



NCBA Bank of Kenya PLC v Afriasia Marine Limited (Civil Appeal E003 of 2024) [2024] KEHC 8765 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E003 OF 2024
JK NG'ARNG'AR, J
JULY 23, 2024**

BETWEEN

NCBA BANK OF KENYA PLC APPELLANT

AND

AFRIASIA MARINE LIMITED RESPONDENT

(Being an appeal from the whole of the ruling and order of the Honourable D.O. Mbeja (PM) delivered on 29th February 2024 in Mombasa Chief Magistrate's Court Civil Suit No. E442 of 2023, Afriasia Marine Limited v NCBA Bank of Kenya PLC)

JUDGMENT

1. The basis of the appeal herein is a Notice of Motion Application dated 18th April 2023 filed by the Respondent (Afriasia Marine Limited) for orders of injunction restraining the appellant from dealing with plot number 12443/1/MN pending the hearing and determination of the application and the suit, that one Mr. Joseph Gikonyo trading as a licensed auctioneer be called for cross examination of the contents of his certificate under Section 15 (c) of the *Auctioneer Rules* 1997, and that costs of the application be granted.
2. The application was premised on grounds on its face and the affidavit of James Mutua Muange (the Director of the Respondent) sworn on 18th April 2023 that the Respondent obtained two loan facilities from the Appellant of Kshs. 3,000,000 in 2016 and Kshs. 1,500,00 in 2017. That plot number 12443/1/MN belonging to the Respondent was used as security. That repayment of the loan went well until the advent of Covid 19 which affected the business and the Respondent had challenges repaying the loan. That there were communication challenges between the Appellant and the Respondent and that in January 2023 the Respondent learnt that the Appellant had sold the subject property by way of public auction to a 3rd party without any recourse to the Respondent. That there was a risk of



- the subject property being transferred to the 3rd party and the Respondent stood to suffer irreparable damage which could not be made good by an award of costs.
3. The Appellant through their Replying Affidavit sworn on 3rd May 2023 by Stephen Atenya, the Senior Legal Counsel of the Appellant opposed the application by deponing that the Respondent admitted to being in default of the loan, he had offered his property identified as Subdivision 12443 (Original No. 11300118) Section 1 Mainland North as security, and which was perfected by registration of a charge over the said properties. That despite several demand letter, requests and reminders being issued, the Respondent failed to regularize the loan facility which stood at Kshs. 7,907,863.67 and continued to accrue interest.
 4. The Appellant further swore in the Replying Affidavit that they instructed Auctioneers to issue appropriate notices being the notification of sale and 45 days redemption notice. After lapse of the 45 days' notice, the Appellant instructed Auctioneers to advertise the charged properties for sale in the daily newspaper on 7th November 2022. The Appellant then instructed Milligan Valuers Limited to undertake valuation of the suit property which indicated that the market value was Kshs. 5,200,000. That on 14th November 2022, the suit property was sold via auction to the highest bidder at Kshs. 3,900,000 which was not sufficient to settle the outstanding loan amount. As at 24th April 2023, the balance was Kshs. 6,242,522.92 an amount which continued to accrue interest until payment in full. The Appellant argued that the Respondent also did not advance any justification to cross-examine the auctioneer, Mr. Joseph M. Gikonyo who was an agent of the Appellant and not a party to this suit. The Appellant prayed that the Respondent's application dated 8th April 2023 be dismissed with costs.
 5. The learned trial magistrate considered the application, the responses thereto and submissions in its decision and found that the Applicant had an arguable case and satisfied the threshold set for grant of a temporary injunction. The application dated 18th April 2023 was allowed on merit all circumstances having been considered.
 6. Being dissatisfied with the ruling and order of the Honourable D.O. Mbeja (PM) delivered on 29th February 2024, the Appellant filed the appeal herein on 12 grounds summarised as follows: -
 7. That the learned magistrate erred in law and in fact by: - allowing the Respondent's application for injunction, failing to appreciate the well established principles of granting injunction, failing to appreciate the admission of indebtedness and default by the Respondent in its supporting affidavit, failing to consider and/or properly review the evidence adduced by the appellant and by overly favouring the evidence of the Respondent, failing to appreciate that the suit property was sold by way of auction to an innocent 3rd party and bona fide purchaser for value without notice of any defect in the suit land, and failing to consider the fact that the said 3rd party purchaser was not joined in the suit and no adverse orders can be issued in their absence in the circumstances, failing to appreciate that the Plaintiff did not demonstrate any wrong doing and/or breach on the part of the Appellant in the process leading up to and the auction of the suit property, and not faulting the sale procedure but yet went ahead to allow the application of injunction.
 8. The Appellant prayed for orders that the appeal be allowed, that the ruling and order of the learned magistrate made on 29th February 2024 in Mombasa MCC E442, [*Afriasia Marine Limited v NCBA Kenya PLC*](#) be set aside, that this honourable court do proceed to consider and determine the Respondent's Notice of Motion application dated 18th April 2023 in Mombasa MCC E442, [*Afriasia Marine Limited v NCBA Kenya PLC*](#) and dismiss it with costs to the Appellant, that costs of this appeal be awarded to the Appellant, and this honourable court be pleased to make such further orders as it may deem just in the circumstances.



9. The appeal was canvassed by way of written submissions and the Appellant filed submissions dated 15th May 2024 which outlined the issues that arise for determination to include whether the trial magistrate erred by allowing the Respondent's application for injunction, whether the trial magistrate misinterpreted and/or misapplied the provisions of Section 99 of the Land Act 2012, whether the trial magistrate considered the Appellant's evidence and who shall bear costs of the appeal and that of the application.
10. On whether the trial magistrate erred in law and fact by allowing the Respondent's application for injunction, the Appellant relied on the Salama Beach Hotel Limited & 3 Others v Arcuri Ignazio & 2 Others (2020) eKLR and contended that the three conditions to be met by a party seeking injunctive reliefs are that there is a prima facie case with a probability of success, that the applicant will suffer irreparable injury not atonable by way of damages, and that the applicant must prove their claim on a balance of probabilities. The Appellant argued that the trial magistrate committed an error of law by failing to consider that the suit property had been sold to an innocent 3rd party. That the trial court rightly quoted Section 99 of the Land Act 2012 on the protection of the purchaser as it was held in the case of Beatrice Atieno Onyango but failed to apply the same to the instant case.
11. The Appellant submitted that the trial magistrate in the entire ruling failed to consider the Appellant's evidence particularly on issues raised on service of statutory notices and the valuation report. That this led to derogation of the right to be heard on merit as required in law as was held in the case of Johannes Matiko & Another v Republic (2014) eKLR and MKK v Republic (2019) eKLR. On costs, the Appellant relied on Section 27 of the Civil Procedure Act which provides that costs shall follow the event unless the court for some good reason orders otherwise. They argued that they incurred unnecessary costs to defend the application and the appeal and therefore deserve to be awarded costs.
12. The Appellant prayed that the appeal dated 25th March 2024 be allowed and for the Respondent to bear costs. The Appellant also urged the court to set aside the trial court's ruling delivered on 29th February 2024 and proceed to dismiss the Respondent's Notice of Motion application dated 18th April 2023 with costs.
13. The appellate mandate of this court was set out in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123 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 nor heard the witnesses and should make due allowance in this respect...”
14. After considering the entire record of appeal, submissions and grounds of appeal, the issue for determination is whether the temporary injunction granted in the trial court was merited and who shall bear costs.
15. Order 40 Rule 1 of the Civil Procedure Rules provides for cases in which temporary injunction may be granted that: -

Where in any suit it is proved by affidavit or otherwise: -

 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
16. However, there are three well settled guiding principles for the grant of orders of temporary injunction as was held in *Giella v Cassman Brown* (1973) EA 358 and they are whether a prima facie case has been established, whether the party seeking injunction will suffer irreparable damage if the injunction is denied and whether the applicant demonstrated that the balance of convenience tilts in their favour.
17. On whether a prima facie case has been established, it was the position of the Appellant that the learned magistrate faulted in holding that the Respondent had established a prima facie case but failed to point out with specificity of the issues he had considered while arriving at the conclusion. The Appellant also submitted that the trial court failed to acknowledge that the Respondent expressly admitted being in default of the loan facilities and as such no prima facie case can arise in the circumstances. This court however establishes that inasmuch as the Respondent admitted to being in default, they also stated that the subject property was sold by way of public auction to a 3rd party without any recourse to them as the Applicant's directors.
18. On whether the party seeking injunction will suffer irreparable damage if the injunction is denied, the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR explains irreparable injury as: -
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
19. On the one hand, the Appellant submitted that the trial magistrate did not ascertain the kind of irreparable loss that the Respondent could suffer if the property is transferred to an innocent 3rd party purchaser, that the property had an ascertained value, and that they reserved the right to invoke any remedies available in law including sale of the charged property. On the other hand, the Respondent's position was that a 3rd party had made payments towards the subject property and there was a serious risk of the property being transferred to the party thereby rendering the suit an academic exercise. The Respondent submitted that the piece of land attaches sentimental value over and above monetary value, and in any event, the Appellant has not demonstrated that it is in a position to make good the anticipated loss.
20. On whether the applicant demonstrated that the balance of convenience tilts in their favour, the Appellant submitted that the property was sold by public auction on 14th September 2022 and the Respondent filed its application in April 2023, 6 months after the suit property was auctioned and that there is no guarantee that the Respondent will be able to redeem the property should it be successful in its claim.



21. The court in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR in dealing with the issue of a balance of convenience held: -

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

22. The Respondent submitted that if the orders of temporary injunction are discharged, it means the Appellant will proceed and transfer the property. That there is no imminent threat that the Appellant stands to suffer if the Respondent is allowed to hold onto the suit property as parties agree on pertinent issues. That if the orders are not sustained until the suit is determined, reversing the anticipated losses would be costly on the Respondent.

23. There is an ongoing suit in the trial court involving the subject property and if the order of temporary injunction is not granted, the suit property is at the risk of being dealt with before hearing and determination of the case. This court is satisfied that the Respondent met the threshold of being granted the said orders by the trial magistrate. Subject to the foregoing and for the interest of justice, this court upholds the decision of the trial court. The appeal therefore lacks merit and is dismissed. Costs in the cause. 14 days right of appeal explained.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JULY, 2024.

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J.K. NG’ARNG’AR, HSC

JUDGE

In the presence of: -

Nyamache Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Samuel Shitemi

