REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 22 OF 2018

PHIDES MUTHONI MURIUKI.....APPELLANT/APPLICANT

VERSUS

CONSOLIDATED BANK OF KENYA.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 31/08/2018 in which the applicant seeks to review the orders and/or directions issued by this court on the 29/08/2018 and in reviewing those orders the applicant seeks that this court proceed and grant him conservatory orders restraining the respondent or its agents from selling the applicant's land parcels no. Nthawa/Siakago/2719, 223 and 1268.

2. It is the applicant's case that he filed the application dated 31/08/2018 under certificate of urgency seeking to restrain the respondent and his agents by temporary injunction from selling the suit property herein by way of auction which was scheduled to take place on the 22/08/2018. The court failed to grant the prayer of injunction as they had been overtaken by events. The applicant proceeds to state that the respondent's agent proceeded to set another date for auction on the 13/09/2018 after the initial auction did not take place without giving him statutory notice as provided in Rules 15(c) and (d) of the Auctioneer Rules.

3. In rejoinder, the respondent stated that he was not aware of any orders issued by the court on the 29/08/2018 that necessitated the application for review and if at all there were any orders issued, were to the effect that the applicant's application for interim injunction had been dismissed.

4. Further the respondent stated that contrary to allegations by the applicant, rules 15 c and d were not applicable in the instant case and that in any case its agents gave the applicant fresh 45 days redemption notice on the 19th July 2018.

5. The respondent further stated that the applicant had failed to meet the conditions precedent for grant of conservatory orders and having undeniably failed to settle his loan facility, the respondent's statutory power of sale had crystallised and as such the application ought to be dismissed with costs.

6. The parties filed written submissions to dispose of the matter.

B. Applicant's Submissions

7. The applicant submitted that his application for review was merited as he had come across new evidence of the respondent's agent advertising the suit property for sale without giving him notice in the advertisement in the Daily Nation on the 29/08/2018.

8. Regarding the grant of injunction, the applicant submitted that he had, at the first instance, established a prima facie case as there was a contention on the amount to be repaid to the respondent.

9. The applicant further submitted that he would suffer irreparably as he had developed the suit properties that were up for auction and as such his investment and input would be washed away. The applicant submitted that the balance of convenience tilted in his favour as he was likely to suffer the greater hardship if the auction would be allowed to proceed.

10. The applicant further submitted that the amount of Kshs. 21,000,000/= claimed by the respondent as per the auctioneer's valuation of the suit property was manifestly excessive considering that the respondent had advanced the applicant Kshs. 13,000,000/= of which the applicant had already repaid Kshs. 12,000,000/=.

11. The applicant further relied on the doctrine of *lispendens,* which provides that nothing should change during litigation, has been held to be applicable in the Kenyan Court vide a number of decisions such as the Court of Appeal in **Naftali Ruth Kinyua v Patrick Thuita Gichure & Another [2015] eKLR.**

C. Respondent's Submissions

12. The respondent submitted that for an application for review to be successful the ground relied on must be in existence before or during and that the same would be difficult or impossible for the applicant to bring to the attention of the court during the hearing. They relied on the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**.

13. The respondent also submitted that the error to be reviewed must be apparent on the face of record requiring no elaborate argument to expose as was held in the unreported case of **National Bank of Kenya Limited v Ndungu Njau (Civil Appeal No. 211 of 1996)**

14. Regarding the issuance of conservatory orders, the respondent submits that the applicant has failed to prove a prima facie case with triable issues as the issue in dispute was sums of monies owed and the same would be cured by award of damages against the respondent. The respondent further submits that the applicant wilfully entered into a charge agreement being privy to the terms and conditions therein and as such the court should uphold the sanctity of commercial transactions as was held in the case of **Machakos HCCC No 215 of 2008 – Jopa Villas LLC v Private Investment Corp & 2 Others**.

15. Further, the respondent relied on the case of **Peter Njuguna Kuria & Another v City Council of Nairobi & 4 Others [2013] eKLR** where the court held that a party seeking conservatory orders must demonstrate a prima facie case with likelihood of success where unless the order is granted the party would suffer prejudice as a result of the threatened violation of the constitution.

16. The respondent submits that the applicant has failed to convince the court that the balance of convenience tilts in his favour as he has failed to convince the court that the harm occasioned by failure to grant order would not be compensated by way of damages. The respondent relies on the case of **Maithya v Housing Finance of Kenya Ltd & Another [2003] EA** cited in **Abel Moranga Ogwacho & Another v Standard Chartered Bank Ltd** where the court held that securities are valued before lending and loss of the properties by sale is clearly contemplated by the parties even before the security is formalized and as such damages would be an adequate remedy.

17. The respondent also submitted that the doctrine of lispendens had been misapplied by the applicant as it applies to land ownership questions where the plaintiff may be prejudiced if the land in question is transferred pending the hearing and determination of the ownership issue as was held in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR.**

D. Analysis & Determination

18. This application is brought under the provisions of **Order 45 of the Civil Procedure Rules** which provide that:

> ***"1. (1) Any person considering himself aggrieved—***
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> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
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> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"***

19. Therefore, **Order 45 of the Civil Procedure Rules, 2010** is very explicit that a court can only review its orders if the following grounds exist: -

> **(a)** ***There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or***
>
> **(b)** ***There was a mistake or error apparent on the face of the record; or***
>
> **(c)** ***There were other sufficient reasons; and***
>
> **(d)** ***The application must have been made without undue delay.***

20. The pertinent issue for determination herein is whether the Appellant has established any of the above grounds to warrant an order of review. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"***

21. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that:

> "*In* **Francis Origo & another v. Jacob Kumali Mungala** *(C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-*
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> ***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."***
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> *We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.*

We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu & Another [1963] E.A. 557** *when he held that:*

> ***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"***

22. What was before court on the 29/08/2018 was an application under certificate of urgency by the applicant that sought to restrain the respondent and his agents by temporary injunction from selling the suit property herein by way of auction which was scheduled to take place on the 22/08/2018. The court failed to grant the prayer of injunction as the application had been overtaken by events. On the 12/09/2018, a day before the second auction, the parties again appeared before court wherein the parties entered consent that the sale by auction be postponed provided the applicant deposited Kshs. 310,000/= in court which the applicant did.

23. It is the applicant's case that the intended auction of the suit property scheduled for 22/08/2018 did not take place as the highest bidder did not meet the reserve price and as such the auction was again rescheduled for the 13/09/2018. The applicant proceeds to state that the respondent's agent proceeded to set another date for auction on the 13/9/2018 after the initial auction failed to take place without giving him statutory notice as provided in rules 15 c and d of the Auctioneer Rules. It is this new auction scheduled for the 13/09/2018 that the applicant's terms as "*new and important matter or evidence"* necessitating review.

24. I have well considered the reasons given by the applicant for seeking an order of review. It should be noted that the grounds for review are very specific as discussed herein above. The applicant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record.

25. Turning to the issue of the temporary injunction sought by the applicant, the conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358,** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

> ***"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."***

26. A party seeking a conservatory order must demonstrate that he has a prima facie case with a probability or likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.

27. I have perused the submissions of the parties and the authorities relied on. The question is whether the applicant has made out a *prima facie* case. She has admitted that there's default in outstanding repayment of the loan advanced to her and that the sum is more than double the amount advanced. In the case of **Hyundai Motors Ltd vs East African Development Bank Ltd H.C.C.C 503/2003 (Milimani)** it was held that whereas the validity or otherwise of a Charge document can only be determined at the hearing of a suit nonetheless **"the interpretation or validity of a charge document cannot be used to obtain orders preserving the status quo of the property."**

28. In the case before me the only reason advanced by the applicant is that there is disagreement in the amount repayable yet there is no

serious attempt to pay the loan. This reason is not sufficient to make a prima facie case that would form a basis for granting an injunction.

29. Further, I am in agreement with the respondent that the doctrine of lispendens has been misapplied by the applicant as it applies to land ownership questions where the plaintiff may be prejudiced if the land in question is transferred pending the hearing and determination of the ownership issue as was held in the case of **Co-operative Bank of Kenya Limited (supra).**

30. *Finally regarding the money deposited in court to halt the auction of the suit land, I do note that the parties entered a consent to have the money amounting to Kshs. 310,000/= deposited in court to halt the auction of the suit property. It is now settled law* that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. This was the holding of the court in **Flora N. Wasike vs Destimo Wamboko [1988] eKLR**.

31. Regarding the postponed auction of 22/08/2019, the applicant argues that he required to be given another statutory notice of sale for the auction that was to be fixed. Another auction was fixed by the respondent on 13/09/2019 but no fresh notice was given to the applicant. The respondent states that he advanced the applicant a total of Kshs. 14,624,078/= on three securities. Due to irregular servicing of the loan, the loan accumulated to Kshs. 19,695,149/=.

32. One after another, the respondent issued two statutory notices to the applicant which did not elicit positive response. The respondent then proceeded to advertise the properties for sale by public auction.

33. Having been issued with the two earlier notices, I do not think it was necessary to issue another statutory notice after the auction was postponed. The applicant was fully aware of the predicament facing her. Furthermore the outstanding loan had not been repaid.

34. *The upshot of the above is that it is my considered opinion that the applicant has failed to demonstrate to this court why review orders should be granted and further satisfy the court to grant the temporary injunctions sought.*

35. *I find no merit in the application dated 31/08/2018 and I hereby dismiss it with costs.*

36. *It is hereby so ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2019

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Gathua for Appellant