Musanga v Access Bank (Kenya) PLC & another (Civil Appeal E212 of 2023) [2024] KEHC 1044 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1044 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E212 OF 2023

RN NYAKUNDI, J

FEBRUARY 8, 2024

BETWEEN

FLORENCE KHAYANGA MUSANGA ..... APPELLANT

AND

ACCESS BANK (KENYA) PLC ..... 1ST RESPONDENT

ISAAC LANGAT T/A KOLATO AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. The applicant approached this court vide a Notice of Motion Application dated 2nd November 2023 seeking the following orders;
    1. Spent
    2. Spent
    3. Thatan injunction do issue restraining the respondents whether by themselves, their servants and/or agents from advertising, selling and/or transferring or evicting the appellant from occupation and user of the land parcel known as Uasin Gishu/Kimumu Scheme/ 1655 pending the hearing and determination of the appeal.
    4. Thatthe costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by the appellant.

Brief Facts

3. The applicant instituted Eldoret CMCC No. 321 of 2023 - Florence Khayanga Musanga v Access Bank (Kenya) Limited & Another vide a plaint dated 25th July 2022. During the pendency of the suit,

the applicant filed an application seeking interlocutory orders seeking an injunction restraining the respondents from interfering with the property known as Uasin Gishu/Kimumu Scheme/1655. Upon considering the application, the trial court dismissed the application vide a ruling dated 17th October 2023.Being aggrieved with the ruling, the appellant lodged an appeal vide a Memorandum appeal dated 2nd November 2023. The applicant filed the present application as well.

4. The respondent opposed the application vide a grounds of opposition dated 14th November 2023 urging that the application has been overtaken by events as the suit property has already been sold. Further, that there has been material non-disclosure and concealment of material facts to wit; the appellant has not been making any loan repayments despite promises; the applicant was duly served with statutory notices; that this is the third suit she has filed seeking to stop the respondents from realizing the security; that she has not offered any proposal on settlement from the outstanding loan; that despite making various demands, the appellant has failed to make any payments. The respondent maintained that the application is a hopeless attempt to frustrate the 1st respondents' right to recover the loan amount and to realise security.

Applicants' Submissions

5. Learned counsel for the applicant, Wambua Kigamwa & Company Advocates. He stated that Order 42 Rule 6 (6) of the *Civil Procedure Rules*. 2010 provides for the jurisdiction to grant the relief. Further, that the tenets for grant of a temporary injunction pending appeal have been well settled in the decision in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, in which the court stated as follows;

> "a) An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
>
> (b) The discretion should be refused where it would inflict greater hardship than it would avoid.
>
> (c) The applicant must show that to refuse the injunction would render the appeal nugatory.
>
> (d) The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358."

6. Counsel urged that the appeal raises fundamental matters. Further, that the order, if granted, would inflict greater hardship than it would avoid. He submitted that the property of the appellant is yet to be transferred to a third party. Additionally, that no evidence has been given before the court that the full purchase price has been paid.

7. It is the applicant's case that damages could not be deemed as an adequate remedy to fully compensate such a wanton and blatant breach of rights since the respondents had purported to exercise the power of sale without advertisement and illegally transfer the property to a person who was not a purchaser. The appellant is also entitled to the protection under article 40 of the *Constitution* of Kenya, 2010 from being deprived of her property in an arbitrary manner.

8. On whether the tenets in *Giella v Cassman Brown* (1973) EA 358 were met, counsel urged that the material before the trial court raised fundamental matters over infringement of the appellant's rights. Further, that on inadequacy of damages as a remedy and the balance of convenience, the material before the court demonstrated that the appellant had been in occupation for over 20 years and is still

in occupation. The strength of the respondents to pay damages was immaterial in an application for injunction as they were clearly in blatant breach of the law.

Counsel urged the court to allow the application as prayed.

Respondents' Submissions

10. Learned counsel for the respondent filed submissions dated 5th December 2023. It is the respondent's case that the applicant has not satisfied the court that she will suffer substantial loss if the prayers sought in the application are not granted. Citing Order 42 Rule 6 of the *Civil Procedure Rules*, and the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, learned counsel submitted that a stay of execution should only be granted where sufficient cause has been shown. Further, that stay is discretionary, relying on the case of *Butt v Rent Restriction Tribunal* (1982) KLR.

11. The respondent's case is that appellant needs to adduce evidence to show that she will suffer substantial loss which may need to be compensated by way of damages. She has not shown in what way the respondents have infringed on her rights. The appellant owes Kshs. 2,239,073/- to the applicant in form of a loan facility and the same was secured by securities whose validity has not been questioned. The allegations that the respondent did not issue the applicant with any statutory notices are unfounded. The applicant created securities to secure his indebtedness to the 1st respondent vide charges which grant the 1st respondent the authority to exercise statutory power of sale in the event of default. The applicant was in arrears as at 8th January 2018 and as at 31st August 2023 the outstanding amount owed to the respondent was Kshs. 2,366,153.80/-.

12. The 1st respondent maintained that it served notices on appellant and proceeded to appoint the 2nd respondent to issue notices in exercise of the 1st respondents statutory power od sale, further, that the appellant has not challenged the process leading up to the 1st respondents' exercise of statutory power of sale. Counsel urged that the applicant has not shown in what way the 1st respondent's actions have infringed on any of the applicants' rights. He has failed to clear the first hurdle of the Giella test and the application for injunctive relief fails.

13. The respondent's case is that damages would be an adequate remedy even if the applicants have established substantial loss. He cited section 99(4) of the *Land Act* and the decision of the court in *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* (2001) eKLR in support of this submission. Counsel submitted that pursuant to the advertisement published on 29th May 2023, a public auction was conducted and the suit property was sold to the winning bidder at Kshs. 6,000,000/- on 16th June 2023. The winner has since paid the deposit of Kshs. 1,500,000/- and further, the applicant has made bare allegations of fraud concerning the property as the sale was in respect of Iasin Gishu/Kimumu/1655 and not 1665 as alleged. The error in the advertisement does not constitute an irregularity to warrant an order that the auction was unlawful.

14. Counsel maintained that the statutory power of sale was conducted in accordance with the law and urged the court to dismiss the application with costs.

Analysis & Determination

15. In my view, the following issues arise for determination;

1. Whether the application for an injunction pending the determination of the appeal is merited

16. The Principles guiding courts in determining an application for injunction have been discussed over time. The principles for considering stay of execution were set out in the case of *Giella v Cassman*

Brown & Co Ltd and another (1973) EA. 358 being that, first the applicant must show a prima facie case with a probability of success at the trial. Secondly an interlocutory injunction will not be granted unless the applicant would suffer an injury, which cannot be compensated in damages. Thirdly if the court is in doubt, it should decide the application on a balance of convenience.

17. Since time memorial the superior courts have consistently pronounced themselves on the nature, scope, extend and limits of the jurisdiction under order 42 rule 6 (1) and order 40 (1) & (2) of the *Civil Procedure Rules*. There are different angles of the jurisdiction question as analysed in the various facets of the courts pronouncements on the principles to be taken into account by an applicant who seeks to predicate their remedies upon either order 42 (6) (1) or order 40 (1) & (2) of the *Civil Procedure Rules*. Regarding these principles Lord Diplock in *American Cyanamid vs Ethicon Ltd* (1975) AC 396 added his voice as to the question of when there is a serious issue to be tried thus;

> the court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

18 . It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult question of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring and undertaking as a damages upon the grant of an interlocutory injunction was that "it aided the court in doing that that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing." *Wakefield Vs Duke of Buccleugh* [1865] 12L LT 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

> "As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such and undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."

19. In explaining when the balance of convenience should be considered, His Lordship explained that;

> it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration

in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

20. In positing the instant application the applicant main concern was to stay the proceedings of the trial court to peruse an appeal arising out of the decision by the learned trial magistrate dated 17/7/2023. The issues envisaged before the trial court are in a way same consequential orders with the minimal difference of an additional phrase that it is for pending determination of the intended appeal. In my considered view in so far as issues of injunctive orders are concerned the substantive law on Re Judicata under section 7 of the *Civil Procedure Act* operates as a bar on the same subject matter. In the case of *Njangu v Wambugu and another* Nairobi HCCC No. 2340 of 1991 (unreported), held that;

> " if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

i. What issues were really determined in the previous application?

ii. Whether they are the same in the subsequent application and were covered by the Decision.

iii. Whether the parties are the same or are litigating under the same Title and that the previous application was determined by a court of competent jurisdiction.

21. For my purposes this application fails under order 40 (1) & (2) of the *Civil Procedure Rules*. It follows therefore, that the test to be surmounted is within the operative words of order 42 rule 6 (1) of the Civil procedure rules.

Whether the application for stay of execution pending the determination of the intended appeal is merited

22. The applicant brought the application under Order 42 rule 6 of the *Civil Procedure Rules* which provides as follows;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

a. Whether the applicant shall suffer substantial loss which cannot be compensated by damages

23. It is not in dispute that the applicant is in arrears of Kshs. Kshs. 2,239,073/- as at August 2023, arising from a loan facility that was issued by the 1st respondent and secured vide a charge over the property known as Uasin Gishu/Kimumu 1655. The applicant has merely stated that substantial loss if the prayers are not granted as prayed. In the case of *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* [2002] KLR 63, it was held as follows;

> "In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."

24. Such a context of interpretation regarding the frontiers of order 42 rule 6 of the rules was also accorded attention by the court in *James Wangalwa & Another Vs Agnes Naliaka Cheseto* Civil Application No. 42 of 2011 where the court stated that;

> "No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

25. What is relevant here is that the applicant in seeking stay would have to delve into the veracity of the documentary evidence and the truthfulness of the affidavit evidence presented during the interlocutory trial of the case at bar. I reiterate that the court would then draw a distinction between the question of law and fact canvased before the trial court to establish the occurrence of substantial loss in the event this application is lost. Flowing from these guiding principles one must resist the temptation to treat any findings of fact or law as a reasonable ground to stay proceedings which are at the interlocutory stage. In making these observations the threshold expected of the applicant is yet to be surpassed.

26. In my view, the application fails to meet the requirement that requires the applicant to show that that substantial loss will be occasioned if the injunction is not granted. Further, given that the suit property was converted into a commodity for the purpose of securing the loan facility, the respondent can compensate the applicant by way of damages in the event that the appeal succeeds.

b. Security

27. The applicant has not made any proposals on security, indicating that there is no good will whatsoever on her part to even attempt to settle any amount of the decretal sum Further, it is evident that the application is overtaken by events as the property was already placed on auction and a successful bidder has already paid a deposit.

28. Upon consideration of the background of the sit leading up to this point and the actions of the applicant, it is my considered view that the applicant is undeserving of orders for an interlocutory

injunction. She is seeking to delay the respondent from enjoying the fruits of its judgement and recovering the monies owed from the loan facility.

29. On the face of the record the substratum of the claim revolves around the guiding principles in *Stanly v Wilde* [1899] 2Ch 474 in which the court stated that;

30. The principle is a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment of or discharge of such debt or obligation, as provision to the contrary notwithstanding ...any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and therefore void A "clog" or "fetter" is something inconsistent with the idea of "security"

31. In the premises, the application is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8TH DAY OF FEBRUARY 2024

.....

R. NYAKUNDI

JUDGE

Representation:

Katonya Njoroge LLP

Wambua Kigamwa & Company Advocate