



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 284 OF 2015

BETWEEN

ICICI BANK LIMITED.....1ST APPELLANT

KOLLURI VENKATA SUBBARAYA KAMASASTR....2ND APPELLANT

AND

SURYA HOLDINGS LIMITED.....1ST RESPONDENT

RHEA HOLDINGS LIMITED.....2ND RESPONDENT

YESHODA INVESTMENTS LIMITED.....3RD RESPONDENT

KARUTURI LIMITED.....4TH RESPONDENT

KARUTURI OVERSEAS LIMITED.....5TH RESPONDENT

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

(Gikonyo, J.) dated 14th July, 2015

in

H. C. C. C. No. 68 of 2015)

JUDGMENT OF THE COURT

1. This is an interlocutory appeal against the ruling of the High Court (Gikonyo, J.) dated 14th July, 2015 wherein several injunctive orders were issued pursuant to an application filed by the respondents. As far as we know the suit is still pending before the High Court. It appears that there was a long standing bank/customer relationship between the 1st appellant and the respondents. The 1st, 2nd and 3rd respondents are land holding companies which leased their parcels of land to the 4th respondent whose principal business was flower farming. The 4th respondent also engaged in the importation of flowers. At

the hearing of the appeal we were informed that the 4th respondent had since been wound up. The 5th respondent is affiliated with the 4th respondent. The 2nd appellant was appointed as a receiver over the 1st, 2nd, 3rd and 4th respondent companies by the 1st appellant.

2. In brief, the facts culminating in this appeal were that on diverse dates in the years 2010 and 2011 the 1st appellant extended various banking facilities to the 5th respondent. Of relevance was a Foreign Currency Term Loan (FCTL) which was to be disbursed in two phases as follows: -

- i. FCTL-1 for USD 15 million, as per sanction letter dated 20th December, 2010.
- ii. FCTL-2 for USD 25 million, as per sanction letter dated 20th December, 2010 and amended by a letter dated 27th September, 2011.

The second was a Working Capital Demand Loan (WCDL) for USD 11 million.

3. However, the nature and extent of the securities for the said facilities is an issue in contention between the parties. On one hand, the respondents' position is that the 1st, 2nd, 3rd and 4th respondents are guarantors of only the FCTL which was extended to the 5th respondent. In addition, a joint & several debenture (debenture) dated 24th October, 2011 over the freehold and leasehold properties (suit properties) of the said respondents secured only the FCTL. The WCDL was secured by different guarantors and securities in Ethiopia. On the other hand, the 1st appellant maintains that the debenture also acted as security for the WCDL.

4. It is worth noting that the securities under the debenture were also held on a *pari passu* basis by CFC Stanbic Bank Limited (Kenya) (CFC) as security for an amount of USD 6,950,000 which was advanced to the 4th respondent. The terms regulating the shared securities are contained in an inter-bank agreement between the 1st appellant and CFC.

5. The 1st appellant disbursed the full FCTL-1 amount of USD 15 million which was repaid by the 5th respondent. Nevertheless, the 1st appellant failed to disburse the entire FCTL amount in the second phase and instead disbursed a sum of USD 10 million. Apparently, before disbursing the balance, the 1st appellant recalled the facilities it had extended to the 5th respondent and demanded payments of any outstanding amounts thereunder. According to the respondents', the 1st appellant combined the two facilities extended to the 5th respondent, that is, the FCTL and WCDL which were secured by different securities in different countries without any color of right and contrary to the terms of the debenture. The 1st appellant's actions were calculated to cripple the 4th and 5th respondents' businesses which were dependent on the facilities and to clog the respondents' equitable right of redemption. Furthermore, the 1st appellant refused to release part of the securities under the debenture which were estimated to be worth Kshs.90,951,630 as at 20th June, 2012 on account of an alleged outstanding amount of USD 19,991, 580 from the 5th respondent. Thus, the respondents could not source for alternative funding.

6. The foregoing had a domino effect on the 4th and 5th respondents' businesses resulting in their inability to meet their contractual and financial obligations which in turn exposed them to law suits. One such suit was H. C. Winding up Petition No. 12 of 2013 (Winding up cause) wherein one of the 4th respondent's suppliers namely, Allpack Industries, sought to wind up the said respondent. Thereafter, the 1st appellant appointed the 2nd appellant as receiver over the 1st, 2nd, 3rd and 4th respondent companies. Subsequently, on 26th January, 2015 the 2nd appellant advertised the suit properties for sale.

7. Convinced that the 1st appellant was the author of the 4th and 5th respondents' predicament and had no right to benefit from the same, the respondents filed suit on 17th February, 2015 in the High Court praying for several declarations and injunctive orders. Contemporaneously, the respondents also filed a notice of

motion seeking interlocutory injunctive orders.

8. Their application was premised on the grounds that firstly, the 1st appellant had breached the terms of the lending contract by failing to disburse the entire FCTL amount. As such, it could not rely on the terms of the said contract to mount any claim against the respondents. In any event, it was the 1st appellant in collusion with CFC that instigated default on part of the respondents. Secondly, the 5th respondent was not in breach and had in fact fully repaid the first FCTL. At the time the 1st appellant recalled its facilities, the 5th respondent was up to date in repayment of the second FCTL. Therefore, there was no basis for the 1st appellant to appoint the 2nd appellant let alone advertise the suit properties for sale. Thirdly, the appellants were in breach of lawful court orders restraining the sale of the respondents' properties issued in H.C.C.C No. 78 of 2014 between the 1st, 2nd and 4th respondents and CFC (CFC suit). Fourthly, the 2nd appellant had mismanaged the 4th respondent's business. Lastly, it was imperative for the suit properties to be preserved from disposition by the 2nd appellant.

9. Understandably, the appellants opposed the application. It was deposed on their behalf that at the time the facilities were recalled the outstanding amount was USD 19,991,580.80 plus interest of USD 152,071.82; the outstanding amount continued to accrue interest until payment in full; the 1st appellant's actions were proper in law and in conformity with the agreements between the parties; as per the terms of the debenture, any outstanding amount became due after the respondents breached the conditions therein; they did so by failing to make repayments when they became due by failing to honour their undertakings; disclose the existence of the winding up cause, service of a statutory notice of sale upon the 4th respondent by CFC and a tax audit by Kenya Revenue Authority that assessed the 4th respondent's tax liability at approximately Kshs.950 million to the 1st appellant.

10. The 1st appellant's actions were geared towards safeguarding its interests; in the appellant's opinion, the respondents were guilty of laches because the 2nd appellant was appointed on 5th June, 2014 and they were informed of the same.

Their application which was filed on 17th February, 2015 was a knee jerk reaction to the advertisement made on 26th January, 2015 for the sale of the suit properties. The appellants' were neither parties in the CFC suit nor were they served with the orders therein. Consequently, the respondent had not only failed to establish a *prima facie* case but also that damages would not be an adequate remedy in the event the orders sought were not granted. In the end, the balance of convenience tilted towards the orders being declined.

11. In the impugned ruling the learned Judge exercised his discretion in favour of the respondents and issued the following orders:-

a) An injunction restraining the 1st defendant either by itself or through the 2nd defendant, being its receiver and manager or such other receiver and manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th plaintiffs moveable and immovable properties including but not limited to all those properties known as LR No. 10854/60 in the name of the 2nd plaintiff, LR No. 12248/19,12248/20,12248/21,12248/38,25261 and 25262 in the name of the 1st plaintiff or otherwise from howsoever dealing with the suit properties pending the hearing and determination of this suit.

b) An injunction restraining the 1st defendant either by itself or through the 2nd defendant, being its receiver and manager or such other receiver and manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd,

3rd and 4th plaintiffs assets under or secured by the debenture dated 24th October, 2011 pending the hearing and determination of this suit.

c) An injunction restraining the 2nd defendant being the receiver/manager or such other receiver/manager that the 1st defendant may purport to appoint restraining him and/or them from discharging, executing and/or effecting any powers or such powers under the deed of appointment dated 9th June, 2014 or such other appointing instrument or in any other way interfering with the operations, management, running and affairs of the 1st, 2nd, 3rd and 4th plaintiffs/applicants pending the hearing of this case. This order is not removal of the receiver and manager. It only stops him from exercising any of his powers.

12. Aggrieved with the foregoing, the appellants' filed the appeal before us which is predicated on the grounds that the learned Judge erred in fact and law by-

a) Finding that the respondents' had satisfied the principles set out in Giella vs. Cassman Brown & Co. Limited [1973] for granting an injunction.

b) Making final determinations at the interlocutory stage rendering a full trial moot.

c) Finding that the 2nd appellant was properly appointed and in the same breath restrain him from carrying out his duties.

d) Giving undue weight to the proceedings in the CFC suit wherein the appellants were not parties.

e) Finding that the appellants disobeyed a court order issued in the CFC suit.

13. The appeal was disposed through written submissions and oral highlights. Mr. Nyaribo appeared for the appellants while Mr. Wandabwa together with Mr. Owino appeared for the 1st, 2nd, 3rd, and 5th respondents. Mr. Maweu appeared for the 4th respondent.

14. It was submitted on behalf of the appellants that the learned Judge ought to have been guided by the settled principle that parties are bound by the terms of their contract. He ought not to have interfered with the terms thereunder. Reliance was placed on ***Halsbury's Laws of England 4th Ed. Vol. 16*** wherein the authors at paragraph 144 stated:

"The court will not interfere with the freedom of contract and will not ... merely because a man has made an improvident contract, relieve him from its consequences."

15. The terms of the debenture were clear that it secured the entire liability accruing as against the 5th respondent. The 5th respondent defaulted in making repayments and the 1st appellant sent several reminders and demands without any success. For that reason the 1st appellant had a right to appoint the 2nd respondent as provided under the debenture. The 1st appellant was under no duty to refrain from exercising that right merely because it might cause loss to the respondents. In that regard, the appellant relied on ***Re Potters Oil Ltd 1 WLR 201*** and ***Madhupaper International Limited vs. Kerr [1985] eKLR***.

16. Asserting that the 2nd appellant had the right to advertise the suit properties for sale, the appellants argued that the debenture created a charge over the said properties. Moreover, the execution of the debenture by the respondents coupled with their conduct of depositing the title deeds of the properties with an advocate to the order of the 1st appellant created an equitable mortgage. Therefore, the beneficial interest over the suit properties was transferred to the 1st appellant. Accordingly, there was no need for the 2nd appellant to seek the court's sanction before advertising and selling the properties.

17. The appellants' urged that an injunction as an equitable relief ought to be granted only under equitable circumstances. It could not be issued where a party sought to use it to disregard its obligations such as in this case. According to the appellants', the respondents had not made a case for the issuance of injunctive reliefs. Elaborating further, it was argued that the respondents had admitted the indebtedness of the 5th respondent and as such a *prima facie* case had not been established. To buttress this line of argument, the case of **American Cyanamid vs Ethicon Limited [1979] AC 396** was cited and we were referred to the sentiments made by Lord Diplock that:-

“If there is no prima facie case on the point essential to entitle the respondent to complain of the appellant’s proposed activities, that is the end of any claim to interlocutory relief.”

18. The respondents had also failed to demonstrate that they would suffer irreparable loss which could not be adequately compensated by an award of damages. As far as the appellants' were concerned the minute the respondents offered their properties as security under the debenture, the said properties became commodities for sale to which a sentimental value could be attached. In support of that proposition, the appellants' relied on the persuasive decision of the High Court in **Thomas Nyakamba Okong’o vs Co-operative Bank of Kenya Ltd. [2012] eKLR**.

19. The appellants took issue with the learned Judge’s order restraining the 2nd appellant from carrying out his duties yet he had found that he had been properly appointed. To them, the learned Judge’s decision led to an absurd outcome since by operation of the law, once a receiver is appointed the powers of the company’s directors are suspended. Therefore, the 1st, 2nd, 3rd, and 4th respondents were left in limbo in as far as their management was concerned.

20. The appellants contended that a court should not interfere with the exercise of power by a receiver who has been properly appointed save in exceptional circumstances. No exceptional circumstances were demonstrated to warrant the learned Judge’s interference. They submitted that the decision whether to sell suit properties or not was within the discretion of the 2nd appellant.

21. The learned Judge was also faulted for making final determinations on several issues of fact without having an opportunity to test the veracity of allegations made by the parties at a full hearing.

22. In the alternative, the appellants' submitted that the injunctive orders ought to have been issued subject to certain conditions which safeguarded the 1st appellant’s interests.

23. According to the respondents, 1st appellant had breached the terms of the contract between the parties. That by itself fulfilled the standards for granting an injunction as set out under **Giella vs. Cassman Brown & Co. Limited (supra)**.

24. It was submitted that the appointment of the 2nd appellant was oppressive and unfair; there was no default on the part of the respondents hence, there was no reason for the appointment of the 2nd appellant. Supporting the learned Judge’s interference with the 2nd appellant’s appointment, the respondents relied on **Fina Bank Limited vs Spares Industries Limited [2000] eKLR** wherein Tunoi, J.A (as he then was) expressed;

“However, it is also correct law that where a party has a statutory right of action the Court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively. The issue of receivership is an emotive one

and I understand why the respondent had to resort to litigation. It destroys the business. It is expensive. The appointment of Receivers and Managers may not necessarily improve the financial position of the business. These, in my view, are matters for consideration as to whether to grant a temporary injunction or not. I am satisfied that all these observations were in the mind of the learned Judge when he acceded to the application for injunction. Indeed he acted in

accordance with the principles laid down in Giella vs Cassman Brown & Co. Ltd. [1973] EA 358 and came to the correct decision. I find no ground to fault him as he had exercised his discretion correctly and judicially.”

25. In the respondents’ opinion, the 2nd appellant could not advertise or sell the suit properties without the sanction of the court. This is because the charges created by the debenture over the said properties were not registered thus they were informal charges within the meaning of **section 79** of the **Land Act**. Besides, the orders issued in the CFC suit restrained the sale of the suit properties under the debenture. The actions of the 1st appellant were aimed at defeating the said orders.

26. Mr. Maweu took no position with regard to the appeal and left it to the Court to determine the appeal.

27. We have considered the record, submissions by counsel and the law. The appeal herein challenges the exercise of discretion by the learned Judge. This Court may only interfere with the exercise of such discretion on the basis of well settled principles which we take from the locus classicus case of **Mbogo & Another vs. Shah [1968] EA 93** at page 96, thus:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court 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 and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.”

28. There are three tests which guide a court in determining whether to issue an injunction or not. The three well- known tests enunciated in **Giella vs Cassman Brown [1973] EA 358** are to the effect that a party seeking a temporary injunction has to establish a *prima facie* case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.

29. A *prima facie* case is one which is arguable and warrants consideration by the court. This Court in **Mrao Ltd vs First American Bank of Kenya Ltd. & 2 others [2003] eKLR** succinctly defined a *prima facie* case thus,

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”

30. Did the respondents establish a *prima facie* case? In determining whether they did, we take caution not to make final findings on issues of fact which would otherwise embarrass the trial which is still pending. The learned Judge appreciated and properly so that the legal rights of the parties depend on facts which are in dispute between them. On the one hand, the respondents’ contention is that the 1st appellant breached the terms of the contract by recalling the financial facilities extended to the 5th respondent and failing to disburse the entire FCTL without any justification; unilaterally varying the terms of the agreement by consolidating two different facilities. The 1st appellant in collusion with CFC were the authors of the respondents’ financial predicament. In contrast, the appellants’ contended that the 1st appellant acted within the terms of the debenture; it recalled the facilities and appointed the 2nd appellant after the respondents breached the terms of the debenture. The only evidence which was available to the learned Judge and to us is affidavit evidence by parties which is incomplete, conflicting and untested. In view of the serious issues raised by the parties and conflicting evidence, to express an opinion now as to the prospects of success of either party would only be embarrassing to the Judge who will eventually have to try the case. In that regard, we are guided by the sentiments of this Court in **Central Bank of Kenya & Another vs Uhuru Highway Development Ltd & 4 Others [2000] eKLR**,

“In this case, the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application of an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

.....

It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. Those are matters to be dealt with at the trial.”

31. We find that the learned Judge in considering whether a *prima facie* case had been established went over and above his mandate at the interlocutory stage. From the onset he erroneously engaged in a merit consideration of the issues in dispute. This is clear from the manner in which he framed the issues for determination. We set out the issues as framed herein below:-

a)

b) Whether non-disbursement of the entire loan is a basis for injunction. Here, I will consider arguments that the bank breached the loan agreement and, therefore, as a defaulting party it cannot enforce a contract that it has failed to honour. I will also consider whether a borrower can default on repaying a loan for sums not availed in terms of the Letter of Offer.

c) Whether a bank can unilaterally and without the consent of Guarantors vary the terms under which various Guarantees were executed, and the effect of such unilateral variation of the contract with a borrower to the detriment of both the borrower and guarantors;

d) Whether the 2nd Defendant/Respondent was properly appointed as Receiver and Manager of the Applicants. The legal position of the power to sell property based on an informal Charge and whether the receiver herein should sell the properties herein will be addressed as well; and

e) Allegations of disobedience of court orders by a Receiver.

32. Operating under the foregoing misapprehension, the learned Judge ended up making final findings at the interlocutory stage. In his words he stated:

“Specific answers to issues:

In light thereof, I give the following specific answers to issues herein;

a)

b) Whether non-disbursement of the entire loan is a basis for injunction.

The non-disbursement of the entire loan in contravention of the loan agreement is a ground of issuing an injunction especially where it amounts to failure to perform your part of the bargain, thus, breach of the contract. A bank which negates on its obligation to disburse funds under a loan agreement is in default of the contract and will not be allowed to derive advantage from its own default. This is the case here. In such case, the borrower may argue that there is no default in so far as non-disbursed funds are concerned. There is, therefore, an infringement of right for which an injunction would issue.

c) Whether a bank can unilaterally and without the consent of Guarantors vary the terms under which various Guarantees were executed, and the effect of such unilateral variation of the contract with a borrower to the detriment of both the borrower and guarantors;

There were unilateral variations of the agreement by the bank without consent of the borrower or the guarantors. Such variation would affect the lending contract as well as the guarantee. It may also afford the guarantors a defence and claim discharge of guarantee. It is a basis for issuing an injunction in appropriate cases such as this one. The 1st

Defendant act of consolidating the Foreign Currency Term Loan and the Working Capital Demand Loan, and loading the entire amount on securities offered by the 1st, 2nd, 3rd, and 4th Plaintiffs/Applicants for the Foreign Currency Term Loans will need evaluation in the trial. It is a substantial issue.

d) Whether the 2nd Defendant/Respondent was properly appointed as Receiver and Manager of the Applicants. The legal position of the power to sell property based on an informal Charge and whether the receiver herein should sell the properties herein will be addressed as well.

The 2nd Defendant's appointment as Receiver and Manager as well as the right to appoint such receiver is seriously in doubt. The actions by the 2nd Defendant on hive-down were also done in bad faith as he was aware of the court order issued on 11th June 2014 and that there were other two Receivers and Managers on the suit properties and business. In view of the inter-bank Agreement and the law, the actions by the 2nd Defendant were inappropriate for they were taken unilaterally and without reference to the other Receivers and Managers who were appointed by CFC Stanbic Bank. The power to appoint the receiver was exercised oppressively.

e) Allegations of disobedience of court orders by a Receiver.

The Defendants were fully aware of the court orders issued on 11th June 2014 when they chose to move forward with the sale of the enterprise and the suit properties. Their actions were inappropriate and completely squeeze out the core of receivership the way it is envisioned in law. Although they were no parties to suit number 78 of 2014, they ought to have acted carefully and in recognition of the effect of such order and the fact that there were receivers and managers on same site. They acted negligently in respect of the properties and business of the 1st – 4th Plaintiffs when they ignored the law, the court order and the existence of the Receivers and Managers on the site with whom they ought to have endeavoured to act jointly. The Defendants actions negate the maxims of equity that;

“he who comes to equity must come with clean hands” and “he who seeks equity must do equity”.

There was no basis for the learned Judge to make the said findings in light of the conflicting evidence which could only be tested in a full trial. See *Kenya Railways Corporation vs Thomas M. Nguti & 6 Others [2009] eKLR*.

33. Taking into account the evidence on record, we are not satisfied that the respondents' had demonstrated that they would suffer irreparable harm which could not be compensated by damages. The fact that the learned Judge believed that more often than not receivership led to the ultimate collapse of company was not enough to satisfy this test.

34. Ultimately, we believe that in the circumstances of this case the balance of convenience tilted in favour of rejection of the injunctive orders sought and speedy determination of the issues on merit at a full hearing.

35. Having expressed ourselves as herein above we find that the learned Judge did not properly exercise his discretion. In the end we allow the appeal with costs and set aside the impugned ruling and the injunctive orders issued thereunder.

Dated and delivered at Nairobi this 30th day of June, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR