TSS Grain Millers Limited (Under Administration) v NCBA Bank Kenya PLC (Civil Appeal E052 of 2022) [2023] KEHC 18648 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18648 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E052 OF 2022

DKN MAGARE, J

MAY 12, 2023

BETWEEN

TSS GRAIN MILLERS LIMITED (UNDER ADMINISTRATION) ..... PLAINTIFF

AND

NCBA BANK KENYA PLC ..... DEFENDANT

RULING

1. The Application dated 8/8/2022 has been pending in Court since 2022. The same sought the following orders: -

    a. Spent.

    b. Spent

    c. There be a temporary injunction, pending the inter –parties hearing of the suit, restraining the Defendant, its agents, servants or employees from advertising for sale, selling by pubic auction or private treaty, leasing, collecting rent, disposing, alienating or in any other way interfering with the plaintiff's rights over Mombasa/ Block /I/373 in Shimanzi.

    d. The costs of this application be awarded to the plaintiff.

2. The Application is based on grounds that the Plaintiff was apprehensive that the charged property may be sold by private Treaty. The property in issue is Mombasa/Block/373 in Shimani Mombasa. The Plaintiff in their Notice of Motion under certificate of urgency stated that the Defendant's conduct is fraudulent and was likely to cause them irreparable loss and damages. The Applicant is stated to be under administration vide Mombasa High Court Insolvency No. 1 of 2016 while the Defendant has a charge of the plaintiff's parcel of land Mombasa Block 1/373. The

3. The plaintiff pleaded that they had filed another suit being Mombasa HCCC 107 of 2018 between Juja Coffee Exporters and the Defendant and not the Plaintiff. In the previous suit the Plaintiff therein

sought to have the charge invalidated. The Plaintiff further averred that the Defendant has sued in HCC 9 of 2016. It was common understanding that the Plaintiff challenged the charge thought vide two separate suits.

4. The Defendant filed a replying affidavit on 19/9/2022 through Jackson Nyaga. The defendant averred that they advanced USD 18,000,000/= to the plaintiff to the Plaintiff for paying Standards Chartered Bank Plc and for purposes of working capital and to take over an existing facility.

5. The loan is said to have been acknowledged in a suit filed previously in HCC 414 of 2017 - Standard Chartered Bank of Kenya Limited v Juja Cofee Exporters Ltd & 5 others [2020] eKLR. The defendant averred that there was default and the Defendant averred that the administrator granted permission to dispose of the suit property, in accordance, with Section 560(1) a of the *Insolvency Act*. The said section provides as doth: -

> " 560. Moratorium on other legal process while administration order has effect
>
> (1) While a company is under administration—
>
> (a) a person may take steps to enforce a security over the company's property only with the consent of the administrator or with the approval of the Court;
>
> (b) a person may take steps to repossess goods in the company's possession under a credit purchase transaction only with the consent of the administrator or with the approval of the Court; if the Court gives approval—subject to such conditions as the Court may impose;
>
> (c) a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the Court; and
>
> (d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.
>
> (2) In giving approval for a transaction under subsection (1), the Court may impose a condition on, or a requirement in connection with, the transaction."

6. The plaintiff is said to be filed two suits being HCC 65 of 2017 and HCC 13 of 2018. The same were dismissed through a judgment on 25/10/2019. The application for injunction pending appeal was equally dismissed in those suits. The defendant stated that that the conditions, for sale have been fully complied with.

7. Justice PJ O Otieno gave his judgment in the said case, no reported as Tahir Sheikh Said Grain Millers Limited (Under Administration) v Nic Bank Limited & another [2019] eKLR and held as doth: -

> " 16. However when the suit No. 13 of 2018 was filed, the parties in HCC No. 65/2017 had negotiated and agreed that the suit property be sold and a consent duly granted. The foundation of the suit is pleaded at paragraph 9 of the plaint as follows:-
>
> > "The Plaintiff avers that the intended sale is unlawful because it is expressly prohibited by section 560(1)(a) of the *Insolvency Act* No. 18 of 2015 since the Plaintiff is under Administration".
>
> 17. For the purposes of this suit and the issue for determination, that ground of the suit is misconceived if not wholly false. I do find that the suit when filed on 5/3/2018 there was in existence a valid consent by the administrator. Accordingly, the claim cannot be sustained as framed. It lacks merits and it is therefore dismissed with costs to the defendant.

8. The Defendant annexed various correspondences including the dismissed suits.

Parties' Submissions

9. The plaintiff filed submissions on 31/10/22 reiterating the contents of the Supporting Affidavit. The Plaintiffs state that the 2nd plaintiff never signed the charge documents. I note however that this suit does not have a second plaintiff. There is only one Plaintiff in the suit.

10. The application dwells on the issue of balance of convenience and irreparable loss. The prima facie case is said to be through the dispute of a principal debt existence of the charge is disputed.

11. The plaintiff states that the Defendant failed to elect on a remedies available. No valid statutory notices were served. They rely on the case of Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR where the Court, J. B. Havelock held as follows: -: -

> " 23. As a result of the foregoing and with reference to the 1st Plaintiff's Application before Court for injunctive Orders, I hold that it has made out a prima facie case with a probability of success. As I have found that both Statutory Notices as above were invalid, the Defendant Bank's statutory power of sale has not crystallized. Accordingly, I am of the opinion that this Court does not need to consider whether damages are an adequate remedy as regards the sale of the suit property. Any such sale, at the present time, would be illegal as regards non-compliance by the Defendant Bank with the *Land Act*, 2012. Similarly, it becomes clear that this Court is not beholden to consider whether the balance of convenience lies as regards the 1st Plaintiff's Application before Court. However, that is not to say that the Defendant Bank cannot in the immediate future put its house in order through the reissuance of a valid Statutory Notice under the provisions of the *Land Act*, 2012, as pointed out by the 1st Plaintiff. Should that happen."

12. The Plaintiff is of the view that the injury will be irreparable they rely among other on the authority of Purbai Gopal.

Analysis

13. The applicant needs to meet the terms set out in Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360 the court must be satisfied in the words or of Spry VP as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

14. The test was settled in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.
>
> If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
>
> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

15. I need to add that the baseline for the injunction application is equity. Whoever comes to Equity must do equity. While at it, they must come with clean hands. If one comes with soiled hands, equity is turned off. In respect hereof, in the mater before the Court the plaintiff did not disclose existence of two suits, one of which is fully determined.

16. A reading of paragraphs 18 and 19 of the plaint, shows that the plaintiff is challenging the legality of the charge. This was challenged in the former suit. The plaintiff only enclosed up to the first three pages of the judgment. The court was however able to get the documents from the defendants' documents and from the Kenya laws reports. The issue in that case was not only the consent but exercise of statutory power of sale. The said suit was dismissed.

17. Effectively the issue of statutory power of sale is now res judicata. In the case of Gulf African Bank Limited (Civil Case E014 of 2022) [2022] KEHC 259 (KLR) (Commercial and Tax) (25 March 2022) (Ruling), the case stated as follows: -

> "5. The main issue for determination is whether the court should grant an injunction restraining the Bank from exercising its statutory power of sale in the circumstances outlined above. The principles for the grant of an injunction established in Giella v Cassman Brown [1973] EA 358 are still good law and hold that in order to succeed, an applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour.

18. In the case of, Nguruman Limited v. Jan Bonde Neilsen, Herman Philipus Steyn Also known as Hermannus Phillipus Steyn & Hedda Steyn [2014] eKLR, the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in Giella v Cassman Brown (Supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions. The court stated as doth: -

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: -
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted,
>
> and
>
> (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

19. The remedies are sequential. Having been sequential then after finding that the issue of statutory power of sale has been determined there is no need to proceed to the next level.

20. The issue of stature power of sale is foreclosed. This cannot be raised again in this was. It was fully dealt with in the suit. A party cannot regurgitate the same case over and over again. There has to be an end to litigation.

21. The consequence of this finding is that there is no prima facie case. In the circumstances, I do not find merit in the Application dated 8/8/2022 is dismissed in limine.

Res judicata

21. Other than the Application being res judicata, the prayers sought relate to the Application touching on the matter of statutory power of sale. This was an issue upon which judgment of this court has been delivered. Section 7of the *Civil Procedure Act* provides doth: -

> " 7. Res judicata
>
> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
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> Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
>
> Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

23. These are matters which under explanation 4, Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit I note that the suit is res judicata. The same was heard and fully determined in a judgment on merit. Judgment remains in situ to date. It has not been set aside at all.

24. In the case of William Mutuura Kairiba v Samuel Nkari & 4 others [2019] eKLR William Mutuura Kairiba v Samuel Nkari & 4 others [2019] eKLR, the court noted as doth: -

> " Justice Richard Kuloba (as he then was) set out the Definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

25. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

    a. The plea of res judicata is applicable only where the former judgment was;

    b. That of a court of competent jurisdiction.

    c. Directly speaking upon the matter in question in the subsequent suit and

    d. Between the same parties or their privies.

26. The case of Purbai Gopal Ramji Patel V Asset Recovery Co. Ltd & Another [2009] EKLR, the court, Luka Kimaru J as then he was, stated as doth: -

> " As stated earlier in this ruling, the validity of the charge has been upheld by this court. The plaintiff cannot be allowed to re-litigate the issue of the validity of the said charge for a second time before this court. Since the thrust of the plaintiff's application was the challenge of the validity of the deed of assignment of the debt by the bank to the 1st defendant, and this court having held that the deed of assignment was valid and further that the said deed of assignment of debt mandated the 1st defendant to assume all the powers of the bank under the charge, I hold that the plaintiff has failed to establish a prima facie case to entitle this court grant her the interlocutory injunction sought. The plaintiff was served with the requisite statutory notice. She was served with the redemption notice. The validity of the charge is no longer subject to litigation. The plaintiff has not placed any evidence before this court that she has paid the amount demanded in the statutory notice. She cannot therefore legitimately prevent the bank and its assignee, the 1st defendant, from exercising the statutory power of sale provided in the instrument of charge."

27. I find that the suit will serve no useful purpose in view of the admission and finding that the suit is res judicata. There is nothing to go on trial. I strike out the entire suit in limine

Costs

28. The subject matter is USD 16,200,000/=. I do not find it necessary to indicate costs for now under section 27 of the *Civil Procedure Act*. The costs should be agreed or taxed.

29. Under section 27 of the *civil procedure act*, the court has discretion in award of damages. The act provides as doth: -

> " Costs (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall

be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

30. I have no good reason for not granting costs. Costs follow the event unless the court directs otherwise for a good reason. In Spinners and Spinners Limited v Kimilili Wholesalers (K) Limited [2020] eKLR, Justice Ha Omondi, as then she was stated as doth: -

> " In Morgan Air Cargo Limited V Evrest Enterprises Limited [2014] eKLR the Court stated as follows with regard to what is meant by the word "event" and quoted the literally work by Kuloba, J (as he then was) in his text Judicial Hints on Civil Procedure 2nd edition at page 99 as follows:
>
> > "The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word 'event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action.
>
> Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it.
>
> An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part"

31. The same court further referred to the case of Joseph Oduor Anode v Kenya Red Cross Society Nairobi High Court Civil Suit No 66/2012 eKLR, where the Court held as follows: -

> " ...in matters of costs, the general rule as adumbrated by the statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must however be patent on record. In other words, when the court decides not to follow the general principle the court is enjoined to give reasons for not doing so"

32. The conclusion is that the application dated 8/8/2022 is dismissed for lack of merit. For avoidance of doubt, any interim orders are hereby vacated. Costs of Ksh. 30,000/= for the application be paid by the Plaintiffs to the Defendant. The suit is equally stuck out with costs for being res judicata.

Determination

a. The matter is res judicata Mombasa HCC 65 of 2017 and HCCC 13 of 2018 vide a Judgment delivered on 25/10/2019 which has not been set aside. This suit is as such struck out for being res judicata with costs to the Defendant.

b. The application dated 8/8/2022 is dismissed with costs of 30,000/= to the Defendant

c. Costs of the suit be agreed or taxed.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kibaara for Defendant

Miss Gwahalla for the Plaintiff

Court Assistant - Firdaus