IN THE HIGH COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & KANTAI, JJ.A.)

CIVIL APPEAL NO. 185 OF 2010

PURBAI GOPAL RAMJI PATEL..……..…...….……..APPELLANT

VERSUS

ASSET RECOVERY SERVICES……..…..…..….1ST RESPONDENT

JOSEPH MUNGAI GIKONYO t/a
ARAM INVESTMENTS…….2ND RESPONDENT

(An appeal from the Ruling and/or Order of the High Court of Kenya (Milimani) Nairobi (Kimaru, J.) dated 1st July, 2009

in

H.C.C.C. No. 352 of 2009)

****

JUDGMENT OF THE COURT

This appeal is from the ruling of the High Court **(Kimaru, J**.), delivered on 1st July, 2009 in which the learned Judge dismissed the appellant's application for injunction to restrain the respondents from auctioning, selling or in any other way interfering with the appellant's property namely ***LR. No. 209/45/6*** *(hereinafter the "suit property")* pending the hearing and determination of the suit before the High Court.

The primary facts of the dispute were straightforward. The suit property belonged to **Ramji Patel**, now deceased *(hereinafter "the deceased")*, and the appellant is the personal representative of his estate. The deceased charged the suit property to **City Finance Limited** *(hereinafter "the bank")*, to secure financial accommodation extended by the bank to **Kuza Farm & Allied Limited** *(hereinafter "the borrower")*. The bank sometime later after the creation of the said charge, assigned certain debts to **Asset Recovery Company Limited** *(hereinafter "the 1st respondent")*. The borrower defaulted in the repayment of the sums advanced to it and the 1st respondent sought to recover the sums from the deceased. The 1st respondent, therefore, served a statutory notice of sale pursuant to the charge executed between the bank and the deceased. The appellant as the legal representative of the estate of the deceased filed the High Court suit giving rise to this appeal seeking five reliefs, among them, a permanent injunction restraining the 1st respondent and **Joseph Mungai Gikonyo T/A Garam Investments** *("the 2nd respondent")* from selling or in any other way interfering with the suit property and a declaration that there was no

assignment of the said charge to the 1st respondent by the bank.

Appurtenant to the plaint was a Notice of Motion principally under the then ***Order XXXIX rules 1, 2, 3 and 9*** of ***Civil Procedure Rules (now Order 40 rules 1,2 and 3)***, seeking orders of temporary injunction restraining the respondents from selling or otherwise interfering with the suit property pending the hearing and determination of the said suit. The application was based on the main grounds that the charge over the suit property was never assigned to the 1st respondent and, therefore, it could not purport to exercise a statutory power of sale under the unassigned charge.

The application was opposed by the respondents who argued that in a previous suit filed by the deceased against the bank the validity of the charge had been confirmed and the appellant was in her suit attempting to revive a matter already determined. Learned counsel, for the respondents contended that as the charge was valid the 1st respondent was entitled to exercise the statutory power of sale thereunder as the bank had assigned its powers under the said charge.

The learned Judge considered the rival submissions by learned counsel appearing for their respective clients and came to the conclusion that the appellant had not demonstrated a *prima facie* case to entitle her to the temporary injunction. In concluding his ruling, the learned Judge stated:

> ***"In the present application, it is evident that the 1st defendant, having been assigned by the bank to recover the debt owed by the estate of the deceased herein was the bank's assignee under the instrument of charge and, therefore, had the power to do any act that could legally be done by the bank, including exercising the statutory power of sale under the charge to recover the outstanding debt. I do hold that it was not necessary for the bank to assign the charge to the 1st defendant for the 1st defendant to have the requisite power to exercise the statutory power of sale under the charge on behalf of the bank. There is no legal requirement that the plaintiff, as the personal representative of the estate of the deceased, be notified of the assignment before the 1st respondent can act under the deed of assignment".***

It was the refusal to grant the order of injunction by the High Court that triggered this appeal by the appellant. In her Memorandum of Appeal, the appellant, through her counsel, set out ten (10) grounds of appeal which were argued together before us, **by Mr. Imanyara**, learned counsel who represented the appellant as he did before the High Court. **Mr. Imanyara's** main submission was that the learned Judge erred in law in declining the injunction application despite having found that the charge over the suit property was not assigned by the bank to the 1st respondent. **Mr. Imanyara** pointed out that the fact that the charge was not assigned was conceded by

Mr. Mbaluto, learned counsel, who then represented the respondents before the High Court.

Learned counsel further contended that the bank only assigned debts due from borrowers and the appellant was not a borrower and, therefore, according to learned counsel, the appellant was not bound by the assignment as she was merely a guarantor. It was also learned counsel's further view that

Section 130 of the ***Transfer of Property Act*** which the learned Judge relied upon was not applicable as the same applies where there are actionable claims excluding claims under charges and mortgages. In the end, learned counsel urged us to allow the appeal as, in his view, the appellant clearly demonstrated a *prima facie* case with a probability of success at the trial.

Ms Ngonde, learned counsel for the respondents in opposing the appeal, contended that as all the debts under the charge over the suit property were assigned to the 1st respondent, it was entitled to exercise the statutory power of sale under the charge. It was her contention that in those premises, the learned Judge could not be faulted. She, therefore, urged us to reject this appeal.

As we have endeavored to show above, what was before the learned Judge of the High Court was an application for the equitable remedy of temporary injunction. The conditions for the granting of the same were set out in the precedent setting case of ***Giella –v- Cassman Brown & Co. Ltd***. ***[1973] EA 358*** where, at page 360, it was stated:

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".***

The learned Judge was not only alive to the principles to be applied in an application for the equitable remedy of injunction, he, indeed, invoked ***Giella –v- Cassman Brown*** (supra). This appeal is, indeed, anchored on the contention that the appellant satisfied the conditions for the grant of a temporary injunction.

In dealing with the first condition *(prima facie case)*, the learned Judge stated:

> ***"Since the thrust of the plaintiff's application was the challenge of the validity of the deed of assignment of the debt by the bank to the 1st defendant and this court having held that the deed of assignment was valid and further that the said deed of assignment of debt mandated the 1st defendant to assume all the powers of the bank under the charge, I hold that the plaintiff has failed to establish a prima facie case to entitle this Court grant her the interlocutory injunction sought".***

So, the appellant's case turned on whether she had placed enough material before the Court which would tend to show that she had a *prima facie* case with the probability of success at the trial. Our perusal of the record indicates that the primary reason why the learned Judge found that no *prima facie* case had been demonstrated by the appellant was that the charge debt had been assigned even though the charge itself had not been assigned. The learned Judge was of the firm view that as the assignment of debts was acknowledged, there could be no dispute that even the rights under the charge had also been assigned. But was that the case beyond peradventure?

We think it is elementary, that for any entity to exercise a statutory power of sale under a charge, the existence of the charge is a prerequisite.

The power is a special one exercisable by the one on whom the charge documents reposse the power. Absent the charge, the statutory power of sale has no foundation. To put the issue differently, it is not every creditor who may exercise a statutory power of sale. The creditor must have reserved that right in the charge document for such right to be exercisable.

In the appeal before us, the bank assigned to the 1st respondent *"non-performing loans on account of credit facilities granted to ……parties on diverse dates details of which are in the schedule……"*. The deed of assignment did not mention any charge or mortgage. We are not, therefore, surprised that the 1st respondent acknowledged that the charge over the suit property was not assigned. If the charge was not assigned the statutory power of sale which could only be exercisable under the charge was not also assigned, so to speak. In that event the 1st respondent had no basis for serving a statutory notice of sale. In view of the foregoing, we are satisfied that the finding of the High Court that the appellant had not demonstrated a *prima facie* case was based on the erroneous conclusion that a statutory power of sale could be exercised in the absence of a charge.

We are alive to the principles applicable when an appellant challenges the exercise of judicial discretion of a Judge of the High Court. Those principles were stated in ***Mbogo and Anor –v- Shah, [1968] EA 93***. We can only interfere with the exercise of discretion by the High Court where we are satisfied that its decision is clearly wrong because it has misdirected itself and acted on matters on which it should not have taken into consideration and in doing so, arrived at a wrong conclusion or put another way, we

cannot interfere with such exercise of discretion unless we are satisfied that the Judge in exercise of 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 mis-justice.

In the matter before us, we have found that the conclusion of the learned Judge that a party may exercise a statutory power of sale without there being a charge was clearly a gross misdirection which led the learned Judge to the wrong conclusion that the appellant had not demonstrated a *prima facie* case. We are, therefore, entitled to interfere with his exercise of judicial discretion.

We must, therefore, allow this appeal and set aside the order of the High Court delivered on 1st July, 2009. We further order that the appellant's chamber summons dated 20th May, 2009 is hereby allowed. Costs of the application will abide the outcome of the suit before the High Court. As the estate of the deceased is still indebted to the bank in quite a tidy sum of money, we order that each party bears their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY, 2016.

P. M. MWILU

……..…….

JUDGE OF APPEAL

F. AZANGALALA

…….…….

JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR