REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI ,NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 263 OF 2014

BETWEEN

PHILES NYOKABI KAMAU.....APPELLANT

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION.....RESPONDENT

(*Appeal from the Ruling and Order of the High Court Milimani Commercial Courts (Havelock, J.) Dated 1st April, 2014*

in

H.C.C.C. NO. 515 of 2013)

****

JUDGMENT OF THE COURT

This is an interlocutory appeal against the Ruling of the High Court **(Hon. Mr. Justice Havelock, J.)** (as he was then) dated the 1st day of April, 2014.

The background to the appeal is that, the appellant **Philes Nyokabi Kamau** is the registered Proprietor of Land known as **Njoro/Ngata Block 1/97** (the suit property). In or about October 1989, she agreed to charge the suit property in favour of the **Industrial & Commercial Development Corporation** (the respondent) to secure repayment of a loan of Kshs. 2,050,000/= advanced to her son **Newton Kamau Ndovu T/A Ndovu Dry Cleaners** (the borrower).

The borrower defaulted on the loan repayment prompting the respondent to file Nairobi HCCC No. 2851 of 1997 (the former suit) directed at the borrower and the appellant, as the guarantor, seeking the recovery of Kshs.7, 597,224.50 together with interest thereon at the prevailing commercial rate until payment in full, costs and any other relief that the court may deem fit to grant. The respondent's suit was resisted by the borrower and the appellant in a joint defence dated the 19th day of November, 1998. The borrower and the appellant then filed a chamber summons brought under **Order XXXIX Rule 2A (1)** Civil

Procedure Rules (CPR) (as it was then), section **3A** of the Civil Procedure Act (CPA) and all other enabling provisions of the law. It sought a temporary injunction to restrain the respondent either by itself, its servants and or agents, or auctioneers or others whomsoever from selling, advertising for sale or in any other manner howsoever disposing or alienating the suit property until the final determination of that suit. The respondent resisted the application vide a replying affidavit and grounds of opposition. Both the record and the impugned ruling are silent as to the outcome of the said interim application, save for the mention in the impugned ruling that the suit in which it was anchored was still pending disposal.

During the pendency of the former suit, the respondent issued a letter to Prime Valuers Nakuru, dated 20/09/2013 directing them to undertake the valuation of the suit property for purposes of sale by way of public auction. This is what provoked the filing of Nairobi HCCC No. 515 of 2013 (the latter suit) vide a plaint dated the 19th day of November, 2013, and subsequently amended on the 9th day of December, 2013, directed at the respondent. On this latter suit, the appellant anchored a Notice of Motion brought under **Order 40 rule 1** of the CPR 2010, section **1A & 3A** of the CPA and all other powers of Court and the provisions of the law. The application sought an injunction to restrain the respondent either by itself, its servants and/or agents, and or auctioneers from advertising or offering or selling or in any other manner howsoever from disposing or alienating the suit property until the final determination of the suit. The application was based on the grounds in its body, a supporting and supplementary affidavit by the borrower. It was resisted by a replying affidavit deposed to by one **Peter Mugi Kiruga** on the 16th day of December, 2013 on behalf of the respondent. The application was heard on merit and dismissed.

The appellant was aggrieved and is now raising nine (9) grounds of appeal. It is her complaint that the learned Judge erred:-

(1) in dismissing the appellant's application for injunction for being *res judicata.*

(2) in granting a relief which had not been solicited.

(3) in failing to note that the appellant's application before him had been provoked by the respondents letter of instruction dated the 20th day of September, 2013 which could not have formed issues in HCCC No. 2851 of 1997.

(4) in misdirecting himself on the proper interpretation of section 7 of the CPA.

(5) in failing to note and hold that the respondent had not proved the existence of any or any valid charge capable of creating a statutory power of sale and therefore the injunction sought was deserving.

(6) in failing to appreciate and hold that on the facts and in the circumstances of the case, the appellant's liability (if any) as purported guarantor had already been discharged by either the conduct of both the respondent and the principal debtor or by reason of the guarantors' limit of liability reserved in the guarantee, document (if any).

(7) in failing to note and appreciate that the respondent had already commenced the process of selling the appellant's land in a manner which would contravene the law and that the dismissal of the appellant's application for injunction was likely to give the respondent unjustified advantage to benefit from an illegality.

(8) in not considering and making a finding on the balance of convenience.

(9) in making an order which had the effect of prejudicing, the appellant's suit and thus rendering the suit nugatory.

The appeal was canvassed by way of written submissions filed by the appellant and orally highlighted by learned counsel **Mr. F.M. Mulwa** and buttressed by case law, while none were filed by the respondent. Notwithstanding the non filing of written submissions and non attendance of the respondent or its

representative to make any representations against the appeal on the hearing date, we are obligated in law to render a merit decision on the complaints raised by the appellant in this appeal.

On the appeal generally, **Mr. Mulwa** submitted that the appellant acknowledged the pendency of HCC 2851 of 1997 in her pleadings in HCCC No. 515/2013; that the issues that informed the filing of HCCC No. 515/2013 were totally different from those in HCCC 2851/1997 as the latter suit was provoked by the respondent's action of issuing instructions to an auctioneer to commence the process of advertisement and sell of the suit property.

Learned counsel submitted that although it was not disputed that the appellant was a party to the former suit, the doctrine of *res judicata* was wrongly invoked as the issues in the said suit had not been determined; that the respondent neither availed the proceedings, the Judgment, or the ruling on the interlocutory application in the said suit to demonstrate that the issues therein had been finally determined; reiterated that the issues that provoked the filing of the latter suit were not in controversy in the former.

Turning to the ingredients for granting of an interlocutory injunction, **Mr. Mulwa,** submitted that the appellant had made out a prima facie case with a probability of success for the reason that she is the undoubted registered proprietor of the suit property; that she was not the principal debtor but a mere guarantor; that the debt had been paid off to the extent of her liability as a guarantor and she had annexed receipts to her affidavit in support; which were never rebutted by the respondent.

With regard to the suffering of irreparable loss by the appellant learned counsel submitted that if the property is auctioned, the appellant will lose it and the latter suit would be rendered nugatory. On balance of convenience he urged that it tilted in favour of the appellant as the registered proprietor. The appellant had come to court with clean hands seeking to protect her interest and had demonstrated that she had set out to challenge the validity of the charge.

To buttress the above submissions, **Mr. Mulwa** cited **Hassan Huri & Another versus Jephet Mwakala [2015**] eKLR for the principle that when dealing with an interlocutory appeal, the appellate court should refrain itself from making any definitive findings of either facts or law that may embarrass the fair trial of the pending suit; **Margaret Njoki Mugiri versus Barclays Bank of Kenya Ltd [2016] eKLR** for the exposition of circumstances under which this Court will interfere with the exercise of discretion by the trial court; **Housing Finance Company of Kenya versus Captain J.N. Wafubwa [2014] eKLR** for circumstances under which the doctrine of *res judicata* will apply; **Abubakar Salim Machiri Mutoro & 2 others [2013] eKLR and Republic versus Attorney General & 2 Others Exparte Tom Odoyo Oloo [2016] eKLR** for the proposition that *res judicata* does not apply where the subject matter of the litigation arose after the issues in the earlier suit.

This is an interlocutory appeal involving the learned Judges exercise of Judicial discretion to withhold an injunction from the appellant. The principles that guide the interference or otherwise with the exercise of the said judicial discretion have crystallized in a long line of cases. **Sir Clement De Lestang V.P**. put it succinctly in **Mbogo versus Shah [1968] EA 93** at page 94 thus:-

> ***"It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The President, **Sir Charles Newbold** agreeing, added his own understanding at page 96, thus:-

> ***" 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."

See also Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein he stated thus:-

> ***"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 as at first instance, would or might have given different weight to that given by the Judge to the varies factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

We have given due consideration to the record and in our view, only one issue falls for our determination namely whether the learned trial Judge exercised his discretion judiciously when he withheld the injunction from the appellant on account of both the application and the latter suit on which it was anchored being *res judicata*.

The doctrine of *res judicata* is not a new innovation. In **Kaaria & another versus the Attorney General and others [2005] 1EA83**, it was observed that the said doctrine was traceable to the pronouncement of the court in **Henderson versus Henderson [1843- 67] ALLER 378** thus:

> ***"……where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the Court requires parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, in advertence, accident, omitted part of their case. The plea of*** *resjudicata* ***applies, except in special cases not only to a points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which the parties exercising reasonable diligence might have brought forward at the time."***

The doctrine is enshrined in section **7** of the CPA. It provides;-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been finally heard and finally decided by such court"***

From the above, the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in issue between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title; and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.

In **Kamunye & Others versus Pioneer General Assurance Society Ltd [1971] EA 263**, It was stated that simply put: *res judicata* is essentially a bar to subsequent proceedings involving same issues as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

Both suits to which the appellant is undisputably a party remain undetermined to date. The record is also silent as to the outcome of the interim injunction application filed by the borrower in the former suit. There is also no dispute that the High Court was properly seized of the issues in controversy in both suits

and was also competent to determine the same but had not competently determined the main suits as at the time the injunction application in the latter suit was finally determined and rejected on account of it being *res judicata.* In the absence of proof of the final determination of both suits and the interim application in the former suit, there was no basis for the application of the doctrine of *res judicata* to the latter application. We also agree with the appellant's assertion that the replying affidavit did not invoke this doctrine as a bar to that application. The doctrine was therefore erroneously applied to deny the injunction.

That finding *perse* does not automatically entitle the appellant to the injunction. We have an obligation to determine whether the supportive facts placed before the learned trial Judge met the threshold for the granting of injunctions. That threshold was set by the locus classicus case of **Giella versus Cassman Brown Ltd [1973] EA 358**. In **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012** this

Court differently constituted had this to say:-

> ***"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 the temporary injunction is not granted, and***
>
> ***(c) Alley any doubts as to (b) by showing that the balance of convenience is in his favour."***

The court went further to add the following:

> ***"These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and tests are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd versus Afraha Education Society [2001] Vol. 1EA.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 irreparable, in other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no considerations. 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."***

In **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, a prima facie case was defined in the following words:-

> ***"In Civil cases a prima facie case is a case in which on the material presented to 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 case. 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 highier than an arguable case."***

When the facts of the case are considered in the light of the principle in the **Mrao** case (supra), it becomes clear that the appellant had demonstrated *prima facie* case sufficient to warrant grant of the injunctive relief. The appellant having pleaded that she had met her liability under the charge and that the charge was invalid, the court ought to have mentioned status quo and invited the respondent to adduce evidence in rebuttal of those assertions before being allowed to proceed with the exercise of its statutory power of

sale.

As stated in the **Nguruman case** (supra), the existence of a prima facie case with a probability of success is not the end of story. We are obligated to interrogate the second crucial pillar, as to whether damages are an adequate remedy. See also **Margaret Njoki Mgwi versus Barclays Bank of Kenya Ltd** (supra) in which the court approved the holding of the Supreme Court of India in **Dalpat Kumar & another versus Prahlad Singh & others AIR 1993 SC 276,** that "the phrases "*prima facie case*" "*irreparable loss*" and "*balance of convenience"* are not mere rhetoric phrases or incantations. They are important factors to be carefully weighed and considered in each and every case where an application for an injunction is applied for.

In the instant appeal, there can be no argument that the value of the suit property can be computed and paid for in monetary terms. In that case, injunctive relief does not lie. Since we are in no doubt about the first two pillars, consideration of the balance of convenience does not lie.

In the result and for the reasons we have stated above, we have no reason to disturb the finding of the learned Judge. Accordingly the appeal is without merit and we order that it be and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R.N.NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

……..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR