



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO (P), GATEMBU & M'INOTI, JJA)

CIVIL APPEAL NO. 39 OF 2019

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

AND

JUJA COFFEE EXPORTERS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Malindi (Olola, J.) dated and delivered on 31st January, 2019)

in

Malindi ELC Case No. 90 of 2017)

JUDGMENT OF THE COURT

1. In a ruling, the subject of this appeal, delivered on 31st January 2019, the Environment and Land Court (ELC) (*Olola, J.*) allowed the respondent's application dated 19th April 2017 made under Order 40 of the Civil Procedure Rules and restrained the appellant, National Bank of Kenya Limited (the Bank), by orders of temporary injunction, from selling or dealing with a property known as Title Number Lamu/Block IV/2 in exercise of its statutory power of sale.

2. In this appeal, the Bank complains that the grant of those orders by the ELC constituted a wrong exercise of judicial discretion and has urged this Court to set them aside. Bearing in mind that the grant or refusal of a temporary injunction involves exercise of judicial discretion, the test applicable in determining whether the Bank's complaint is justified is whether it has demonstrated to our satisfaction that the learned Judge of the ELC misdirected himself in law, misapprehended the facts, took account of considerations which he should not have, failed to take into account considerations he should have, or that his decision is plainly wrong. In *Mbogo & Another vs. Shah [1968] E.A. 93* at page 96, Sir Charles Newbold P. stated that:

“...a Court of Appeal 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 in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

3. We cannot, therefore, interfere with an exercise of judicial discretion unless it is shown that the discretion has not been exercised judicially. See also *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898*. What then are the circumstances here?

4. Based on the material before us, the background in brief, is that in October 2013 and February 2016, the respondent, Juja Coffee Exporters Limited (the borrower), was at its request granted banking facilities in the amount of USD 29,700,000.00 in the form of overdraft, pre-shipment and postshipment financing secured by, amongst other securities, a legal charge and further charge dated 4th February 2014 and 12th May 2014 (the securities) respectively over a property known as Title Number Lamu/Block IV/2 (the charged property) registered in the name of Lamu Ginners Company Limited (the chargor).

5. According to the Bank, the borrower defaulted in the repayment of the facilities and as of 21st April 2017, the outstanding debt due

and owing stood at USD 37,552,678.18 and Kshs.12,296,289.49 with interest continuing to accrue. The Bank asserts that on account of default in the repayment of the facilities it embarked on exercising its remedies under the securities; it issued a 3 months statutory notice on 28th December 2015 and upon expiry of that notice it issued a 40 days statutory notice after which it became entitled to exercise its statutory power of sale; that thereafter other notices were given including the 45 days auctioneers' notice; advertisements were done and valuation of the property undertaken with a view to holding a public auction.

6. In a bid to stop the Bank from selling the charged property, the borrower filed suit before the ELC on 21st April 2017 seeking declaration that the notification of sale was irregular, null and void; an order for cancellation, revocation or setting aside of the notification of sale; and an injunction to restrain the Bank from selling the charged property. In the alternative, the borrower sought an order, "*that the parties do engage in a negotiation for a structured consent settlement.*".

7. Alongside the plaint, the borrower presented an application by Notice of Motion to the ELC on 21st April 2017 seeking temporary restraining orders that were granted in the impugned ruling despite opposition by the Bank.

8. The suit and the application for temporary injunction were based on the grounds that the principal director of the borrower, Ahmed Tahir Sheikh Said, described as "*the primary decision maker*" and the person "*who held a majority stake in the company*" and as "*the face and contact*" of the borrower died on 10th January 2017 following illness; that the Bank was made aware of the death despite which it "*wrongfully, unlawfully, in bad faith and in breach of contract*" proceeded to issue the notification of sale with a view to selling the charged property by auction. The borrower also contended that despite its advocates' letters to the Bank to stop the sale pending a meeting between representatives of the parties, and despite requests for copies of security documentation, the Bank refused to stop the sale.

9. In granting the temporary orders stopping the Bank from exercising its statutory power of sale, the learned Judge expressed that it was apparent that the borrower obtained banking facilities from the Bank on the basis of which the Bank "*apparently registered a legal charge*" over the charged property in the name of the chargor; that in the circumstances of the case, the Bank should have endeavoured to supply the borrower with documents relating to its financial dealings with the Bank because it did not deny "*that at all material times, they were dealing with the founder and primary contact*" of the borrower when the facilities were advanced; that from the material before him neither party "*is in a position to independently and authoritatively verify whether the said banking facilities were obtained and if so, under what authority*"; that there are legitimate questions raised by the borrower over the charge and "*there appears to be no proof of the existence of the same*"; that the borrower had "*raised a pertinent issue as to whether the charge was executed and whether the directors who did so had the ...authority to do so*"; that it was incumbent upon the Bank to demonstrate the existence of the same as well as the fact that it was properly executed by authorized signatories; and that as "*the existence of the charge and its authenticity remain in doubt*", and that "*pending its production, authentication and verification of the amounts due under it, the suit property ought to be preserved.*"

10. We have considered the appeal, the written submissions by Munyao Muthama & Kashindi and by Kilonzo & Aziz Co., Advocates for the Bank and borrower respectively, on which learned counsel Mr. Omondi and Miss. Mulwa relied.

In keeping with the long-standing principles in *Giella vs. Cassman Brown Co Ltd [1973] E.A. 358*, the grant or refusal of an interlocutory injunction is a matter of exercise of judicial discretion and an applicant is required to show a *prima facie* case with a probability of success; secondly, that it would suffer irreparable harm which would not be adequately compensated by an award of damage; and lastly if the court was in doubt, to determine the application on a balance of convenience.

11. As submitted by counsel for the appellant, the conclusions reached by the learned Judge on the basis of which the Bank was restrained from exercising its statutory power of sale are not, with respect, easy to understand. In the plaint and the witness statement sworn by Tauhida Tahir Said, a director of the borrower, it is expressly acknowledged that the borrower, a limited liability company, borrowed money from the Bank and as security a legal charge over the property was executed. In the plaint, the borrower also acknowledges the indebtedness to the Bank but expresses uncertainty as to the exact amount.

12. In short, the borrower, a limited liability company, acknowledged in its pleading that it applied and obtained banking facilities from the Bank; that the facilities were secured by a charge over the property; that the borrower "*does owe the [Bank] an outstanding amount*" though "*uncertain whether the amount is as claimed by the [Bank]*". In the affidavit sworn in support of the application by Tauhida Tahir Said, a director of the borrower, it is expressly deposed that "*the Bank undertook to grant to [the Borrower] at the latter's request, certain banking facilities*" and that "*as security for the said borrowing, the Bank registered a legal charge over Title Number Lamu/Block IV/2...*"

13. Based on the pleading and depositions in the affidavit by the borrower's own director acknowledging the borrowing and the security given to the Bank for the same, we find that the learned Judge misdirected himself in proceeding on the basis that there was contest, either as to the borrowing or the execution of the securities. The existence of the legal charge was expressly admitted.

14. In restraining the Bank from pursuing its remedies under the legal charge, the learned Judge appears to also have been moved by the plea that one of the directors of the borrower, who was said to be the "*mover*" of the company and the principal director had died. Whereas the sympathy and compassion shown by the Judge may be commendable, it was not a sound legal basis for exercising judicial discretion in the manner that he did.

15. The claim that there was a contest as to the exact amount outstanding was also not a basis for restraining the Bank. Authorities for the proposition that a dispute on the outstanding loan should not scuttle the exercise by a chargee of its power of sale go back many years. See for instance *Habib Bank A.G. Zurich vs. Pop-In (Kenya) Ltd & 3 others [1995] eKLR* and also *John Nduati Kariuki t/a Johester Merchants vs. National Bank of Kenya Ltd [2006] eKLR*.

16. Satisfied as we are that the borrower did not meet the threshold in *Giella vs. Cassman Brown Co Ltd* (above) for the grant of interlocutory relief and persuaded as we are that the learned Judge misdirected himself in proceeding on the wrong basis that the legal charge was disputed, we need not address the other issues raised by counsel in their respective submissions.

17. We allow the appeal. The ruling and orders granted by the Environment and Land Court at Malindi on 31st January 2019 is hereby set aside and substituted with an order dismissing the respondent's notice of motion dated 19th April 2017 with costs to the appellant. The costs of the appeal are awarded to the appellant.

Dated and delivered at Nairobi this 5th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR