REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 160 OF 2015

JOASH ORINA ……..…..... APPELLANT

AND

FIDELITY BANK LTD. ……...……..... 1ST RESPONDENT

TUMAINI TRANSPORTERS LTD. ..……..…..……. 2ND RESPONDENT

(An appeal from the ruling of Hon. Karani, Resident Magistrate, delivered on 24th September, 2015 arising from the appellant's application dated 23rd June, 2015 in Mombasa SRMCC No. 433 of 2015)

JUDGMENT

1. The appellant being dissatisfied with the ruling of Hon. Karani delivered on 23rd September, 2015 filed a memorandum of appeal on 27th October, 2015 against the said ruling raising the following grounds of appeal:-

(i) That the Learned Magistrate misdirected himself in assuming the Appellant lacked a prima facie case for an injunction against the 1st Respondent;

(ii) That the Learned Magistrate erred in fact and law in stretching the legal threshold for an interlocutory injunction beyond the reasonable boundaries of the law by demanding the Appellant to quantify the alteration of the nature of the agreement;

(iii) That the Learned Magistrate erred in fact and law in failing to appreciate the serious legal issues that emanate in the Appellant's matter;

(iv) That the Learned Magistrate erred in fact and law in denying the application the injunction (sic) since it annihilates the entire basis of the Appellant's claim;

(v) That the Learned Magistrate erred in fact and law in denying the application for the injunction since it denies the Appellant an opportunity to contest the validity of the claim against him;

(vi) That the Learned Magistrate erred in fact and law in overlooking the concrete evidence the 1st Respondent had radically altered the terms and conditions of the loan agreement.

The appellant prays for:-

(a) the appeal to be allowed and for the ruling and order delivered on 23rd September, 2015 to be set aside; and

(b) costs of the appeal to be in the cause.

2. The application the subject of the appeal herein was filed on 23rd June, 2015. The appellant sought the following orders:-

(i) That the application be certified as urgent and service thereof be dispensed with and the application heard in the first instance;

(ii) That the Honourable Court be pleased to grant a temporary injunction restraining both the 1st Defendant either themselves or agents (sic), servants, representatives or any other person from selling the shares pending the hearing and determination of the application;

(iii) That the Honourable court be pleased to grant a temporary injunction restraining both the 1st defendant either by themselves or agents, servants, representatives or any other person from selling the shares pending the hearing and determination of the suit; and

(iv) That the costs of the application be in the cause.

3. The said application was supported by the affidavit of the appellant, Joash Machiegwa Orina sworn on 11th March, 2015 and filed on 23rd June, 2015. The 1st respondent filed a replying affidavit on 22nd July, 2015 opposing the said application.

4. The Hon. Magistrate held that the appellant had not met the requirements laid down in the case of **Giella vs Cassman Brown** 1973 (EA) 358 and **Mrao Ltd. vs First American Bank & 2 Others,** [2013] eKLR for the grant of an interim injuction.

5. In the present appeal, Counsel for the parties hereto filed written submissions which they highlighted.

APPELLANT'S SUBMISSIONS

6. Mr. Lutta, the appellant's counsel urged the court to allow the appeal for the reasons that the Learned Magistrate overlooked the duty of a creditor to inform a guarantor of the status of a borrower. He submitted that the guarantor was not informed of the default on the part of the borrower. He relied on the case of **Delphis Bank vs Shield Purchase Guarantor & Another,** HCCC No. 672 of 2002, to augment the foregoing submission.

7. Counsel contended that the agreement between a guarantor and creditor is special in that a guarantor is at arm's length from the primary contract. As such, the creditor bears an inalienable obligation of updating the guarantor on the status of the credit so that a guarantor can follow up on the debt with the borrower. In this regard, Counsel relied on an excerpt from **Charles Chew in the Journal of International banking and financial law, volume 27 No. 10 (2012).**

8. It was submitted that the appellant was informed on 9th March, 2015 about the intended sale of his shares. On 6th March, 2015, the 1st respondent wrote to Dyer & Blair with instructions to sell the appellant's shares. In Mr. Lutta's view, the latter communication was premature. Counsel submitted that the appellant was not aware of the outstanding amount of Kshs. 2,742,709.61 which had escalated from Kshs. 850,000/= from November, 2012. The appellant could not comprehend how the amount was arrived at. Counsel cited the case of **Northshire Holdings Ltd. & another vs Austead Holdings Ltd**. **Inc** [2010] EWHC 1495 ch, which states that the creditor bears the burden to disclose material facts that the surety would not be expected to know.

9. Mr. Lutta argued that the Learned Magistrate erred by relying on the case of **Mrao vs First American**

Bank & 2 Others (supra) as the Court of Appeal was dealing with a borrower and a creditor, there was no issue of a guarantor. He stated that the Learned Magistrate by so doing held the appellant to a different threshold of a borrower instead of a guarantor. It was his view that the appellant had established a prima facie case for grant of an injunction. He prayed for the appeal to be allowed with costs.

1ST RESPONDENT'S SUBMISSIONS

10. Ms. Muthee for the 1st respondent submitted that the appellant guaranteed the 2nd respondent for a facility with the 1st respondent. The 2nd respondent defaulted on his credit facility and the 1st respondent sought to exercise its powers of sale.

11. Counsel contended that meetings were held between the three parties to resolve the matter and information was passed on to the appellant, thus he knew there was default. She drew the court's attention to the supplementary Record of appeal which she stated contains the said information. She argued that Dyer and Blair were communicated to after the appellant and 2nd respondent were informed of the default. She further stated that the appellant was given adequate time between the year 2012 and 2016 to remedy the default. In her view, the decision in **Mrao vs First American Bank** (supra) was properly applied to the present case as the appellant and 2nd respondent have shown no intention to remedy the breach.

12. Ms. Muthee submitted that the principles laid down in the case of **Giella vs Cassman Brown** (supra), were not met. The appellant did not show what irreparable damage they may suffer and a prima facie case was not established. She cited the case of **Vivo Energy Kenya Ltd. vs Maloba Petrol Station & 3 Others**, Civil Appeal No. 21 of 2014, in stating that there must be more than an unfounded fear or apprehension on the part of the appellant of an injury that cannot be compensated.

13. In her view, the lower court arrived at the right decision. Counsel further stated that the 1st respondent is a financial institution that can afford to pay damages and that the appellant read the terms of the agreement and knew that the bank had the right to sell the shares. She added that shares stand the risk of being devalued and the 1st respondent stands the risk of not recovering its security.

14. Ms. Muthee cited the provisions of Order 40 rule 2 of the Civil Procedure Rules which gives courts powers to grant orders of an injunction subject to security being provided. She prayed for the appeal to be dismissed.

APPELLANT'S REJOINDER

15. Mr. Lutta in his rejoinder stated that shares have an intrinsic value and it is not possible to ascertain their specific value as they fluctuate. He reiterated that the letter from the 1st respondent dated 9th March, 2015 was received after a letter was written to Dyer and Blair on 6th March, 2015. He emphasized the fact that the 1st respondent did not exercise its duty to tell the appellant of the default. He stated that they were ready to abide by any conditions set by the court.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the appellant was notified of the default on the part of the 2nd respondent; and

(ii) If the Learned Magistrate properly directed himself on the principles of granting of an interlocutory injunction.

16. In considering the appeal herein, this court is alive to the fact that the granting of an interim injunction is an exercise of judicial discretion by the court, unless the appellate court is satisfied that the discretion

has not been exercised judicially. See the decision in **United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd *[1982-88] 1 KLR 639,*** *where M*adan J.A. (as he then was), aptly explained the essence of this approach as follows**:**

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

17. In the application before the lower court, the Learned Magistrate considered the submissions of the Counsel for the parties herein and found that the 1st respondent had given ample time and notices for the default to be made good to no avail. He also found that although the appellant alleged that the 1st respondent acted unilaterally and altered the original offer and the penalties of the term of the overdraft, he did not offer any specifics on the same and/or the contract he felt the 1st respondent had overcharged as a result of the alteration. The Learned Magistrate therefore declined to grant an order for an injunction.

18. A perusal of the application filed on 23rd June, 2015 shows that the appellant attached to his supporting affidavit dated 11th March, 2015 a copy of the agreement marked as JMO-1, in which he agreed to guarantee the 2nd respondent for an overdraft facility of a maximum amount of Kshs. 850,000/= exclusive of interest and other costs and expenses as set out in the overdraft facility. The appellant offered his shares held in CDSC account No. [particulars withheld].

19. Clause 4(f) of the agreement provided for a joint and several guarantee and indemnity in the 1st respondent's favour from Mr. Benard Mwilu and Mrs. Lydia Mawia Mwilu (individually referred to in the letter as a **"Guarantor"** and together as the **"Guarantors"**) being all the Directors represented to the 1st respondent as the Directors of the Borrower as of the date of the agreement in securing Ksh. 850,000/= plus interest from the date of demand and other sums.

20. Clause 4(g) provides for the continuous personal guarantees and indemnity of Mr. Joash Machiegwa Orina (appellant) for a total of Kshs. 850,000/= and clause 6(a) provides that interest on the overdraft facility will be calculated on daily cleared balances debited monthly by way of compound interest at Base Lending Rate (BLR) then at 20% p.a. plus 2% p.a. effective rate of 22% per annum. The 1st respondent reserved the right on its sole and absolute discretion to vary the basis on which interest shall be calculated from time to time and/or vary the rate of interest above that stated at any time or from time to time to such other per annum rate commonly chargeable by banking and financial institutions in Kenya from time to time. The clause has a rider that the 1st appellant's decision shall not be questioned by the borrower on any account whatsoever and failure by the 1st respondent to advise the borrower shall not prejudice its right to recover interest charged subsequent to any change. The agreement has a default interest rate of 10% p.a. over and above the Base Lending Rate.

21.Clause 11(k) provides that if any of the guarantors fails to pay on the due date any money or fails to discharge any obligation or liability payable by any of them under any security given by them, the 1st respondent shall be entitled to call in the facilities immediately and enforce any or all of the securities.

22. Clause 19 provides that any notice given or made by the 1st respondent to the borrower and/or guarantors shall be deemed to be made and served; **and under paragraph (d) thereof, if posted, three (3) Business days after posting provided that proof is given that the Notice was properly addressed and adequately stamped and put into the post.** (emphasis added).

23. A perusal of the Lower Court file does not yield the replying affidavit that the 1st respondent relied upon to respond to the application in issue. The Record of Appeal at page 58 however contains a copy of the said document that was filed in court on 22nd July, 2015. A rubber stamp on the said document shows that it was received by the appellant's law firm on the same day. The court will therefore consider the contents of the said affidavit.

24. In paragraph 23 of the said affidavit, the deponent Sukesha Dabholkar deposes as follows:-

> ***"That it is shown to me the documents aforementioned paginated 1 …..which I produce in bundle (sic) as an exhibit collectively marked as "SD1 …."***

This court however notes that not a single document is attached to the said affidavit. There are therefore no documents to show that the 1st respondent gave notice of sale of the guaranteed lien to the appellant and or the 2nd respondent in terms of clause 19 of the agreement. The shares that were to be sold belonged to the appellant, no letter addressed to him specifically was displayed before the court.

25. As submitted by Counsel for the appellant, it was strange that the 1st respondent gave instructions to Dyer and Blair to sell shares belonging to the appellant on 6th March, 2015 yet the letter notifying the 2nd respondent of the intended sale of the appellant's shares was written on 9th March, 2015.

26. I have perused the authorities cited by Counsel for the appellant and the respondent. It is my finding that the case of **Giella vs Cassman Brown & Co. Ltd.** (supra) is applicable to the circumstances of this case and had the learned Magistrate applied himself properly to the evidence laid out before him, he would have found that the appellant did establish that he had a prima facie case for grant of an interim injunction.

27. In the case of **Mrao vs First American Bank of Kenya Ltd. & 2 Others** [2003] eKLR, the Court of Appeal when considering what amounts to a prima facie case stated thus:-

> ***" 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."***

28. The Court of Appeal in **Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 others,** [2015] eKLR, cited the decision of **Nguruman Limited vs Jan Bonde Nielsen & 2 others** CA No. 77 of 2012, where the court held thus:-

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

29. On the second principle of irreparable loss, this court takes judicial notice of the fact that shares are unique in that they can either appreciate or depreciate in value. I hold that the appellant might suffer irreparable injury if an injunction is not granted as once his shares are sold, he might be unable to recoup them at the same value from the open market.

30. As the appellant's Counsel rightly put it no statement of account was exhibited as having been sent to the appellant to show how the amount of Kshs. 2,804,995/= referred to in paragraph 15 of the replying

affidavit was arrived at. The issues of whether the only amount recoverable from the appellant is Kshs. 850,000/= or more can only be brought out by giving the parties hereto an opportunity to argue their respective cases at the main hearing. The balance of convenience therefore lies in favour of the appellant.

31. Although the Counsel for the appellant and respondent availed a bundle of authorities, after perusal of the same. I am of the view that only four authorities, that of **Giella vs Cassman Brown** (supra), **Mrao vs First American Bank of Kenya Ltd. & 2 Others** (supra), **Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 others** (supra) and **Northshire Holdings Ltd. & Another vs Austed Holdings Ltd. Inc** (supra), are applicable to the circumstances of this case. Contrary to the submission of Counsel for the appellant, the principles that apply for grant of the orders for an injunction remain unchanged even if the case in issue is one of a guarantor *vis a vis* a creditor. The only variance would be the subject of the dispute and the facts relied upon by each party.

32. The end result is that the appeal is hereby allowed and a temporary injunction is hereby granted restraining the 1st defendant/1st respondent either by themselves or agents, servants, representatives or any other person from selling the shares in issue pending the hearing and determination of Mombasa SRMCC No. 433 of 2015. The appellant shall deposit security in the sum of Kshs. 850,000/= in court within 30 days. Costs are awarded to the plaintiff/appellant. The case in the lower court shall be heard by any other Magistrate, save for Hon. Karani, Resident Magistrate.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **6th** day of **April, 2017**.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

Mr. Mwawasaa for the respondent

Oliver Musundi - Court Assistant