



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.95 OF 2017

GREGORY GITIJE MBERIA.....1ST APPELLANT

DORIS MUTHONI GITIJE.....2ND APPELLANT

-Versus-

FINA BANK LIMITED.....1ST RESPONDENT

LEAKEY'S AUCTIONEERS.....2ND RESPONDENT

RULING

Injunction

[1] The Notice of Motion Application dated 19th September 2017 prays inter alia for an order for temporary injunction to restrain the Respondents whether bSt. Lativa Medical & Laboratory Services themselves, their employees, servants, officers, agents, auctioneers or any other person whomsoever from doing any of the following acts that is to say; advertising for sale, selling whether by public auction or private treaty, disposing off or otherwise howsoever interfering with the 1st Appellant's ownership or title to the parcel of land known as Title Number Kiirua/Ruiri/4803 pending the hearing and determination of this suit.

[2] The application is expressed to be brought under Sections 1A, 1B, 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya, Order 40 Rules 1 (a),2,4 and 10 and Order 51 Rule 1 of the Civil Procedure Rules 2010, the Land Act No.6 of 2012, and the Land Registration Act No. 3 of 2012. It is supported by the grounds on the face of the application and an affidavit sworn by the 1st Appellant Gregory Gitije. The said grounds have been reinforced in the submissions filed in court pursuant to the directions of the court given on 31st October 2017.

[3] From the submissions, the pleadings and affidavits filed, the following arguments arise. The Applicant is the registered owner of parcel known as title number Kiirua/Ruiri/4803. He had filed Nairobi CMCC No. 6621 of 2013 in which the lower court issued an order of temporary injunction. On 10th March 2015, the Respondents applied for the striking out of the suit and discharge of the said injunction. On 24th August 2017, the Learned Trial Magistrate Hon H Ndung'u struck out their suit on the basis that it was an abuse of court process. Being greatly aggrieved by the said ruling and the fact that the 1st Respondent has engaged a Valuer to value the suit property for purposes of selling it, he is apprehensive that the sale would take place any time.

[3] The Applicant argued that his case has satisfied the requirement in the case of *Giella v Cassman Brown (1973) EA 358*. First, it was submitted that the injunction sought will preserve the suit land and maintain the prevailing status quo which ensures that the Respondents did not advertise for sale, whether by public auction or private treaty, dispose of or otherwise howsoever interfere with the 1st appellant's ownership or title to the suit property. Second, he contended that if the injunction was not granted, and the Respondent effectuate their aforesaid sale, the appellants would definitely incur profound harm, loss and damage which could not be adequately atoned for by a pecuniary award as the suit land was matrimonial and family home. And, third, the balance of convenience tilted in favour of the Appellants because they had demonstrated through affidavits that the Respondents were seeking to sell their land in breach of the law. Consequently, the appellant submitted that the Respondents would not be prejudiced in any way by the grant of the injunction. He urged the court to grant the relief sought pending the hearing and determination of the suit.

You knew security was matrimonial home

[4] In opposition to the application, the 1st Respondent filed a Replying Affidavit sworn by Ruth Muiruri the head of legal services. They also filed submissions in which they reinforced their stand point. The Respondents reiterated the events as recounted by the Applicant about the suit that was struck out. Except, they provided two important details: (1) that the injunction had been obtained just at verge of 1st

Respondent's realizing its security; and (2) that the suit was struck out on the basis that it had been transferred to Meru Court by a court without jurisdiction. The said decision provoked the instant application.

[5] The Respondent insisted that the court could not grant itself jurisdiction where none exists. Therefore, the decision of the lower court in striking the suit could not be faulted. Accordingly, they opined that the appeal filed is unlikely to succeed. Further, they argued that, it is trite law that the exercise of chargee's power of sale could not be restrained merely because the applicant disputed the statements of account or the balance due unless he had paid the admitted amount. On irreparable loss, they urged that the Appellant was well aware that this was a family home when he offered it as security for the loan and that having done so, he would be expected to have acted with deligence to ensure payment is made or make other arrangements.

DETERMINATION

[6] I have carefully considered this application; the rival submissions and the authorities relied upon by the parties. I will not pretend to be re-inventing the wheel on the subject of temporary injunction. I am content to cite what Ojwang J (as he then was) stated in the case of **Amir Suleiman vs. Amboseli Resort Ltd (2004) eKLR 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 basis 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.....

[7] What is 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** answered this question as follows:-

“...I would say that 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.

Is there a prima facie case for issuance of an injunction in this case?

Dispute on sum owing

[8] From the material before the court, there is a dispute no exactly the amount of loan owed by the Appellant to the Respondent. Parties have given conflicting information on the sum owing. However, I am acutely aware that:-

*“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due, unless on terms of the mortgage, the claim is excessive”. See **Sports Cars Ltd vs Trust Bank Ltd, Case No 754 of 1999.***

Accordingly, dispute on sum payable alone may not be a basis for issuance of an injunction to restrain a chargee from realizing the security given for the loan. Noteworthy is that the Appellant acknowledges indebtedness; he has not claimed that he has paid the debt. This would work against him.

[9] The foregoing notwithstanding, and without evaluating the prospects or otherwise of the intended appeal, it is unchallenged that the suit property is matrimonial property. That is quite something. It is also not in dispute that the suit property is being sold. See the letter dated 6th September 2017 by the Respondents addressed to Legend Valuers Limited, requesting the said valuers to conduct a valuation for purposes of selling the mortgaged property. When I combine these facts, a command strikes; that I should follow after what Justice Hoffman in the English case of **Films Rover International (1986) 3 All ER 772** stated that:

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

[10] This is a case where I should seek balance of convenience. Applying the test, I will issue a limited injunction to subsist for 45 days only so as to allow parties to reconcile accounts of the loan. Meanwhile, the 1st Respondent will deliver accounts of the loan herein to the Appellant within 14 days. I expect the Appellant to pay whatever is due on the loan when he comes to court next. Given the decision I have made, each party shall bear own costs. The Appellant is further directed to take steps towards expeditious disposal of the appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 8th day of May 2018

.....

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiogora for Mr. Muthomi for Applicant

M/s. Mahma for Mr. Njuguna for respondent.

.....

F. GIKONYO

JUDGE