



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 30 OF 2019

SHADRACK OMONDI OKUMU.....1ST APPELLANT

MARY WAYU.....2ND APPELLANT

VERSUS

HOUSING FINANCE COMPANY (K) LTD.....RESPONDENT

(Being an Appeal from the Ruling dated and delivered on 29th May, 2019 by Hon. J.M. Kituku, Senior Principal magistrate in Kilifi SPMCC. No. 57 of 2019)

Coram: Hon. Justice R. Nyakundi

Dr. Khaminwa Advocate for appellants

Mr. Miller Advocate for the respondent

RULING

This is an appeal lodged by the plaintiff/appellant for special leave to appeal against the interlocutory ruling and order in CMCC No. 57 of 2019 in which **Hon. Kituku, SPM** dismissed the pleas for injunction under Order 40 Rule 1 and 2 of the Civil Procedure Rules against the defendant/respondent.

Background

The applicant/plaintiff had filed a plaint dated 28th February, 2019 before the **Senior Principal Magistrate's Court in CMCC. No. 57 of 2019** against the defendant/respondent seeking the following orders:

- a) An injunction do issue restraining the defendant by itself, its servants, employees, appointed receivers, auctioneers and specifically Keysian Auctioneers, agents, assigns, advocates or any person whatsoever acting on his behalf or claiming through, under or deriving title through it from trespassing, entering, ejecting, evicting or in any other manner interfering with the plaintiffs' occupation, possession and proprietorship of the suit property known as Plot L.R. No. 5408/III/MN (CR 49951).*
- b) A declaration that the sale of the Plot L.R. No. 5408/III/MN (CR 49951) and all subsequent transactions are null and void.*
- c) In the alternative and or in addition to prayer (b) an order do issue that the time for compliance and/or for rectifying any default by the plaintiffs with a notice served under Section 90, if any, to redeem Plot L.R. No. 5408/III/MN (CR 49951) be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under Section 104(2) as read with Section 90 of the Land Act, 2012.*
- d) An order do issue to the Registrar of Lands forbidding the registration of dispositions and the making of entries inconsistent with plaintiffs' interests with respect to the property known as Plot L.R. No. 5408/III/MN (CR 49951) by any persons claiming through, under or deriving their title form the defendant.*
- e) In the alternative to prayer (c), an order nullifying the registration of any party other than the 1st plaintiff as the registered proprietor of the suit property and all other subsequent entries on the register.*

f) An order do issue to compel the defendant to supply the plaintiffs with the full and complete loan statement.

g) Costs of this suit.

h) Another relief that this Honorable Court may deem just and convenient.

Simultaneously, with the plaint a notice of motion dated the same day making reference to the suit sought interim reliefs of interlocutory injunction pending the hearing and determination of the suit.

In addition the plaintiff/applicant applied for temporary injunction to issue to the Registrar of Lands forbidding registration of disposition and the making of entries, adverse to those of the plaintiff's interests with respect to the suit property known as **Plot L.R. No. 5408/III/MN (CR 49951)**.

The trial court considered the affidavit evidence in the light of the averments in the plaint to determine the issues of the notice of motion. In his considered view he acknowledged that the property in question had been mortgaged to the defendant/respondent under a legal charge duly executed by the parties.

The learned trial magistrate by his ruling dated 29th May, 2019 dismissed all the reliefs as crafted in the aforesaid notice of motion of 28th February, 2019.

Being aggrieved with the ruling and order the appellant sets out the following grounds in his memorandum in support of the appeal: -

1) That the learned trial magistrate reached a decision that was against the Constitution, the Land Act, the Civil Procedure Act and the civil Procedure Rules 2010.

2) That the learned trial magistrate improperly exercised his discretion and or duty by taking into account matters which he ought not to have taken into account and failing to take into account matters he should have taken into account.

3) That the learned trial magistrate erred in dismissing the appellants' application for temporary injunction pending the hearing and determination of the suit on its merits.

4) That the learned trial magistrate erred in failing to consider the allegations of fraud and collusion between the respondent and 3rd party purchaser in their conduct of the sale by auction.

5) That the learned trial magistrate erred in failing to take into account all the evidence tendered in court by and on behalf of the parties.

6) That the learned trial magistrate erred in holding that the 90 day statutory notice was duly served upon the appellants.

7) That the learned trial magistrate erred in holding that all requisite steps were followed before the respondent exercised its statutory power of sale.

On appeal **Mr. Khaminwa** appeared for the appellant and relying on the memorandum and affidavit he urged this court to allow the appeal and quash the declarations as decreed by the learned trial magistrate.

Learned counsel placing reliance on Section 103, 105 of the said Act Article 40 of the Constitution and the principles in **Peter Ngugi Kabiri v Esther Wangari, Githinji 2015 eKLR**, **Narendra Karsan Sanghani T/A K.B. Sanghani & Sons v P.N. Mashru Ltd 2018 eKLR** and **Patrick Waweru Mwangi & another v Housing Finance Co. of Kenya Ltd 2013 eKLR** submitted and argued that the plaint raised serious issues between the appellants and the defendant requiring grant of interlocutory injunction to give an opportunity to the parties to delve into the merits of the claim.

Learned counsel contended that the temporary injunction as provided for under Order 40 of the Civil Procedure is more appropriate to preserve the subject matter of the suit from being alienated, wasted or disposed off before the two claimants ventilate the issues to justify the respective positions to the claim.

Learned counsel submitted that the prospects of the suit succeeding would be rendered nugatory in absence of an interlocutory injunction in place to safeguard the rights of the plaintiff/appellant.

The respondents counsel **Mr. Miller** in a rather extensive detailed submissions and exhibited annexures forcibly opposed the appeal for the court to interfere with the discretion by the trial court to decline an interlocutory injunction to the plaintiff/appellant.

The fundamental question the respondent counsel raised was in respect of the public auction which has already taken place and a third party who was the successful bidder cannot be estopped from being registered as a proprietor.

In his arguments learned counsel contention was that the remedy if any for the plaintiffs/applicants lies in pursuing award of damages. For this legal proposition he cited the principles in the cases of **Muinidi Okemba Lore v Lucy Wangui Gachara (2014) eKLR**, **Kamulu Academy Ltd & another v British American Insurance (K) Ltd. & 2 others (2018) eKLR**.

Learned counsel submits that the learned trial magistrate adequately considered the threshold issue of making the decision on interlocutory injunction. Learned counsel reiterated the legal position while relying on the principles set out in **Giella v Cassman Brown & Co. Ltd (1973) E.A. 358, East African Development Bank v Hyundai Motors Kenya Ltd (2006) eKLR, Nguruman Ltd v John Bonde Nielsen & 2 others CA No 77 of 2002**. That there is no merit on the grounds of appeal as the trial magistrate properly applied the right principles for grant of injunction.

Further, learned counsel submitted that an interlocutory injunction being a discretionary remedy the exercise of it is vested in the trial court at the time of adjudication of the application.

It follows therefore argued learned counsel that the appellant has not shown that such discretion was capriciously or whimsically exercised in regard to the impugned ruling.

In conclusion learned counsel argued and submitted against any re-opening of interlocutory proceedings initially and properly considered by the trial court.

Analysis

At the heart of this appeal is the question whether the learned trial magistrate was right in refusing to grant the appellant relief of temporary injunction.

The answer still is to be found in the illuminating principles which have influenced the exercise of discretion under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules. On injunctions in the cases of **Giella v Cassman Brown** and **Mrao Ltd v First American Bank of Kenya Ltd & 2 others 2003, Nguruman Ltd** (supra) where the courts have approved the following conditional principles to be met by an applicant that: -

- a) An applicant must show a prima facie case with a probability of success to be tried at the main suit.*
- b) That the applicant would suffer irreparable harm not capable of being reserved by way of damages.*
- c) That the balance of convenience in the interest of justice does tilt in favour of the applicant.*

From the record the case involved different issues raised by the plaintiff/applicant against the defendant/respondent. In the plaint its claimed by the plaintiffs that they executed an instrument in the form of a legal charge in the suit property **L.R. No. 5408/III/MN/CR 4995** in favor of the defendant Bank. That the appellants applied for a loan facility in the amount of Kshs.5,236,000 for the purpose of constructing their residential and matrimonial premises. The loan was secured by a charge over the suit property number **LR NO. 5408/III/MN (C.R. 49951)**. Further, the appellants avers that it was a term of agreement that payment of instalments were to be financed through rental income of the premises. That in the course which was reflected in the plaint the contractual arrangements between the appellants and the respondent bank materially there was a default to service the loan. Further, as at 13.8.2019, the loan arrears has raised to Kshs.25,213,389.65 plus accrued interest. All these issues therefore, came up for consideration by the trial court.

In the pleadings they sought declarations of injunction that the instrument of the mortgage deed was in the process of being alienated, disposed off, sold, in total disregard of the statutory provisions of the land more specifically Section 90 and 104(2) of the Land Act 2012.

The court in its ruling considered that the notice of motion in terms of the statutory creation of a legal charge the merits and prospects of success of the prospective suit was remotely unlikely given the pleaded facts of the claim. These factors taken into account are similar if not identical as set out in the cited cases of **Giella Cassman, Nguruman and Mrao (supra)** case.

The principles in the above case provides novel and clear guidelines in respect to the court's jurisdiction and exercise of discretion to grant interlocutory orders of injunction when considering whether to exercise discretion to interfere with the decision by the trial court an excellent exposition of the Law is found in the persuasive English case of **Headman Productions Ltd Elal v Hanulum & another 1983 AC 191** where the court held to: -

“Upon an appeal from a judge's grant or refusal of an interlocutory injunction the further of an appellate court.... is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. ... it may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference. That particular facts existed or did not exist, which although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the trial of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunction may sometimes be sketchy, there may be occasional cases where even though no erroneous assumption of law or fact can be identified. The judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the grant. That no reasonable judge regardful of his duty to act judiciously could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside grant or of these reasons, that it becomes entitled to exercise an original discretion of its own.”

Bearing in mind the basic principles on the test of exercising discretion the burden of proof rest with the appellant especially when the interest of justice so requires for such an interference by the appellate court of the impugned decision.

In determining this appeal, the legal position is quite clear and has been quite clear for some considerable time. The persuasive decision in **Erica Francis-Griffiths v Patricia Griffiths**, [2016] JMSC Civ. 68 sums it all as follows:

“(a). Whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should turn out that the court turns out (sic) to be wrong or which seems likely to cause the least irremediable prejudice to one party or to the other.

(b). Whether an interlocutory injunction is prohibitive or mandatory, the claimant must demonstrate that there is a serious issue to be tried before any injunction will be granted.

(c). There is no usefulness to be derived from arguments based on semantics as to whether an injunction is prohibiting or mandatory. What is required in each case is to examine the particulars facts of the case and the consequences of granting or withholding of the injunction is likely to be.”

In this matter have taken into consideration that the defendant/respondent bank had complied with the provisions of section 90 to 96 of the Land Act Number 6 of 2012. The bank initiated the process of sale of the suit property in exercise of its powers as a chargee. Within the context implicit in the statutory notice of sale the redress for an interlocutory injunction as properly known to comprise of a prima facie case, irreparable harm not compensatable by way of damages, balance of convenience was not clearly available in favor of the appellant. He who comes to equity must come with clean hands. After careful consideration of the arguments and submissions made in relation to this appeal, I will not interfere with the discretion of the Learned trial Magistrate as there was no misdirection which was fatal to the decision. I am of the considered view the irremediable prejudice and injustice tilts more in favor of the respondent if this appeal was to be allowed.

For the foregoing reasons, the appeal is therefore refused and dismissed with costs to the respondent. Leave to appeal allowed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Gitahi for Mr. Khaminwa for the appellants
2. Mureithi for Miller for the respondent