IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 392 OF 2018

BETWEEN

CHAXTON GEOFFREY KAMAMI MAINA.....APPELLANT

AND

KCB KENYA LTD.....1ST RESPONDENT

JEED AUTO SPARES LTD.....2ND RESPONDENT

EDWARD MURIMI.....3RD RESPONDENT

ISHMAEL ELISHA ESIKOTE t/a HIGH CLASS AUCTIONEERS.....4TH RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Nairobi (**M. Kasango, J.**) dated 18th September, 2018*

in

HCCC No. 21 of 2017)

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JUDGMENT OF THE COURT

This is an appeal from a ruling of the High Court (**M. Kasango, J**.) dated 18th September, 2018 in which the appellant's application for an interlocutory injunction was dismissed with costs.

The brief facts leading to the present appeal are that in or about 2007 the appellant applied for a loan facility of Kshs. 2,400,000/- from the 1st respondent to enable him complete the purchase of a residential property known as L.R. No. 18111/53 Baraka Estate Phase II House No. D35 hereinafter, "*the suit property*". The loan was to be repaid in equal monthly instalments of Kshs. 33,390/- for a period of 15 years. The suit property was charged as security in the form of a first legal charge. The appellant fell into arrears and could not remit the agreed monthly instalments. On 25th August, 2016 he learnt that the suit property had been sold through a public auction by the 1st respondent in the exercise of its statutory power of sale.

Aggrieved, the appellant filed suit in the High Court of Kenya at Nairobi as well as an application for an interlocutory injunction to restrain the respondents from transferring or interfering with the appellant's occupation and ownership of the suit property. It was the appellant's case that he was not aware of any auction undertaken by the 1st respondent because he was neither served with the statutory notices of sale nor the auctioneer's notification of sale; and that the suit property was not advertised for sale in any event. Accordingly, the purported sale of the suit property by the 1st respondent, if at all, in exercise of statutory power of sale was illegal and fraudulent.

In response, the 1st respondent in its replying affidavit sworn by its Credit Support Manager, deposed that the appellant was served with the statutory notices of sale dated 18th January, 2015 and 4th May, 2015 by way of registered post. The respondent also annexed an affidavit of service sworn by one Michael M. Siloya, a process server, who deposed that he had served on the respondent the 45 days redemption notice and that he had posted at strategic places of the suit property, posters of the intended auction of the suit property. He also stated that he went to the suit property to serve the 45 days redemption notice on 6th May, 2016 at 9.30 a.m. and that he served the same on the appellant who was called outside from the suit property by a house help.

The learned Judge in making her determination noted that the appellant had not provided evidence from the post master general to confirm that the address used by the 1st respondent to send the said notices was not his address or that he did not receive the notices. Consequently, the court presumed on a prima facie basis that the notices were served upon the appellant. The court further observed that the appellant did not deny being served or that he was not at home on the day the process server alleges to have served him, nor did he request for the cross examination of the process server with regard to that service. (See **City Service Station v Jamreck Peter Njuguna [1989] eKLR).** The learned Judge further held that the appellant was required to meet the threshold of granting an injunction as set out in **Geilla v Cassman Brown and Co. Ltd. [1973] EA 358**, being that the applicant must establish a prima facie case with probability of success; that the applicant will suffer irreparable loss that cannot be compensated by an award of damages; and if the court is in doubt, it will decide the application on a balance of convenience. To the Judge, the appellant had failed to show a *prima facie* case with probability of success, having failed to show that the respondents did anything illegal or irregular in auctioning the suit property. Consequently, the appellant's application was dismissed with costs and the interim orders earlier granted were vacated.

Aggrieved by the impugned ruling, the appellant lodged the present appeal in which he raised 10 grounds to wit, that the learned Judge erred in law and in fact by: holding that the appellant had not established a prima facie case; failing to find that although the 1st respondent had filed affidavits of service, the same was contested by the appellant and the process server who effected service was not cross examined; failing to find that the purported auction did not meet the requirements of law; failing to consider the appellant's submissions on the doctrine of *lis pendens* thereby failing to order the preservation of land under the doctrine; failing to exercise her discretion in making an order for preservation of the suit property pending the hearing and determination of the suit; holding that the appellant did not have a genuine and arguable case; failing to consider all the issues raised by the appellant in both written and oral submissions made before her; ruling the way she did; failing to appreciate the relevant principles and case law in coming up with the ruling; and failing to give any due and proper consideration to the pleadings, evidence on record and submissions, and thereby making an erroneous ruling.

When the appeal came up for hearing, parties relied on their written submissions and opted not to highlight the same.

In his written submissions, the appellant questioned the validity of the auction by the 4th respondent and pointed out that the said auction did not meet the rules and regulations of the Auctioneers Act since the 4th respondent did not have a valid practicing certificate. He relied on the case of **Joseph Kamau Mwangi v Kenya Commercial Bank [2004] eKLR** in submitting that any action conducted by an unauthorized auctioneer was fatal to the exercise of statutory power of sale. He contended that he was not served with the mandatory statutory notice of sale in accordance with Section 97(2) of the Land Act and that no valuation was undertaken prior to the sale. The appellant further submitted that as at 31st October, 2016 the suit property was valued at Kshs. 14,000,000 by Shelter (M) Valuers Limited hence the suit property should have been sold at a minimum of Kshs. 10,500,000 being not lower than 75% of the market price as provided for under Section 97(3) of the Land Act. He was of the view that the suit property should not have been sold at Kshs. 8,000,000. Relying on the case of **Lucy Njoki Waithaka v Industrial & Commercial Development Corporation HCCC No. 321 of 2001,** the appellant maintained that he is likely to suffer irreparable loss as the suit property is his residential home and his rights will be breached; and that he has since remitted to the 1st respondent Kshs. 3,280,487.74/-which is more than the principal amount.

He urged us to allow the appeal and issue an order of temporary injunction in his favour.

In response, the respondents submitted that the appellant conceded that he was in arrears in the repayment of the loan. Further, that the appellant was served with all the statutory notices required. Consequently, sale by public auction of the appellant's suit property was carried out strictly in accordance with the law.

In determining this appeal, we are alive to the fact that the suit in the trial court is yet to be heard and determined. We must therefore exercise restraint in the pronouncements that we make in this judgment to avoid embarrassing or prejudicing the judge who will eventually hear and determine the suit.

We have considered the record of appeal, submissions by counsel and the law. Most of the grounds of appeal as well as the written submission are irrelevant to the matter at hand. They are best left to be ventilated before the trial court. The appeal arises from a decision of the High Court made on an interlocutory application in exercise of its judicial discretion and therefore the issue that we are called upon to determine is whether the learned trial Judge exercised his discretion judiciously when he withheld the injunction sought by the appellant, and lastly, whether the application met the threshold required for an interlocutory injunction to be granted.

In most instances, it is difficult to set aside a decision rendered by court in exercise of discretion. Considering that an injunction is a discretionary remedy, the circumstances in which the appellate court can interfere with the exercise of discretion by the lower court are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in **Mbogo and Another v Shah [1968] EA 93** it is satisfied that the decision of the lower court is clearly wrong:

> ***"It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Sir Charles Newbold in agreeing with the above finding stated thus:

> ***"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."***

Similarly, in **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898** the Court held *inter alia* that:

> ***"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 as at first instance, would or might have given different weight to that given by the Judge to the varies 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 consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."*** Emphasis ours.

Having gone through the record carefully, we are unable to say that the learned Judge in refusing to grant an injunction, abused her discretion by misdirecting herself in law, misaprehending the facts or that she took into account matters she should not have, or failed to take into account matters which she should have taken into account, and lastly, the decision though discretionary was blatantly wrong. The Judge appreciated what was required of her in an application of this nature and applied her mind to the application correctly. There is no basis upon which we can fault her.

Beyond the exercise of desecration, did the appellant meet the threshold for the grant of an interlocutory injunction? That threshold was set by the locus classicus case of **Giella vs Cassman Brown (supra)** as pointed out by the trial court. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012** this Court reiterated thus:

> ***"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 tests are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd versus Afraha Education Society [2001] Vol. 1EA.86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted irreparable, in other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no considerations. The existence of a prima facie case does not permit leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."***

The learned Judge in dismissing the appellant's application held that the appellant had failed to prove a prima facie case with a probability of success, that the 1st and 4th respondents did not do anything illegal or irregular in auctioning the suit property. A prima facie case was defined in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** as thus:

> ***"In civil cases a prima facie case is a case in which on the material presented to 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."***

It is clear that the appellant defaulted in repaying the monthly instalments agreed upon. Indeed, he concedes to this fact. Following the default, the 1st respondent exercised its statutory power of sale. The 1st respondent adduced evidence to the effect that the appellant was served with the statutory notice through registered post and physically at his home as was deponed to by the process server. The appellant did nothing to rebut this claim and also failed to ask that the process server be called so as to be cross examined on mode of service. Prima facie therefore the learned Judge may have been right in holding that the appellant may have been served with the statutory notices and auctioneer notification of sale. Based on the foregoing, can it be said that the appellant had established a *prima facie* case? We do not think so, and we cannot fault the learned Judge for coming to that consolation. **Lord Diplock** in the case of **American Cyanamid v Ethicon Limited [1975] AC 396** stated thus:

> ***"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."***

That notwithstanding, there can be no argument that the value of the suit property can be assessed and paid for by way of compensation in the event that appellant succeeds in the suit. The appellant already knows the value of the suit property through the valuation reports he tendered in court, in which case an award of damages would suffice.

In the result and for the reasons we have stated above, we have no reason to disturb the finding of the learned Judge. Accordingly, the appeal is bereft of merit and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 20th day of November, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb.

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR