IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J.MOHAMMED, JJ.A)

CIVIL APPEAL NO. 223 OF 2016

BETWEEN

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

AND

HENRY NDUNGU KINUTHIA.....1ST RESPONDENT

TERRACRAFT (K) LIMITED.....2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi

(E. K. O Ogola, J.), *dated 17th October, 2014)*

in

HCCC NO. 485 OF 2008)

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JUDGMENT OF THE COURT

[1] Proceedings leading to this appeal originated from the High Court in a suit filed by **Henry Ndungu Kinuthia (1st respondent),** who was a director in **Terracraft (K) Limited** (**2nd respondent**). The 1st respondent had charged his property to **Barclays Bank of Kenya Limited (appellant)**, as security for loan facility advanced to the 2nd respondent by the appellant in 1997. Initially the property charged was LR No. 14970/105 Runda Evergreen Nairobi, but later in June 2001, the loan facility was extended and legal Charges registered over the 1st respondent's properties L.R. No.14970/105 Runda Evergreen Nairobi and L.R. No.7785/851 Runda Mae Nairobi valued at Kshs.50,000,000 and Kshs.60,000,000 respectively (hereinafter referred to as the 'suit properties').

[2] Sometime in May 2008, the appellant served the 1st respondent with a Statutory Notice dated 26th May 2008 expressing its intention to exercise its statutory power of sale. Upon the 1st respondent being served with the notice, he moved to the High Court and filed a suit against the appellant contending, *inter alia*, that the Charges were null and void for non compliance with the law, and also unenforceable for failing to comply with mandatory provisions of the law; and that the appellant had acted in bad faith and unfairly in a bid to infringe the 1st respondent's equity of redemption. The 1st respondent therefore sought, among other prayers, a permanent injunction restraining the appellant from selling or disposing off the suit property; an order compelling the 2nd respondent who was the principal debtor to settle debts if any owed to the appellant; and an order directing the appellant to discharge the Charge and further Charge and deliver the title documents to the 1st respondent.

[3] Filed contemporaneously with the plaint was an application in which the 1st respondent sought a temporary injunction restraining the appellant, its agents or advocates or auctioneers from interfering with the 1st respondent's right of possession, or selling the suit properties or in any way interfering with the 1st respondent's right of ownership; and an order under section 52 of the Transfer of Property Act 1882 prohibiting any dealings with the suit property during the pendency of the suit.

[4] On 22nd February 2011, the High Court (Khaminwa J) having heard the application, allowed the application and issued an order of injunction restraining the appellant and their agents, from interfering with the selling or disposing off the suit properties or in any way interfering with the Plaintiff's ownership and title to the suit properties "pending the hearing and determination of this suit." In addition, an

order under Section 53 of the Transfer of Property Act, 1882 of India prohibiting any registration of any dealing involving the suit property during the pendency of the suit was issued.

[5] Three years after the issuance of the Orders of 22nd February 2011, the appellant through its auctioneers served the 1st respondent with a notification of sale scheduled to take place on 17th June 2014 by public auction, and 45 days redemption notice dated 16th April 2014 in regard to the suit properties. The 1st respondent moved to the High Court through a notice of motion dated 27th May 2014 seeking to have the appellant's Managing Director, Jeremy Awori, the Company Secretary, Judy Nyaga and the Head of Corporate Recoveries, Ken Kuria (hereinafter referred to as ('the contemnors') cited and Warrants of Arrest issued for their committal to civil jail, for contempt of the orders issued by the High Court on 22nd February 2011.

[6] The 1st respondent maintained that the appellant's action was a deliberate defiance of the orders of the court and should therefore be punished; that the appellant was aware that the main suit was scheduled to come up for hearing on 26th June 2014, as a hearing notice had been duly served and received by the appellant on 11th February 2014; and that the appellant failed to exercise its right to set aside, review or stay the Orders pending appeal, nor did it take any further action in regard to a notice of appeal that it had filed.

[7] In response to the 1st respondent's motion, the appellant filed a Notice of Preliminary Objection seeking to have the application struck out with costs on the grounds that it contravenes the mandatory provision of **Section 5** of the Judicature Act and that the same was brought under the wrong provisions of the law. The appellant filed further grounds of opposition contending that the application was fatally defective as the same was filed without leave of Court; that the application was frivolous and lacked merit; that the injunction had lapsed under the provisions of **Order 40 rule 6** of the Civil Procedure Rules and therefore the appellant cannot be held to be in contempt of Court.

[8] Upon hearing the application and contending arguments, the High Court (Ogola J) delivered a ruling in which the learned judge noted that the 1st respondent brought the application under **Order 39 rule 4 of the Civil Procedure Rules** which was the wrong provisions of the law, but nonetheless took cognisance of **Order 40 rule 3** of the Civil Procedure Rules that gives the court granting an order of injunction the powers to punish individuals for contempt of such orders. The learned judge noted that the order of injunction was issued ***"pending the hearing and determination of this suit"*** and observed as follows:

> ***"Whether there was sufficient reason or not I do not know. What is on record is that the judge in her wisdom issued injunctive orders herein*** *'pending the hearing and determination of this suit.'* ***That is clear enough. That order is not against the law in Order 40 Rule 6. Rather it complements Order 40 Rule 6. If the respondents were unhappy with that order, they ought to have applied to have it set aside or reviewed or they could even appeal against it. To decide unilaterally, that it was an illegal order was itself an act in contempt of the said order. This court on its own motion has the jurisdiction to punish such contempt"***

[9] Consequently, the learned judge found the contemnors in contempt and ordered their committal to jail. It is that decision that has provoked the current appeal which is predicated on the grounds that the learned judge erred in law and fact by; holding that the Order issued on 22nd February 2011 had not lapsed automatically by operation of law; failing to recognise the wording ***"pending the hearing and determination of this suit"*** does constitute sufficient reason anticipated in **Order 40 rule 6** of the Civil Procedure Rules; failing to consider whether there was personal service of the application for contempt to the contemnors as envisioned by **Section 5** of the Judicature Act; misinterpreting the law and granting itself jurisdiction it did not have under **Order 40 rule 3;** and failing to grant the contemnors a chance to be heard.

[10] During the hearing of the appeal, Miss M. N. Karanja appeared for the appellant while Mr. P. King'ara appeared for the 1st respondent and Ms. C.W Kimere appeared for the 2nd respondent.

[11] Counsel for the appellant submitted that its contention that under **Order 40 Rule 6** the interlocutory injunction lapsed after twelve months, is the correct position as the said Rule is couched in mandatory terms and therefore cannot be interpreted in any other way. Counsel cited two previous decisions of the learned judge in which he had expressed the same position, and noted that even in the judgment subject of the appeal, the learned judge also accepted this position but purported to create a distinction by focusing on the use of the wording ***"pending the hearing and determination of this suit."***

[12] In asserting that the learned judge erred in his interpretation of the rule, counsel for the appellant fortified her position by relying on ***Erick Kimingichi Wapang'ana & Another v. Equity Bank Limited & Another [2015] eKLR***. In addition, counsel argued that the learned judge erred by proceeding on his own motion to find the contemnors in contempt without giving them a chance to be heard; that the learned judge acted *suo motto* purporting to apply **Order 40 rule 3 of the Civil Procedure Rules,** that this was wrong as the order requires that a Notice of Motion be filed first. Counsel confirmed to the Court that as at the time of the appeal hearing, the suit properties had not been sold. Citing ***Rustam Hira v. Charles Mbagaya Amira & Another [2016] eKLR*** in which this Court expressed the importance of a party being heard before being committed for contempt of court, counsel urged the Court to allow the appeal.

[13] On his part, counsel for the respondent opposed the appeal submitting that the action of the contemnors was blatant disobedience of the Orders issued by the High Court. Counsel pointed out that the order of injunction included a prohibition that was issued under the doctrine of *lis pendens*, and that the issues that the appellant was now raising ought to have been raised before the High Court. He asserted that an order made by the court must be respected; that the learned judge was right in acting *suo motto* as the matter was before him and the contempt continued in his court; and that in any case, the prohibition issued under **section 52** of the **Transfer of Property Act of India** was still in force.

[14] In reply to the submissions made for the respondent, counsel for the appellant pointed out that the record of appeal confirmed that the appellant raised the issue of service before the learned judge; and that the appellant did apologize to the court. He urged that the appellant did not act in bad faith or with malice. He added that an injunction order issued pursuant to section 52 of the Indian Transfer of Property Act is dependent on the main injunction issued under the Civil Procedure Rules and cannot therefore stand on its own.

[15] We have carefully considered this appeal, the arguments that were made before the learned judge, the submissions made before us and the authorities cited. In our view, the issues that arise for determination are: whether the injunction issued on 22nd February, 2011, automatically lapsed after twelve months by operation of law; whether the words ***"pending the hearing and determination of this suit"*** in the order of injunction, sufficed as sufficient reason as envisioned in **Order 40 rule 6** of the Civil Procedure Rules; and whether the learned Judge erred by acting *suo motto* and finding the contemnors guilty of contempt without giving them a right to be heard.

[16] The appellant asserted that the Orders issued on 22nd February 2011 automatically lapsed after 12 months by effluxion of the law, as per the provision of **Order 40 rule 6**. That Rule states as follows:

> ***"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."***

[17] A plain reading of Order 40 Rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse. Therefore the question we address is whether the words ***"pending the hearing and determination of this suit"*** created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after 12 months.

[18] We have perused the ruling made by the High Court on 22nd February 2011. In the first place we note that the 1st respondent's notice of motion dated 26th August, 2008 that was subject of that ruling was brought under Order 39 Rules 1, 3, 5 and 9. Rule 1 of that Order specifically gave the court power to:

> **"grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

[19] Under the 2010 edition of the Civil Procedure Rules, Order 39 rule 1 became Order 40 Rule 1 in exactly the same terms, but there was the introduction of Order 40 Rule 6 limiting the order of interlocutory injunction for a period of 12 months. Thus, the order granted by the court issuing the interlocutory injunction ***"pending the hearing and determination of this suit"*** can only be read within the context of Order 40 Rule 1. In other words, the court was not addressing itself to Order 40 Rule 6 and providing sufficient reason for the order of injunction to remain in force for more than 12 months, but was merely issuing an order of temporary injunction to preserve the suit property during the pendency of the suit.

[20] The order made by the court on 22nd February 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by way of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time.

[21] We take note of the fact that in applying the Civil Procedure Rules the High Court was obligated under Section 1A and IB of the Civil Procedure Act, to be guided by and to further the overriding objective of the civil Procedure Act and Rules which includes to facilitate the just determination of the proceedings; the efficient disposal of the business of the court; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. The importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective was underscored by the High Court (Gikonyo J) in ***David Wambua Ngii v Abed Silas Alembi & 6 others [2014] eKLR:***

"It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure."

[22] This court expressed similar sentiments in ***Nguruman Limited v Jan Bonde Nielsen & 2 others 2014 eKLR*** :

> ***"Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders."***

[23] It is not disputed that as at the time when the appellant purported to issue a notification of sale and a 45 days redemption notice dated 16th April 2014, a period of three years and two months had lapsed from the time that the orders of interlocutory injunction were issued on 22nd February 2011. No attempt was made to have the orders extended by the court and therefore the court had no opportunity to consider whether there was any sufficient reason to extend the order of interlocutory injunction beyond the 12 months. We reiterate what this Court stated in ***Erick Kimingichi Wapang'ana & Another v. Equity Bank Limited & Another [2015] eKLR*** that:

> ***"Rule 6 Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless", as the Rule provides, "for any sufficient reason the court orders otherwise……In this case there was***

no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction lapsed on 12th October 2012"

[24] As we have demonstrated the words" ***"pending the hearing and determination of this suit"*** could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. This is clearly a situation where the 1st respondent was content to rest on his laurels for more than three years, and made no attempt to have the injunction extended. Nor did he appear anxious to have the substantive suit expeditiously disposed of.

[25] Furthermore, we are in agreement with the submission that the order of prohibition of registration of any dealing under section 52 of the Indian Transfer of Property Act that was issued by the learned judge could not stand alone, nor could it negate Order 40 Rule 6 of the Civil Procedure Rules. We find that the order of interlocutory injunction lapsed under Order 40 Rule 6 and therefore there was no injunction that the respondent defied in issuing the notification of sale and the redemption notice.

[26] Before we conclude, we wish to observe that due process was not followed in the procedure adopted by the learned judge in dealing with the contempt proceedings. It is evident that under Order 40 Rule 3, the High Court had powers to deal with disobedience of the order of injunction and had powers to commit a contemnor to jail, or order his properties to be attached. In our view, section 5 of the Judicature Act was not relevant as procedure was provided for under Order 40 Rule 3 that required the application to be brought by way of a notice of motion within the same suit.

[27] Nevertheless in applying Order 40 Rule 3, the cardinal principles of natural justice and the constitutional fundamental right to hearing had to be met. The notice of motion dated 27th May 2014 shows clearly on the face of it, that orders were sought against the contemnors who were officials of the appellant. However these officials were not respondents in the application, and it is the appellant who was served with the application. Although the contemnors were employees of the appellant it cannot be assumed that they had personal knowledge of the terms of the order of injunction or the application for contempt. The learned judge did not address the issue whether the contemnors were served or had personal knowledge of the order alleged to have been contravened, nor was there any demonstration or proof that the contemnors were each personally served with a copy of the order or any notice of penal consequences. Besides, the proceedings contained in the record of appeal shows that the learned judge only made an order requiring the presence of the contemnors in court for the reading of the ruling, and this was after the hearing of the application. In the circumstances, the orders made by the learned judge against the contemnors personally, without their having been given an opportunity to be heard was in violation of due process and cannot be sustained.

[28] We conclude that the orders of injunction made on 22rd February 2011 lapsed after 12 months and the contemnors could not be said to have been in contempt of orders that had ceased to exist by operation of law. Furthermore, the due process was not followed in the hearing of the contempt application. In the circumstances, we allow this appeal and set aside the ruling and orders of the High Court made on 17th October 2014. The fine if paid should be refunded to the appellants. In addition, we award the appellants the costs of this appeal. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 28th day of September, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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

DEPUTY REGISTRAR