



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 49 OF 2016

SAMUEL KONGO KARANJA.....APPELLANT

VERSUS

FIRST CAPITAL (K) LIMITED.....RESPONDENT

JUDGMENT

1. The appellant, *Samuel Kongo Karanja* was the plaintiff in CMCC No. 6319 of 2015. He filed this interlocutory appeal against the ruling delivered by the trial court, *Hon. E. K. Usui* (Senior Principal Magistrate) on 15th February 2016 in which the learned trial magistrate dismissed the Notice of Motion dated 16th October 2015. In the Notice of Motion, the appellant had sought orders of injunction to restrain the respondent, its servants, agents, auctioneers or anybody claiming under them from attaching, selling, transferring or otherwise alienating the appellant's household goods and tools of trade pending the hearing and determination of the suit.

2. In the affidavit supporting the motion and in his plaint filed contemporaneously with the application, the appellant claimed that he had applied for and obtained three unsecured loans from the respondent in the total sum of KShs.471,000. He averred that he had initially applied for a loan of KShs.360,000 which was disbursed in two instalments of KShs.70,000 on 9th June 2015 and KShs.299,000 at a later date. On 14th July 2015 and on 21st July 2015, he obtained top-ups of the initial loan in the sum of KShs.77,000 and KShs.94,000 respectively.

3. The appellant further stated that it was agreed between the parties that each loan facility would attract interest at the rate of 20% per annum and that it would be repaid in four equal quarterly instalments; that despite this agreement, he opted to pay the interest that was supposed to accrue on the initial loan in the sum of KShs.60,000 in advance on or about 9th July 2015.

4. It is the appellant's case that notwithstanding the clear terms of his agreement with the respondent, the respondent vide its letter dated 22nd August 2015 prematurely recalled the entire loan amount and unilaterally varied the rate of interest from 20% per annum to 20% per month; that at the instructions of the respondent, Hariki Auctioneers unlawfully proclaimed his household goods and tools of trade in a bid to recover alleged loan arrears in the sum of KShs.897,456.

5. In opposing the motion, the respondent filed a replying affidavit sworn by its loan officer *Ms Angeline Wambugi*. Though concurring with the appellant that the total loans disbursed to the appellant amounted to KShs.471,000, she disputed the appellant's averments concerning the terms under which the loan facility was extended. She claimed that the initial loan of KShs.300,000 which was later revised to KShs.360,000 following default by the appellant was disbursed on terms that it was to attract interest at 20% per month; maximum repayment period was three calendar months and in case of default, interest at the rate of 1% per day of any outstanding amount would accrue until payment in full; that the additional sum of KShs.77,000 was to attract interest at the rate of 20% per month and maximum repayment period was one calendar month. A penalty interest of 5% would be applicable to any outstanding balance.

6. The respondent further asserted that the loan facilities were secured by a chattels mortgage as shown in the chattels mortgage instrument executed by the appellant which was annexed to the replying affidavit; that the appellant breached the terms of repayment of the loans which were very specific and that out of the principal amount advanced in the sum of KShs.471,000, the appellant had only paid a paltry KShs.60,000; that in a bid to repay the loan arrears, the appellant issued the respondent with some bounced cheques.

7. It was the respondent's case that given the appellant's breach of the terms of their agreement, it was entitled to recover its outlay by exercising the powers of attachment set out in the chattel mortgage. In the respondent's view, the appellant was not entitled to orders of injunction as he had not established a *prima facie* case given its admitted indebtedness to the respondent. The respondent further contended that a dispute as to accounts cannot be a ground for grant of an injunction and that in any case, the appellant had not proved that if the application was dismissed, he would suffer loss which cannot be compensated by way of damages.

8. The record of proceedings in the lower court shows that the Notice of Motion was canvassed by way of written submissions. As noted earlier, the learned trial magistrate after considering the parties rival submissions dismissed the appellant's application with costs noting that the appellant had not established a *prima facie* case and that he had not demonstrated that if the orders sought were not granted, he would

suffer loss that cannot be compensated in monetary terms.

9. The appellant was aggrieved by the trial court's decision hence this appeal. In his memorandum of appeal, he relied on the following five grounds:

(i) *That the learned trial magistrate erred in fact and in law by failing to find that the chattels mortgages the respondent was relying on to attach the appellant's goods were not registered at the time of proclamation by the respondent's auctioneers;*

(ii) *That the learned trial magistrate erred in fact and in law by failing to find that the chattels mortgages were registered more than 21 days after their supposed execution contrary to Section 6 of the Chattels Transfer Act and were therefore void for that purpose;*

(iii) *That the learned trial magistrate erred in law and in fact by finding that the appellant had not satisfied the conditions for granting injunctions;*

(iv) *That the learned trial magistrate erred in failing to give due consideration to the appellant's submissions; and*

(v) *That the learned trial magistrate erred in applying the wrong principles of law thereby arriving at a wrong decision.*

10. When the appeal came up for hearing, the parties consented to having it prosecuted by way of written submissions which they subsequently filed.

11. In his submissions before the trial court and in support of his appeal, the appellant urged the court to find that he was entitled to the orders of interlocutory injunction as sought in his application as in his view, he had satisfied all the conditions for grant of such orders as set out in the celebrated case of ***Giella V Cassman Brown & Company Limited, [1973] E.A. 358.***

12. The thrust of the appellant's case is that he had established a *prima facie* case with a probability of success at the trial as he had managed to demonstrate that the proclamation of his household goods and tools of trade was unlawful as it had not been sanctioned by any court order. According to the applicant, the proclamation was also seeking to enforce a chattels mortgage instrument which was null and void in view of the fact that the chattels mortgage was registered on 28th October 2015 which was after 21 days of its execution contrary to *Section 6* of the *Chattels Transfer Act*.

13. The appellant also urged the court to note that the proclaimed goods were his household goods and tools of trade which were of great sentimental value and were the means of his livelihood and if the orders of injunction were not granted and the same were sold, he would suffer loss that cannot be adequately compensated by way of damages. That in any event, the balance of convenience tilted in favour of stopping the proposed sale until the substantive issues raised in the suit were determined during the trial.

14. In its submissions, the respondent asserted that the appellant had not established a *prima facie* case and was not entitled to the orders sought as he had not denied being indebted to the respondent and in its view, a dispute as to accounts is not a ground for grant of an injunction; that the appellant had not demonstrated that if an injunction was not granted, he was likely to suffer loss that cannot be compensated by way of damages.

15. As the first appellate court, I am duty bound to re-evaluate and to reconsider all the material that was presented before the trial court in support and in opposition to the motion in order to arrive at my own independent conclusions regarding the legal validity or otherwise of the trial court's decision.

16. I have carefully considered the grounds of appeal, the parties' rival written submissions and the authorities cited alongside the pleadings filed by both parties in the suit pending before the trial court. It is my finding that the only issue for my determination in this appeal is whether the learned trial magistrate erred in his finding that the appellant had not met the legal threshold for grant of an interlocutory prohibitory injunction.

17. In his very brief ruling dismissing the appellant's application, the learned trial magistrate held as follows:

"I have considered the application, replying affidavit and the parties' submissions. Giella V Cassman Brown is applicable. The plaintiff does not deny that he is indebted to the defendant. The issue is how the interest was calculated and how it was to be paid. That being the case, I find no prima facie case established against the defendant to warrant the orders sought herein. The plaintiff has not demonstrated that he will suffer loss that cannot be compensated in monetary terms. I find no merit in the application. It is dismissed with costs to the defendant. Suit to be listed down for hearing."

18. Given the ruling of the learned trial magistrate, it is clear that he did not address his mind to the real issues that were in controversy between the parties in the dispute before the trial court which should have formed the basis of his determination regarding whether or not the appellant had established a *prima facie* case with a probability of success.

19. The learned trial magistrate failed to appreciate that the appellant's suit challenged the legality of the proclamation and intended sale of his goods by the respondent on two grounds the first one being that the proclamation was based on an invalid and unenforceable chattels mortgage which had not been registered in accordance with the law and secondly, that the proclamation was meant to recover amounts which were not owed to the respondent as they were not calculated on the basis of the terms of the party's loan agreements but on terms that were allegedly unilaterally imposed by the respondent.

20. Since the appellant's claims were denied by the respondent, they raised important issues for consideration during the trial. The learned trial magistrate ought to have considered the appellant's claims alongside the rest of the pleadings and the material placed before him in order to establish whether or not the appellant had established a *prima facie* case. He did not do so. Instead, he based his decision on his finding that the appellant had not disputed his indebtedness to the respondent without proceeding to establish whether the debt that was admitted was the same debt that was sought to be recovered in the proclamation and intended sale of the appellant's goods.

21. After my own independent analysis of the trial court's record, I find that the appellant's claims challenging the legality of the respondent's proclamation of his goods amounted to substantive legal issues which needed to be ventilated and determined after a trial. It is also my finding that whether or not the respondent had unilaterally varied the terms of its loan agreements with the appellant was a question of fact which could only be established by evidence in the course of a trial.

22. Having taken all relevant facts into consideration, it is my finding that the learned trial magistrate failed to thoroughly interrogate the appellant's case including the reliefs sought in the plaint and thereby arrived at the erroneous conclusion that the appellant had failed to establish a *prima facie* case. In my view, the appellant had demonstrated a *prima facie* case which warranted the grant of an interlocutory injunction to preserve the substratum of the suit pending the hearing and determination of the same.

23. Given my foregoing findings, I am satisfied that this appeal is merited and it is hereby allowed. The ruling of the trial court delivered on 15th February 2016 is consequently set aside and is substituted with a ruling of this court allowing prayer 3 of the Notice of Motion dated 16th October 2015 on terms that an order of temporary injunction is hereby issued restraining the respondent, its servants, agents, auctioneers or anybody claiming under it from selling, transferring or otherwise alienating the plaintiff's household goods and tools of trade pending the hearing and determination of the suit filed in the trial court.

24. The suit shall be heard by a magistrate of competent jurisdiction other than *Hon. E. K. Usui* Senior Principal Magistrate.

25. On costs, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

26. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mrs. Kuria for the appellant

Ms Amwanzo holding brief for Mr. Maondo for the respondent

Mr. Salach: Court Assistant