ELC suit No 155 of 2020. The ruling was on the respondent's (plaintiff in the subordinate court) notice of motion application dated September 3rd, 2020 where the following prayers were sought:
 1. That this honourable court be pleased to certify this notice of motion as extremely urgent, dispense with its service on the defendants in the first instance and hear the Motion ex-parte in terms of prayers 2 and 3 hereunder;
 2. That pending the hearing and determination of this application inter-parties, this honourable court be pleased to issue an order of a temporary injunction restraining the defendants/respondents by themselves, their agents, or servants from auctioning, selling, alienating, disposing, transferring or in any manner howsoever from dealing with parcel Dundori/Lanet Block 11/1328 (Muwa).
 3. That pending the hearing and determination of this case this honourable court be pleased to issue an order of injunction restraining the defendants/respondents by themselves, their



agents or their servants from auctioning, selling, alienating, disposing, and transferring or in any manner howsoever from dealing with parcel Dundori/Lanet Block 11/1328 (Muwa).

4. That the costs of and incidentals to this notice of motion be borne by the defendants.
2. The application was supported on the grounds on the face of the application and the respondent's affidavit sworn in support thereof by Samuel Maina Gachihi the respondent's director on September 3, 2020. The 1st appellant opposed the application vide the replying affidavit sworn by Lawi Sato, the 1st appellant's legal officer on September 29, 2020.
3. After hearing the parties on the application, the learned trial magistrate rendered his ruling and allowed the application. The learned trial magistrate issued a temporary injunction which was granted upon considering the circumstances that were obtained in the year 2020 restraining the appellants by themselves, their agents, or servants from auctioning, selling, alienating, disposing, transferring or in any manner howsoever from dealing with parcel Dundori/Lanet Block 11/1328(Muwa).
4. Aggrieved by the learned trial magistrate's ruling, the appellants appealed to this court and set out seven grounds of appeal in their memorandum of appeal as hereunder:
 1. That the learned honourable magistrate erred in law and fact in holding that the respondent had established a prima facie case as envisioned in the case of *Giella v Cassman Brown & Co Ltd* 1978 EA 358, misapplying the second and third principles in *Giella* and failing to find that the respondent had not satisfied the second and third principle.
 2. That the learned honourable magistrate erred and misdirected himself in law by basing his finding on facts which had neither been pleaded nor proved by evidence.
 3. That the learned honourable magistrate erred and misdirected himself when he failed to apply the well known principles of law in arriving at his decision.
 4. That the learned honourable magistrate erred and misdirected himself when he ordered a temporary injunction.
 5. That the learned honourable magistrate erred in law and in fact in failing to evaluate the evidence by the defendant and/or consider its elaborate and detailed written submissions.
 6. That the learned honourable magistrate erred in law and in fact in finding that the 1st defendant had not undertaken a forced sale valuation over the charged property.
 7. That the learned honourable magistrate exhibited bias by selectively evaluating the evidence by the respondent and failing to consider the totality of the appellant's case.
5. The respondent *vide* the plaint dated September 3, 2020 filed on September 4, 2020 sought for a permanent order for injunction restraining the appellants by themselves, their agents and their servants from auctioning, selling, transferring, alienating and or disposing or dealing with all that parcel of land known as LR No Dundori/Lanet Block 11/1328 (MUWA) and that costs of this suit be borne by the appellants.
6. Simultaneously with the plaint, the respondent filed the notice of motion application praying for an injunction to stop the appellants from auctioning and selling land parcel No Dundori/Lanet Block 11/1328 (MUWA). The respondent averred that the appellants advertised the suit property for sale by way of public auction without issuing the requisite notices.



7. The 1st appellant filed a replying affidavit in opposition to the respondent's application. The 1st appellant stated that it had given a loan to the respondent that was secured by a charge of Kshs 6,300,000/= over land parcel No Dundori/Lanet Block 11/1328 (Muwa).
8. The 1st appellant stated that the respondent defaulted in the months of October, November, December 2019 and January and February 2020 in paying the contractual monthly instalments despite repeated requests to do so.
9. The 1st appellant contended that as a result of the default, it issued the 90 days statutory notice under Section 90 of the Land Act dated February 5, 2020 to the respondent which notice was sent via email and registered mail to the respondent's address.
10. The 1st appellant contended further that the respondent continued in default and upon the expiry of ninety days' notice, the chargee's statutory power of sale crystallized.
11. It was the 1st appellant's contention that since the respondent persisted in default, it issued a 40 days redemption notice dated May 11, 2020 in accordance to Section 96 of the Land Act via email and through the respondent's postal address.
12. The 1st appellant averred that the respondent sought to get relief from his contractual obligations in an email dated June 4, 2020 and acknowledged the outstanding amount and stated that he was awaiting the arrival of his goods from china to enable him regularize the outstanding payments.
13. The 1st appellant averred that it instructed the 2nd appellant to issue the 45 days notification of sale which the 2nd appellant did dated 22nd July 2020 which notice the respondent acknowledged receipt at paragraph 6 of its affidavit.
14. The 1st appellant further averred that upon the expiry of the 40 days redemption notice, the bank's statutory power of sale accrued and that it had a contractual right to realize its security and it could only be restrained if the respondent paid the entire amount claimed.
15. The parties before the lower court argued the application by way of written submissions and the learned magistrate delivered his ruling on March 4, 2021. In his ruling the trial magistrate found that the respondent had defaulted to repay the debt and this was because of the challenges that had been posed by covid-19 in the year 2020.
16. The learned trial magistrate granted a temporary injunction having regard to the challenges that were occasioned following the outbreak of Covid -19 in the year 2020 and emphasized that the orders were made in the interest of justice.
17. The appeal was canvassed by way of written submissions. The appellants filed their submissions on May 24, 2022 while the respondent did not file any submissions.
18. The appellants submitted that the trial court misdirected itself and improperly exercised its discretion in granting the interlocutory injunction. The appellants further submitted that the trial court improperly applied the principles established in the case of *Giella vs Cassman Brown & Co Ltd* [1978] EA 358 and failed to consider and evaluate the relevant material placed before it thereby reaching a wrong decision.
19. The appellants submitted that the respondent failed to establish a prima facie case as it did not tender any evidence in support of its allegations. The appellants further submitted that the trial court failed to consider the 1st appellant's replying affidavit which rebutted the respondent's allegations.



20. The appellants submitted that the trial court did not make any finding as to whether or not the respondent had shown irreparable harm and further that the respondent failed to establish any irreparable harm not capable of compensation in damages so as to merit the injunction order.
21. The appellants submitted that the respondent had voluntarily offered the suit property as security and as such the same became a commodity for sale in the event default occurred. In such circumstances a borrower in default cannot allege that the bank's lawful exercise of statutory power of sale of the charged property would cause him irreparable loss. The appellants relied on the case of *Kitur v Standard Chartered Bank & 2 Others* [2002] 1KLR where the court held as follows;

“it must be noted that when a chargor lets loose his property to a chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the chargor.”
22. The appellants also relied on the case of *William Kanyi Hezekiah v Equity Bank Ltd & another* [2017] eKLR where the court stated as follows:

“In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual agreement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.
23. The appellants submitted that the trial court erred in law and in fact in arriving at the conclusion that the balance of convenience favoured the respondent based on the notion that the Covid-19 pandemic may have caused non-payment of the loan.
24. The appellants further submitted that the trial court erred in law and in fact in arriving at the conclusion that the balance of convenience favoured the respondent considering that the respondent's default commenced way back in October, November and December 2019 and January, February 2020 before the government of Kenya implemented the containment measures for the management of the Covid 19 pandemic as from March 2020.
25. Further the appellants contended the respondents did not furnish any evidence that could link its default to the onset of the Covid-19 pandemic. The allegations as to the impact of Covid-19 to the respondents business were not substantiated.
26. The appellants relied on the case of *South Nyanza Sugar Co Ltd v Leonard O Arera* [2020] eKLR and submitted that nowhere in the contract did the parties designate Covid -19 as an exemption to the respondent's obligation to repay the loan.
27. The appellants concluded their submissions by urging the court to grant the reliefs sought in the memorandum of appeal dated March 26, 2021.

Analysis and Determination

28. The only issue that arises for determination is whether on the basis of the facts and evidence before the learned trial magistrate the respondent was entitled to the injunction sought in its application dated September 3, 2020.



29. In determining whether or not the learned trial magistrate was justified in reaching the decision that he did, the court is under a duty to re-evaluate the evidence and the material that was placed before the subordinate court. This principle was set out in the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where the court held as follows:

“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”.

30. In this matter, the learned magistrate issued the injunction in the interest of justice considering the circumstances that were prevailing in the year 2020.

31. The principles of granting a temporary injunction were laid down by the court in the case of *Giella v Cassman Brown Co Ltd* (supra) and restated in the case of *James Njoro Kibutiri v Kenya Shell*, Nairobi High Court, Civil Case No 3398 of 1980 (1981) eKLR as follows:

The conditions for granting a temporary injunction in East Africa are well known and these are: First, the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See also EA *Industries v Trufoods* (1972) EA 420.”

32. For a party to be granted a temporary injunction, they must meet all the three conditions and, in the event, that they fail to meet one condition then they would not be entitled to a temporary injunction.

33. A prima facie case was defined as follows in the case of *Mrao Ltd V First American Bank of Kenya Limited and 2 Others* [2003] eKLR by the Court of Appeal:

“a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

34. In this matter, the 1st appellant issued a loan facility to the respondent which was secured by the registration of a charge over land parcel No Dundori/Lanet Block 11/1328 (Muwa) which is registered in the name of the respondent’s director.

35. It is not disputed that the respondent defaulted in repaying the loan but its only contention is that it was not served with any of the requisite notices except for the 45 days redemption Notice that was left at its office. The respondent further averred that it defaulted in 2020 due to the Covid -19 pandemic.

36. The 1st appellant on its part averred that the respondent defaulted in October, November, December of 2019 and January and February in 2020 which was before the onset of Covid-19 Pandemic. The 1st appellant further averred that as a result of the said default it issued all the requisite notices with a view of realising the security in exercise of its statutory power of sale conferred under the charge.

37. In considering whether the respondent had a prima facie case, this court will look at whether the notices required under the law were issued. Section 90 of the *Land Act* requires the chargee to issue a notice to the chargor demanding for the amount due in the event that the chargor defaults in making repayments



for a loan. When the Chargor fails to comply, then the chargee is required to issue various notices that would eventually lead to it exercising its statutory power of sale.

38. The 1st appellant's contention was that after the respondent defaulted in the repayment of its loan, it repeatedly requested the respondent to repay the same but the respondent still remained in arrears. The 1st appellant contended that it first issued the respondent with the 90 days statutory notice dated February 5, 2020 via email and registered mail to the respondent's address as it was indicated in the letter of offer, charge and title deed.
39. The 1st appellant's stated that upon service of the 90 days statutory notice, the respondent continued to be in default and it issued to it the 40 days redemption notice dated May 11, 2020 via email and registered mail. That further, the respondent was served with the 45 days notification of sale dated the July 22, 2020 by the 2nd appellant.
40. The address on the notices sent by way of registered post was PO Box 90-00618 which is the same address indicated in the charge instrument. On the evidence it is apparent that the charger was properly served with the requisite notices by the charge by way of email and prepaid registered mail. There was evidence of despatch of the letters placed on record.
41. When the chargor alleges that that the statutory notices were not served upon it, the chargee has to prove that the said notices were served. The court in the case of *Moses Kibiego Yator v Eco Bank Kenya Limited NKUE & L* No 426 of 2013 [2014] eKLR stated as follows:

“In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.”
42. On the basis of the evidence and material placed on record there is no dispute that the borrower had defaulted in the loan repayment, demand had been made and the appropriate statutory notices had been given by the chargee of its intention to exercise its statutory power of sale to enforce its security. The court is of the view that on the material and evidence placed before the subordinate court, the learned trial magistrate erred in finding the respondent had established a prima facie case to justify the grant of a temporary injunction. Default on the loan having been shown and the requisite statutory notices having been demonstrated to have been served on the chargor, there was no basis to restrain the charge from exercising its power of sale under the charge instrument.
43. The learned trial magistrate in granting the injunction held that the respondent has established a prima facie case with probability of success. With respect this was not borne out by the evidence and was in my view a misapprehension of the facts and the evidence as clearly an analysis and evaluation of the facts and the law does not show the respondent had established a prima facie case with a probability of success.
44. As no prima facie case was established, the interlocutory injunction granted by the subordinate court lacked merit and the court ought to have dismissed the application for injunction. In consequence I allow the instant appeal, set aside the ruling delivered by Hon Orange K I Principal magistrate on



March 4, 2021 and substitute thereof an order dismissing the respondents notice of motion dated September 3rd, 2020 with costs to the appellant.

45. The costs of the appeal are awarded to the appellant.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER 2022.

J M MUTUNGI

JUDGE

