**N THE COURT OF APPEAL AT NAIROBI**

**(CORAM: W AKI, GATEM BU, M'INOTI, JJA)**

**CIVIL APPEAL NUMBER 240 OF 2009**

**BETWEEN**

**BHANOO SHASHIKANT JAI.....APPELLANT**

**VERSUS**

**MULTI OPTIONS LIMITED**

**(IN RECEIVERSHIP).....1STRESPONDENT**

**KALPANA S. JAI.....2ND RESPONDENT**

**SHAMIR K. DESAI..... 3RD RESPONDENT**

*(An appeal from the ruling/order of the High Court of Kenya at Nairobi Milimani*

*Commercial Courts (Lesiit, J.) delivered on 7th August, 2009)*

**in**

**MCC Civil Suit No. 718 of 2008)**

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**JUDGEMENT OF THE COURT**

**Introduction**

**1.** This is an appeal from an interlocutory decision of the High Court (Lesiit, J) in a ruling delivered on 7 August, 2009 granting the 1strespondent's motion for temporary orders in the following terms:

> "*1.* ***An order of*** *lispendens* ***be and is hereby issued under section 52 of the Transfer of Property Act, 1882, restraining the respondents, either by themselves, their employees, agents or otherwise from transferring or otherwise dealing with the interest comprised in the properties referred to as L.R. No. 37/89 and L.R. No. 27/129, except under the authority of the Honourable Court on such terms as it may impose.***
>
> *2.* ***An injunction be and is hereby issued against the respondents either by themselves, their employees, agents or otherwise be restrained from effecting distress over the applicant's assets, entering, dealing with, selling, alienating, disposing, interfering with the applicant's quite possession of or in any way transferring the interest comprised in the properties referred to as L.R. No. 37/89 and L.R. No. 37/129, situate in the city of Nairobi until the hearing and determination of this suit.***
>
> *3.* ***The proclamation of distraint of moveable property dated 28th November, 2008 be and is hereby aside (sic) and the costs of the said distraint process ordered to be borne by the 3rd respondent.***
>
> *4.* ***An order be and is hereby issued directing that the respondents, or either of them, do deliver to the plaintiff company the title documents, charges, and discharges of charge for the L.R. No. 37/89 and L.R. No. 37/129, and any other assets,***

***documents and books of the plaintiff company within 7 days from the date of service with this order.***

*5.* ***An order be and is hereby issued directing that the caveat registered in the Nairobi Lands Registry on 8/12/2006 over L.R. No. 37/129 be removed forthwith.***

*6.* ***The 1st and 2nd respondents be and are hereby compelled to submit and verify a statement of affairs of the plaintiff company within 14 days from the date of service with this order.***

*7.* ***The costs of this application be borne by the respondents."***

**2.** Aggrieved by those orders, the appellant lodged the present appeal complaining that the Judge fell into error by granting orders of specific performance or mandatory injunction on an application for interlocutory injunction; that the Judge failed to consider that the property known as L R No. 37/89 was already transferred and registered in the name of the appellant; that the order for removal of caveat registered by the appellant against L R No. 37/129 was granted without according the appellant an opportunity to be heard; that the Judge erred in holding that security over immovable property could be acquired through a debenture as opposed to either a mortgage or a charge; that the Judge erred in holding that a floating charge could crystallize upon immovable property; and that the Judge erred in granting final orders summarily.

**Background**

**3.** Based on the pleadings and the affidavits filed before the High Court the facts in this case, though yet to be tested at trial, would appear to be as follows: Multi Options Ltd was granted loan facilities by Bank of India and by Akiba Bank Ltd. To secure the facilities to Bank of India, it charged its properties known as L R No. 37/89 and L R No. 37/129 to that bank by instruments of legal charge registered in December, 1997. Further charges over the same properties were registered in favour of Bank of India on5thJuly, 2002. To secure the facilities granted by Akiba Bank Ltd, Multi Options Ltd (the Company) issued a debenture and a further debenture in favour of that bank on 2ndSeptember, 2002 and on 13thSeptember, 2005 respectively. The record indicates that Akiba Bank Limited was initially EABS Bank Limited and later changed its name to Eco Bank Kenya Limited.

**4.** It would appear that the Company ran into financial difficulties and had challenges in servicing the loan facilities. With a view to clearing its debt with Bank of India the Company entered into an agreement with the appellant dated 11th May 2006in which it agreed to sell the two properties to the appellant for Kes. 16 million. Bank of India agreed to the sale provided that the purchase price would be channeled to that bank to liquidate the company's indebtedness with that bank. The proceeds of sale of the properties were paid to Bank of India which proceeded to discharge the charge and further charge over the properties by instruments dated 11thMay, 2006. On the same day, i.e. 11th May 2006, instruments of transfer of the properties in favour of the appellant were executed by the Company and witnessed by the 2ndand 3rdrespondents as the directors of the Company. It is averred that the appellant (the purchaser), is the mother of the 2ndrespondentand the mother-in- law to the 3rdrespondent.

**5.** Before the transfers of the properties in favour of the appellant could be registered, EABS Bank Limited appointed receivers and managers over the Company by a deed of appointment dated 25th May, 2006. The initial receivers and managers so appointed were Ponangipalli V. M. Rao and K. V. S. K. Sastry. Those two were subsequently replaced by the appointment of David Kibet Chebii as receiver manager through a deed of appointment dated 2 October 2008. On 13th July 2006, the transfer of the property L R No. 37/89 in favour of the appellant was registered at the Registry of Titles.

**6.** Against that background, the receiver manager of the Company instituted suit before the High Court by a plaint dated 2nd December, 2008 being HCCC No. 718 of 2008 contending that the dealings with the properties subsequent to the appointment of the receiver was tantamount to inter-meddling with the Company properties; that the agreement for sale entered into between the Company and the appellant would not affect the interests of the debenture holder and neither could the appellant nor the 2nd or 3rd respondents claim a prior right over the properties; and that the transfer of the properties without the knowledge or approval of the receiver was unlawful.

**7.** It is the receiver's case that the 2ndand 3rdrespondents as directors of the Company conspired to obtain the title documents and discharge of charge from Bank of India knowing fully well that the receiver was in charge of the Company; that the purported transfer of LR No. 37/89 and the lodging of a caveat over LR No. 37/129 by the appellant has the effect of unlawfully depriving creditors of access to the company assets.

**8.** It is also the receiver's case that that the 2ndand3rdrespondents as directors of the Company failed to discharge their statutory obligations under Section 351 and 352 of the Companies Act by failing to furnish a statement of affairs. Further complaints as pleaded in the plaint are that the appellant, as the purported owner of the properties attempted to unlawfully levy distress for rent or mesne profits without any basis for doing so.

**9.** Based on those claims, which as we have indicated are yet to be tried by the lower court, the receiver seeks in his plaint: a declaration that the receiver is the proper custodian of all the Company's property including title documents and discharges of charge over the suit properties; an order directed at the appellant and the 2nd and 3rdrespondents to deliver to the receiver the title documents relating to the properties; a declaration that upon appointment of a receiver on 25thMay 2006, the debenture holder stood in priority over all unsecured creditors regarding all the Company's property; a declaration that the purported sale and transfer of the properties to the appellant without the sanction of the receiver is null and void; an order directed to the Registrar of Titles to cancel the transfer in favour of the appellant; a permanent injunction to restrain the appellant and the 2nd and 3rdrespondents from levying distress or otherwise dealing with the properties; that the caveat registered by the appellant over the LR No. 37/129 be removed; that the 2nd and 3rdrespondents be compelled to submit and verify a statement of affairs of the Company within 14 days.

**10.** Alongside the plaint, and on the basis of those pleadings and asserted facts, the receiver presented before the High Court an application by way of chamber summons seeking the orders that were ultimately granted by the lower court on 7 August 2009, as set out in paragraph 1 of this Judgment.

**11.** That application was opposed. In her affidavit in opposition to the application, the appellant took issue with the capacity of the Company to maintain the suit in light of the appointment of a receiver; she asserted that the properties were not and did not form part of the assets of the Company; that she entered into the agreement for sale over the two properties prior to the appointment of the receiver; that on execution of the agreement for sale on 11thMay 2006, she became the equitable owner of the properties; that the debentures could not extend to land which would only be secured by a fixed charge; and that the receiver had instituted another suit, being High Court Civil Case No. 288 of 2007, that was still pending before the High Court. On their part the 2ndand 3rdrespondents did not file an affidavit in reply but filed grounds of opposition two the application.

**12.** After considering the application, the learned Judge of the High Court found that the two properties were covered by the debentures; that from the moment receivers were appointed over the Company, the powers of the directors of the Company were paralyzed; that even though the sale agreement over the properties in favour of the appellant had been signed 14 days before the appointment of the receiver manager, "*that agreement became a piece of paper and any transaction that took place between the* [the 2nd and 3rd respondents] *as representing the … company and the*[the appellant], *after that date, were of no legal effect*."

**13.** The Judge was accordingly satisfied that the receiver had made out "*a prima facie case with a high probability of success at the trial"* that the properties had not been sold to the appellant by the 25th May 2006 when the receiver manager was appointed; and that the nature of injury or loss that would ensue unless she granted the orders sought would not be adequately be compensated by an award of damages. She accordingly allowed the application and granted the orders aforementioned prompting this appeal.

**Submissions on the appeal**

**14.** In support of the appeal learned counsel for the appellant Mr. Otieno Omuga submitted that the orders granted are in the nature of a mandatory injunction and had the effect of mainly determining the suit. On the strength of the decision in ***Kenya Breweries Ltd vs Okeyo [2002[ E A 109*** and the English decision of ***Shepherd Homes Ltd vs Shandahu (1971) 1 Ch. 34***, counsel urged that a mandatory injunction should not be granted at an introductory stage in the absence of special circumstances; that in this case there were no special circumstances that warranted the issuance of such orders; that the Judge failed to consider that there were other assets that could be utilized to settle liabilities of the Company to the debenture holder and it is therefore mischievous for the receiver to claim the appellant's properties.

**15.** It was submitted that in the circumstances of this case, and having regard to the overriding objectives to act fairly and justly, what was required was maintenance of the *status quo* of the properties at the time of the ruling as opposed to granting a mandatory injunction whose effect would leave the appellant exposed having already settled the company's indebtedness with the Bank of India but is denied the right to enjoy ~~our~~ his investment. In that regard the case of ***E. Muriu Kamau and another vs. National Bank of Kenya [2009] eKLR*** was cited. According to counsel, the orders granted by the court violate the appellant's right to own property under Article 40 of the Constitution.

**16.** It was submitted further that the order for the removal of the caveat lodged against LR No. 37/129 by the appellant violated the appellant's right to fair hearing under Article 50 of the Constitution as well as the appellant's right to administrative action under Article 47 of the Constitution: that it is a violation of provisions of section 57(5) of the repealed Registration of Titles Act which requires a caveator to be summoned and given an opportunity to make representations before removal of caveat. In support, reference was made to the decision in ***Republic vs Chief Justice of Kenya and 6 others Ex Parte Ole Keiwua [2010] 1 KLR 428***.

**17.** According to counsel the decision of the lower court is also erroneous in that the Judge found that immovable property can be the subject of a debenture as opposed to mortgage or a charge; that notwithstanding the debenture, the Company retained its power to deal with its assets and as long as the floating charge created by the debenture had not crystallized, the Company was at liberty to sell any of its assets in the course of its business and that the floating charge created by the debenture remained in force until 25th May 2006 when the Company was placed under receivership.

In support, counsel referred to the case of ***Ashborder BV and Others vs. Green [2004] EWHC 1517,*** among other cases.

**18.** Counsel concluded by urging that in granting the orders in the manner that it did at interlocutory stage, the court usurped the role of the trial court as the orders granted had the effect of bringing the entire suit to an end. In that regard reference was made to the case of ***Alex Wainaina t/a John Commercial Agencies vs Johnson Mwangi Wanjihia [2015] eKLR*** amongst other cases. According to counsel, the Judge went beyond considering whether a *prima facie* case had been made out and wrongly determined the matter with finality.

**19.** Supporting the appeal, learned counsel for the 2ndand 3rd respondents Mr. E. Masika submitted that a full trial was required in order to address the matters in controversy; that the Judge failed to accord the parties an opportunity to bring evidence on contested matters; that the Judge wrongly concluded that the two properties purchased by the appellant were the subject of the debentures; that it was necessary to establish whether the consent of Bank of India was given prior to the issuance of the debentures; that a mandatory injunction can only be granted in special or exceptional circumstances and none were shown to exist in this case.

**20.** Opposing the appeal, learned counsel for the 1strespondent Mr. S. Luseno relied on the submissions filed before the lower court and submitted that the conditions for the grant of the orders that were given were satisfied; that the orders were justified in order to arrest an illegality; that in deserving cases such as this, the court has the mandate to grant mandatory injunctions as the directors of the Company were trying to frustrate the receivership; that it was never suggested by the appellant or by the 2nd and 3rd respondents that the receivership was illegal and the appeal is therefore wholly without merit.

**Analysis and determination**

**21.** We have considered the appeal and submissions by counsel.Although the appellant has 7 grounds of appeal in his memorandum of appeal, the main issue for consideration is whether the Judge erred in holding that the 1st respondent had fulfilled the necessary conditions to be granted interlocutory injunctive relief. Related to that is the question whether the circumstances in this case warranted the issuing of mandatory injunction at an interlocutory stage.

**22.** Webear in mind that in considering the application giving rise to the impugned ruling, the lower court was exercising judicial discretion. Accordingly, the circumstances in which we can, as an appellate court, interfere with the exercise of discretion by the lower court are circumscribed. We can only do so if satisfied that the Judge misdirected herself in law or that she misapprehended the facts or that she considered extraneous matters or that she failed to consider relevant factors or that her decision is plainly wrong. In ***Mbogo & Another vs. Shah [1968] E.A. 93*** at page 96, Sir Charles Newbold P. stated:

> ***"…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."***

**23.** In effect, we cannot interfere with an exercise of judicial discretion unless it is shown that the discretion has not been exercised judicially. We are also mindful that the suit before the lower court is yet to be tried and must be guarded not to express concluded views that might embarrass the trial court.

**24.** We begin with the question whether the Judge erred in holding that the 1st respondent had fulfilled the necessary conditions for the grant of interlocutory injunctive relief. In other words, did the judge properly exercise her discretion in granting interim relief? The principles governing the exercise of judicial discretion when considering an application for interlocutory junction were stated in the famous case of ***Giella vs Cassman Brown & Co Ltd [1973] EA 358*** thus: that an applicant must show a *prima facie* case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and that when the court is in doubt it will decide the application on the balance of convenience.

**25.** Based on our review of the ruling under consideration, the Judge was alive to and was guided by those principles. In considering whether the applicant had established a *prima facie* case, the judge considered the import of the transfer of the properties in favour of the appellant having been done after the appointment of a receiver by the debenture holder; she considered whether the properties were the subject of the debentures and whether the Company could dispose of the properties during the currency of the receivership. These were undoubtedly relevant considerations in determining whether or not a *prima facie* case had been made out to justify the grant of the interim relief that was sought.

**26.** The judge also considered, as she was obliged to do, whether the receiver would suffer irreparable injury unless the orders were granted. In that regard, the judge stated:

> ***"If the injunction is not granted the debenture holder will lose out on its security, and that means it may be difficult for each to recover from the plaintiff company. The other reason is that the debenture gives the debenture holder certain rights and a ranking in preference to unsecured creditors. If the assets over which the debenture crystallized are lost, the rights that the***

***debenture holder had accrued under the debenture so far will also be lost. It is not to the benefit of the plaintiff company, neither is it to the benefit of the creditors to allow such a situation. This injury or loss cannot adequately be compensated by an award of damages***."

**27.** Based on the foregoing, we do not see how the Judge can be faulted for the manner in which she applied the principles in ***Giella vs Cassman Brown & Co Ltd*** (above). Indeed, we discern from the appellant's submissions that the appellant's real grievance relates to the nature of relief that the court ultimately granted as opposed to a complaint that an interim measure of protection was not deserved. In that regard, counsel for the appellant submitted that courts are enjoined to dispense substantive justice and to weigh the relative hardships of the parties before them; and that "*the application of this principle necessitated the maintenance of the status quo of the suit properties at the time of the ruling instead of granting mandatory injunctions*". That then leads us to the question whether the circumstances in this case warranted the issuing of mandatory injunction at an interlocutory stage.

**28.** There is abundant authority for the proposition that a mandatory injunction ought not to be granted at an interlocutory stage in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. That was the holding in the English case of ***Locabail International Finance Ltd vs Agroexport and others [1986] All ER 901***. See also ***H al sbury's Laws of England***, 4th edition, Volume 24 at paragraph 948. The same principles of law have been adopted and applied by our courts. See for instance ***Kenya Breweries Ltd vs. Okeyo [2002] 1 EA 109***.

**29.** Recently, in ***Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia [2015] eKLR***, this Court reaffirmed those principles and after reviewing past decisions on the subject and stated that:

> "***The consistent reiteration of those principles by the court is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution***."

**30.**Based on a review of the impugned ruling, it is not evident that the Judge considered whether the applicant had established the existence of any special circumstances to warrant orders that she gave at an interlocutory stage directing: the appellant to deliver the title documents relating to the properties to the 1st respondent; the removal of the caveat registered against the properties. The 1st respondent did not demonstrate the existence of exceptional or special circumstances to warrant or to justify the grant of a mandatory injunction at that stage. To that extent only, we are entitled to interfere with the decision of the lower court.

**31.** In the result, whereas we are satisfied that the Judge was right in holding that the 1st respondent had established a case for the grant of an interim relief by way of a temporary injunction to maintain the status quo, the Judge erred in granting mandatory injunction orders at that stage. Consequently, we allow the appeal to the extent only that we hereby set aside order numbers 4 and 5 as reproduced at paragraph 1 of this Judgment. For the avoidance of doubt, the orders numbers 1, 2, 3, 6 granted by the lower court shall remain in place pending the hearing and determination of the suit in the High Court.

**32.** As the appellant has partially succeeded in this this appeal, we think each party should bear its own costs of the appeal as well as the costs of the application in the High Court.

Orders accordingly.

**Dated and delivered at Nairobi this 20th day of December, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL**

*I certify that this is The true copy of the original.*

***DEPUTY REGISTRAR***