Ogai v Mwananchi Credit Limited & another (Civil Appeal E026 of 2022)
[2025] KEHC 2380 (KLR) (Civ) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E026 OF 2022

PM MULWA, J

FEBRUARY 13, 2025

BETWEEN

ISAAC LAJOS ONGONDO OGAI ..... APPELLANT

AND

MWANANCHI CREDIT LIMITED ..... 1ST RESPONDENT

T/A MISTAN AUCTIONEERS ..... 2ND RESPONDENT

(Being an appeal against the ruling and orders of Hon. Mr. Lesooita Saitabau, PM dated 21st February 2022 at the Magistrate's Court at Nairobi Milimani in Cmcc ELC E380 of 2021)

JUDGMENT

1. This appeal is made against the ruling and order of the subordinate court dated 21st February 2022, which declined to grant the Appellant a temporary injunction to restrain the 1st respondent, Mwananchi Credit Limited, jointly or severally, whether by themselves or through their employees, from selling, offering for sale, transferring, charging, leasing, pledging, auctioning, or in any other way alienating or disposing of the property known as L.R. Number Kajiado/Kaputei Central/1784 within Aroi Group Ranch, Mashuuru Area, Kajiado County (hereinafter referred to as "the suit property").

2. The facts leading to the dispute are not contested. In November 2019, the appellant sought a loan facility of Kshs. 4 million from the 1st respondent, offering the suit property as security and a charge was created thereon. The appellant contends that the 1st respondent failed to issue the mandatory statutory notices as required by law in the exercise of its statutory power of sale. The appellant also argues that the statutory notice was issued under Section 56 of the *Land Act*, which was the wrong provision, and the notice failed to comply with the provisions of Section 90(2) of the *Land Act*. The appellant claims the notice demanded the full amount of the loan plus interest and did not inform the appellant of his rights.

3. The appellant faults the trial magistrate for failing to consider the invalidity of the statutory notices and for finding that the appellant had failed to demonstrate a prima facie case.

4. The 1st respondent opposed the grant of the injunction, asserting that the requisite notices were issued. While acknowledging an error in quoting the wrong provision of the law in issuing the notices, the 1st respondent argued that this should not be grounds for granting the injunction. The issue of default, according to the respondent was admitted. The respondent contended that a proper notice was issued under Section 96(2) of the *Land Act*.

5. The appellant's grounds are as set out in the Memorandum of Appeal. Both sides filed written submissions. The main issue raised is whether the trial magistrate erred in finding that the appellant failed to demonstrate a prima facie case.

6. It is trite law that an appellate court should not interfere with the exercise of the discretion of a lower court unless it is satisfied that in exercising discretion it misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that as a result there has been misjustice. (see Mbogo v Shah [1968] EA 93).

7. The court in Giella v Cassman Brown & Co. Ltd (1973) EA laid down the established principles for granting an injunction, thus:

> " Firstly, an 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 would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

8. Further, in the recent case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi) the Court of Appeal explained that:

> " ...all the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

9. The learned trial magistrate found that the appellant failed to establish a prima facie case with a probability of success. Upon reviewing the record, I find that the trial court properly evaluated the facts before it. The loan was clearly in default, and the appellant was fully aware of the terms of the loan agreement. The record shows that the appellant had acknowledged these terms by executing the loan agreement and was, therefore, bound by them. The trial court further observed that the issue of interest and penalties was a natural consequence of the loan default, and these aspects should not have come as a surprise to the appellant. The appellant's argument that the interest and penalties were excessive appears to be an afterthought, as the terms of the loan stipulated a 10% interest per month in case of default.

10. Concerning the statutory power of sale, it is clear that under Section 90 of the *Land Act*, 2012 the Bank (as the chargee) is empowered to issue a notice when the chargor (in this case, the appellant) defaults in its obligations under the charge. It is undisputed that the appellant received the statutory notices. As stipulated under the law, the chargee is required to serve such notices to alert the chargor of their obligations to remedy the default. The statute is designed to protect the interests of the chargor by providing them with an opportunity to remedy the default within a specific timeframe.

11. The purpose of this is to prevent the chargee from taking immediate action to sell the charged property without giving the chargor the fair chance to correct their default. Once the 90-day period for remedying the default has elapsed without compliance, the statutory power of sale crystallizes, and the chargee may proceed with the sale of the charged property, as is stated in Section 96 (2) of the *Land Act*.

12. The appellant does not deny receiving the statutory notices but argues that the notices were issued under the wrong legal provision, which, according to the appellant, renders them invalid. The appellant further contends that the statutory power of sale had not crystallized because the notices did not comply with the relevant legal provisions.

13. While the appellant's argument appears to raise a legal issue about the validity of the notices, I find that the notices, though issued under Section 56(2) of the *Land Act*, were sufficient to notify the appellant of the default and the consequences thereof. The fact that the appellant does not dispute the content of the notices or their receipt undermines the claim that they were invalid. The issue raised by the appellant does not affect the substance of the notices, which clearly outlined the outstanding amounts and warned of the consequences of further default.

14. The first statutory notice, dated July 24, 2020, indicated an outstanding loan of Kshs. 3,028,879.00 and gave the appellant three months to repay, in line with Section 90 of the *Land Act*. A subsequent notice to sell, issued on November 23, 2020, demanded Kshs. 7,683,900.73, with a 40-day deadline, as per Section 96(2) of the *Land Act*. The appellant did not dispute the default or the amounts, but challenged the legal basis of the notices. It was concluded that both the procedural and substantive requirements for the notices were met.

15. The appellant argued that the law only required repayment of the amount in default, not the full loan balance. However, the notices aimed to inform the appellant of the entire outstanding loan and the consequences of not addressing the full arrears. The appellant's interpretation, focusing only on the "default" amount, ignored the broader context of the loan agreement, where the total loan was due for repayment. The learned magistrate held that the statutory notices were issued correctly and the appellant's position was not supported.

16. After careful review of the trial court's decision and the facts presented, I am not persuaded that the learned trial magistrate erred in finding that the appellant had failed to establish a prima facie case with a probability of success. The statutory notices issued to the appellant were valid, and they properly informed the him of his default and the consequences of further non-compliance. The appellant was given ample opportunity to rectify the default within the prescribed timeframes, and no valid defence has been raised to justify the failure to do so. The trial court correctly concluded that the appellant had no viable claim to challenge the validity of the statutory power of sale.

17. It is my finding that the trial magistrate correctly applied the law in this case. Since the appellant failed to establish a prima facie case, I see no reason to interfere with the ruling of the lower court.

18. The upshot is that the appeal herein lacks merit and is dismissed with costs. I uphold the learned trial magistrate's ruling dated 21st February 2022.

JUDGMENT DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Oluoch Cynthia for Appellant

Mr. Kuloba for Respondents

Court Assistant: Carlos