IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 228 OF 2016

BETWEEN

ST. ELIZABETH ACADEMY-KAREN LIMITED ....……. APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED ....…..…..…… 1ST RESPONDENT

G.A. LIFE ASSURANCE LIMITED ……...……... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ochieng, J.) dated 18th August, 2016 **in**

HCCC No. 333 of 2013)

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JUDGMENT OF THE COURT

1. St. Elizabeth Academy-Karen Limited (the appellant) is a limited liability company which owns and runs a school going by the name of St. Elizabeth Academy. The school stands on part of land Title Numbers 1159/140 and 1159/377 (suit properties) situate at Karen in Nairobi. Part of the land is also used for farming to provide food for the students and as their training ground for basic agriculture.

2. Sometime in 2009, the appellant borrowed money from National Bank of Kenya Limited (the 1st respondent) on terms stipulated in the mortgage agreements. The loan was secured by mortgages, one payeable within 7 years and the other payeable within a period of 15 years. The appellant charged several of its properties to secure the two loans amongst them the suit properties herein. According to the appellant, due to the vagaries of the economy in the country at the time and the rising interest rates, it was unable to service the loan as anticipated and soon fell into arrears. The appellant appealed to the 1st respondent to be allowed to restructure the loan, a plea that was rejected. The properties were advertised for sale on 1st August, 2013 which action, according to the appellant was not sanctioned by the law, as the requisite notice under **Section 90(1)** of the Land Act 2012 had not been issued.

3. The appellant moved to the High Court challenging the intended sale vide **Milimani Commercial and Admiralty Division Civil Case No. 333 of 2013** on 30th July, 2013. Simultaneously, the appellant filed the Notice of Motion seeking several reliefs. Among the reliefs sought were extension of time for compliance and/or for rectifying any default to regularize the mortgage accounts concerning the two parcels of land; that the 1st respondent's exercise of statutory power of sale be suspended for 24 months; an order of injunction restraining the 1st respondent from advertising for sale or dispossessing the appellant of the suit properties in any way; and an order for accounts.

4. The Notice of Motion fell for hearing before **J. Kamau J** who, in a Ruling dated 16th December, 2014 dismissed the same with costs to the first respondent. The learned Judge found that the appellant was indebted to the respondent and was therefore at liberty to re-issue the statutory notices.

According to **Mr. King'ara**, learned counsel who appeared for the appellant in this appeal however, by the time Kamau J delivered the Ruling in question, the appellant had sold some of the land and paid off the loan and even refunded the excess of forty million (Ksh.40,000,000) to the 1st respondent. Mr. King'ara however admitted that no such evidence of payment of the loan was placed before Judge Kamau.

5. Counsel consequently filed the applications seeking *inter alia* an interlocutory injunction restraining **G.A. Life Assurance Limited,** (2nd respondent) from advertising, selling, evicting or in any other way dispossessing the appellant of the suit properties. He also sought orders of review against the Ruling of Kamau J on the basis that evidence relating to the sale and repayment of the loan had not been placed before the learned Judge before she rendered her Ruling. The learned Judge (Ochieng J) was however not persuaded and made the following finding:

> **"The bank has provided copies of correspondence which suggests that the plaintiff was aware that there would still be an outstanding balance, after the plaintiff's account was credited with Kshs.300,000,000. In any event, the plaintiff could have provided the information to the court prior to the determination of the first application for an injunction, if the said information was deemed important. The plaintiff cannot blame the court for not taking into account information which was not available to the court.**
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> **And because the information was already available previously, it cannot be said to constitute new and important facts which the plaintiff could not have had at the time it canvassed the first application. Accordingly, those facts cannot be the basis for the review of the ruling delivered on 16th December 2014"**

The learned Judge found the application for review unmerited and dismissed it.

6. On the second application which sought *inter alia* injunctive orders against the 2nd respondent, the court found that the appellant "had failed to establish that the 2nd respondent had actual or constructive notice of the bank's alleged dishonesty or lack of propriety in the manner in which the suit property was sold. The court was therefore disinclined to grant orders restraining the 2nd respondent who had bought the property by private treaty from the 1st respondent from completing the transfer of the sale. The learned Judge also found there was no evidence to show the transfer of the suit property was illegal or unlawful. Both applications were dismissed vide the Ruling rendered on 18th August 2016, now impugned. It is that Ruling that the appellant has challenged before this Court.

7. By a Memorandum of Appeal dated 4th October, 2016, filed by Gichuki King'ara and Company Advocates, the appellant has proferred a total of 13 grounds of appeal, which in summary and paraphrase are:-

That the learned Judge erred in law and in fact in holding that the appellant had not satisfied the conditions for granting an injunction; failing to find that the appellant had established proper and viable grounds for review of the Ruling of 16th December, 2014; failing to consider that the appellant had settled the loan in full; failing to uphold the doctrine of *lis pendens* and Section 98(1) (d), 90(2) and 96(3) of the Land Act and "expressing outright biasness against the appellant.

The appellant prays that the court sets aside the impugned Ruling, and award it costs of this appeal and those below at the High Court.

8. At the plenary hearing of the appeal, Mr. King'ara learned counsel for the appellant, adumbrated most of the grounds of the appeal. He also gave us the history of the dispute which we have summarized above. The thrust of his submissions however is that although the debt is not denied, some land was sold and the loan was repaid in full leaving an excess of Ksh.40 million which was refunded to the appellant. It was Mr. King'ara's contention that the refund of Ksh.40 million gave the appellant the legitimate expectation that the loan had been cleared; only to be ambushed later with an advertisement of another 4 acres of the appellant's land for sale at a public auction. Mr. King'ara also faults the 1st respondent's decision to sell the property by private treaty even after advertising it and intimating that it would be sold by public auction. He also submitted that following the said repayment, the 1st respondent discharged all the appellant's title deeds and so by the time 2nd respondent purchased the property, it had already been discharged and was not therefore available for sale. He said the appellant was still in possession of the property and so this Court should set aside the impugned Ruling and grant the appellant the injunctive orders it sought before the High Court.

9. **Mr. Odhiambo**, learned counsel for the 1st respondent opposed the appeal. He said that the sale now impugned was conducted by the appellant in conjunction with the 1st respondent. According to counsel, the sale in question only raised 80 million shillings out of which 40 million was applied towards offsetting the loan while the balance of 40 million was released to the appellant on its request to enable it meet some urgent obligations. Counsel also posited that the Ksh.340,000,000 was only partial payment of the loan and there was an unpaid balance which continued to accrue interest. He submitted further that it was the appellant which was actually trying to dispose of the properties without the knowledge of the Bank. He referred us to an intended sale of L.R. No. 1159/140 (Original No. 1159/9615) from the appellant to Cheneta Limited. Learned counsel denied that the properties in question had already been discharged as claimed by the appellant, and reiterated that the Bank could not have sold properties it had already discharged. Indebtedness by the appellant had been confirmed by both Kamau J and Ochieng J and any accounts could not be settled at interlocutory stage. He urged the court to dismiss the appeal as the application in question was properly dismissed.

10. On his part, **Mr. Litoro** who appeared for the 2nd respondent adopted the submissions by the 1st respondent's counsel and maintained that the injunctive orders sought were properly denied as the appellant had failed to meet the threshold set out for such applications to succeed. On the second application, it was learned counsel's submission that review was not merited as there was no new evidence presented before Ochieng J to justify review.

He called court's attention to the fact that by the time the appellant moved the court for orders of injunction, the property had already been sold to the 2nd respondent and so under **Section 98** and **99** of the Land Act, the only recourse open to the appellant lay in damages.

11. We have considered all this evidence as behooves us under **Rule 29(1) (a)** of the Rules of this Court, which Rule we have applied in a litany of decisions coming to us on first appeal. Our duty in this appeal is simple and straightforward. Did Ochieng J have sufficient evidence before him to enable him review Kamau J's decision dismissing the appellant's first application; did the injunctive prayers sought by the appellant against the 1st and 2nd respondents meet the threshold for granting injunctions? We have to look at the evidence presented to the

High Court with a fresh mind, re-evaluate it and come to our own independent conclusion. We are alive to the fact that there was no appeal preferred against Kamau J's ruling. It is however not possible not to refer to it as it was the subject of the review application dismissed by Ochieng J, the subject of this appeal.

12. The principal reason given by Kamau J for disallowing orders of injunction against the 1st respondent was because indebtedness was admitted by the appellant. There was before the Judge a challenge on the validity of the statutory notice; and an order for rendering of accounts; extension of time to restructure the loan etc. Since the Judge rendered the Ruling almost 1 year and 5 months after the filing of the case, she was of the view that the said time had actually been sufficient for the appellant to reorganize itself; there was therefore no need to extend the time by the 24 months sought by the appellant. We cannot find any fault in that finding.

13. On the issue of injunction, the learned Judge, citing this Court's decision in **Civil Application No. 108 of 2005 – Francis J.K. Ichatha v. Housing Finance Company of Kenya Limited** (unreported), made the finding that a dispute in computation of interest or the figures owed is not sufficient to warrant restraining a chargee from exercising its statutory power of sale. The learned Judge was spot on on that issue. This Court in **John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR** expressed: -

> **"The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue however is whether the dispute on the outstanding loan can scuttle the exercise by a chargee of its power of sale. On that legal proposition this Court has expressed itself before and we need only refer to J.L. Lavuna & others V. Civil Servants Housing Co. Ltd. & Another – Civil Appl. No. NAI 14/95 where Kwach J.A. stated:-**
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> **"I have always understood the law to be that 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. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th edition at paragraph 7255.""**

Having correctly arrived at these conclusions, the rest of the application was bereft of the necessary requirements for it to pass the **Giella v. Cassman Brown** test.

14. On the 2nd Ruling, the subject of this appeal, we agree with learned counsel for the 1st respondent that the prayer for injunction had already been disposed of before Kamau J, after hearing *inter-partes*. It could not therefore be relitigated without running afoul of the *res judicata* Rule. As far as the prayer for review was concerned, the law in this area is well settled.

The prayer for review was predicated on **Section 80** Civil Procedure Act and **Order 45 Rule 1(a)** of the Civil Procedure Rules. This Rule provides in the relevant part as follows;-

> **"1(i) Any person considering himself aggrieved**
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> **(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred …**
>
> **(b) …**
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> **and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply …"**

The appellant was relying on the ground of new evidence, which was the claim that the property had already been sold to Cheneta Limited on 22nd July 2013, which fact was not availed to Kamau J when she heard the first application. As rightly observed by Ochieng J, the application was filed on 30th July 2013, the sale having taken place on 22nd July 2013. As at the time the application was filed, the sale had already taken place. The hearing of the application and the subsequent Ruling came much later. The issue of the sale was not therefore new as the appellant was a party in the transaction and was therefore possessed of the evidence in question.

15. In our view, the learned Judge properly exercised his discretion in disallowing review. There were no grounds whatsoever, in our view, for the review orders to be granted. The application fell way short of the required threshold contemplated by **Rule 45(1)** of the Civil Procedure Rules. We cannot fail to mention that this is an interlocutory appeal. The issues raised in the plaint are yet to be determined (at least as at the time we heard the application). They can only be canvassed and determined with finality after full hearing of the main suit. The issue of *lis pendens* raised by counsel for the appellant had nothing to do with review and was being raised at the wrong forum. It was an issue to be canvassed at the hearing of the main suit. We think we have said enough to demonstrate that this appeal is without merit. It is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of February, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR