IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 356 OF 2012

BETWEEN

DELPHIN KANUU KAMAU ……..……..……..…….. APPELLANT

AND

FINA BANK LIMITED …….....…… RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nakuru (Wendoh, J.) dated 1st August, 2012

in

HCCC No. 227 of 2011)

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JUDGMENT OF KIAGE, J.A

This interlocutory appeal is against a ruling delivered on 1st August, 2012, by which Wendoh, J. dismissed the appellant, **Dolphin Kanuu Kamau's** application for injunction. The appellant had sought an interim order restraining the respondent, **Fina Bank Limited** from selling the property known as **Kiambogo/Kiambogo Block 2/8737**, (the suit property) pending the hearing and determination of Civil Suit No. 227 of 2011. That suit is in consequence of this appeal still pending at the High Court.

The essence of the appellant's complaint before that court was that the suit property had been advertized for sale by public auction on 25th August, 2011 over a loan facility advanced to one **Alice Nyambura Mburu** trading as Alinjueni Enterprises, which stood at Kshs. 1,283,875.18 as at 7th September, 2010. The said loan was secured by a charge over the suit property with the appellant as guarantor but she vehemently denied ever guaranteeing the said loan or pledging the suit property as security for its repayment. She supposed that her mother Roseline Mothea Murithia, with whom she had left the title document for the suit property, or persons allied to her may have, with the collusion of the bank's officers, presented and charged the said document without her knowledge or authority. She denied acknowledging or executing the charge instrument, terming it fraudulent, null and void.

The respondent opposed that application maintaining that it did, in fact, grant the financial facility to the borrower and that the same was secured by the charge, as well as the appellant's personal guarantee. Both were signed by the applicant before her advocate, one Fidelis Wambua Musembi. The applicant, on becoming aware that the suit property would be auctioned for non-payment, wrote to the respondent in her own hand on 5th August, 2011, praying for the cancellation of the sale to facilitate an amicable settlement. The applicant's bona fides and candour were questioned by the fact of her not making any criminal complaint against her mother, if it were true she unlawfully pledged the applicant's title, and the failure to join her in the proceedings.

Taking the view that the appellant had *"not demonstrated that she had a prima facie case with high chances of success"* and that she had not been candid with the court and so had not come before it with clean hands, the learned Judge dismissed the application.

That dismissal provoked this appeal in which the appellant complains that the learned Judge erred in; making final findings of fact on disputed affidavits; basing her decision on omissions that could well have been corrected later; failing to realize that the appellant's perceived non-disclosures were not material; failing to fully analyze the principles for granting injunctions; and finding that there were omissions and non-disclosures when there were none or, if there were, did not prejudice the respondent.

Submissions, lists and bundles of authorities were filed by the parties and highlighted by their learned counsel during the plenary hearing of the appeal. Going first, **Mr. Kanyi Ngure** for the appellant, contended that the learned Judge erred in failing to grant the sought injunction

pending suit seeing that the appellant had pleaded that there was no contractual relationship between her and the respondent in that she never signed any guarantee, and the suit property was fraudulently charged. He urged that the appellant having denied any knowledge of the advocate who allegedly attested had signature on the charge, the respondent should have brought an affidavit from the said advocate but did not do so. There were disputed facts which called for interrogation at trial and in the meantime an injunction ought to have been granted as the appellant had established a *prima facie* case that her title, left in the custody of the mother, was improperly charged.

Citing this Court's decision in ***LIFICO TRUST REGISTERED vs. PATEL [1985] KLR 538,*** counsel faulted the learned Judge for allegedly deciding weighty issues of law and fact on affidavits instead of awaiting trial, and also blamed her for refusing the injunction on the basis of the appellant's perceived non-disclosure, lack of candour and coming to court with unclean hands. To counsel, the appellant's failure to make a criminal complaint against her mother should not have been held against her as civil claims can be instituted and pursued independently of criminal proceedings.

Terming the appellant's case as *'solid and well-founded'*, counsel criticized the learned Judge for exercising her discretion wrongly and invited this Court to interfere with her decision, He rested by citing ***MBUTHIA vs. JIMBA CREDIT FINANCE CORPORATION & ANOR [1988] eKLR*** for the proposition that the facts herein having been disputed, the learned Judge ought to have considered balance of convenience, which should have favoured the appellant whose land was in danger of being auctioned. Counsel urged us to allow the appeal and grant the injunction.

On his part, **Mr. Denis Makori** the respondents' learned counsel reiterated that the appellant was guilty of non-disclosure as evidenced by her failure to report the alleged fraud to the police and her electing not to sue her mother, which entitled the court to infer that the allegations of fraud were mere red herrings. He also maintained that the appellant did write to the respondent seeking accommodations and opportunity to pay the outstanding amount. Referring to this Court's decision in ***FRANCIS J.K. ICHATHA vs. HOUSING FINANCE CO. OF KENYA LTD,*** Civil Application No. 108 of 2001, counsel asserted that the appellant having come to court with unclean hands, she was not entitled to the injunction.

It was further urged, on the strength of our decision in ***NGURUMAN LTD vs. JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR,*** that as the threshold principles for grant of injunction are to be dealt with sequentially, the learned Judge was right in not considering the balance of convenience once she found that the appellant had not established a *prima facie* case. Moreover, as the matter lay in the discretion of the learned Judge, counsel urged us not to interfere with her decision and instead dismiss the appeal.

Having given consideration to the arguments made and authorities cited, and carefully considered the record before us, it is worth recalling that as this is an interlocutory appeal, this Court must be careful not to make any firm conclusions on disputed matters as that would embarrass the trial court to which belongs the mandate of making those findings. I also remind myself that as the grant or decline of an injunction is a matter that lies in the discretion of the first instance court, our approach is necessarily deferential, and we interfere only on rare cases in which it is shown that the Judge misdirected himself and essentially abused discretion by misapprehending the law or misconstruing the facts; taking into account what he ought not to have considered or failing to consider what he ought to have taken into account; or, looking at the case as a whole, he was patently wrong. An appellate court would not be entitled to reverse the Judge on account only that had it been considering the matter itself, it would have arrived at a different conclusion. The discretion of the first instance court must not lightly be interfered with and the onus is upon the person seeking interference to demonstrate in what respect that court was blatantly at fault. See ***MBOGO vs. SHAH [1968] EA 93***; ***UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITERS (K) LTD [1985] EA 898.***

Bearing those controlling principles in mind, I note that in the present case the learned Judge took the view that the appellant had not established a *prima facie* case. She accepted the version of facts presented by the respondent and in particular that the appellant did, in fact, execute both the personal guarantee and the charge before her advocate. She also accepted that the appellant did, in fact write, pleading with the respondent to stop the auction sale and allow her to pay the sums outstanding on the debt. In so doing, she rejected as improbable the appellant's protestations of non-involvement and non-execution of those documents, and believed that the appellant was not candid about the alleged fraudulent charging of the suit property, to the respondent.

I think, with respect, that the learned Judge had cause enough to take the view of the matter that she did. It is the business of judges at every stage to draw inferences and arrive at conclusions over disputed facts. That is the essence of adversarial litigation where two sides are presented and the judge must choose which makes more sense, and is thus more believable. The appellant's mere denial of knowledge of the loan, and of execution of the charge document, was not enough to dislodge the signed documents in her name. The Judge thought, and with justification, that the appellant was economical with the truth. She took the view, and I for one cannot fault her for it, that had there been fraud or collusion involving the mother and others, the appellant would have made a report to the police, and would also have joined the mother in the suit. That she did not do so spoke volumes about and cast doubt on the bona fides of her claims of non-involvement in the loan and charge.

I am not prepared to find that the Judge misdirected herself in coming to that conclusion or that she acted perversely, in the circumstances. Injunctions are an equitable remedy and he who seeks them must do equity. He must be honest and forthright with the court and must not leave the impression that he is merely denying facts out of convenience. Knee-jerk denials of what seems obvious does not endear one to a court of equity. In the present case the learned Judge thought that the appellant was guilty of non-disclosure, and I think she had a reasonable basis for so holding.

I think that overally the learned Judge's approach in eschewing a consideration of the rest of the principles in ***GIELLA vs. CASSMAN BROWN [1973] EA 358***. Upon finding a *prima facie* case unestablished was proper although she ought not have spoken of one with *"high chances of success"* as all that is required is *'a probability'* of success. It is consistent with what we set out in **NGURUMAN** (supra). Once an applicant flounders on the first hurdle of *prima facie* case, the court need not consider the second hurdle whether damages are an adequate remedy, less still the third limb of balance of convenience.

The inevitable result of my foregoing reasoning is that I find this appeal to be devoid of merit, and would dismiss it with costs.

As Okwengu and Sichale, JJ.A are of the same opinion, it is so ordered.

Dated and delivered at Nairobi this 5th day of June, 2020.

P. O. KIAGE

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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 had the opportunity to read the draft judgment of **Kiage, JA** and I am entirely in agreement that this appeal is for dismissal. The learned Judge of the High Court properly considered the application before her, and gave reasons as to why she did not find it appropriate to grant the order of injunction that was sought.

The learned Judge was properly guided by the principles for granting an injunction and properly exercised her discretion. In the circumstances, there is no justification for this Court to interfere and the orders shall be as proposed by Kiage, JA.

The appeal is accordingly dismissed with costs.

Dated and delivered at Nairobi this 5th day of June, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

CONCURRING JUDGMENT OF SICHALE, JA

I have had the advantage of reading in draft the judgment of **KIAGE, JA**. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Nairobi this 5th of June, 2020.

F. SICHALE

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JUDGE OF APPEAL