IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & J. MOHAMMED, JJ. A)

CIVIL APPEAL NO 334 OF 2017

BETWEEN

PATRICK JAMES MBOGO.....1ST APPELLANT

JOSEPHINE MUKAMI MBOGO.....2ND APPELLANT

AND

BANK OF AFRICA LIMITED.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Tuiyott, J.)

delivered on 29th June 2017

in

H.C.C.C. No 346 of 2016)

****

JUDGMENT OF THE COURT

Background

1. This is an appeal against the ruling and order of the High Court (**Tuiyott, J),** wherein the learned Judge dismissed the application by **Patrick James Mbogo** (the 1st appellant) and **Josephine Mukami Mbogo,** (the 2nd appellant) for injunctive relief against **Bank of Africa Kenya Limited** (the respondent).

2. The background to the appeal as can be discerned from the plaint dated 24th August, 2016 is that by way of a letter of offer dated 13th December, 2011, the respondent offered the appellants a loan facility of Kshs 70 million against the following securities:

i) a first legal charge over the properties known as **Kajiado/Kitengela/22515**, **Kajiado/Kitengela/22516** and **Kajiado/Kitengela/22517** (the charged properties) which were registered in the appellants' names for Kshs. 45,000,000.00.

ii) a rental assignment deed over the charged properties in favour of the respondent bank and;

iii) a further legal charge over the charged property in the sum of Kshs 25,000,000.00 which was advanced to the appellants.

3. Trouble for the appellants begun when the respondent advertised the charged properties for sale by way of public auction in the exercise of its statutory power of sale in Daily Nation Newspapers of 6th August, 2016 and 22nd August, 2016. In response, the appellants filed suit in the High Court being **Civil Case No 346 of 2016**.

4. Contemporaneous with the suit, the appellants filed an application by way of motion on notice dated 24th August, 2016 seeking *inter alia* an order to restrain the respondent, either by itself, its servants, agents or any one of them from interfering with the charged properties in any way, either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever pending the hearing and determination of the main suit; an injunction restraining the respondent, either by itself, its employees, servants, agents or auctioneers from auctioning the charged properties as advertised in the Daily Nation Newspapers of 6th August, 2016 and 22nd August, 2016 pending the

hearing and determination of the application; and an order directing the respondent to provide properly reconciled accounts with respect to the loan facility, and remove all amounts levied illegally to wit, compounded interest, penalties and collection fees as well as costs of the application.

5. The grounds upon which these orders were sought were set out on the face of the application and in a supporting affidavit sworn by the 1st appellant. The 1st appellant set out the background of the loan facilities that were secured between the appellants and the respondent and faulted the respondent for improperly valuing the charged properties. The 1st appellant contended that the charged properties have been fully developed with commercial and residential houses which have an estimated market value of Kshs 150,000,000.00 but the statutory notices issued undervalued the property to the amount of Kshs 115,000,000.00; that this was a clear indication that the auctioneers and some bank officials were working in cahoots to undervalue the charged properties and dispose them to persons known to them at a throw away price; that the appellants have been repaying the loan, by way of instructions to an entity called **Masterways Properties Limited** to advance to the respondent the sum of Kshs 750,000.00, which had been paid.

6. The 1st appellant further contended that he and the 2nd appellant had made various proposals to the respondent towards resolution of the matter, and urged the respondent to take a further charge against the suit properties and to reduce the interest on the facility. The 1st appellant further urged the court to issue the orders as prayed as the respondent had acted with the intention of wrongfully grabbing the appellants' assets and prime properties; that the intended auction was being undertaken fraudulently; and that the appellants did not have crucial information on the loan, in particular the loan balance, the bank statements or any notices that are required to have been issued by law.

7. The respondent opposed the application by way of an affidavit sworn by **Samuel Irungu**, a recoveries officer at the respondent bank. Denying the averments by the appellants, the respondent contended that the interest to be charged on the facilities advanced to the appellants was 1.5% per annum below the Kshs Base Rate which amounted to an interest rate of 22.5%. The respondent further contended that by 2015 the appellants had failed to perform their obligations under the charge and further charge that had secured the facilities advanced to them, and as a result, the respondent issued three separate demands to settle the accounts. The respondent contended that all the demands were ignored by the appellants.

8. It was the respondent's further contention that arising from the appellants' failure to comply with the demands for payment, the respondent instructed its advocates to issue the appellants with a statutory notice under Section 90 of the Land Act, 2012. This notice, dated 15th April 2012 was delivered to the appellants by way of registered post on 16th April 2015. By this time, the amount owed to the respondent was in the sum of Kshs 85,181,290.76. It was the respondent's further contention that the appellants did not respond to the notice, but visited the respondent's Mombasa offices and made various promises to pay the aggregate amount owed to it. It was the respondent's further contention that the appellants eventually paid a part of the outstanding amount, but failed to pay the full amount as promised, leaving the sum of Kshs 79,029,403.88 unpaid. It was the respondent's further contention that in February 2016, it instructed its advocates to issue a statutory notice of sale dated 8th March, 2016 to the appellants to sell the charged properties by public auction which notice was delivered to the appellants on 9th March, 2016. Following expiry of the statutory notice of sale, the respondent instructed its auctioneers to sell the charged properties by public auction. It was the respondent's further contention that between June, 2016 and August, 2016, the appellants engaged the respondent in negotiations with a bid to agree on the payment of the outstanding amount. However, the appellants did not make good any of their promises and as such, the auctioneers were instructed to proceed to sell the charged properties by way of public auction. Based on these averments, the respondent argued that the appellants had not made out a case for the grant of orders of injunction, and urged that the application be dismissed and that the respondent be allowed to exercise its statutory power of sale.

9. Relying on the principles set out in ***Giella v Cassman Brown [1973] EA 358,*** the trial court considered whether or not the appellants had established a *prima facie* case with a probability of success. The trial court found that: the respondent's right to exercise its statutory power of sale had accrued; and that due to the fact that there were substantial variations between valuation statements submitted by both parties, there was need to have a joint valuation undertaken by the parties before the sale could take place. The trial court further found as follows:

> ***"The Court has found that there is an admission that the plaintiffs (the appellants herein) are in arrears, in other words, that they owe the Bank money that is due. There is evidence that the Statutory Notices required by Law have been served. Even if there is a legitimate dispute as to how much exactly is owing, the admitted amount is substantial and there cannot be valid ground to restrain the Chargee from exercising its statutory power of sale…This Court is unable to find merit in the Motion of 24th August, 2016 and does therefore dismiss it with costs."***

10. This ruling is the subject of this appeal. The appellants have raised several grounds of appeal, the salient ones can be summarized as follows: that the trial court erred in failing to appreciate that the applicant had established a *prima facie* case with a high probability of success to wit that: there were various issues determined by the trial court that could only be conclusively addressed during the main hearing of the suit; that the intended sale was illegal; that the respondent had breached the fiduciary duty it owed to the appellants; and further, that the trial court failed to appreciate that the appellants would suffer irreparable loss and damage should the respondent not be restrained from carrying out its statutory power of sale.

Submissions by Counsel

11. These grounds of appeal were expounded on in the appellants' submissions which were orally highlighted before us by learned counsel, **Mr. Kwengu** who appeared together with learned counsel, **Ms. Miya** for the appellants**. Mr. Kwengu** submitted that the appellants had presented a *prima facie* case as the law gave them the first right to redeem their property by paying the loan through financing secured through a different financial institution. However, the appellants were unable to exercise this right as the respondent failed to avail the necessary documents, such as computations on the charges as well as the amount outstanding, that would have enabled them pursue this option.

12. **Mr. Kwengu** further argued that the intended sale was illegal, as the appellants were not served with the requisite and mandatory notices. He faulted the trial court's finding that the appellants had admitted their indebtedness to the respondent, and argued that what had in fact transpired was that the appellants sought to know the extent of their indebtedness in order to enable them redeem their property. The

appellants further submitted that they did intend to redeem the charged properties by way of an arrangement entered into with **Paramount Bank Limited** who carried out a valuation on the charged properties and sought information as to the extent of the amount owed to the respondent. This information was not availed by the respondent thus implying bad faith on its part.

13. The appellants further submitted that they had satisfied the second limb for the grant of an order of injunction, which is that they would suffer irreparable harm should the intended sale proceed as the respondent advertised the charged properties at a grossly undervalued amount with a risk that the main suit would be rendered academic should the sale of the charged properties not be stayed. For these reasons, the appellants urged us to set aside the orders of the trial court and allow the instant appeal.

14. Opposing the appeal, **Ms. Ndirangu,** learned counsel for the respondent, argued that the appellants did not meet the threshold for the grant of an order of injunction on the grounds that the appellants did not demonstrate a *prima facie* case with a probability of success. Arguing that the appellants based most of their case on the issue of their equitable remedy of redemption, Counsel argued that the trial court properly addressed itself to the issue of statutory notices and found that they were duly served on the appellants. Counsel further submitted that the trial court also took cognizance of the fact that there were numerous discussions, negotiations and meetings that were held with a view to accommodating the appellants but these did not bear fruit. In view of this, the appellants' allegation that they were denied a right to redeem the charged properties was unsubstantiated. Counsel further urged that in any event, the respondent's right to exercise its statutory power of sale could not be restrained, and for this proposition cited **Halsbury's Laws of England, 4th Edition Vol. 32 Para 725** as follows*:*

> ***"…The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged."***

For this reason, the respondent urged us to find that the appellants did not make out a *prima facie* case that would warrant the grant of an interim injunction.

15. Learned counsel for the respondent further argued that having failed to satisfy the first limb, the issue of whether the appellants would suffer any harm did not arise. He argued that since the dispute between the parties was a claim for recovery of money that had been advanced by the respondent, any loss occasioned to the appellants could be adequately compensated by way of damages should the appellants be successful in their suit.

16. The respondent's final submission was that the balance of convenience tilted in its favour since the appellants had approached the court for an equitable remedy, but had done so with unclean hands. Counsel submitted that the appellants had authored a forged Court order in a bid to stop the sale of the suit properties by public auction. Counsel relied on the persuasive authority of ***Kyangavo v Kenya Commercial Bank Ltd & Another (2004) 1KLR 126*** for the proposition that "***he who comes to equity must come with clean hands and must also do equity."*** Urging us to take cognizance of the fact that the appellants had reneged on their payment obligations, the respondent submitted that the appellants by their own conduct were unworthy of injunctive relief. For these reasons, the respondent urged us to dismiss the appeal with costs.

Determination

17. We have considered the appeal, the rival submissions, the authorities cited and the law. As we embark on determining the appeal, we remind ourselves that the grant of an order of injunction is an exercise in discretion. The circumstances under which this Court will interfere with the exercise of discretion by the trial court were well articulated in ***Mbogo & Another v Shah [1968] EA 93*** at ***94*** as follows:

> ***" I think it is well settled that this Court will not interfere with the exercise of discretion of 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 it 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."***

18. With this caution in mind, we also recall that this appeal arose from an interlocutory application and we cannot make conclusive findings of fact as that would prejudice the proceedings in the main suit which is still pending. Our duty in this appeal is to determine if the trial court correctly exercised its discretion in refusing the order of injunction.

19. The principles for the grant of an order of injunction that an applicant ought to satisfy are found in the oft-cited case of ***Giella vs Cassman Brown Co. Ltd (supra)*** where it was held that such an order would be granted where:

> ***a. The applicant had established a prima facie case with a probability of success;***
>
> ***b. The applicant stood to suffer irreparable loss which would not be adequately compensated by an award of damages; and***
>
> ***c. If the court was in doubt, the application would be determined on a balance of convenience.***

20. The principles have been revisited on various occasions by this Court, for example in ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR (Civil Appeal 77 of 2012)*** wherein it was reiterated that:

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:***
>
> ***(a) establish his case only at a prima facie level,***

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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.

…

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, will be 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 consideration. 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".

21. These are principles that we must now apply to the appeal before us. Did the appellants establish a *prima facie* case with a probability of success? In ***Mrao Ltd v First Assurance Bank of Kenya Ltd [2003] eKLR (Civil Appeal No 39 of 2002)*** a *prima facie* case was defined as:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."

In ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra)*** stated the following of a *prima facie* case:

"***We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.***

22. We have set out the respective parties' positions above. The gist of the appellants' complaint is that the respondent intends to illegally and irregularly undertake the sale of the charged properties, and more so without allowing them their equitable right to redeem the charged properties. The appellants indicated in submissions that the statutory notices had not been received, but the record bears out the inaccuracy of this. It is not in dispute that the appellants fell into arrears on the facilities advanced to them by the respondent. In their pleadings before the trial court as well as their submissions before us, they have gone to great length to demonstrate that they were in negotiations with the respondent with a view to settling their loan account and redeeming the charged properties. However, these negotiations never bore fruit, meaning that the appellant still remains indebted to the respondent.

23. There is the question of the interest that was to be charged on the facilities, with the appellants contending that the rate ought to have been retained at 17% while the respondents maintain that the agreement between the parties was that interest be charged at a floating rate of 1.5% below the base rate. This is an issue that was placed for determination in the main suit before the trial court. Even so, we find that the trial court did not err in in finding that the appellants still owed a significant amount of money to the respondent, and in any event, a dispute on the computation of interest is not sufficient to restrain a financial institution from exercising its statutory power of sale. See ***Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd [2005] eKLR (Civil Application 108 of 2005).*** We are therefore not satisfied that the appellants established a *prima facie* case as required for the grant of an interim injunction.

24. As to whether the appellants stand to suffer irreparable harm should an order restraining the sale of the charged properties not be granted, we are persuaded that any loss that would be suffered by the appellants could be well recompensed by an order in damages. We adopt the sentiments in ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra)*** to wit:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury.

…

The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

25. It has not been established that any loss that the appellants are likely to suffer should they be successful in the main suit could not be adequately remedied by way of damages. As such, the trial court did not err in finding as it did.

26. The upshot is that for the reasons stated above, we have no reason to disturb the finding of the trial court. Accordingly, the appeal is without merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 6th day of November,2020

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR