



**P.J. Dave Flowers Limited v Limuru Hills Limited & 2 others (Civil Appeal
123 of 2019) [2022] KECA 129 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 129 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 123 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
FEBRUARY 18, 2022**

BETWEEN

P.J. DAVE FLOWERS LIMITED APPELLANT

AND

LIMURU HILLS LIMITED 1ST RESPONDENT

ASL CREDIT LIMITED 2ND RESPONDENT

ESTATE OF THE LATE ISHMAEL ELIJAH MURIITHI 3RD RESPONDENT

(Being an Appeal arising from the Ruling and Order of the Environment and Land Court at Malindi (Olola, J.) delivered on 17th July 2019 in ELC Case No. 218 of 2017)

JUDGMENT

1. This appeal arises from orders granted by the Environment and Land Court (ELC) on two applications filed therein by P. J. Dave Flowers Limited, the Appellant herein, and ASL Credit Limited, the 2nd Respondent herein respectively, as well as on a Preliminary Objection raised to the 2nd Respondent's application by Limuru Hills Limited, the 1st Respondent herein. The 3rd Respondent, the Estate of Ishmael Elijah Muriithi, which had been joined as an Interested Party in the trial Court, opposed the 2nd Respondent's application while supporting the Appellant's application. The ELC in its ruling (Olola, J.) dismissed the Appellant's application and the 1st Respondent's Preliminary Objection, and allowed the 2nd Respondent's application.
2. The facts giving rise to the ruling were as follows. The Appellant had by way of a Notice of Motion application dated 13th November 2017 sought orders of injunction and inhibition to restrain the Respondents from dealing with, disposing or alienating the suit premises and from any further dealings whatsoever in respect of the suit premises. The application by the 2nd Respondent, dated 3rd May 2018, on the other hand sought orders that ex parte orders granted to the Appellant be discharged and/



- or set aside, and the Appellant's application dated 13th November 2017 and the suit against the 2nd Respondent be dismissed with costs, to be paid by the Appellant and 3rd Respondent.
3. The 1st Respondent filed a Notice of Preliminary Objection dated 4th June 2018 objecting to the 2nd Respondent's application on the grounds that it was an omnibus application, was disguised as one for discharge of an injunction order, and an abuse of the Court process. Further, that the application was incurably defective on account of the fact that affidavit evidence is expressly prohibited in such an application. The 3rd Respondent also filed Grounds of Opposition dated 4th June 2018 opposing the 2nd Respondent's application on similar grounds.
 4. The Appellant's suit and application in the ELC arose from an agreement of sale dated 1st September 2015, in which the 1st Respondent sold to it Beach House number 4 on Land Reference Number 350/III/MN, Kilifi (herein after "the suit premises") at a cost of forty-three million shillings (Kshs.43,000,000/-), which was to be paid in full upon execution of the agreement of sale. The 1st Respondent failed to complete the project and to give the Appellant a sub-lease in respect of the said beach house, despite having been paid the purchase price in full. Further, the Appellant learnt of an encumbrance created by the 1st Respondent in favour of the 2nd Respondent in respect of the suit premises worth Kshs.182,695,880/- and USD 285,513/.
 5. In addition, that there was a caveat by one Martha Muriithi claiming a purchaser's interest in villas 3 and 5 on the suit premises, which was registered on 25th August 2017. It was argued that the 1st Respondent entered into a contract of land without disclosing a material condition about the title or getting the consent of the 2nd Respondent to whom the property was charged. The Appellant was anxious that it would lose its claim over the beach house thereby causing it irreparable damage. The ELC granted the Appellant a temporary order restraining the Respondents from dealing in the land on 7th February 2018, upon the filing of its application.
 6. The 2nd Respondent's case was set out in a supporting and replying affidavit both dated 22nd February 2018, and a further affidavit dated 8th August 2018, which were all sworn by Raman Modh, its head of Credit. The 2nd Respondent contended that the Appellant failed to exercise due diligence and ought to have known about the charge created over the suit premises, hence could not claim to be an innocent purchaser for value without notice. Further, that the Appellant and the 3rd Respondent were guilty of laches, since the charge was registered on 11th August 2019 and they never brought their alleged claims to Court. Moreover, the 1st Respondent having defaulted in their payment obligations, the 2nd Respondent issued the requisite notices under the Land Act and the Auctioneers Act in readiness to exercise their statutory power of sale, and unless the ex parte orders granted to the Appellant were set aside, they stood to suffer irreparable damage as the debt stood at Kshs.437,519,286.00 and continued to accrue late payment charges at 5% per month.
 7. In addition, that the Appellant obtained the ex parte orders through deceit, misrepresentation and without disclosing that the Appellant had placed a caveat on the suit premise on 18th October 2017, while there was an existing charge in favour of the 2nd Respondent. The 2nd Respondent further deponed that the statutory power of sale had crystalized and the process did not need the ELC to sanctify it. They denied being party to and were unaware of the allegations of fraud, as the alleged sale transactions were done after the registration of the charge and without the consent of the 2nd Respondent.
 8. The 2nd Respondent concluded that the Appellant did not have a reasonable cause of action and would not suffer prejudice should the order of injunction be set aside and it is allowed to exercise its statutory power of sale as the outstanding balance of the debt outstripped the value of the security under the



charge, and it would suffer immense prejudice and loss as the Appellant had not demonstrated ability to settle the outstanding amounts.

9. The Appellant filed a replying affidavit sworn by Hitesh Pravin Dave on 28th May 2018, in response to the 2nd Respondent's application, and contended that the said application disclosed no cause of action, since the 2nd Respondent had no recognizable interest in the suit premises capable of being enforced by the ELC, as the 2nd Respondent's debt was a commercial debt that did not involve the use of the land, and was based on recovery of a debt from a charge. Further, that no evidence had been tendered by the 2nd Respondent to show the amount of debt or that the notices to sell were issued to the 1st Respondent. The Appellant further claimed that it was a victim of fraud as the 1st Respondent borrowed money without disclosure to either the 2nd Respondent or the Appellant and the 1st Respondent delayed in executing the sale agreement intentionally.
10. The Appellant maintained that their cause of action was valid as envisaged in Order 40 of the Civil Procedure Rules, 2010 in respect of seeking injunctive relief, and that it had both a beneficial and contractual interest capable of enforcement by the ELC by virtue of its constitutional jurisdiction. The Appellant also urged that there was need to carry out valuation on the suit premise so as to ascertain the current market value before withdrawing, varying and/or discharging the injunction. In addition, that the injunction in force was justified and the Appellant would suffer irreparable damage if it was discharged, whereas the 2nd Respondent sought to recover a debt and could be sufficiently compensated.
11. After hearing the parties, the ELC held that the Appellant did not fall under any of the categories of persons under Section 103(1) of the *Land Act* who can apply for relief against the exercise by a chargee of any of the remedies available to it under the said Act, to warrant the grant of an injunction against the exercise of the 2nd Respondent's statutory power of sale. Further, that the grant of the orders sought by the Appellant would clog the 2nd Respondent's statutory power under the charge, and the Appellant's claim ranked inferior to the 2nd Respondent's claim on the suit property and cannot therefore take precedent thereof.
12. The Appellants were aggrieved by the said decision, and lodged a Memorandum of Appeal dated 26th September 2019, in which they raised thirty-eight (38) grounds of appeal on the findings made by the ELC, which were challenged along three broad areas. Firstly, the jurisdiction of ELC to hear and determine the 2nd Respondent's application which was of a commercial nature; secondly the exercise of the ELC's discretion to strike out the Appellant's suit against the 2nd Respondent at interlocutory stage in light of the issues raised by the Appellant, and thirdly the threshold for grant and discharge of an interlocutory injunctions. These are also the main issues that arising for determination in this appeal.
13. As this is a first appeal from the decision of the ELC, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123*, where it was stated that an appeal to this Court is by way of retrial, and the principles upon which this court acts in such an appeal are that it must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this Court is not bound to follow the trial judge's findings of fact if it appears either that they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja [1986] KLR 661*.

14. In addition, as the present appeal is against an order made in the exercise of judicial discretion, this Court will only interfere if it is shown that the discretion was exercised injudiciously. The principles



that guide the appellate court in the exercise of this mandate were set out in *Mbogo & Another vs Shah (1968) E.A. 93 at 96* as follows:-

“ An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

15. The appeal was heard on 9th November 2021, with learned counsel Ms. Mureithi appearing for the Appellant, learned counsel Ms. Kageni appearing for the 2nd Respondent, and learned counsel Mr. ole Kina appearing for the 3rd Respondent. Counsel for the 1st Respondent was not present, although served with the hearing notice. Ms Mureithi urged her case based on written submissions dated 3rd November 2021, and Mr. ole Kina submitted that he would adopt the said submissions and that he supported the appeal. Ms. Kageni on her part relied on written submissions dated 8th November 2021.
16. On the first issue on the ELC’s jurisdiction, the Appellant’s counsel urged that the said Court erred by exceeding its jurisdiction, and drew this Court’s attention to Article 162 (2) (b) and (3) of *the Constitution* and Section 13 of the *Environment and Land Court Act* no. 19 of 2011 to submit that the ELC entertained the 2nd Respondent’s claim on a commercial debt yet the registered charge had nothing to do with the use of land, and exceeded its jurisdiction by entertaining a chargee’s claim. Reliance was placed on the decision of this Court in *Cooperative Bank Limited vs Patrick Kang’ethe Njuguna & 5 others [2017] eKLR* that the jurisdiction of the ELC to deal with disputes from contracts incidental to the use of land does not include those relating to mortgages, charges, collection of dues and rents, which fall within the civil jurisdiction of the High Court. Reliance was also placed on the case of *Joel Kyatha Mbaluka t/a Mbaluka Associated vs Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR* where the position in *Cooperative Bank Limited vs Patrick Kang’ethe Njuguna (supra)* was reiterated.
17. The 2nd Respondent on her part submitted that the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (supra)* (hereinafter “the Cooperative Bank Case”) was distinguishable from the present case, on the ground that in the *Cooperative Bank Case*, the chargor had sued the chargee claiming an outstanding loan amount which was inflated, and the chargee failed to issue the requisite statutory notices prior to commencing the sale process. However, that in the instant case, the issue before the ELC was whether the Appellant’s unregistered rights as an innocent purchase for value ranked superior to the chargee’s rights secured under a registered charge, and its statutory rights of sale. In addition, there existed no dispute as to the creation of the charge or the process leading up to the sale by the charge including issuance of the statutory notice. The 2nd Respondent stated that the Appellant misconstrued the Cooperative Bank Case to mean that once there is a mention of a charge document before the ELC, then that Court should down its tools for want of jurisdiction.
18. It is necessary to clarify the issues that were before the ELC for consideration, in determining whether the said Court had jurisdiction or not. Both the Appellant and 2nd Respondent in this respect sought orders in relation to the Appellant’s application for an injunction against the 1st and 2nd Respondents in relation to dealings with the suit premises, and the 2nd Respondent in addition sought orders striking out the said application and Appellant’s suit against it. The Appellant was a purchaser of the suit property that was the subject of a charge, while the 1st Respondent was the chargor, and 2nd Respondent



the chargee. The Appellant therefore had no contractual relationship with the 2nd Respondent either in relation to the suit property or the charge.

19. The relationship between the parties and the prayers sought in the Cooperative Bank Case were distinctly different. The applicant therein was the chargor, who sought to restrain the chargee from placing advertisements for the sale of the suit properties therein by public auction or offering the said properties for sale by public auction or otherwise, and from taking any further steps in the exercise of its statutory power of sale. This Court found that this relationship arising from a charge had nothing to do with use of the land, and was limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor. Further, that a charge did not constitute use of land within the meaning of Article 162 of *the Constitution*, and the cause of action therein was not the validity of the charge, but a question of accounts.
20. In the present appeal, the Appellant clearly had an interest in the suit premises as a purchaser thereof, as did the 2nd Respondent who sought to dispose of the said property to realize its security. It is notable that it was held in the Co-operative Bank Case that the rights acquired by a chargee in land are limited to the realization of the security so advanced. Both parties therefore had acquired interests that conferred jurisdiction on the ELC to hear and determine the applications before it, and the ELC did not err in doing so.
21. On the second issue of the exercise of the ELC's discretion to strike out the Appellant's suit against the 2nd Respondent at interlocutory stage, the Appellant's counsel submitted that every person has a right to have any dispute resolved by the application of the law in a fair and public hearing before a court as enshrined in Article 50 of *the Constitution*, and that the trial Judge did not allow the Appellant to have its day in Court, nor have the opportunity to scrutinize and appreciate the sequence of how the interest in the subject property were created. Therefore, that this led to the exercise of discretion without due regard to all the facts tabled before the ELC, the issues raised relating to misrepresentation and deceit on the part of the 1st Respondent, and the documents relating to the dispute. Reliance was placed on the case of *Mbogo & Another vs Shah (1968) EA* for the proposition that this Court can interfere where there is a wrong exercise of discretion by a trial Judge.
22. The Appellant's counsel further submitted that the salient principles that apply in striking out of pleadings are that it is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleading. Reference was made to the decision in *D. T. Dobie & Company (Kenya) Ltd vs Muchina [1980] eKLR* for the proposition that nosuit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and that the court ought to act cautiously and consider all facts of the case. The Appellant concluded that the ELC departed from the facts placed before it and ignored the law in striking out the Appellant's suit, and instead focused on the 2nd Respondent's application, whose interest ought to have been ventilated at full trial.
23. The 2nd Respondent's counsel on her part made reference to the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR* to submit that once the application to strike out the suit was filed, the Appellant was bound by their pleadings and the introduction of the Memorandum of Understanding and the liability of the common advocates handling the transaction was an afterthought which the ELC was right in disregarding. Further, the Appellant was not able to defend its claim against the 2nd Respondent and instead focussed on the role played by the 1st Respondent, who purportedly cause a delay in executing the sale agreement. The 2nd Respondent urged that the ELC only dismissed the suit against the 2nd Respondent, and the Appellant will still have its day in court to prosecute the alternative prayer of refund.



24. It was the 2nd Respondent's position that in an application to strike out pleadings, the question addressed by the court is whether the pleadings raise a prima facie case. The 2nd Respondent submitted that it was not privy to the sale agreement between the Appellant and the 1st Respondent giving rise to the suit, and there was no likelihood that the trial Court would uphold the sale agreement over the registered charge, since the agreement was entered into after the creation of the charge. In addition, that the said agreement was in breach of sections 87 and 88 (g) of the *Land Act*, as it was entered into without the prior consent of the chargee and was therefore an illegality that Court could not enforce. Reliance was placed on the case of *Kenya Airways Limited vs Satwant Singh Flora [2013] eKLR* for this proposition.
25. The principles that apply to the exercise of the discretion to strike out pleadings are set out in Order 2 rule 15 of the *Civil Procedure Rules*, and various decisions of this Court including *Yaya Towers Limited vs Trade Bank Limited (In Liquidation) (2000) eKLR* and *DT Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR 1*. In *Kivanga Estates Limited vs National Bank of Kenya Limited [2017] eKLR*, this Court restated the applicable principles as follows:
- “Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former's discretionary power to strike out the pleading”.
26. Order 2 Rule 5 entitles a court to strike out a pleading if it discloses no reasonable cause of action or defence in law; it is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. We have perused the ruling by the ELC and note that these principles were neither considered nor applied in the determination of the application by the 2nd Respondent to strike out the Appellant's application and suit. On the contrary, the ELC proceeded to make definitive findings on the merits of the Appellant's and 2nd Respondent's respective cases without having heard the parties on the same, which was clearly in error. The Courts role, when invited to strike out a claim in limine on the ground that it is bound to fail, was explained in *Yaya Towers Limited vs Trade Bank Limited (In Liquidation) (2000)* as follows:
- “In such a case the court's function is limited to a scrutiny of the plaint. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the Court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success.”
27. The last issue before us is whether the threshold for grant and discharge of an interlocutory injunctions was met by the Appellant and 2nd Respondent respectively. The Appellant submitted that had the trial Judge exercised his discretion to preserve the suit premise till the trial, the Appellant could have demonstrated the fraud orchestrated by the 1st and 2nd Respondents as well as the omissions and negligence at play in the whole transaction by their common advocate. Further, that the reasoning that the Appellant's claim ranked inferior to the 2nd Respondent's claim was contrary to the law, as the Appellant's sale agreement did create a contract relating to an interest in the land though unregistered, while the 2nd Respondent's charge was a contract in relation to a commercial debt. Reliance was



placed on the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR* for the circumstances establishing a prima facie case.

28. The 2nd Respondent on the other hand submitted that the Court made determinations on both the application of temporary injunction and the application to dismiss the suit simultaneously as they raised similar issues. Further, that the said Court was right to dismiss the application as it did not meet the threshold to warrant issuance of such orders, and reliance was also placed on the case of *Mrao Ltd vs First American Bank of Kenya and 2 others (supra)* on the requirements of a prima facie case. According to the 2nd Respondent, the Appellant does not fit the definition of a bona fide purchase for value as described in the case of *Mukiri vs The Attorney General & 4 Others [2017] eKLR*, namely, a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. In this regard that the Appellant had not provided proof of title to the house claimed; consent obtained from the chargee prior to entering the sale agreement; the fraud involved or pleaded; the purchase price allegedly paid and finally, the 1st Respondent could not sell any of the houses erected on the said property without the consent of the 2nd Respondent as the title was encumbered.
29. Reliance was also placed on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others CA No 77 of 2012* where the Court held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The 2nd Respondent concluded that the Appellant was an incompetent party within the meaning of section 103 (1) of the *Land Act* to apply for an order of injunction against a charge.
30. It is trite law that a party seeking the issuance of interlocutory injunction must show a *prima facie* case with a probability of success. In addition, 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. If the Court is in doubt, it will decide an application on the balance of convenience as held in *Giella vs Cassman Brown [1973] E.A. 358*. A *prima facie* case was defined in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Other [2003] eKLR* as follows:

“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.”
31. The ELC in this regard found that the Appellant did not show that their purchaser’s interest had been registered on the title of the suit property by the time the charge against the said property was registered. Further, that its caveat was registered on the title two years after the date of the charge and could not take precedence over the charge. Therefore, that the Appellant could not apply for relief against the 2nd Respondent under section 103 of the *Land Act*.
32. In our view, these are final findings which the ELC could not make at an interlocutory stage, and it was sufficient for purposes of a prima facie case, for the Appellant to demonstrated that it entered into a sale agreement over a house in the suit property and had paid the purchase price in full. In addition, the irreparable damage and inconvenience it would suffer in the event the said property was sold also justified interim relief pending determination of the issues arising in the suit. The ELC therefore did err for these reasons in dismissing the Appellant’s application for an injunctive relief, and allowing the 2nd Respondent’s application as regards discharge of the injunction.
33. Be that as it may, we were informed during the hearing of this appeal by Ms Kageni that the suit property has since been sold in realisation of the 2nd Respondent’s security, and this position was not disputed by Ms. Mureithi. The Appellant’s application and prayers for an injunction and inhibition have therefore been overtaken by events. We will accordingly for this reason, only set aside the orders



made by the ELC that the Appellant's suit against the 2nd Respondent be struck out, and the said suit shall be and is hereby reinstated and shall proceed to full hearing in the ELC. The Respondents shall meet the Appellant's costs of the appeal.

34. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

