IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 243 OF 2015

BETWEEN

SUREKHA HASMUKHLAL VIRCHAND SHAH.....1ST APPELLANT

MAYURI SUNIR SHAH.....2ND APPELALNT

JASODABEN CHANDULAL SHAH.....3RD APPELLANT

VERSUS

INVESTMENTS & MORTGAGES BANK LTD.....RESPONDENT

(*Appeal from the Ruling and/or Order of the High Court of Kenya*

at Nairobi (Havelock, J.) Dated 24th April, 2014)

in

Commercial & Admiralty Division (Milimani) Civil Suit No. 27 of 2013)

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JUDGMENT OF THE COURT

This is an interlocutory appeal arising from the Ruling of the **Hon. Mr. Justice Havelock**, **J,** delivered on the 24th day of April, 2014, dismissing the appellants' application seeking an injunction to restrain the respondent from advertising for sale, disposing of or selling by private treaty or public auction, all that property known as **Mombasa Block XXVI/380- Kizingo** (the suit property).

The brief background to the Appeal is that, in the year 1992 and subsequently on 10th January, 1996; 25th May, 1998; and 9th January, 2009, Chandulal **Virchand Shah, Suni Chandulal Shah** and **Atul Chandulal Shah,** the registered proprietors and chargors of the suit property, variously obtained overdraft, financial accommodations and or other banking facilities from the respondent. They were all secured against the suit property, in addition to joint and several guarantees executed by, **Hashmuklal Virchand Shah,** (the guarantor). The chargors defaulted on their repayments of the sums advanced under those facilities, prompting the respondent to issue a thirty (30) days statutory demand notice under the provisions of section **65(2)** of the Registered Land Act (RLA) (now repealed), on 19thDecember, 2011,demanding a total of Kshs. 72,292,600.62 together with interest. On the 8th February, 2012, the respondent issued a ninety (90) days statutory notice for the same purpose. On 5th December, 2012, the respondent through, **Garam Auctioneers,** issued a notification of sale giving the appellants forty five (45) days within which to redeem the property by paying the sum of Kshs. 76,051,895.47, in default of which the suit property would be sold by public auction. There is no documented reaction to those demand notices by the appellants. On 21st January, 2013, the respondent once again, through **Garam Auctioneers,** advertised the suit property for sale by public auction and scheduled the sale for4th February, 2013.

Apparently, it is in reaction to this last advertisement and, in our view, in a bid to forestall the impending sale of the suit property, that the appellants filed a plaint dated the 21st day of January, 2013, on which was simultaneously anchored a Notice of Motion, seeking an injunction on the same terms as the substantive relief in the plaint.

The application was based on the grounds in its body and a supporting affidavit of **Hasmukhlal Virchand Shah,** together with the annexures

thereto. In summary, the appellants' main contention was that the respondent's move to realize the security stood vitiated, on the ground that it was based on the erroneous demand of Kshs.77,000,000.00 which was far in excess of the Kshs.20,000,000.00 maximum limit for which the suit property was offered as security. Second, that the respondent had also flouted the law for its failure to comply with the mandatory provisions of the Land Act 2012, in the process of realizing the security.

In rebuttal, the respondent relied on a replying affidavit deposed and filed by **R.V. Narasimhan,** on the 1st day of March, 2013, together with the annexures thereto. The respondent admitted the existence of the various banking transactions averred to in the Plaint as having taken place between it and the appellant. It was also deposed that the appellants defaulted on their obligations prompting the respondent to initiate the process to realize the security; that the process was not only regular but also proper and well founded in law as the appellants had defaulted. The appellants stood to suffer no prejudice if the respondent proceeded with the said process to its finality as the respondent was able and willing to pay compensation that may arise should the appellants ultimately succeed in their claim against it.

The learned Judge, after due consideration of the facts before him, found no merit in the application, and dismissed it with costs to the respondent, triggering this appeal. The appellants raised ten (10) grounds of appeal which were subsequently condensed into three main issues in their written submissions, dated the 29th day of November, 2016. They complain that the learned Judge erred both in law and in fact when he failed to find that:

> ***A. The respondent breached the terms of the charge by purporting to recover the sum of Kshs. 76,051,895.47, which was far in excess of the maximum prescribed debt of Kshs. 20,000,000.00 for which the suit property stood security.***
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> ***B. The respondent was enjoined to comply with the provisions of the Land Act No. 6 of 2012 in the exercise of the intended power of sell of the suit property.***
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> ***C. The respondent fell into error when it failed to issue the appellants with the notice to sell under section 96(2) and 96(3) of the Land Act, 2012.***

In support of the appeal, learned counsel **Mr. O.K. Odera,** submitted that the power to grant an injunction is a discretionary one; that the principles that guide the exercise of, judicial discretion as enunciated in **Mbogo versus Shah [1968] E.A. 93**;are that in order to succeed on this appeal, the appellants are in law under an obligation to demonstrate that the Judge misdirected himself in principle, was plainly wrong and as a result, arrived at a wrong decision, when he declined to grant an injunction in theirfavour; and that the facts laid before the Judge also met the threshold set in the celebrated case of **Giella versus Cassman Brown [1973] EA 358** on injunctions.

In support of the appellants' contention that they established a *prima facie* case with a probability of success, counsel relied on **Mrao versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125, and Nguruman Limited versus Jan Bonde Nielsen & 2 others civil Appeal No. 77 of 2012,**and submitted that the appellant had sufficiently demonstrated that the respondent's move to realize the security based on the amount demanded of Kshs. Kshs.76, 051,895.47 as opposed to Kshs.20,000,000.00 maximum contractual limit which the suit property secured was in contravention of clauses 2 and 12 (viii) of the further charge. Relying on **Paul Odhiambo Edward Gondi versus National Bank of Kenya Ltd, Civil Appeal No. 271 of 2005**, in which the court upheld an appellant's argument that his liability could not exceed the limit secured by the further charge, Counsel submitted that on the facts, the appellants were justified in seeking the intervention on the issue as to the correct amount in respect of which the respondent should have based its right to realize the security. In counsel's view, this should have been determined first before the respondent could be allowed to proceed to finality to realize the security. The holding in the **Paul Odhiambo Edward Gondi** case (Supra), in counsel's view, coupled with the respondent's failure to comply with the provisions of Section 78 of the Land Act 2012 establishes a *prima facie* case.

In support of the second pillar, Counsel submitted that the intended illegitimate sale of the suit property would not only have clogged the appellants' right of redemption, but in counsel's view, it would also have been injurious to the appellants' proprietary rights, which in equity, was incapable of compensation for by way of damages.

Turning to the last pillar, on the balance of convenience, counsel submitted that this tilted in favour of the appellants. Counsel contended that in the circumstances, the trial Judge exercised his discretion wrongly when he withheld the injunction from the appellants and therefore warrants interference. He cited **Trust Bank Limited versus Eros Chaments Limited & another [2000] EA 550,** to fortify the submission that allowing the respondent to proceed to exercise its power of sale in the manner initiated, would extinguish the appellant's equity of redemption.

In opposition to the appeal, learned counsel **Mr. Martin Munyu,** leading Miss **Diana Ogula,** though conceding that the respondent initiated the process to realize the security in the suit property under the RLA, which was the law then governing such a process, submitted that the said Act was repealed before the process was completed. Counsel therefore submitted that in the circumstances, the Land Act 2012, which came into force before that process was halted, has no application, as it has no retrospective application. The Judge could not therefore in the circumstances be faulted for discounting its application as it was well founded in law.

In opposition to the appellants' submission that they had established a *prima facie* case, counsel argued that all that the appellants placed before the Judge was an argument that the respondent had not complied with the provisions of the Land Act, 2012, which was inapplicable.

Counsel next urged that no irreparable loss would be occasioned to the appellants if the respondents were to proceed to realize the suit property since, having been offered as a commodity for sale, its value is capable of being determined and compensated for in monetary terms, especially when the appellants had not contended both in their pleadings before the High Court and now in their submissions before this Court that the respondent would not be in a position to meet such compensation.

Turning to the 3rd pillar, counsel submitted that the balance of convenience also tilted in favour of the respondent as the appellants received financial facilities from the respondent which they failed to repay. The Judge could not therefore, in the circumstances be faulted for

rejecting the application.

To buttress the above submissions, counsel cited among others, **Jimmy Wafula Simiyu versus Fidelity Commercial Bank Ltd HCC No. 658 OF 2012** for the proposition that the law governing a mortgagee's exercise of statutory power of sale is the law prevailing as at the time the process is initiated; **Sammy Japheth Kariuki versus Equity Bank Limited & another Civil Case No. 84 of 2013 [2014] eKLR, Desai & 2 others versus Fina Bank Ltd [2004] 2EA46,** and **St. Elizabeth Academy –Karen Limited versus Housing Finance Co. of Kenya Limited[2013] eKLR,** all for the now crystallized principle that a dispute as to the amount outstanding with respect to a debt allegedly owed by a mortgagor to a mortgagee is not a basis for granting of an injunction. They also cited Moses **Ngenye Kahindo versus Afri Cultural Finance Corporation HCCC No. 1044 of 2001** and **Maithya versus Housing Finance Co. of Kenya & another [2003] 1EA 133**, for the proposition that where a party has offered property as security which is capable of valuation and a market value attached to it, such a party cannot turn around and contend that the loss suffered by him if the property were to be sold would be irreparable.

This being an interlocutory appeal, we must refrain from making any concluded view on the issues in controversy in the main suit, to avoid prejudging or prejudicing the pending suit. See **David Kamau Gakuru versus National Industrial Credit Bank Limited C.A No, 84 of 2001.**We should also be slow to interfere with the exercise of discretion by the trial Court, even if we would have come to a different conclusion had we been seized of the matter in the first instance. See **United India Insurance Co. Ltd versus East African Underwriters (Kenya) Ltd [1985] E.A. 896,** in which **Madan, JA(**as he was then**)** articulated the principle as follows:-

> "***The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance would or might have given difference weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere of 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 consideration of which he should not have taken account of; fourthly, that he failed to take account of consideration of which he should have taken account; or fifthly, that his decision, albeit a discretionary one is plainly wrong."***

We have considered the record in the light of the above rival submissions; the case law relied upon by the respective parties. With those principles in mind deciding whether the trial Judge exercised his discretion improperly when he declined the injunction is the sole issue that is in view before us.

The learned Judge analyzed the record and made observations thereon that, the respondent acted in accordance with the provisions of the RLA; that the application of the Land Act 2012 did not arise as it came into operation after the initiation of the process of realization of the security; that the Notices issued on the 19th December, 2011, and 8th February, 2012, were properly issued under the RLA, and were therefore not affected by the Land Act, 2012, which came into effect in May, 2012. Further that the forty-five (45) days notification of sale issued under Rule 15(c) of the Auctioneers Rules 1997, was regular as that was the correct procedure applicable then. On that account the Judge concluded that on the facts before him, it was not disputed that the appellants availed themselves of the banking facilities averred to in their plaint; that they defaulted on their commitments under the said facilities; that they received sufficient notice from therespondent requiring them to make good that default, but they neglected and or refused to remedy that default. Instead, according to the Judge, they sought to hide behind the provisions of section 96(3) of the Land Act 2012, which according to the Judge, was inapplicable as Parliament had not made provision for the form that appellants claimed had not been served on them in accordance with the provisions of the said Act. The Judge ruled that in the circumstances, he would not aid a wrong doer, and neither would he sit idle nor let the law to be used as a cover for ills. He therefore invoked the provisions of section 1A and 1B of the Civil Procedure Act, to uphold justice and ensure the fair and just determination of the matter.

The approach we take when determining whether the Judge exercised his discretion judiciously when he dismissed the application for injunction has already been crystalized by a long line of case law enunciated by this Court. In ***Nguruman Limited case (supra)***, the following observation was made:-

> "**Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Courts below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of a failure to take into consideration relevant matter or because the Judge considered irrelevant matters as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion".**

Whenever, a Court exercises discretion, there is always a presumption of correctness of the decision which is reversible only upon showing of a clear abuse of discretion. Once more, we remind ourselves that in considering this appeal, it would be both premature and prejudicial to the rights of the parties to make any conclusive pronouncement of fact or law, while the suit where such merits will be decided is still pending.

As to the applicable threshold, we associate ourselves with the observation made by the Court in **Kenya Commercial Finance Company Limited versus Afraha Education Society [2001] Vol. E.A. 86.** At page 89 paragraph c-e, the Court had this to say:-

> **d. "The sequence of granting an interlocutory injunction is firstly, that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will enure *(sic*) in his favour; secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience**
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> **– see *Giella –versus- Cassman Brown and Co. Ltd [1973] EA 358 at 360 letter E.* These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed".**

In the **Nguruman Limited** case (Supra), the Court went further and added the following:-

"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

(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour;

These are the three pillars on which rest 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 separable, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Company Limited versus 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 damage 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 facie* case does not permit *'leap-frogging'* by the applicant to injunction directly without crossing the other hurdles in- between. It is where there is doubt as to adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it's granted.

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 '*prima facie,* the nature and extent of the injury. 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 or 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 that 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".

Starting with the 1st pillar, a prima facie case was defined in **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others** (supra)as follows:-

"In civil cases, a *prima facie* case 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, to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable one. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case"

The Court went further to make the following observations on that definition:-

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion We reiterate that on considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Position of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.

How do all these principles, conditions and guidelines relate to this appeal? A temporary injunction would issue under Order XXXIX of the repealed Civil Procedure Rules in the following instances:- If it is proved that while a suit is pending determination, any property in dispute in the suit is in danger of being wasted, damaged, alienated or wrongfully sold in execution of a decree by any party to the suit, or the other party intends to remove or dispose of his property to avoid execution; or where the other party threatens to commit a breach of contract or other injury arising out the contract or related to a property or right".

We have given due consideration to the above observations on the definition of a *prima facie* case and we agree that it is a correct reflection of the meaning assigned to it. We fully associate and adopt the said observations as applicable to the circumstances under reference in this appeal.

Applying the above threshold to the rival submissions on this 1st pillar, and in the light of the holding in the **Paul Odhiambo Edward Gondi versus National Bank of Kenya**(supra), it is our finding that the appellants had satisfied the threshold on this pillar, reasons being that since

the respondent does not dispute the existence of the limitation clause(s) in the contract, there was need for the Court to determine the merits of the applicability or otherwise of the said limitation clause(s)before the respondent could proceed with the process to realize the security to its finality.

As for the second pillar, we agree with the respondents' submissions that where a party has offered property as security which is capable of valuation and a market value attached to it, such a party cannot turn around and contend that the loss suffered by him if the property were to be sold would be irreparable. We are also not in doubt as regards the respondent's ability to compensate such value, should the suit property be realized as security. It would follow that the appellants have not met the second pillar and we have no basis therefore for granting the injunction sought. Being of that view, and in line with the Nguruman case, it becomes unnecessary to consider the balance of convenience.

In the result, we order that the appeal be and is hereby dismissed with costs.

Dated at Nairobi this 23rd day of November, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR