IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 49 OF 2013

BETWEEN

GESA BUILDING AND CIVIL ENGINEERING LTD.....1ST APPELLANT

GEORGE NGURE CHIRA.....2ND APPELLANT

AND

EQUITY BANK LIMITED ……..……...… RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Njagi, J.), dated 30th July, 2012

in

H.C.C.C No. 791 of 2010)

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JUDGMENT OF THE COURT

An order of injunction will issue where the applicant proves, *inter alia*, that the respondent is about to commit a breach of contract or other injury of any kind. See: **Order 40** of the Civil Procedure Rules.

In this appeal, the respondent issued a notice under the since repealed Registered Land Act warning the appellants of its intention to exercise statutory power of sale on the ground that the appellants had defaulted in servicing an overdraft facility of Kshs. 7,000,000 advanced to it by the latter on 28th November, 2008; that at the time the statutory notice was issued, the appellants owed to it Kshs. 6,620,953.28.

Upon receipt of the notice, the appellants, believing that the respondent was about to commit a breach of contract moved the High Court by a plaint. At the same time they applied, pursuant to the provisions of **Order 40** aforesaid to restrain the respondent by an order of injunction from repossessing and disposing in a public auction or by any other means motor vehicles Registration Nos. KBB 326D, KAL 479S and KAZ 333S; and also from selling or transferring parcels of land known as GITHUNGURI/IKINU/ 2526 and GITHUNGURI/ IKINU/2527. It was the appellants' case that, although the respondent granted them an overdraft facility of Kshs. 7,000,000, only Kshs 2,729,281 was outstanding at the stage the latter gave notice; that in the result, it was imperative that accounts be reconciled before the appellants could be asked to settle the balance on the overdraft. The appellants also asked the High Court to find that the guarantee agreement was void for not being executed in accordance with the law.

Njagi, J, before whom the application fell for arguments, isolated one broad issue; whether the appellants have made out a case for the grant of an interlocutory injunction. After outlining the well-known strictures for the grant of an order of injunction, the Judge expressed the view that the appellants, by their own admission, were truly indebted to the respondent; and that the contestation by the appellants based on the extent of indebtedness, was, according to learned Judge, relying on the authority of **Habib Bank A.G Zurich V Pop-In (Kenya) Ltd. & 3 Others** Civil Appeal No. 147 of 1989, not a relevant factor. On that score, the Judge concluded that the appellants had not made out a *primafacie* case with a probability of success; that since the motor vehicles and the two parcels of land offered as security in the transaction could be sold and the proceeds paid over to the respondent, they stood to suffer no loss. In any case, the learned Judge added it is the respondent who stood to suffer prejudice if the loan was not settled immediately, hence the balance of convenience was in its favour.

The power of a court in an application for an interlocutory injunction is discretionary. Being a judicial discretion, it has to be exercised on the basis of the law and evidence. An appellate court may only interfere with the exercise of judicial discretion if satisfied that the Judge misdirected himself on the law; or that he misapprehended the facts; or that he took account of considerations of which he should not have

taken account; or that he failed to take account of consideration of which he ought to have taken into account; or that his decision, though discretionary was plainly wrong. See: **Carl Ronning V Societe Navale Chargeurs Delmas Vieljeux,** (1984) KLR 1.

The appellants have contended before us that the learned Judge did not properly exercise his discretion in dismissing their application for injunction in that; the respondent did not possess a valid legal instrument of chattels mortgage for it to sell the subject motor vehicles; the respondent did not hold a valid legal charge to enable it exercise statutory power of sale; the amount owing was in dispute; the Judge misapplied the balance of convenience as well as the principles enunciated in **Giella V. Cassman Brown** (1973) EA 358.

The respondent had a different opinion. They argued that the learned Judge properly and dismissed the appellant's case as it was bereft of merit; that the appellants' failed to establish a *prima facie* case; and that they admitted the debt.

The only question, in our assessment is whether the learned Judge properly judicially exercised his discretion. The answer to this question calls for consideration of the principles for granting an interlocutory injunction. First, the applicant must show a *prima facie* case with a probability of success. A *prima facie* case in civil cases;

> **"…. 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 as to call for an explanation or rebuttal from the latter".** *(Per* Bosire, JA) in **Mrao Ltd V. First American Bank of Kenya Ltd& 2 others** [2003] eKLR).

We may add that a court seized of an application for injunction ought not make definitive conclusions of either fact or law so as not to embarrass the court that will ultimately hear the action.

The second principle is that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages; and finally, should the court be in doubt, it ought to decide the application on the balance of convenience.

We have no doubt that the learned Judge appreciated the above principles. He cited the *locus classicus* **Giella V Cassman Brown.** In considering whether the appellant presented a *prima facie* case, the Judge took into account the fact that the appellants admitted that they owed the respondent some money, save for the actual amount owing. The Judge then resorted to the decisions of this Court in **Habib Bank** (supra) and **Lavuna & Others V Civil Servants Housing**, Civil Application No. Nai. 14 of 1995 (8/95 Ur), as well as the ***Halsbury's Laws of England,*** 4th Edition, Vol. 32 at para. 725. In the latter, the authors explained this position in the following passage;

> **"The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage , the claim is excessive.**"

Likewise in **Lavuna & Others** (supra) the Court reiterated the foregoing as follows:

> **"...A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage…"**

On the second principle, the learned Judge found, in the circumstances of the dispute that any loss or injury the appellants stood to suffer if the securities were realized was capable of being ameliorated by an award of damages.

The Judge found, on the final principle that the balance of convenience tilted towards the respondent as **"the amount owed outstrips the value of the security".**

We truly cannot find any fault in the manner the learned disposed of the application, save only to stress that he did not have to consider the last two principles after finding that there was no *prima facie* case. This is how the Court explained the approach in the case of **Nguruman Limited V Jan Bonde Nielsen & 2 others** [2014] eKLR.

> **"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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 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, 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".**

Nothing turns on the fact that the Judge considered the last two conditions even after finding that the appellants had not established a *prima facie* case.

For the reason that the main suit is still pending in the High Court for determination, we wish not to venture further than what we have said, except to conclude that the learned Judge could not but hold that the appellants were not entitled to an order of injunction; and further that the Judge exercised his discretion properly and in accordance with the law.

The appeal, for all the reasons explained, must fail. Accordingly, it is dismissed with costs.

Dated and delivered at Nairobi this 25th day of January, 2019.

W. OUKO, (P)

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ASIKE – MAKHANDIA

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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.

DEPUTY REGISTRAR