



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**HC. CIVIL CASE NO. 8 OF 2018.**

**K-REP BANK LIMITED.....APPELLANT**

**VERSUS**

**ABDI NOOR ISMAIL )**

**MZEE TITUS SOITAH ).....RESPONDENT**

*(Being an appeal from the ruling of Hon. M. Wambani in Bungoma*

*Chief Magistrate's Court Civil Suit No. 452 of 2012*

*delivered on 1<sup>st</sup> March, 2013)*

**J U D G M E N T**

Abdi Noor Ismael (1<sup>st</sup> Plaintiff/Respondent) and Titus Mzee Soittah (2<sup>nd</sup> Plaintiff/Respondent) filed suit in Chief Magistrate's Court by Plaint dated 13.9.2012 seeking the following orders;

*(a) An order directing the defendant to render records of account in respect to its transactions with the 1<sup>st</sup> plaintiff, of the sums owed on the account as at 11/9/2012.*

*(b) A declaration that the plaintiffs in the circumstances of this matter is entitled to redeem the charged property and consequently an injunction restraining the defendant, its agents and/or servants or whosoever from putting up for auction or auctioning Land Parcel No. BOKOLI/CHWELE/1856.*

*(c) Costs of this suit.*

The basis of the claim is that the 1<sup>st</sup> Plaintiff applied for loan facilities and overdraft all totaling Kshs.2,750,000/=. The 1<sup>st</sup> Plaintiff created a charge on Bokoli/Chwele/1856 belonging to 2<sup>nd</sup> Plaintiff and Motor Vehicle Reg. No. KBG 512E. The 1<sup>st</sup> plaintiff defaulted in the payment and Appellant/Defendant sold by Debtors auction Motor vehicle KBG 512E. The Respondent still now wants to sell by Public auction the charged parcel of land. The Plaintiff filed an application dated 13.9.2012 seeking orders;

*(ii) Pending the hearing and determination of this application, there be a temporary injunction restraining the defendant, its agents and/or servants or whosoever from putting up for auctioning the property comprised in title No. BOKOLI/CHWELE/1856.*

*(iii) Pending the hearing and determination of this application, there be a temporary injunction restraining the defendant, its agents and/or servants or whosoever from putting up for auctioning the property comprising in title No. BOKOLI/CHWELE/1856.*

The parties filed their respective submissions by Ruling dated 1.3.2013. The learned Trial Magistrate in her ruling stated: -

***“Because the applicants have raised viable and/or substantial triable issues, I do hereby grant the injunction as prayed, to enable all the parties to this suit ventilate all their issues in a fair and full hearing of this case, to enable the court arrive at a fair, just and judicious decision.”***

Aggrieved by the ruling the appellant filed this appeal on the following grounds;

- 1. The learned trial magistrate erred in law by granting orders of injunction in a suit where court did not have jurisdiction.**
- 2. The learned Magistrate erred in law by failing to consider the express provisions of Article 162(2) (b) of the Constitution of Kenya read with Section 13 of the Environment and Land Court Act No. 19 of 2011.**
- 3. The learned Magistrate erred in Law when she failed to consider the appellant's submissions and proceeded to allow the Respondent's application.**
- 4. The Learned Magistrate erred in Law when she failed to consider principles of granting injunctions as provided for in the case of AINEALA GIELLA Vs. CASSMAN BROWN.**

Both parties filed submissions in respect of the Appeal on the issue of lack of jurisdiction by the learned trial magistrate. The same has now been clarified by the enactment of the Magistrates (Court Act 2015) and even before then, this being a claim under commercial transaction, the magistrate's court, subject to pecuniary jurisdiction had jurisdiction to hear and determine.

The second grounds of the appeal is that the Learned Magistrate failed to consider the principles of granting injunction and that she did not consider the appellant's submission. In the application dated 13.9.2012 the Respondent sought injunction restraining the selling of the charged property pending the hearing and determination of the Plaintiff/Respondents suit. An interlocutory Injunction where a suit is filed is aimed to achieve two objectives;

- (a) The maintenance of a position that will more easily enable justice to be done when final orders are made and**
- (b) an interim regulation of the acts of parties that is just and convenient in all the circumstances.**

The trial magistrate in her ruling found that the Applicants (Respondents) had raised triable issues and that the order of injunction was to enable the parties to ventilate all their issues during the hearing of the suit.

I am therefore satisfied that the trial magistrate considered all the aspects of the application and particularly the object of granting an interim injunction. She addressed herself to the principles guiding the grant of injunctions and this court is not satisfied that she exercised her discretion wrongly, in granting the injunction.

I, therefore, dismiss the appeal. I note that the suit was filed in 2012. It is now 7 years since the order of injunction was granted. The Respondent has had order for 7 years. In view of the duration this matter had been in court, I direct that the Plaintiff/Respondent do set the matter for hearing and prosecute the same within 6 months to conclusion. In default of the prosecution and finalization of the suit within 6 months from date of this ruling. The order for injunction be vacated.

**Dated, signed and Delivered at Bungoma this 5<sup>th</sup> day of June, 2020**

.....

**S.N. RIECHI**

**JUDGE**