IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 22 OF 2019

BETWEEN

KENYA COMMERCIAL BANK LIMITED.............................1ST APPELLANT

GARAM INVESTMENTS AUCTIONEERS ....2ND APPELLANT

AND

ISHA MOHAMED NOOR ....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya at Malindi (Olola, J.) dated 14th December, 2018

in

***E.L.C Civil Case No. 240 of 2017.*)**

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JUDGMENT OF THE COURT

1. The appeal herein turns on the single issue of exercise of judicial discretion. In particular, whether the learned Judge (Olola, J.) properly exercised his discretion in granting an interim injunction in E.L.C No. 240 0f 2017 (herein after referred to as the suit). As such, the circumstances under which this Court can interfere with the exercise of such judicial discretion are settled and well put by the predecessor of this Court in the case of ***Mbogo & Another vs. Shah*** **[1968] EA 93**. In short, before we can upset the discretion, we must be satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision; or that it was manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and injustice has arisen.

2. Did the learned Judge err in the exercise of his discretion? The answer lies with the facts which were placed before the Environment and Land Court (ELC). The dispute relates to suit properties described as Portion No. 10801 (CR 34037) and Portion No. 11215 (CR 46603) which are registered in the name of Tahir Sheikh Said Ahmed who died on 10th January, 2017. According to **Isha Mohamed Noor** (the respondent), the suit properties are matrimonial properties wherein both she and her co-wife, one Hamude Ahmed Said, resided with their husband who happened to be the deceased.

3. On 20th November, 2017 she came across a leaflet issued in the name of **Garam Investments Auctioneers** (the 2nd appellant) advertising the sale of the suit properties by a public auction scheduled to take place on 4th December, 2017. Apparently, the suit properties had been charged in favour of **Kenya Commercial Bank** (the 1st appellant) as securities for financial facilities advanced to KAB Investments Limited (the company).

4. The foregoing came as a surprise to the respondent who claims that firstly, the deceased's signature on the charges were a forgery and she imputed the same as the doing of the directors of the company. Towards that end, she contended that the said directors were facing charges of forgery and fraud at Chief Magistrates Court at Malindi in CRCC No. 1096 of 2018. Secondly, contrary to the provisions of the ***Land Act, 2012*** her consent as the deceased's spouse was not obtained prior to the creation of the charges. Thirdly, she was never served with any of the statutory notices envisioned under the ***Land Act*** prior to the advertisement of the public auction.

5. Consequently, the respondent filed suit against the appellants seeking an injunction restraining the appellants from selling, transferring or otherwise dealing with the suit properties; a declaration that the charges were procured by fraud thus were null and void; or in the alternative, a declaration that the charges were defective for failure to obtain spousal consent from the deceased's widows; and discharge of the charges

amongst other orders.

6. Simultaneously, the respondent filed an application dated 30th November, 2017 praying for *inter alia:*

> **"…**
>
> ***3) That an interim injunction do issue against the Defendants by themselves, their servants and/or agents from selling, offering for sale, advertising, alienating, transferring by public auction or Private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90(3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that parcel of land known as Portion Number 10801 (CR 34037) and Portion Number 11215(CR 46603) pending the hearing and determination of this suit.***
>
> **…"**

7. The aforementioned application was anchored on the grounds that the respondent had made out a *prima facie* case with a high probability of success; unless the orders sought were granted the appellants would proceed with the sale rendering the suit academic. The respondent also contended that the 1st appellant would not suffer any prejudice since the suit properties were charged in its favour and the title documents were in its custody.

8. In response, the 1st appellant strenuously opposed the application. Through Francis Kiranga, described as the 1st appellant's Section Head, it was deposed that the application in question was an abuse of the court process and devoid of merit. In the 1st appellant's view, the application was aimed at restraining it from exercising its statutory power of sale which had legally accrued. It was not in dispute that the suit properties had been charged in favour of the 1st appellant for loans advanced to the company and equally, it was common ground that the company had defaulted in making payments. The 1st appellant distanced itself from the fraudulent claims, maintaining that it was not a party to the same.

9. It was also deposed on behalf of the 1st appellant that the charges over the suit properties were registered between the years 2009 and 2010 hence the provisions of the ***Land Act*** which came into force on 2nd May, 2012 were not applicable. Therefore, there was no requirement for spousal consent with regard to the charges in question.

10. Furthermore, the 1st appellant had already commenced the recovery process by opting to exercise its statutory power of sale during the lifetime of the deceased following the company's default. In turn, the deceased and the company instituted E.L.C No. 2 of 2016 against the 1st appellant in a bid to stop it and even filed an interlocutory application dated 11th January, 2016 therein for interim injunctive orders. After his demise, the deceased was substituted with the respondent and her co-wife. In addition, the application dated 11th January, 2016 was dismissed by a ruling dated 12th May, 2017 for the sole reason that the court found that the 1st appellant was validly exercising its statutory power of sale.

11. As far as the 1st appellant was concerned, the respondent was guilty of non- disclosure of not only the existence of E.L.C No. 2 of 2016 but also that she was aware of the fact that the suit properties had been charged prior to filing the suit. In any event, the 1st appellant argued that the value of the suit properties was ascertainable hence in the event the suit succeeded, the respondent could be compensated with damages. The 1st appellant also believed that the balance of convenience titled in favour of it being allowed to realize its securities for the simple reason that the company was heavily in arrears of loan repayments.

12. Upon weighing the rival positions taken by the parties as against the law the learned Judge in a ruling dated 14th December, 2018 held:-

> ***"In law, a spouse would have an equal even though unregistered interest over the matrimonial home. Thus if the Plaintiff is to be believed she ought to have been given a chance to redeem the properties where her husband was unable to. Indeed while the absence of the spousal consent does not vitiate a charge registered prior to the commencement of the Land Act 2012, it is my view that the same does not absolve the Chargee from giving notice to a spouse who has interest in such matrimonial property.***
>
> ***Such notice must be given in the required form and the mere fact that the Plaintiff became aware of the case filed by her deceased husband against the 1st Defendant does not in my considered opinion absolve the 1st defendant from the requirement to give notice. That in my view must be the reason why Section 78(1) (b) of the Land Act 2012 (as amended by Section 60 of the Land Laws(Amendment) Act aforecited imports the requirements to serve notices to spouses and other persons who were not required to be served under the repealed Acts of Parliament into the present law.***
>
> ***In the circumstances of this case therefor I find and hold that the 1st Defendant was under an obligation to serve the Plaintiff with a Statutory Notice. No such notice was issued as by law required. Accordingly I hereby grant an injunction as sought at Prayer 3 of the application,…"***

13. It is that decision which is the subject of this appeal wherein the appellant complains that the learned Judge erred in law and fact by:-

> ***i. Holding that the suit properties were matrimonial properties of the respondent.***
>
> ***ii. Granting an injunction pending the determination of the suit.***

iii. Holding that the 1st appellant was under an obligation to issue statutory notices to the respondent prior to exercising its statutory power of sale.

iv. Failing to not only find that the 2nd appellant was a disclosed principal of the 1st appellant but also to dismiss the application as against the 2nd appellant.

14. At the plenary hearing, Mr. Omondi appeared for the appellants while Mr. Ochieng held brief for Mr. Waziri who is on record for the respondent. Mr. Ochieng sought an adjournment on the ground that Mr. Waziri was at the time bereaved and had also not filed his written submissions as directed during the case management conference. On his part, Mr. Omondi indicated that he was ready to proceed.

15. Albeit sympathizing with Mr. Waziri for his loss, we could not help but note that despite the directions with regard to the parties filing their written submissions being issued on 27th March, 2019, Mr. Waziri was yet to comply a month down the line. As a result, we declined to grant the adjournment and proceeded to hear the appeal based on the record, the written submissions filed on behalf of the appellants and the law.

16. It was the appellants' case that only two statutory notices were required to be served under the ***Land Act*** prior to the 1st appellant exercising its statutory power of sale. The first as provided under ***Section 90*** of the Act was 3months' notice to the chargor while the second by dint of ***Section 96(2)*** was a 40days' notice to a spouse of a chargor where such a spouse had given consent to the charge. In the case at hand, the respondent was neither the chargor nor had she given consent to the charges in question.

17. Moreover, the appellants urged that the learned Judge correctly appreciated that there was no requirement at the material time for the respondent to give her consent to the said charges. Therefore, the learned Judge should have found that the 1st appellant had no statutory obligation to serve any notices to the respondent.

18. The learned Judge was faulted for relying on ***Section 60*** of the ***Land Laws (Amendment) Act, 2016*** which he construed to have imported by virtue of ***Section 78(1)(b)*** of the ***Land Act*** the requirement for issuance of statutory notices upon spouses and other persons as the basis of granting the injunction. According to the appellants, the amendment act came into force on 21st September, 2016 way after the 1st appellant had already issued the requisite statutory notices in respect of the suit properties to the chargor and the borrower thus it could not apply retrospectively. In support of that line of the proposition reference was made to the Supreme Court's decision in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

19. The appellants also took issue with the learned Judge's finding to the effect that the suit properties were matrimonial properties. To them, there was nothing to support such a finding. Relying on ***Section 106B*** of the ***Evidence Act***, it was argued that the learned Judge was wrong to rely on the photographs adduced by the respondent as evidence that the suit properties were matrimonial properties yet there was no certificate verifying their authenticity. Besides, the appellants assert that the learned Judge failed to take into account the valuation reports annexed to the affidavit sworn on behalf of the appellants. The reports clearly indicated, contrary to the respondent's allegations, that the suit properties were unoccupied and one of them was even described as a commercial property.

20. In the alternative, the appellants submitted that even if the suit properties were matrimonial properties, once they were charged as securities they became commodities liable for sale by the 1st appellant to recover its debt. The appellant took issue with the fact that the learned Judge overlooked the respondent's material non-disclosure of the existence of ELC No. 2 of 2016. As far as they were concerned, the same was an abuse of the court process.

21. Last but not least, the appellants submitted that the learned Judge should have struck out the injunction application as against the 2nd appellant who was a disclosed principal of the 1st appellant.

22. The principles that govern a court when it comes to the question of whether or not to issue an interlocutory injunction are old hat. In the often quoted case of ***<u>Giella vs. Cassman Brown</u>*** **[1973] EA 3** the principles were succinctly summed up as follows:-

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

23. Did the learned Judge apply his mind to the aforementioned principles? As to whether the respondent had made out a *prima facie* case, we are guided by the case of ***<u>Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others</u>*** **[2003] eKLR** wherein this Court defined a *prima facie* case in the following manner:

> ***"A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case.' <u>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</u>."*** *[Emphasis added]*

With the aforesaid definition in mind, we are satisfied that the respondent had made out a *prima facie* case that as an administrator of the estate of the deceased she was entitled to be served with a notice prior to the advertisement of sale of the suit properties.

24. As to whether the pictures produced by the respondent were authentic or whether the valuation reports depicted the correct status of the said properties, in our view, are issues which call for elaborate arguments and/or evidence and final determination at the trial. It is trite that whenever a court is seized of interim applications, such as in this case, it has no business to make final determinations on the conflicting

affidavit evidence. As per Lord Diplock in **American Cyanamid Co (No 1) vs. Ethicon Ltd [1975] UKHL 1:**

> ***"it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."***

This Court also held a similar position in ***Mbuthia vs Jimba Credit Finance Corporation & Another*** **[1988] KLR 1** where it was held that;

> ***"…the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."***

25. We also see no reason to fault the learned Judge for expressing his doubts on arguability of the allegation that the 1st appellant was required to procure the respondent's consent before the creation of the charges. This is because as the learned Judge correctly appreciated the charges in issue were registered before the commencement of the ***Land Act*** which requires procurement of a spouse's consent prior to creation of a charge over matrimonial property.

26. However, we find that the balance of convenience titled in favour of granting the injunction as the learned Judge did. We are also alive to the fact that the learned Judge did not grant an open ended interim injunction rather he qualified his orders in the following terms and rightly so:

> ***"As it is not denied however that the borrower is in default, the 1st Defendant shall be free to exercise its Statutory Power of sale once proper notices are issued to the Plaintiff, if thereupon, the debt shall remain outstanding."***

27. All in all, we find that the learned Judge exercised his discretion on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is, to do justice to the parties before it. See ***Githiaka vs. Nduriri*** **[2004] 2KLR**.

28. In the end, we think we have said enough to demonstrate that the appeal herein lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 25th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

…………………………..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR