



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CIVIL APPEAL NO. 300 OF 2015

BETWEEN

ANITA CHELAGAT O'DONOVAN.....1ST APPELLANT

ESTATE OF TERENCE PETER O'DONOVAN.....2ND APPELLANT

ESTATE OF JOYCE JEROTICH O'DONOVAN.....3RD APPELLANT

AND

FREDRICK KWAME KUMAH1ST RESPONDENT

ZIPPORAH WAIRIMU WANJOHI.....2ND RESPONDENT

NATIONAL BANK OF KENYA LIMITED.....3RD RESPONDENT

(An appeal from the orders of the High Court of Kenya at Nairobi, (Charles Kariuki, J.) dated 21st October, 2015 in H.C.C.C. NO. 131 OF 2015)

JUDGMENT OF THE COURT

By this interlocutory appeal, the appellants **Anita Chelangat O'Donovan** and the estates of her deceased parents **Terence Peter O'Donovan** and **Joyce Jerotich O'Donovan**, over which she holds some letters of administration, challenge the dismissal by the High Court (C. Kariuki, J) of their application for various injunctions respecting some three properties in Nairobi and specially a house in Loresho South comprising **Nairobi/Block 90/143** („the property?).

In their suit at the High Court the appellants had sued **Fredrick Kwame Kumah** and **Zipporah Wairimu Wanjohi** the 1st and 2nd respondents (the buyers) over their attempt to enter upon and take possession of the property having bought it from National Bank of Kenya (the Bank), which is the 3rd respondent, in exercise of its statutory power of sale. The appellants contended before the High Court that they were unaware of such sale having taken place and their prayers were for permanent injunctions to restrain the bank from selling the property; all the respondents from evicting, levying distress against them or entering upon the property; to prevent any dealing with the title to the property; and declarations that the two estates were the legal and equitable proprietors of the property and their attempted eviction by the 1st and 2nd appellants were unlawful. They also sought some Kshs. 1.7 million being loss and damage allegedly incurred in the attempted eviction; general damages and costs.

Simultaneous with the filing of the suit the appellants filed the aforesaid application for basically the same reliefs but on interlocutory basis. It was supported by the affidavit of **Anita Chelagat O'Donovan** (Anita) sworn on 18th March 2015. She described herself as a resident of Nairobi **“but presently in Wakefield United Kingdom.”** She stated that she and members of her family were seeking the court's protection “from the threats of forceful eviction made against myself and members of my family from our family home” being the property which had been their home since 1979. Her deceased parents were the registered proprietors of the property and upon their demise it vested in their respective estates but on 31st January 2015 “a horde of thugs” descended upon it and attempted to evict their beneficiaries and causing damage and loss thereat. The buyers were contacted by e-mail and they stated that they had acquired the property and that they threatened eviction from and rent for the same. Anita swore at paragraph 14 to 16 as follows;

“14. That the only other party that has hitherto asserted an interest in the Loresho Property is the 3rd defendant (the Bank) as chargee.

15. That the said 3rd defendant has however failed and or neglected to explain to the plaintiffs its dealings over the Loresho Property.

16. That the 3rd defendant's aforesaid refusal is exacerbated by the fact that its purported interest in Loresho Property has been impugned and is the subject of ongoing proceedings in the Court of Appeal in Civil Application No. Nai. 45 of 2014 (UR 32/2014 involving the 2nd and 3rd plaintiffs and the 3rd defendant.”

She averred that she and her co-appellants had **“not received any notices whatever”** from the Bank as required by the Lands Act, 2012 and that the acts of buyers and the bank were unlawful and had occasioned loss and damage to the appellants who might be **“brutally thrown out of [their] home and rendered homeless.”**

The buyers resisted that application by a replying affidavit sworn by **Fredrick Kwame Kumah** on 23rd March 2015. In it they questioned

Anita's capacity to bring the suit on behalf of the estates of her deceased parents not having obtained letters of administration; asserted that there were trespassers in the property that the buyers attempted to rightfully evict therefrom; accused the appellants of material non-disclosure and misrepresentations; asserted and exhibited their having lawfully and procedurally purchased the property from the bank and having registered title thereto.

The bank also opposed the application by a replying affidavit sworn on 16th April 2015 by its Remedial Officer, **Paul Chelanga** who averred that the appellants had failed to disclose that the bank's right to exercise its statutory power of sale had been fully dealt with and affirmed by the High Court in **Civil Suit No. 333 of 2008**, the ruling whereon was attached and that the suit was an attempt to re-open that other case. Statutory notice was duly served and followed by a redemption notice and a notification of sale on **14th April 2014**; the appellants obtained a 30-day order of stay on **5th June 2014** and on the same day Anita's sister and Co administrator wrote to the bank making a conditional offer to pay Kshs. 8,000,000 towards redemption of the property but was told to redeem it at market rate per current valuation but the appellants took no steps to do so; the bank thereafter sold the property to the buyers who have title thereto and that the appellants should therefore have vacated the same; and that the bank followed the law to the letter in realizing the property which still left the appellants indebted to the bank to the tune of Kshs. **87,467,522.52** which they had not taken steps to pay.

In response the appellants filed a further affidavit sworn by Anita on **24th April 2015** in which she essentially reiterated her previous averments and dismissed the sale by the bank to the buyers as unprocedural, null and void for various reasons she set out. She accused the bank of shifting goal posts in a manifest scheme to clog the appellant's rights of redemption of the property.

The learned Judge considered the application and the submissions made by counsel for the parties and,

finding it unmeritorious, dismissed it provoking this appeal in which the appellants complain that he erred in law and fact in some twenty-one respects but which really come down to a castigation of the learned Judge for making the improper factual findings and legal conclusions and disallowing an application he should have granted. The grounds were more comprehensible as argued by learned counsel **Mr. Kithinji** for the 1st and 3rd appellants and **Mr. Katwa Kigen** for the 2nd appellant.

Going first, Mr. Kithinji contended that the suit and application were premised on the attempted unlawful eviction of the appellants at the behest, principally, of the buyers with the bank being complicit in it but which complaint the learned Judge did not address. Counsel urged that the purchase upon which the buyers laid claim on the property was “curious” because there was at the time of the sale an order of this Court made on **5th June 2014** maintaining the *status quo* for 30 days. He stated that his two appellants were asking the High Court to interrogate the “veracity” (sic), we think he must have meant efficacy or authenticity-of the sale agreement while the appellants were engaging the bank in discussions and had even offered to pay **Kshs. 8 million**, which was rejected. He also questioned the sale given that the bank had issued a 45. day redemption notice-dated 13th April 2014 pursuant to the Auctioneers Rules as well as a notification that there would be a sale by public auction on 14th June, 2014. He asserted that given those curiosities, there was zero compliance with **Section 96(2)** of the Land Act because there was no notice to sell and the bank should not have entered into a contract of sale, was therefore incapable of passing a good title to the buyers.

Counsel next assailed the learned Judge for finding that the buyers’ title was indefeasible which amounted to making findings of finality at an interlocutory stage. Differing with the learned Judge who held that the property was commoditized once it was charged to the bank, **Mr. Kithinji** argued that it was in fact the family home since 1979 and was irreplaceable, which rendered the loss the appellants would suffer irreparable. He concluded that the balance of convenience tilted against the buyers because they anticipated that there would be a challenge to the sale.

Taking his turn, **Mr. Katwa** first submitted that the standard of proof that the appellants were required to meet was that of *prima facie* case and that the case involved the learned Judge’s exercise of discretion. Speaking specifically to irreparable loss, counsel contended that it lay in the 2nd appellant imminent loss of the right of redemption which it was trying to exercise in offering to pay **Kshs. 8 million** out of the demanded **Kshs. 20 million**. He conceded that the High Court in the previous suit had made a finding that the appellants did owe money to the bank but insisted that their challenge was on the manner the sale was conducted. He complained that the sale of the property on 26th May 2014 was improper because the appellants could still have exercised the option to redeem. He saw “*a prima facie triable issue*” in the inconsistencies of the sums demanded with the auctioneers seeking Kshs. 20,456,284.15 while the seller was claiming Kshs. 128 million. The “*prima facie triable issue*” was, to counsel’s mind, sufficient for the learned Judge to have granted the application, which he did not do.

Mr. Katwa next urged that notice under **section 102** of the Land Act was not issued and that the learned Judge was “**absolutely wrong**” to find that notice under **section 96(2)** of the Act had been given. He contended that notices issued under the Auctioneers Rules could not supply the clear statutory requirements. He went on to assert that disposal of the property occurred on **26th May 2014** way before the 40 days started running. For all those reasons, there was a *prima facie* case established.

On the balance of convenience, **Mr. Katwa** urged the maintenance of the *status quo* until the case was heard and a determination made on whether the buyers were innocent purchasers for value without notice.

Opposing the appeal **Mr. Muyuri**, learned counsel for the buyers first reminded us that as an appellate court we should be slow to interfere with the discretion of the first instance Judge, for which proposition he cited this Court’s decision in **UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITERS (K) LTD [1985] KLR**

898. He went on to assert that the appellants had not demonstrated in what manner the learned Judge misdirected himself to warrant our interference. He in particular stressed that the learned Judge did not improperly make any final conclusions.

Responding to the suggestion that the buyers were not innocent but had colluded with the bank to effect an improper sale, counsel protested that the appellants did not plead collusion in their pleadings before the High Court and that it was therefore impermissible for them to sneak the same into this appeal. He then affirmatively stated that there was no irregularity in the transaction over the property and the buyers' title thereto was regular and unimpeachable. He proceeded to defend the learned Judge's finding that the appellants did not stand to suffer irreparable loss as damages were a sufficient remedy and added that mere sentimentality related to the property having been the family home was not good enough to render its sale irreparable. Nor was the loss of the right to redemption as that, too, was capable of being compensated by way of damages the more so because it was common ground that there were monies owing to the bank.

Counsel contended that it was unconscionable that the buyers who bought the property for value and are holders of good title thereto have been denied access to it. All the complaints raised are for interrogation at the hearing of the pending suit but they did not reach the threshold for grant of the injunction sought under the time-honoured principles of ***GIELLA vs. CASSMAN BROWN* [1973] E.A 840**. He also cited ***KENLINE AGENCIES vs. HOUSING FINANCE CO. OF KENYA* [2007] eKLR** and urged us to dismiss the appeal with costs.

For the bank, learned counsel **Mr. Okatch** also opposed the appeal by first explaining that the sale of the property was not in violation of the *status quo* order as the agreement preceded the said order having been entered into on **26th May 2014**. Moreover, the *status quo* was meant to allow the parties to attempt a settlement and was for only **30 days**, whereafter it lapsed. The sale agreement expressly stated that its completion date was some 3 months away and as at the date it was concluded there was no order obtaining. The transfer documents issued in October 2014, when there was no hindrance. Counsel then referred to the ruling by Mwera, J. (as he then was) that had found that as at the time statutory notice was issued the chargors did in fact owe the bank money. Accordingly, in counsel's view, the bank was not required to restart the process by issuing fresh notices. Moreover, it had a right under **section 98(1)(d)** of the Lands Act to proceed by way of private treaty. He blamed the appellants for not redeeming the property despite being afforded opportunity to do so with various accommodations even after the sale agreement had been signed.

Mr. Okatch urged that the learned Judge was right to protect the buyers because, in counsel's submission, a person to whom a sale has been made is protected even if he may have known of any irregularities and, by dint of **section 99(4)**, a person prejudiced by an improper sale has a right in damages only. As there was no evidence of fraud or collusion apparent from the record, the learned Judge was right not to go into them at the interlocutory stage. The buyers title was patently legitimate. And he cited the case of ***SHIMMERS PLAZA LTD vs. NATIONAL BANK OF KENYA LTD* [2013] eKLR**.

Concluding with the assertion that the appellants were never serious about redeeming the property and were properly denied the injunction, counsel pointed out that they still owed and had not paid a single cent even after making the offer to pay some **Kshs. 8 million**, which was further proof of their lack of good faith. Any questions of accounts they may have do not of themselves entitle them to any injunction especially considering that they never challenged by appeal Mwera J's finding of their indebtedness. He urged us to dismiss the appeal.

In his brief rejoinder, **Mr. Marete** asserted that **Section 99** of the Land Act for the protection of the chargee and the process of sale must be strictly in accordance with the statute with no room for its circumvention. He conceded, however, that the alleged fraud or collusion was not pleaded in the plaint.

We have carefully studied the record and given due consideration to the submissions of counsel, both oral and written, as well as the various authorities cited in support of the rival positions. In this appeal there is no doubt that what we are being urged to do is to interfere with the exercise of the learned Judge's discretion in refusing to grant the injunctions sought. In matters of judicial discretion, an appellate court is not at liberty to freely uproot and substitute the decision of the first instance judge. Prudence cautions that in such matters the appellate court proceeds with circumspection and pays deference to the decision of that other judge unless it be shown that there was a patent error and/or misjustice has resulted. In the

UNITED INSURANCE CASE (supra), Madan JA restated the parameters of appellate interference in matters discretionary thus (at pp 908-9) and we agree;

***“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 different weight to that given by the judge to the various 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 considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

See also the earlier and oft-cited case of **MBOGO vs. SHAH** [1968] EA 93.

In order to determine whether the learned Judge fell into an error or errors of a kind as to invite, indeed compel, our appellate interference, we must restate the principles that he was bound to apply when dealing with the application for injunction before him. Those are common place and are notoriously restated with reference to **GIELLA vs. CASSMAN BROWN** [1973]E.A 358 which also speaks to non-interference on appeal in four critical holdings;

“...iii. the court’s discretion to grant an injunction will not be interfered with unless it has not been exercised judicially

iv. an applicant must show a prima face case with a probability of success

v. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

vi. when the court is in doubt, it will decide the application on the balance of convenience....”

See also **E.A. INDUSTRIES vs. TRUFOODS** [1972] E.A. 420.

As to what amounts to a *prima facie* case, the learned Judge cited this Court’s decision in **MRAO LTD vs. FIRST AMERICAN BANK OF KENYA LTD** [2003] KLR 125 which rendered it thus;

“4. A prima facie case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself concludes 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.”

The learned Judge accepted this Court’s opinion in **MRAO** that a *prima facie* represents a standard that is clearly higher than an arguable case a matter on which we note Mr. Kigen appears to flounder by compounding and conflating them into what he terms “***a prima facie triable issue***”. The learned Judge then took time to analyze the appellant’s complaints before arriving at the conclusion that no *prima facie* case had been established against the buyers. His reasoning, which we cannot in fairness fault, was as follows, and worthy of quoting *in extenso*;

“14. However, the 1st plaintiff has not proffered any evidence before the court to establish her legal rights over the suit premises, save for the limited grant of letters of administration ad colligenda bona dated 29th May 2014. Conversely, the 1st and 2nd defendants have presented before the Court the title registered in their respective names, and therefore, in accordance with the provisions of section 26(1) of the Land Registration Act, are by law, considered the registered owners of the suit property. The said provision reads;

„The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a

transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegal, unprocedurally or through a corrupt scheme?.

15. In Michael **H. K. Lang'at v Muigai Commercial Agencies Ltd & 3 Others** [2014] eKLR it was reiterated that;

“Firstly, I find that the plaintiff has not established a prima facie case for reason that he is no longer registered as the owner of the suit property, which is now registered in the name of the 1st defendant who produced evidence of its title to the same. The plaintiff therefore has no current right or interest in the suit property capable of being protected or preserved.

The suit property having already been transferred and registered in the names of the 1st and 2nd defendants, title would only be defeasible if it is established that title to the same had been acquired by either fraud or illegal, unprocedurally or through a corrupt scheme. The 1st plaintiff has not established any of these infractions that had been committed by the 1st and 2nd defendants in the acquisition of the suit property, and thus any claim against their title would be bound to fail.? ”

We think, with respect, that a person who buys property in a forced sale and who has had the same successfully transferred to him; and against whom not a scintilla of evidence is presented, indeed no pleadings are made, of illegality, fraud, collusion or corruption cannot be curtailed in the enjoyment of his proprietary rights by way of injunction and the learned Judge was fully justified in denying the injunction. See **KAPLANA SHASHIKANT JAI vs. ECOBANK KENYA LTD** [2015] eKLR.

The learned Judge also found, and with justification, that when the bank sold the property to the buyers, there was no court order barring such sale. The *status quo* order issued by this Court was made on 4th June 2014 when the sale agreement had already been executed. The order was for a period of 30 days only so that when the transaction was completed in October of 2014, the *status quo* order, for whatever it was worth, had long lapsed. It was also clear from the documents placed before the learned Judge that the requisite notices had already been issued to the appellants and those notices were efficacious in view of Mwera J's holding that there had been default. That default was a continuing one so that in the full circumstances of the case, as we have ourselves analyzed and assessed them, the learned Judge did properly direct himself in finding and holding that there was no *prima facie* case established. We only need add that any disputes as to the quantum or arithmetic of default would also not suffice to win one an injunction. See **JOSEPH ARAP NG'OK & ANOR vs. EABS BANK LTD** [2015] eKLR; **SAMSON MWATHI NYUTU vs. SAVINGS & LOAN KENYA LTD** [2015] eKLR.

We think that with that finding, the learned Judge would have been entitled to dismiss the application for injunction without having to consider the other limbs of **GIELLA vs. CASSMAN BROWN** because a *prima facie* case has primacy and must first be established before the other principles can be gone into. Be that as it may, the learned Judge went as to consider whether the appellants stood to suffer irreparable injury, one that could not be compensated for by an award of damages, in the absence of an injunction.

In addressing the issue, the learned Judge noted that the contention of irreparable loss was based on the argument that the property was the matrimonial family home of the deceased couple and their family, which alone he found did not quite meet the standard. We think the learned Judge was entitled, indeed obligated, to reject as insufficient those sentimental pleas. The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market the tender memories and deep emotions associated with it notwithstanding. We

think the learned Judge did well to follow and apply this Court's holding in JOSEPH GITAI GACHAU vs. PIONEER HOLDINGS [2009] eKLR;

“However, we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgagee.”

It is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well-capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss. On that aspect as well we find the complaints against the learned Judge to be misplaced. See ANDREW MURIUKI WANJOHI vs. EQUITY BUILDING SOCIETY LTD [2014] eKLR.

We also think that in the same way sentimental value cannot be productive of an injunction, the “**loss of the right to redemption**” is equally not a factor that would place the sale of charged property outside the reach of monetary recompense by way of damages. Such right does not exist independently of the property to which it relates. It is conterminous and is subsumed in the property and once the right conditions exist for the exercise of the statutory power of sale as we have found, then the right is lost and that due to the chargor's initial act of charging the property coupled with default. It cannot therefore of itself persuade a court to issue an injunction.

On the whole we are unpersuaded that the learned Judge misdirected himself in any manner entitling us to interfere with his discretionary rejection of the application for injunction. Everything before the learned Judge compelled dismissal of the application, not least because it was overtaken by events. As found by the learned Judge, the sale had already occurred and transfer effected to the buyers who held title which called for due respect and protection. The court could also not stultify and bring itself to disrepute by purporting to lock the stable door long after the horse had bolted thereby acting in vain.

In the result, we find this appeal to be bereft of merit and it is accordingly dismissed with costs.

We are grateful to learned counsel for their well-researched submissions and for the bundles of authorities they placed before us. Our not citing of some of those authorities stems not from non-appreciation of them but from satisfaction that the points they relate to have been otherwise adequately covered.

Dated and delivered at Nairobi this 10th 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

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JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR