IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 24 OF 2014

BETWEEN

GULF AFRICAN BANK LIMITED.....APPELLANT

AND

MOHAMUD SHEIKH HUSSEIN.....RESPONDENT

(Being an appeal against the entire decision contained in the ruling and the order to be extracted therefrom given by the High Court of Kenya at Milimani (Ogola, J.) dated 30th May, 2013

in

HCCC No. 55 of 2013)

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JUDGMENT OF THE COURT

It is common fact that in the month of in March 2009 SAC Limited (the borrower), sought and obtained a credit facility from the appellant in order to purchase two aircrafts and related equipment. The respondent as the guarantor offered his property, **L.R No. Eastleigh 36/11/1,** the suit property, as security for the facility. The value of the suit property at the time of the mortgage was given as Kshs160 million. It is contended that the appellant varied the terms of the security requirements, to provide for, among others, a first ranking legal charge for Kshs. 95 million over the suit property and guarantee of the same amount from the respondent.

By a mortgage dated 9th September 2009 in favour of the appellant, the respondent conveyed the suit property as a guarantor to secure the principal sum of Kshs. 95,000,000/- advanced to the borrower.

It is further claimed that the second facility (Murabaha Stock Finance) was advanced to the borrower for the sum of Kshs. 15,000,000, by a letter of offer dated 4th November 2009. This was over and above the sums secured by the Mortgage dated 9th September 2009. The respondent protested that the appellant did not seek his consent prior to the grant of the additional facility and therefore the facility was not secured by the mortgage dated 9th September 2009; and that without his consent or approval as guarantor or mortgagor, the varied terms of repayment of the loan facility were of no effect, and as a result he was discharged from his obligations.

It is the appellant's case that the borrower sought further indulgence by a letter of offer dated 2nd September 2010, which was granted. This constituted a third facility (Tawarraq Working Capital Finance) of Kshs. 58,672,978. According to the respondent, once again this third facility was secured by the mortgage over the suit property without his consent and without a supplemental mortgage being registered against the suit property; and that the appellant unlawfully coerced and duped him by purporting to restructure the loan facility. The respondent therefore argued that the statutory notice issued by appellant was invalid and irregular.

To all these accusations the appellant insisted that the respondent was always aware of the variations and in fact approved them; and that the securities that the Bank held were continuing securities and the Bank did not need to vary them.

The respondent moved to court by instituting HCCC No. 55 of 2013 contemporaneously with an application for a temporary injunction to restrain the appellant, its agents, servants and/or employees from selling or offering for sale, transferring, charging, leasing or in any other way alienating or disposing of the suit property pending the hearing and determination of the suit.

The superior court below (Ogola, J) in determining whether to grant the order considered that:

> **"32. From the letter of offer dated 26th May, 2011 it is clear that the facility therein was to be secured by a 1st ranking legal charge over the suit property. It has been established that a mortgage was prepared in that regard, executed by the parties and lodged for registration. However, the said registration never took place for the reason that the Deed file in relation to the said property went missing at the Land's registry. That is the position up to date and the same has not been disputed.**
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> **33. In view of the foregoing, it is the Court's determination that the Plaintiff has established a *prima facie* case as envisaged in the case of Giella vs Cassman Brown & Co. Ltd. 1978 EA 358. As regards the Defendant's argument that the Plaintiff can be compensated by way of damages, it is not cardinal principal of law that an injunction cannot issue where the Defendant is able and willing to pay damages."**(Our emphasis).

The learned Judge proceeded to grant a temporary injunction in favour of the respondent.

Aggrieved, the appellant has lodged this appeal on seven grounds, arguing *inter alia* that the learned Judge erred in law and fact in holding that the respondent had established a *prima facie* case as envisioned in the case of **Giella** (supra), misapplying the second principle in **Giella**, failing to find that the respondent had not satisfied the second principle, relying on case law that was only persuasive High Court decision to override decisions of the Court of Appeal that were binding upon him, and failing to act on the finding that the respondent was guilty of material non-disclosure and therefore undeserving of the remedies sought.

When the appeal came up before us for hearing Mr. Taib, learned counsel for the appellant sought to demonstrate that the respondent had completely failed to establish a *prima facie* case in terms of the **Giella** case (supra). He submitted that the respondent premised his case on false allegations that the appellant had advanced to the borrower sums over the amount secured by the mortgage dated 9th September 2009 without the respondent's knowledge and consent, thereby discharging the respondent from his obligations. He affirmed that from the record, the respondent had not produced any evidence in support of allegations against the appellant for fraud, coercion and illegality. Counsel took issue with the learned Judge's appreciation of the ratio in **Giella** when he stated, on the authority of the decision of the High Court in **Givan Okallo Ingari & Another V Housing Finance Company of Kenya Limited**, Civil Case No.79 of 2007, that it is not a cardinal principle of law that an injunction cannot issue where the defendant is able and willing to pay damages. This, according to counsel, did not only overthrow the principles that are now well- settled by a long line of case law after the **Giella** decision, such as **Vivo Energy V Maloba Petrol Station & 3 Others**, Civil Appeal 21 of 2014, **Mrao Limited V First American Bank of Kenya Ltd & 2 Others,** (2003) KLR 125 but also disregarded the principle of *stare decisis.*

Counsel further argued that since the respondent did not disclose the nature of irreparable damages he would suffer, there was no basis for the learned Judge to rely on this question in determining the application. Counsel submitted that since in a mortgage the subject matter of the suit is valued in advance, there cannot be an injunction as the party concerned can be compensated in monetary terms, especially, like in the instant case, where the appellant is a bank, capable of making good any damages that may arise.

Finally, counsel invited us to find that the respondent was guilty of material non- disclosure and misrepresentation, as he had approached the court with unclean hands by presenting to court a forged re-conveyance document and was therefore undeserving of the equitable remedy of injunction.

On her part, Ms. Lipwop, holding brief for Mr. Issa Mansur for the respondent correctly observed that the application of principles enunciated in **Giella** was the gravamen of the appeal. In counsel's view, the learned Judge made a correct finding that the respondent had established a *prima facie* case on the ground that the terms and conditions of the letter of offer dated 26th May 2011 had not been adhered to, and to that extent the appellant could not purport to exercise statutory power of sale.

On the issue of damages, counsel maintained that it would be unjust to allow the appellant to deprive the respondent of his property rights guaranteed under **Article 40** of the Constitution merely on the ground that the appellant was in a position to pay damages. Agreeing with the learned Judge, counsel reiterated that it is not a cardinal principle of law that an injunction cannot issue where the defendant is able to pay. She concluded that the learned Judge judicially and properly exercised his discretion.

Learned counsel on both sides in this appeal approached this matter as if they were arguing the main suit which is still pending before the High Court. This appeal arises from an interlocutory decision and in circumstances like this we must caution ourselves that it is not appropriate to express concluded views on the main issues in controversy in the pending case, as to do so may embarrass the trial court. The issues canvassed at length by both side, as we have stated are, by and large in the province of the trial court and we have no intention of considering them here. Those issues include arguments like the appellant's right to amend, cancel or terminate the facility in question without assigning any reason thereof, whether the appellant could, in the circumstances of the case, exercise its statutory power of sale, and whether or not the registration of the mortgage was impeded by other factors such as the disappearance from the Land's registry of the relevant deed file in respect of the suit property.

All these are matters that must be left to be determined by the trial court after receiving evidence. The primary question before us is whether, on the facts and in the circumstances of this dispute, the 1st and 2nd respondents were entitled to the orders of injunction pending the determination of the suit.

The granting of a temporary order of injunction is an exercise of judicial discretion and sitting as an appellate court, we cannot readily interfere with the exercise of such discretion, unless we are satisfied that the discretion has not been exercised judicially. For instance in **United India Insurance Co. Ltd V. East African Underwriters (Kenya) Ltd (1985)** EA 898, at p. 908 Madan JA (as he then was) stressed the point as follows:

> **"The Court of Appeal will not interfere with a discretionary decision…….unless 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 considerations of which he should have taken account, or fifthly, that his decision albeit a discretionary one, is plainly wrong."**

It has to be remembered that judicial discretion must always be exercised in accordance with the law. In matters of injunction the guiding principles are those set out in **Giella,** the *locus classicus*, which has stood the test of time. It settled the law on the grant of temporary injunction thus:

> **"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…"**

Although the three strictures are listed in captioned passage as first, second and third, they have been construed in a long line of cases to apply sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society & others,** Civil Application No. 142 of 1999, (2001) 1 EA 86.1, **Nguruman Limited V. Jan Bonde Nielsen & 2 others** , Civil Appeal No.77 of 2012 , **Vivo Energy Kenya Limited V. Maloba Petrol Station Limited & 3 others** Civil Appeal No. 21 of 2014, and **Nairobi Conveyors Limited & Another V. National Industrial Credit Bank Limited** , (2001) LLR 1373 (CCK).

In **Nguruman Limited** (supra) this Court in some great detail clarified the sequence as follows;

> **"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**
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> **c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.**
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> **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. The existence of a *prima face* does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between……**
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> **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 it, *prima facie…"***

The Judge, although alive to the three strictures failed to apply them as separate, distinct and logical hurdles. After finding that a *prima facie* case had been established, the learned Judge propounded a theory, contrary to numerous, time-honoured and consistent decisions, that an injunction can issue even where the defaulting party can be compensated in damages. He supported this proposition by relying on a solitary decision of the High Court in **Givan Okallo Ingari & Another** (supra) at the expense of the authorities to the contrary.

We reiterate that if the applicant establishes a *prima facie* case, he must in addition satisfy the court that the injury he will suffer, if an injunction is not granted, will be irreparable. So that where it is shown that damages would be adequate compensation and the other side is capable of paying it, no order of temporary injunction should normally be granted, however strong the applicant's claim may appear at that stage. But if a *prima facie* case is not established, no purpose can be served in considering the aspects of irreparable injury and balance of convenience.

Although the learned Judge was satisfied that a *prima facie* case was proved, he failed to determine whether an award of damages would not be adequate compensation for the respondent. This alone is indicative of erroneous exercise of discretion, entitling us to interfere with his discretion. We cannot see anything on record, either by way of affidavit evidence or in the respondent's submissions, or any statement to suggest that the respondent stood to suffer irreparable injury that would not be compensated by an adequate remedy. This is how the Court in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others** (supra) explained this point, insisting that the nature and extent of the injury must be explained and that;

> **"Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. 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."

The respondent, a Bank has averred that it has the means and is capable of compensating the respondent in the event that the latter is successful upon the determination of the suit.

But apart from the error identified here, we also think the learned Judge did not sufficiently consider the affidavit evidence and annextures, which, in our view did not disclose a *prima facie* case. The *prima facie* case envisaged in **Giella** is one with a **"probability of success"**, that is, **"the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage".** See **Habib Bank AG Zurich V Eugene Marion Yakub,** Civil Application No. 43 of 1982. Bearing in mind this caution and without expressing any firm views, we think, *prima facie* that there was a mortgage which was executed and registered on 9th September, 2009 and subsequent facilities. The respondent admitted having signed the documents. We find *ex facie* nothing to suggest that he did so under undue influence, as pleaded.

We believe that we have said enough to show that the learned Judge fundamentally misdirected himself in the application of the three **Giella** principles.

The Judge did not, therefore exercise his discretion in accordance with the settled principles for the grant of a temporary injunction hence misdirected himself and in the process arrived at a wrong decision. We are entitled to interfere with the exercise of his discretion.

We allow the appeal with costs, set aside the orders granting temporary injunction.

Dated and delivered at Nairobi this 27th day of April, 2018.

M. WARSAME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR