



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**Civil Appeal No. 68 Of 2015**

**BETWEEN**

**MARGARET NJOKI MIGWI.....APPELLANT**

**AND**

**BARCLAYS BANK OF KENYA LTD.....RESPONDENT**

*(An Appeal from the Ruling & Order of the High Court of Kenya at Kerugoya (Olao, J.) dated 13<sup>th</sup> November, 2015*

*in*

*E. L. C. No. 118 of 2015)*

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. This is an interlocutory appeal arising from the dismissal by the High Court (**Olao J.**) of an application for injunction which the appellant herein, Margaret Njoki Migwi (**the borrower**) had sought in her notice of motion dated 17<sup>th</sup> September 2015. She sought the injunction pending the hearing of her suit challenging the validity of a charge over her land which she used to secure a loan she obtained from **Barclays Bank of Kenya Ltd (the Bank)** in the year 2009. It would have been a straight forward appeal revolving purely around the principles of exercise of the trial court's discretion, but the history of the matter is inextricably interwoven with it. We must therefore look at it before considering the appeal.

2. It is common ground that the borrower applied for and obtained a loan of Ksh. 5,120,000 from the bank in February 2009. It is also common ground that she offered her piece of land in Embu Town, Dallas Estate, known as Gaturi/Githimu/1794 (**the charged property**) as security for the loan and executed a charge on 13<sup>th</sup> May 2009 which was registered against the Title. Finally it is common ground that the loan has not been repaid in full to date and continues to attract interest and other charges.

3. Trouble for the borrower started in October 2011 when the bank sought to exercise its statutory power of sale of the charged property in default of the loan repayment. The first auction was due on 19<sup>th</sup> October 2011 but the borrower rushed to the High Court in Embu and filed **HCC 132 of 2011** whose pleadings are

not disclosed in this appeal record. But she also filed a notice motion on 14<sup>th</sup> October 2011 seeking to stop the auction on the ground that she had not been served with the requisite statutory notice. Despite the court (**Ong'undi J**) finding that the borrower had been served with the statutory notice and that the bank could have proceeded with the auction, it granted the borrower's request for a period of 60 days within which she would look for a buyer, sell the property by private treaty, and repay the loan. She did not comply and therefore the bank re-advertised the charged property for sale on 24<sup>th</sup> May 2012. Again, the borrower rushed back to court and filed another motion to stop the auction on the ground that 60 days were not sufficient to conclude the private sale and she needed a further 180 days. Pending the hearing of the motion she went to Milimani Commercial Court in Nairobi and obtained *ex parte* temporary orders from **Mabeya J.** stopping the auction pending the *inter partes* hearing of the motion.

4. For reasons which are not clear but which **Ong'undi J** attributed to the borrower and her counsel, the motion was not heard and determined for another 14 months. In the Ruling made on 15<sup>th</sup> August 2013, dismissing the application, **Ong'undi J.** summarized the sad state of affairs as follows:-

***“1. There is no dispute that the plaintiff has not repaid the money owing to the Bank.***

***2. She has also not paid the auctioneers costs as ordered on 20/7/2012.***

***3. She has not complied with the orders of 31/1/2012 directing her to get a buyer within sixty (60) days.***

***4. On 21/5/2012 she wanted the sixty (60) days given to her extended to 180 days. I do find that even without the Court Ruling on that application the applicant has extended for herself fourteen (14) months about 520 days from 21/5/2012.***

***She cannot therefore come here with an application asking the Court for a Ruling over a matter she and her former Advocate ensured did not proceed. It is not the duty of the Court to go to the registry to check and see who has filed or not filed submissions for the Court to give a Ruling. The parties must move the Court.***

***The applicant is now before this Court to have injunctive Orders herein extended. The said orders lapsed on 6/2/2013 and were never extended. There is therefore no order for the Court to extend. The applicant has all along known she charged her property to the bank for a loan which she has not repaid. If she has found a buyer as she claims, she should present that buyer to the bank for their necessary action. It is an abuse of the Court process for a party not to comply with Orders of the Court and yet run to the same Court at her convenience.”***

5. Once again the bank re-advertised the charged property for sale on 29<sup>th</sup> August 2014 but the borrower amended the plaint to plead that the loan was not recoverable because the charge was unenforceable. She alleged that was “*invalid, illegal, null and void*”. The amended plaint is not exhibited in the record to show the pleadings, but the borrower filed another motion on 26<sup>th</sup> August 2014 to stop the impending auction contending that she was not served with the statutory notice, did not sign the charge before an advocate, and that there was no consent of the Land Control Board to validate the charge. Once again, the matter fell for consideration before **Ong'undi J.** but could not be heard as the court was otherwise engaged. Temporary orders were given pending *inter partes* hearing. After several other adjournments, the matter fell before **Muchemi J.** who had replaced **Ong'undi J.** in Embu on 17<sup>th</sup> June 2015. That is when the borrower, who had filed the suit and the application, surprisingly told **Muchemi J.** that the court did not have jurisdiction to hear the matter as it involved land. She sought transfer of the case to the **Environment and Land Court (ELC)** in Kerugoya. She also prayed for maintenance of the interim orders granted in her favour so far. The bank went along with her wishes since it was her case but insisted that the case be terminated in the High Court and the previous orders nullified to allow the bank to exercise its lawful powers.

6. In her Ruling, **Muchemi J.** stated in part as follows:-

***“The subject matter in this Court is a loan given to the respondent by the applicant where Land L. R. N. GATURI/GITHIU/1784 was given as a security. I am in agreement with the counsels that the matter before me is a land matter and ought to have been transferred to the ELC Court immediately the said Courts were established. Any orders made in this case after the establishment of the ELC Courts by my(sic) High Court Judge was made without jurisdiction and may be declared null and void.”*** (Emphasis added.)

And with that the file was transferred to ELC.

7. Before the ELC, the borrower filed yet another motion dated 17<sup>th</sup> September 2015, seeking to stop the bank from selling the charged property on 7<sup>th</sup> October 2015 as advertised pending the hearing of the motion dated 26<sup>th</sup> August 2014. That is the application heard and disposed of by **Olao J.** on 15<sup>th</sup> November 2015, giving rise to the interlocutory appeal before us.

8. **Olao J.** went through the six-year history of the matter and formed the view that the borrower was in abuse of the court process by filing application upon application all with the object of delaying or frustrating the full recovery of the money admittedly due to the bank. He was also of the view that the various orders made by the High Court (Ongundi and Mabeya JJ) were valid since the case was about a commercial transaction involving the borrowing of money on the security of land which was turned into a commodity liable to sale if the loan was not repaid. In any event, he observed, no one applied to declare the orders void and it was not necessary therefore for Muchemi J. to have declared them void. The learned Judge further upheld an objection made by the bank that the application was *res judicata* owing to the existence of three previous applications dated 14<sup>th</sup> October 2011, 21<sup>st</sup> May 2012 and 26<sup>th</sup> August 2014. He rejected the borrower’s contention that the application was based on new issues of illegality of the charge, on the ground that those facts were within the borrower’s knowledge at all times, but she never raised them, when she first filed the suit in 2011 and made applications for injunctions thereafter. Finally on the merits of the application, the Judge held that there was an unchallenged court finding that the indebtedness of the borrower was not in issue; that the borrower was merely seeking more time to repay the loan but failed to do so when given the opportunity; that the contention that the execution of the charge was not before an advocate was displaced by a document on record that she did in fact sign it before an advocate; and that the borrower had not laid out a *prima facie* case with a probability of success in line with the first requirement in the *locus classicus* case of **Giella vs. Cassman Brown &co Ltd [1973]EA 358.**

9. Those are the findings which the borrower seeks to challenge on three grounds which may be summarized thus:-

The learned Judge erred in:-

- ***Reversing the order of Muchemi J., a court of equal jurisdiction, that the orders made by the High Court were made without jurisdiction and were therefore null and void.***
- ***Finding that the application dated 17<sup>th</sup> September 2015 was res judicata and an abuse of court process.***
- ***Finding that the application was devoid of merit despite the challenge it raised on the legality and validity of the charge.***

10. Learned counsel for her, **Mr. Daniel Mutua Mathuva**, was of the view that Olao J. had no powers to reverse the decision of Muchemi J. *suo motu*. He submitted that the reversal changed the entire perspective of the application which was made on the basis that all that happened in the previous record was swept away and the application stood on a clean slate. It could not therefore attract any argument on

*res judicata* or abuse of court process. The revival of the void orders was then erroneously used by the court to reject the application on a technicality. As for the merits, counsel submitted that the Judge did not carefully consider the issue of want of attestation of the charge and did not examine the issue of consent of the Land Control Board. The judge was instead prejudiced and did not apply equitable principles that call for consideration in applications for injunctions.

11. On the other hand, learned counsel for the bank, Mr. Thomas Kimani, submitted that Olao J. did not reverse any orders made by Muchemi J. All the Judge did was to comment on the validity of the case and the orders made before either of the two courts. As for the history of the case, he submitted that it was necessary to examine it and decide whether the application was *res judicata* or an abuse of court process after the borrower enjoyed injunctions for a period of four years only to turn around and claim that the court had no powers to entertain the suit. Counsel observed that the borrower had not pleaded lack of Land Control Board's consent as purported and could not do so since the charged property was within Embu Municipality and was not agricultural land. There was also no evidence exhibited with the application that the borrower did not sign the charge before an advocate, but on the contrary there was an exhibited affidavit evidence that she did. Finally, counsel submitted that the debt owed had accumulated to more than 11 million shillings and the borrower has not shown any irreparable loss which may occur if the property she offered, and converted to a commercial entity, is sold in default of payment of the loan. It was an expected eventuality, and the bank is capable of compensating her if the intended appeal succeeded.

12. We have considered the appeal and the submissions of counsel fully. Whether to grant or refuse to grant an injunction is a matter of judicial discretion. The circumstances under which this Court will interfere with the exercise of discretion by the trial court are limited and were well articulated by *Madan, JA* (as he then was) in *United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898*, as follows:

***“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 *Mbogo v. Shah [1968] EA 93 Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2001] eKLR 125* ).

13. We are also aware that this being an interlocutory appeal where the suit is pending for hearing and determination on merits before the Environment and Land Court, we must refrain from making any concluded views on the matters in dispute to avoid prejudging or prejudicing the pending suit. (See *David Kamau Gakuru vs National Industrial Credit Ltd, CA No. 84 of 2001*).

14. The first and second grounds of appeal stand or fall on the true construction of the decision of Muchemi J. Learned counsel Mr. Mathuva argued vehemently that there was a decision by Muchemi J. that all proceedings carried on before the High Court from the time the ELC courts came into existence in the year 2011 were null and void. That is the same year the borrower filed her suit before the High Court and sought injunctions thereafter. We have not seen any extracted order to the effect that the proceedings were declared null and void. But we have reproduced above and highlighted the relevant portion of the ruling of Muchemi J. made on 17<sup>th</sup> June 2015 and we are satisfied that there is no such definitive finding. Muchemi J. merely expressed the opinion that any orders made after the ELC courts were established **“may be declared null and void.”** The orders she alluded to were made by judges of coterminous jurisdiction and she was understandably reluctant to sit on appeal over such orders. What she was certain about was that she had the power to transfer the case to another court and made such order accordingly.

There were no subsequent applications or proceedings declaring the suit or the applications made there under null and void. We agree with learned counsel Mr. Kimani therefore that Olao J. did not reverse any orders made by Muchemi J. Indeed, despite his view that the matter was really a commercial one relating to money borrowing, he found no reason to return the file to the High Court. That ground of appeal fails.

15. Having so found, the issue of *res judicata* and abuse of court process become pivotal. For there is statutory prohibition under **Section 7** of the **Civil Procedure Act** that:

***“No court shall try any suit or issue or issue in which the matter directly and substantially in issue has been 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 heard and finally decided by court.”***

16. It has also been judicially determined by this Court that **Section 7** is not exhaustive and the general principles of *res judicata* apply to cover situations beyond main suits, like interlocutory applications. See **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** where the Court posed a relevant situation:

***“If..... arguments to the effect that the doctrine of res judicata applies only to suits concluded after a hearing on issues litigated upon and not to interlocutory applications, an impossible and intolerable situation would arise. A party who fails to stop a statutory sale would go from judge to judge until he may get orders suitable to him. The doctrine of res judicata would be far too limited. It should not be so and must not be allowed to be so. We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (Section 7) is not exhaustive”.***

17. The Court further posed the questions whether a matter of interlocutory nature decided in one suit may be subject of another similar application in the same suit and answered it in the negative. It further posed the question whether the principle of *res judicata* applied to an application heard and determined in the same suit and answered it in the positive. It concluded thus:-

***“There must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for”.***

18. We did not understand Mr. Mathuva to argue that *res judicata* was not applicable to interlocutory applications. On authority, he could not. His emphasis was rather that the failure by Olao J. to declare the previous orders null and void opened up his amended suit as well as the application for a temporary injunction based on it, to the danger of *res judicata*. And so it did. Olao J. was right that “*res judicata* was not confined to the issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter and so clearly could have been raised.” That accords with **Explanation 4** of **Section 7** which provides:

***“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.***

19. The notice of motion dated 17<sup>th</sup> September 2015 relied on averments of illegality and unenforceability of the charge which averments could have been pleaded and urged in the earlier applications determined by the High Court. We cannot therefore find an error in principle when the High Court declared the

motion *res judicata* as it did. We also find the motion was filed in abuse of court process. As stated in the case of **Pop-in (Kenya) Ltd v. Habib Bank A.G Zurich CA No. 80 of 1988**, parties must bring before the court, exercising due diligence, all the points that they could take and that points not taken cannot be taken again as the same would amount to an abuse of court process. It was also in abuse of court process to file a fresh notice of motion when there was already pending in court, undetermined, another notice of motion dated 27<sup>th</sup> August 2013. The second ground of appeal also fails.

20. That would have been sufficient to dispose of the appeal. But the borrower challenged the alternative finding made by Olao J. that the application for injunction failed on merits. The merits were, of course, anchored on the fresh pleadings of illegality which the borrower complains were ignored. As stated earlier, it is not open to us at this stage to delve into the analysis of the borrower's case before the ELC as it will in fullness of time be heard. Suffice it to reiterate the principles for considering an application for injunction which we take from this court's decision in **Nguruman Limited v. Jan Bonde nielsen & 2 Others, CA No. 77 of 2012**, as follows:

***“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 a temporary injunction is not granted, and***

***(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.***

***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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 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, will be 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 consideration. 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. (Emphasis added).***

21. In the case before us, the High Court considered the first issue and was persuaded by findings made in previous unchallenged rulings that the debt owed was not challenged, and affidavit evidence confirming that the borrower had executed the charge over her land as security for the loan. The issue of Land Control Board's consent was not considered. In the **Mrao case (supra)** this Court stated that a *prima facie* case is one –

***“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”.***

In determining whether a *prima facie* case has been established, the court is not supposed to hold a mini trial or to examine the case closely with finality.

22. We think in this particular case the High Court fell into error by examining the case closely with finality and making the finding that there was no *prima facie* case. The court should have gone further to examine the other two pillars as stated above. To paraphrase the Supreme Court of India in **Dalpat Kumar & Another v. Prahlad Singh & Others, AIR 1993 SC 276**, the phrases “*prima facie case*”,

**“irreparable loss”** and **“balance of convenience”** are not mere rhetoric phrases for incantation; they are important factors to be carefully weighed and considered in each and every case where an application for an injunction is applied for. But that is only where a valid application for injunction lies for consideration. As already decided, the application under consideration in this matter was not only *res judicata* but also an abuse of court process.

23. In the result this appeal fails and we order that it be and is hereby dismissed with costs.

***Dated and delivered at Nyeri this 6<sup>th</sup> day of April, 2016.***

***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 a true*

*copy of the original*

***DEPUTY REGISTRAR***