IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 46 OF 2016

BETWEEN

JOHN KIPRGUT KURGAT T/A JOPHIK ENTERPRISES.....APPELLANT

AND

GUARANTY TRUST BANK (KENYA) LTD.....1ST RESPONDENT

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

(An appeal from the ruling and order of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) made on 2nd *February 2016 in Eldoret ELC 431 of 2013)*

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JUDGMENT OF J. MOHAMMED, JA

1. By way of a chamber summons application dated 19th May 2005, filed in the Environment and Land Court, the appellant, **John Kiprugut Kurgat**, trading as Jophik Enterprises, applied for various orders, the main of which was an order of interlocutory injunction directed against Guaranty Trust Bank (Kenya) Limited and Leakey's Auctioneers, the 1st and 2nd respondents respectively. That order sought to restrain the respondents from selling, transferring or in any way interfering with the parcel of land known as **Tulwet/Tulwet Block 7 (Terige)/57** (the suit property) pending the hearing and determination of the appellant's counterclaim against Guarantee Trust Bank (Kenya) (the 1st respondent) and Leakey's Auctioneers (the 2nd respondent). The second order sought was that accounts be taken by an independent certified public accountant or financial expert appointed by the court in respect of the payments made to the 1st respondent by the appellant to ascertain the legality of the charges it had levied in respect of the current account number 1711800213 and loan account number 1774100022.

2. In a bid to show that there was a basis laid for the orders he sought, the appellant stated that he had a *prima facie* case with a probability of success. He claimed to have overpaid his debt to the 1st respondent by an amount of Kshs 975,683.65. The overpayment notwithstanding, the 1st respondent moved to exercise its statutory power of sale and caused the 2nd respondent to take steps to advertise the suit property for sale. The appellant contended that the intended sale was unlawful and amounted to a nullity for reasons: that since the statutory notice had been issued under the repealed Registered Land Act, the 1st respondent had not issued a valid statutory notice to the principal debtor.

3. Further, that the statutory notice issued was improper as it had not been served on the spouse of the chargor as required by the Land Act, 2012; in addition, the appellant stated that since he had repaid the loan amount in full, the 1st respondent did not have a chargee's interest over the suit property. The appellant further contended that the notification of sale that had been issued by the 2nd respondent was in violation of the Auctioneers Rules, 1997 for failing to indicate the amount to be recovered and finally, that the 1st respondent had levied illegal charges on the appellant's accounts.

4. The appellant urged the trial court to grant him the orders sought, arguing that an award of damages would not be an adequate remedy for the sale of the suit property as he would have been deprived of the suit property contrary to Article 40 of the Constitution of Kenya, 2010, and that the balance of convenience tilted in favour of maintaining the status quo in his favour.

5. The application was opposed by both respondents. The 1st respondent filed an affidavit sworn by Beatrice Ndurya, the Head of the 1st respondent's Credit Risk Management. She claimed that the application was an abuse of the court process as a previous application on similar grounds had been declined by the trial court. The 1st respondent further denied the allegation that the suit property was matrimonial property and contended that the notice of intention to sell the property was properly effected under the provisions of the Land Act 2012. The 1st respondent also denied that it had levied illegal charges on the appellant's account, or that the appellant had paid amounts in excess of the

debt due. It was the 1st respondent's contention that, as at 31st May, 2015 the appellant was indebted to it in the sum of Kshs 3,973,294.62, and that this sum continued to accrue interest at the rate of 27.75% until payment in full. The 1st respondent urged the court to dismiss the application, arguing that the appellant had not laid out a *prima facie* case with a probability of success and that the application was intended to defeat its exercise of its statutory power of sale.

6. The learned Judge (**Omwbayo, J**.) dismissed the application with costs. In his ruling, the learned Judge held that the suit property did not belong to the appellant; that the appellant had not shown how he would suffer should the suit property be sold; and that the application was *res judicata*, the issues raised therein having been determined on 30th September, 2014 by Munyao J, who allowed the respondents to proceed with the sale as long as they followed the correct procedure.

7. In addition, the trial court considered whether or not the appellant had laid a basis for the orders sought. Relying on the *locus classicus* case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358,*** the court found that the appellant had not demonstrated a *prima facie* case with a probability of success as he had not adequately shown that the statutory notice was not valid or that the 1st respondent owed him any money. Further, the court found that any damage that the appellant may suffer as a result of the sale could be adequately compensated by an award of damages.

The court therefore found that the appellant having admitted in the original suit that they were indebted to the 1st respondent, the balance of convenience titled towards dismissing the application.

8. Aggrieved by this decision, the appellant preferred this first appeal urging us to set aside the order of the trial court and in its stead allow the chamber summons application dated 19th May 2015, with costs. In his memorandum of appeal, the appellant sets out various grounds of appeal upon which he faults the ruling of the trial court. These grounds were expounded upon by the appellant in written submissions which were highlighted by the appellant's counsel, Mr. Mogambi during the hearing of this appeal.

9. On the issue of whether or not he had *locus standi* to apply for an injunction to halt the sale of the suit property, the appellant submitted that he had locus as he was the principal debtor and had been served with notices by the 1st respondent. He urged that Order 40 rules (1) and (2) of the Civil Procedure Rules allow a party to a suit to apply for an interim injunction at any point while the suit is pending.

10. The appellant further submitted that the issues raised were not *res judicata*. For this he relied on the decision of the court in ***Housing Finance Company of Kenya v J.N. Wafubwa (2014) eKLR*** in which this Court found that there could be special cases where *res judicata* would not apply. The appellant submitted that special circumstances were obtaining that would have allowed the court to depart from the doctrine of res judicata, which include the fact that as at the hearing of the application that had been brought by the registered proprietor of the suit property, the counter claim did not exist and that the respondents herein were not parties and as such the court did not have an opportunity to interrogate the issue of the suit property based on the notification of sale dated 20th March 2015.

11. The appellant maintained that he had a *prima facie* case with a probability of success. He reiterated the grounds relied upon before the trial court, and added that the 1st respondent did not serve the statutory notice in its name, that the notice was not served on the chargor's spouse of the chargor as required by law, that the notice did not conform to section 90 of the Land Act, and that the notification of sale was a nullity as it did not contain the amount of the debt that was to be recovered. He further contended that the 1st respondent violated section 44A of the Banking Act by levying illegal charges on the account. In support of this proposition the appellant relied on ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR.***

12. It was the appellant's submission that he had repaid the debt in full as shown in his forensic debt audit report, and this justified the order of injunction. Claiming that an award of damages would not adequately recompense his loss should the orders sought not be granted, the appellant submitted that the sale of the suit property was in violation of the law, and relying on the decision of this Court in ***Kairu Enterprises Ltd & 2 Others v Housing Finance Co of Kenya Limited (2006) eKLR*** as well as the persuasive decision of the High Court in **Joseph Siro Mosiomo v Housing Finance Company of Kenya Nairobi HCCC No 265 of 2007 (2008) eKLR**, the appellant submitted that damages cannot be an adequate remedy where there has been a violation of the law.

13. The appellant's final submission was on the application for taking accounts. On this the appellant submitted that he had established a clear case for the taking of accounts as he had demonstrated an overpayment to the 1st respondent. Counsel therefore urged us to allow the appeal with costs.

14. The respondents were represented by Mr. Makori and has filed their written submissions. It was their contention that the appellant did not have locus to seek the orders as he was not the registered proprietor of the charged property, and because of this, he could not demonstrate that he would have suffered irreparable, damage that could not be cured by compensation.

15. The respondents also maintained that the application was res judicata as the plaintiff in the original suit had filed a similar application seeking an injunction restraining the 1st respondent from selling the property. This application was directly and substantially in issue as the earlier one and it was between the same parties. The respondents submitted that the issues raised in the application were substantively decided by Munyao, J and as such the application the suit was res judicata.

16. The respondents further contend that the 1st respondent's power of sale had crystallized. The appellant had been granted a loan facility which was accepted and secured by the suit property. He failed to make good the demand to pay, and as such, the 1st respondent moved to realize the security. Further, the statutory notice under section 96(3) of the Land Act was properly served on both the appellant as well as the guarantor; it was properly issued under section 74 of the Registered Land Act, and any deficiencies with respect to the amount to be paid were curable by the fact that the notice had been preceded by the redemption notice which contained the outstanding amount.

17. The respondents denied that the appellant had set out a *prima facie* case with a probability of success and submitted that the main issue

that the appellant had was with the amount that was outstanding from him in respect of the debt and contended that this alone does not mean that a party has established a *prima facie* case that would warrant an order of injunction. Counsel urged us to dismiss the appeal with costs.

Determination

18. In an interlocutory appeal on the question of whether or not an injunction pending full hearing of a suit before a trial court ought to be granted, the trial court exercises judicial discretion, and it is trite law, as stated in ***Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR*** that:

> **" … an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court."**

19. The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited. In ***United* India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd *[1985] E.A 898,*** this Court set out these circumstances in the following terms:

> **"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."**

20. With these principles in mind, I now turn to address ourselves on the question whether we have a basis to interfere with the discretion of the trial Judge. The first issue I must consider is whether or not the application was res judicata as claimed by the respondents and held by the learned trial Judge. It is not in dispute that an earlier application seeking similar orders had been dismissed by Munyao, J. The appellant urged the Court to consider that at the point this application was heard and determined, the respondents were not parties to the suit. This is clearly not the position as the 1st respondent was a party to the suit as the 1st defendant while the appellant was the 2nd defendant. The parties in the earlier application were therefore the same as those in the application eventually brought by the appellant.

21. In addition, the substance of that application concerned the exercise of the 1st respondent's statutory power of sale in order to realise its security, which is the same matter that was canvassed before the application that eventually led to the present appeal. On our part, we are satisfied that the trial court did not err in finding that the issues raised in the application were res judicata.

22. According to the appellant, there are instances where the doctrine of res judicata would not apply, and for this proposition he relied on the decision of this Court in ***Housing Finance Company of Kenya v J.N. Wafubwa (supra).*** In that appeal, this court defined a matter that is res judicata in the following terms:

> **"For the doctrine of res judicata to apply, the matter must be 'directly and substantially' in issue in the previous and in the former suit and the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit."**

23. This Court, quoting the English decision of **Henderson vs. Henderson (1843-60) ALL ER 378** stated that there could be special circumstances that would allow departure from the doctrine of res judicata. I find that there were no special circumstances that would have justified such departure.

24. I turn to consider if the appellant had locus to bring the application. Ancillary to this is the question whether the appellant laid out a basis for the grant of the orders of injunction. In **Nguruman Limited v Jan Bonde Nielsen & 2 others *[2014] eKLR***, this Court noted that:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
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> **a. establish his case only at a prima facie level,**
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> **b. demonstrate irreparable injury if a temporary injunction is not granted, and**
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> **c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.**
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> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.**

25. In considering whether or not the respondents have a *prima facie* case the Court must caution itself not to make a final finding on the basis of the material that is before the Court as the main suit is still pending before the Environment and Land Court. On this I am guided by the sentiments of this Court in ***Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)*** where the Court stated that:

> **"Ordinarily, this Court would not express any concluded view on the dispute between the parties and must not also form a distinct impression as to the merits of the suit at this stage since such determination is reserved for the trial court after the interlocutory appeal has been disposed of."**

26. In our view, the fact that the appellant was not the registered owner of the property did not, of itself, mean that he had no locus. I agree that an applicant in an interlocutory application for injunction does not need to establish title to the property. This Court in ***Nguruman Limited v Jan Bonde Nielsen & 2 others (supra) pronounced itself on this issue as follows:***

> **"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."**

27. I now turn to consider whether or not the appellant set out a *prima facie* case with a probability of success. It is well settled that a *prima facie* case is one that raises substantive issues that ought to be canvassed before a trial court. In the words of this Court in ***Mrao Ltd V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125***,

> **"In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie *case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***

28. The main grounds raised by the appellant relate to the validity of the statutory notice. The first complaint is that it was not served on the spouse of the registered owner; however, there is no indication that the charged property was in fact matrimonial property, or that his spouse was aggrieved by the intended sale of the property. I need not say any more on this allegation to show that it is unmerited.

29. With regard to the questions on the validity of the statutory notice, I have perused the relevant documents contained in the record of appeal and have ascertained that the statutory notice was not defective as to warrant a grant of injunction. Indeed prior to his filing the application, there was no assertion from him that the statutory notice was improper. As matters stand, the record bears out the position that the 1st respondent had a valid interest in the property and was moving to realize the security in line with this charge.

30. Further, the appellant's assertion that he has since repaid the amount due to the 1st respondent is one for the trial court. This Court has held that a dispute in the amount owed is not enough to grant an order of injunction in ***J. L. Lavuna and Others v Civil Servants Housing Co. Ltd. & Another [1995] eKLR.***

31. I have considered the application and the appeal alongside the rival submissions of counsel for the parties and I find no fault in the conclusions reached by the trial court. I am also satisfied that the learned Judge did not have to consider if the appellant had laid a basis for the grant of the orders of injunction once it found the issue was res judicata. On my part, I have also found that the application for an order of accounts as well as the allegations of improper charging of interest would be best determined by the trial court where the appellant can lay out his evidence on the same.

32. In the result, I am satisfied that the trial court exercised its jurisdiction properly and reached the proper conclusion. I therefore decline the appellant's invitation to interfere with the learned Judge's decision. The appeal is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of April, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, JA

I have read in draft the judgment of J. Mohammed, JA and I am totally in agreement that the learned Judge of the Environment and Land

Court properly exercised his discretion in declining to issue the order of injunction as the appellant failed to satisfy the conditions upon which such an order could issue.

I concur that this appeal should be dismissed with costs.

Accordingly, the orders shall be as proposed by J.

Mohammed, JA.

This judgment is delivered in accordance with **Rule 32(3**) of the Court Rules.

Dated and delivered at Nairobi this 3rd day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL