



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 88 of 2018

(CORAM: F. GIKONYO J)

ACE ENGINEERING & BUILDING CONTRACTORS LTDAPPELLANT

-VS-

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Maua by the Honourable Magistrate A.G.Munene (SRM) delivered on 20th July 2018 in Elc Suit No. 65 of 2018)

RULING

Brief background

1. In this case, the Appellant secured a loan facility of Kshs. 2,500,000/= from the Respondent which was secured through a charge on **Kiegoi/ Kinyaka/999**. The loan was to be repaid within four (4) months. The purpose of the said loan facility was for the Appellant to settle supplier's debts in relation to works done under Machakos County Government. The County Treasurer and Transport and Roads Chief officer wrote letters dated between 3rd June 2015-29th November 2016 confirming that Machakos County owes the Appellant Kshs. 6,500,000/= for the works done.

2. On 20th July 2018, the trial court dismissed the appellant's application dated 25th April 2018 which sought a temporary injunction to restrain sale, auction and otherwise dealing with L.r.No.Kiegoi/Kinyaki/999 precipitated this appeal. The Trial Magistrate held as hereunder;

“..... I have carefully read the affidavits in support of the applications on the face of it, it does not explain the reasons the applicants states that the interests are wrongful. On the issue of frustration in my view and based on the prima facie material placed before me, the issue of frustration has not been established on a prima facie basis. This is because, the applicant has not established, any steps it has taken against the county government of Machakos which still exists. In my view, for party to establish his ground, he must on a prima facie basis establish that circumstances which are beyond the parties control have come into existence and has prevented the contract herein being affected. In the instance case, the applicant blames the County Government of Machakos, it should be noted the County Government of Machakos is not a party to this case. Again, the County Government was not a party to the loan facility and as stated, there is not proof of any steps taken against the said County Government by the applicant..... The issue for now is whether the defendant contract between itself and the plaintiff can be affected by the conduct of a 3rd party who is not party to their contract, on the prima facie basis the answer is No.....”

3. In this appeal, the appellant filed application dated 17th August 2018 seeking temporary injunction against the Respondent from selling or auctioning L.r.Kiegoi/Kinyaka/999 and a stay of the proceedings of the trial Court pending the hearing and determination of the Appeal.

Stay of proceedings

4. I will begin with the request for stay of proceedings in the trial court. The applicant did not submit on this request. However, stay of proceeding is a serious interruption of litigation and should be seen within the overriding objective of the court to conclude cases expeditiously. On this see the following passages in **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

5. There is absolutely nothing on which to stay the proceeding in the lower court. In any event it is the appellant’s proceeding and its pendency will only prejudice the respondent. The hearing of case before the trial court is yet to conclude and should be concluded within reasonable time. I therefore hold that the applicant has not presented a probable cause to stay the proceedings in the trial Court.

Of temporary injunction

6. The Respondent filed its Response on 27th August 2018 vide Replying Affidavit sworn by, **Margaret Michoma**, Credit Collection & Recovery Department Manager of the Respondent. She resonated with the decision of the trial magistrate and also averred that the appeal raises diversionary issues and does not in any way raise the issue in dispute. She also stated that they undertook all the legal/statutory requirements before attaching the Appellants property, a fact not disputed by the appellant. That the amount that was owing by the Machakos County, if any, ought to have been received within the 4 months period prescribed in the loan facility. Lastly that the loan Agreement between the appellant and the Respondent had not been in any way frustrated since the County Government was not a party to the contract. She averred that the appellant has been in perpetual default.

7. On 29th August 2018 this Honourable Court directed parties to canvass the Application vide written Submissions. Both parties have since filed their respective Submissions which I have duly considered.

8. Parties in their submissions have substantially argued the appeal. In addition, the applicant essentially re-argued the application subject of this appeal. This state of affairs becomes a kind of a squirm. However, I will determine on the basis of the material before me;

(1) Whether the Applicant has satisfied the threshold for a grant of temporary injunction.

Terms of the Contract

9. The appellant submitted that by virtue of the clause 6.1 and 31 of the contract, the credit facility was to be offset from amounts due from the L.P.O and therefore the Respondent by virtue of its Conduct varied the terms of the contract. It was also argued that communication between the respondent and the County Government of Machakos frustrated the contract- something the trial magistrate did not appreciate.

10. In this respect the respondent submitted that the contract gave the appellant a grace period of 1 year which meant the Appellant ought to have seized the opportunity and raised money to satisfy the facility. It also denied the averment that it directly engaged the County Government and made it a player in the loan agreement.

11. A Court of Law cannot rewrite a Contract. The Court only interprets and enforces the intention of the parties. **In National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503** the court of Appeal stated:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”

12. According to 6.1. the repayment of the facility was in one installment within the repayment period of 4 months after drawdown or upon receipt of the amount due from the L.P.O whichever is earlier but in any event not later than 28th February 2015. When it is read with Clause 3.1 the period of LPO is limited to twelve (12) months but in any event not later than 28th February 2015. Of significance is that the repayment was not pegged exclusively on set-off from proceeds of LPO as was claimed by the Appellant. The key words are *whichever is earlier*. Therefore, the alternative of repayment from the amounts received from LPO does not mean that the contract was varied by Conduct of the Respondent. The 12 months period was a grace period which the Appellant could have taken advantage of in mutually convenient business environment rather than insist on variation of contract. Given this view I take of the contract, I am ready to decide on the injunction..

Temporary Injunction

13. I will not re-invent the wheel on temporary injunctions. The principles on grant of interlocutory injunctions as set out **Giella v Cassman Brown** have been developed further by case law and the prescription of principles of justice in the Constitution in order to meet dynamic and ever changing legal problems. See **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-**

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, In Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover

new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

14. Nonetheless, we should be guided by the traditional considerations set out in the case of **Giella v Cassman Brown [1973] EA 358** at page 360 where Spry VP held that:

“... 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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

15. Visram J (as he was then) was also clear on development of the law on injunctions when he stated in **Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR** that:

- 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 v Cassman Brown [1973] EA 358**

Of prima facie case

16. Has the Appellant established a prima facie case? The Court of appeal in Mombasa in **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO 39 OF 2002** described prima facie case to be:-

“... in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

17. The Applicant made these arguments. That it was not made aware of the change of terms of the contract from repayment being executable after the lapse of the four (4) months to it being executable on the basis of the L.P.O. The applicant also alleged that the Respondent solely negotiated with the County Government without their inclusion hence the County Government became privy to the Contract. It also stated that the agreement was frustrated by the non-payment of the sums owing to it by the county Government. It urged that constant communication between the Respondent and the county government frustrated the contract but the trial magistrate failed to appreciate this.

18. The respondent submitted that it was not privy to the Contract between the Appellant and the County Government. It averred that the contract was not strictly contingent on the County Government repaying the Appellant. That it gave the appellant a grace period of one (1) year which has since lapsed. It averred further that the appellant has not furnished the court with details of its agreement with the county government and that the reliance on the county government to repay the loan led to a self-induced frustration. It lastly averred that the doctrine of *lis pendens* cannot be used in this regard.

19. Arguments on clause 6.1 and 3.1 on repayment of the facility are directly in issue in the appeal as well as the case before the trial court. Nonetheless, it suffices to repeat that these clauses do not exclusively peg repayment from the proceeds of LPO as was argued by the appellant. In any event, the key words are *whichever is earlier* in clause 6.1 of the contract. And worth of note is that LPO period was limited to one year and the last date was set by the contract. Accordingly, I do not find merit in the argument that the respondent varied the contract by their conduct on accepting repayment by LPO. At this stage, the argument is not indomitable or a formidable basis to found a prima facie case for purposes of this application.

20. From the other arguments presented, the Appellant has not established the alleged relationship or communication between the County Government and the Respondent. There is no correspondence attached to the application or letters written by the Respondent to the County Government. The court will not grope in the dark. I also agree with the respondent that it was not privy to the contract between the appellant and the County Government of Machakos. Hence, it cannot be held accountable for actions or omissions by a 3rd party. In any event, the County Government of Machakos is not a party to the contract herein. Frustration has not therefore been proved. Notably, the applicant admitted that it was served with the statutory notices required in law before the Respondent sought to exercise its statutory power of sale.

21. In the circumstances, the appellant has not established prima facie case in the sense of law.

Irreparable Harm

22. The Applicant avers that the suit premises are registered in the name of the **Julius Ntarangi M' Eliungu** who holds the same in trust for her children and his lineage. And that no amount will be able to compensate the chargor in the event that he is evicted from the premises. The

law as I understand it is that matrimonial property may be given as security for loan except the consent of the spouses should be obtained. And once a charge is properly created upon matrimonial property, it may be sold in exercise of statutory power of sale as long as all statutory notices are given to the spouses who gave consent or are entitled to notice. See **David Ngugi Ngaari vs. Kenya Commercial BANK Ltd [2015] eKLR & Julius MainyeAnyenga vs. Eco Bank Limited[2014] eKLR**. There was no objection raised by a spouse or any other person interested in the suit premises at the trial Court.

23. The applicant has not shown he will suffer irreparable damages incapable of compensation in damages.

Balance of Convenience

24. Where does the balance of convenience lie? The Applicant relies on the doctrine of *Lis pendens* and the fact that the Respondent will not suffer loss if the injunctive Orders are granted to tilt the scale in his favour. It relied on the cited case of **Bernadatte Wangare Muriu v Nationa Social Security Fund Board of Trustee & 2 others [2012] eKLR**. The Respondent averred that the doctrine of *lis pendens* is not applicable to this case and cited case of **Anthony Muthumbi Wachira& another v Housing Finance Company of Kenya [2015] eKLR**. The two cited cases relate to the competing interest of parties to suit premises.

25. The case of **Al-Jalal Enterprises Limited v Gulf African Bank Limited [2014] eKLR** was cited where the learned judge observed as followed;

“The fourth issue I raised is whether the doctrine of *lis pendens* applies to Charges/Mortgages. There are numerous authorities on the position that the doctrine of *lis pendens* does not apply to charges/mortgages. The doctrine as embodied in section 52 of the repealed Indian Transfer of Property Act has no application whatever to a mortgagor who has given, under that mortgage, an express power of sale and that, he cannot, by starting a suit, perhaps a perfectly useless suit for redemption, derogate from that which he has, in express terms, conferred on the mortgagee by the instrument, namely, the power of sale...”

26. See also **Fina Bank Ltd v. Ronak Ltd [2001] 1 EA 54**, where the Court of Appeal allowed sale of the suit property in exercise of statutory power of sale despite pendency of the suit.

27. In the new legal regime on land law, the Doctrine of *lis pendens* is not specifically provided for. The common law principle should therefore be seen within the new constitutional and legal regime in Kenya. It shall not apply as a matter of course to bar exercise of mortgage’s statutory power of sale where it is lawfully due.

28. Recapitulation of the above matters leads me to conclude that the balance of convenience lie in refusing the injunction. I therefore find that the Applicant’s application dated 17th August 2018 lacks merit and is dismissed with costs to the Respondent.

Dated Signed and delivered in open court on 16th May 2019

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F.GIKONYO

JUDGE

In presence of

Kimaita for respondent

Kithinji for Ngunjiri for Applicant

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F.GIKONYO

JUDGE