



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 143 OF 2019

JUSTUS GITUMA.....1ST APPELLANT

SIMON KATHURIMA.....2ND APPELLANT

EMMANUEL MURIUNGI..... 3RD APPELLANT

MERCY KAGENDO.....4TH APPELLANT

HENRY MURITHI..... 5TH APPELLANT

REUBEN GITONGA..... 6TH APPELLANT

VERSUS

DANIEL KIMATHI.....1ST RESPONDENT/APPLICANT

WISON KIMATHI.....2ND RESPONDENT/APPLICANT

TABITHA KANUGU.....3RD RESPONDENT/APPLICANT

K-REP BANK.....4TH RESPONDENT/RESPONDENT

RULING

1. In or about 2011, the appellants and the applicants, as members of **Lucern Borehole Self Help Group (hereinafter “the borrower”)**, took a loan facility from **K-Rep Bank (hereinafter “the respondent”)**. In order to secure the said facility, the 1st applicant and one **Githinji S. Ndirangu** offered their properties, **Ngusishi/ Settlement Scheme/1520** and **Ngusishi/ Settlement Scheme/884 (“the suit properties”)**, respectively as securities.

2. The borrower defaulted and the respondent threatened to realise its security. By a plaint dated 10/10/2013 which was subsequently amended on 19/4/2016, the applicants sued the appellants for a declaration that the appellants were bound to repay the arrears owed to the respondent.

3. By a judgment delivered on 28/11/2018, the trial Court dismissed the suit against the respondent but entered judgment against the appellants to the effect that they were to continue to pay the arrears and the loan to the respondent. The appellants were aggrieved by the said judgment and they preferred the appeal herein which is yet to be heard.

4. On 4/11/2019, the applicants lodged a Motion on Notice dated the same day and brought under **sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 40 of the Civil Procure Rules and Articles 10 and 159 of the Constitution**. In the Motion, they sought an interim injunction to restrain the respondent from selling the suit properties by auction on 6/11/2019 pending the hearing and determination of the application. This ruling is in respect of that Motion.

5. The grounds upon which the Motion was grounded were that; the judgment of the trial Court was in the applicant’s favour; that the appeal was yet to be heard yet the respondent had issued a 21 days notice to sell the suit properties and that the 45 days Notification of sale had not been given.

6. The Motion was supported by the affidavits of **Daniel Kimathi** sworn on 4/11/2019 and 5/11/2019, respectively. He reiterated that the applicants had been victorious before the trial Court. That it was the appellants who are liable to pay the arrears and the loan to the respondent. That the respondent intended to irregularly sell the suit properties. That in the circumstances, if the suit properties are sold, the applicants will suffer irreparable loss and damage.

7. The Motion was opposed by the respondent vide the replying affidavit of **Daniel Njobe Maguru** sworn on 18/11/2019. He stated that the applicant's case against the respondent had been dismissed by the trial Court and no appeal had been preferred. That the applicants had executed charges in respect of the suit properties to secure the lending to **Lucern Borehole Self Help Group**.

8. He further deposed that the borrower still owes the respondent money and all the requisite notices had been issued. He denied that the intended sale was illegal or irregular as contended by the applicants. In his view, the applicant's case is against the appellants and not the respondent. It was urged that the application be dismissed.

9. Both parties filed their respective submissions which this Court has carefully considered. The Court has also considered the authorities relied on.

10. This is an application for injunction. It was filed in the appeal. Although the prayer was ungodly worded, it is intended to persist until the appeal is heard and determined.

11. In **Patricia Njeri & 3 Others v. National Museum of Kenya [2004] Eklr**, Visram J, as he then was, held: -

“In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a be ‘exercised judicially and not in whimsical or arbitrary fashion.’ This discretion is guided by certain principles some of which are as follows:

a. The discretion will be exercised against an applicant whose appeal is frivolous (see Mandhupaper International Limited v. Kerr [1985] KLR 840. ... The applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries v. KCB [1982 – 88] KLR 1088 (also cited in Venture Capital).

b. The discretion should be refused where it would inflict greater hardship than it would avoid (See Manthupaper supra).

c. The applicant must show that to refuse the injunction would render his appeal nugatory (Butt v. Rent Restriction Tribunal [1982] KLR 417 cited also in Venture Capital).

d. The Court should also be guided by the principles in Giella v. Cassman Brown & Company Ltd [1973] EA 358 as set out in Shitakha Mwamodo & Others [1986] KLR 445 (also cited in Venture v. Capital) ”

12. The foregoing are then the principles that will guide this Court in determining the present application.

13. The appeal herein is by the appellants against the decision of the trial Court holding them liable to repay the arrears and loan owed by the borrower to the respondent. The appellants are not in a hurry to prosecute the same. This is so because, although the typed proceedings were ready and certified on 11/11/2019, no action has been taken by the appellants to have the appeal prosecuted.

14. It is true that if the injunction is not granted, the suit properties will be disposed off thereby exposing the applicants to irreparable loss. However, the issue is whether the applicants have any case against the respondent.

15. The record shows that; the trial Court dismissed the applicants claim against the respondent. The applicants did not appeal against that decision. That in effect means that there is no claim whatsoever that is pending as between the applicants and the respondent.

16. As regards the claim that the intended sale is illegal or irregular, the applicants were not candid. When they first came to court, they did not disclose to the Court that they had offered the suit properties as security for the facility afforded to the borrower. I have seen the charges executed by the 1st applicant and **Githinji S. Ndirangu**. They give the respondent the charges power of sale.

17. The record shows that on 26/9/2016, the respondent issued the 1st applicant and the aforesaid **Githinji S. Ndirangu** the Statutory Notice of Sale under **section 90 of the Land Act, 2012** giving them 90 days. This was followed with the Statutory Notice to sell under **section 96(2) of the Land Act, 2012** on 12/1/2017 giving 40 days the two to redeem the securities. On 3/3/2017, the respondent issued the 45 days' Notification of Sale.

18. In its replying affidavit, the respondent exhibited a Valuation Report by **Zenith (Management) Valuers Ltd** dated 1/8/2019. There were also advertisements in the local dailies on 14th and 28th October, 2019. A copy of the bank statement dated 18/11/2019 showed that as at 31/1/2019, the borrower owed the respondent a sum of Kshs.2,63,360.20.

19. From the foregoing, the debt is not disputed. All the requisite legal steps that are necessary before the exercise of the Statutory right of sale by a Chargee have been met by the respondent. The dispute seems to be between the applicants and the appellants. Surely, can that be a basis of an injunction against a Chargee whose monies are held out there? I don't think so.

20. The applicants should seek to be indemnified by the appellants. That right has crystallised but not as against the respondent.

21. In this regard, no prima facie case has been established by the applicants against the respondent. Further, granting the injunction would be occasioning hardship on an innocent lender on the basis of some recalcitrant members of the borrower who have refused to either pay up what the Court has already ordered them to pay or prosecute their appeal to challenge that order.

22. In any event, one of the properties the subject of the order for injunction (**Ngusishi/Settlement Scheme/884**), belongs to **Githinji S. Ndirangu** who is not a party to the proceedings. It is doubtful how he can enjoy an order he has not sought. That would be extremely unfair to the Chargee.

23. In the premises, as unfortunate as it may appear, the 1st applicant and **Githinji S. Ndirangu** having offered the suit properties as security for the facility afforded to the borrower for the benefit of the other members of the borrower, they had turned their said properties into a commercial commodity which the Chargee is now entitled to realise in order to recoup its outlay.

24. Accordingly, I find the application to be without merit and the same is hereby dismissed with costs to the respondent.

It is so ordered.

DATED and **DELIVERED** electronically at Meru this 5th day of May, 2020.

A. MABEYA

JUDGE