



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 229 OF 2018

(CORAM: F. GIKONYO J.)

WISEBORN INDUSTRIES (K) LIMITED.... APPELLANT

VERSUS

FORTUNE SACCO SOCIETY LTDRESPONDENT

(An appeal from the ruling/order of the Co-operatives Tribunal at Nairobi dated 11th April 2018 in Co-operatives Tribunal Case No. 811 of 2017)

JUDGMENT

1. The appellant being the plaintiff filed an application dated 15th December 2017 seeking among other orders an injunction against the respondent from selling, alienating or in whatever other way interfering with L. R. Title No.. Baragwe/Raimu 2366, 2369 and 3282 until the hearing and determination of the suit. On 11th April 2018 the tribunal granted the injunction on condition that half of the sum owed is deposited in an interest earning account within 60 days.

2. The appellant being aggrieved by the said decision filed this appeal citing four (4) grounds which may be summarized into one issue: **whether the conditions for granting an interlocutory injunction have been met?**

ANALYSIS AND DETERMINATION

3. As the first appellate court, this court should evaluate material before the court and make its own determination. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

4. Upon perusal of the application, I find that the other two prayers, except, the prayers for injunction and the general one for ‘*such other order or relief that the court may deem fit to grant*’, were already spent at the time the tribunal heard the appellant’s application dated 15th December 2017. Accordingly, the tribunal did not err when it concluded that the matter for consideration before it was one of injunction. I will therefore proceed to determine the prospect or otherwise of granting an interlocutory injunction herein.

Threshold for interlocutory injunction

5. Even before the enactment of the Constitution of Kenya 2010, Ojwang Ag. J. (as he then was) did not mince his words on the need for a more intrinsic test in granting injunctive relief when he stated in the case of **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 at page 607** that: -

‘...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”....”

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella Vs Cassman Brown* the court has had to consider the following questions before granting injunctive relief.

- i. Is there a prima facie case....
- ii. Does the applicant stand to suffer irreparable harm...
- iii. On which side does the balance of convenience lie?

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...' [Underlining mine]

6. It is now generally agreed that, in determining whether or not to grant an interlocutory injunction, the court should take a wider view of justice as dictated by the Constitution and the overriding objective of the court by evaluating all the circumstances of the case rather than obstinately being tied to some kind of defined principles. See the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR** where Mabeya J remarked that: -

'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Giella vs. Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the law.

7. I will apply the test of the law to the facts of the case. I cannot over emphasize that decisions are made based on the facts of the case. I am content to cite the learned work by Andrew Goodman, *How Judges Decide Cases: Reading, Writing and Analysing Judgments*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009), in which he observes (p.44):

"However rarefied and abstruse the legal argument before the [Court], it must be anchored on the facts of the case: while the judges will feel free to expound upon the most general principles in order to provide guidance for the future, the actual decision...will turn on the facts, even if the detail of the argument is quite remote from them".

8. Arising from the evidence available, these facts are not in dispute; That the respondent advanced a loan facility to the appellant; and that the loan outstanding is over Kshs. 31,000,000/- since December 2017. But the appellant seems to justify the default when it submitted that on or about 5/7/2015 its business and all development on the subject parcels of land were destroyed by government and he is claiming Kshs. 18,593,800/- occasioned by the destruction. It argued that these unfortunate events made the Appellant unable to service its loan facility given by the respondent. It was also submitted that the Appellant had taken out an insurance cover on the property and the developments thereon through a broker (KIRIFA INSURANCE AGENCY) who is a brother/sister company to the respondent. It urged that the policy document clearly stipulates that the respondent is the one to be paid for any insured loss.

9. More was submitted; that the subject property is valued at Kshs. 87,000,000/- which is a substantial amount of money and the Appellant stands to suffer substantial loss if the injunction is not granted. Amidst all these arguments, the Appellant does not deny the loan except that it is just re-organizing itself.

10. The respondent on the other hand, stated that it cannot claim from the insurer (CIC INSURANCE CO.) as it has no capacity as the contract is between the appellant and insurer; the respondent is not a party to it. According to the Respondent, the appellant has failed to avail a single document to show that the respondent has made a claim for compensation, or show that it received any or have any relationship with the insurer. The Respondent decried that the loan was advanced over two (2) years ago and the appellant only paid Kshs. 214,445/- in 2016. The Respondent laments that the default persisted even after the appellant admitted to be doing well in business when this matter was first tabled in ELC court and before being referred to the tribunal.

11. From the material before the court, a loan was advanced to the appellant. The Appellant does not deny its indebtedness to the respondent. The Respondent is now seeking to recover the sum owed by realizing the security tendered. But the appellant seems to take the view that his indebtedness was due to destruction of developments of the subject property. It stated that the sum to be received from the insurer under the policy be paid to the respondent. According to the Appellant the broker herein is a subsidiary of the respondent.

12. I see some difficult matters arising out of these argument on the insurance cover. First, the broker, whether a legal person or a business name or a firm is distinct from the Respondent company. We are told of this by the greatest legal innovation of separate corporate existence of a company formulated in the famous case of *salomon vs. Salomon*. Second, I have perused the policy document. It states that the risk being protected is against burglary. According to the lien clause, the loss, if any, is payable to Fortune Sacco, the respondent. Here two concerns abound. Although the respondent is stated to be the beneficiary of any compensation for the loss covered under the policy, it does not make the Respondent the insured; the insured is the appellant. Any claim should be lodged by the appellant. The Appellant has not adduced any evidence to show that the risk attached, a claim was made and the money payable from the insurer as a result of the destruction was paid out to the respondent towards loan repayment. It has only adduced a letter it wrote to its insurer stating its claim.

13. One other important matter; the Appellant did not show that the loan repayment is covered under the above policy. Therefore, the appellant as the insured ought to have demonstrated that the loan is being repaid or sum insured was paid to the Respondent towards loan repayment. The Appellant proved none of these; he simply defaulted to pay the loan because he was awaiting payment from the insurance on the loss of his property. I am not without pity to the ill that befell the Appellant. However, as I stated earlier, each case turns on its facts and circumstances. In the circumstances of this case, it is quite apt to greet the Appellant in the words stated in the case of **Francis J.K Ichatha v Housing Finance Company of Kenya, Civil Application NO. 108 of 2005** that: -

“A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayments to the Defendant/Respondent a debt which he expressly undertook to pay.

14. Accordingly, the appellant has failed to establish a *prima facie* case for issuance of an injunction. The Appellant has been in default since 2016 and nothing shows that it has paid any money since the first payment.

15. On irreparable loss or damage; the Appellant’s perspective is rather interesting. It was argued that the Appellant will suffer irreparable loss since the security is over Kshs. 87,000,000/- whilst the loan is of Kshs. 31,000,000/-. Such loss is not irreparable damage or loss in the sense *Giella vs. of Cassman Brown* case. I will give ample reasons for that statement. First of all, the security must be sufficient to cover the loan, interest and other incidental costs thereto. Second, the law requires valuation of the security in order to guard against unscrupulous chargee or auctioneer who may sell the property at a gross undervalue. The law obligates obtaining the best price in the locality and given the nature of the land. Third, once land is properly charged as security for loan, it may be sold in the exercise of chargee’s statutory power of sale. Upon due sale and transfer of the land in law, the equity of redemption of the chargor is extinguished; the chargor loses the property. These are the natural consequences of realization of security. Because of these stark consequences, the law has designed sufficient safeguards to preserve equity of redemption as a statutory right to be extinguishable only in accordance with the law. See the safeguards in the amount and nature of notices required by law before land which is given as security is sold by the charge.

16. The established judicial method which vindicates fairness, objectivity and legitimacy in adjudication of cases including injunctive relief is one that entertains the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result. When I apply the test of balance of convenience, the circumstances of this case tilt the scale towards refusing the injunction.

17. But I am aware that injunction is a discretionary remedy, and in light of my above findings, the tribunal properly exercised its discretion in having its mind on the circumstances of the case and granting a conditional injunction. See also **Order 41 Rule 11 of the Civil Procedure Rules**. In the upshot, I find this appeal to have no merit and is dismissed with costs to the respondent.

Dated and signed at Meru this 12th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of December 2019

L. NJUGUNA

JUDGE