**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CIVIL APPEAL NO. 3 OF 2013**

**BETWEEN**

**JULIUS MUSILI KYUNGA …….…... APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LTD ……..…….....1ST RESPONDENT**

**JOEL TITUS MUSYA T/A MAKURI ENTERPRISES…….2ND RESPONDENT**

**JAMES MURIUKI KARAYA……..…...3RD RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Malindi (Ojwang, J.) dated 28th May, 2010 in H.C.C.C. NO. 324 of 2008.)*

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**JUDGMENT OF THE COURT**

[1] ***Julius Musili Kyunga*** who is now the appellant before us was the registered proprietor of a parcel of land known as LR 2812/1 MN situated at Shanzu Mombasa (hereinafter referred to as "***the suit property***"). By a plaint dated 12th November, 2008, the appellant filed a suit against ***Kenya Commercial Bank Limited*** and ***Joel Titus Musya*** T/A ***Makuri Enterprises*** (hereinafter referred to as the ***1st and 2nd respondent*** respectively).The appellant sought to have a charge document dated 4th September, 1997 in respect of the suit property declared a nullity for want of consideration, and orders that the respondents be restrained from selling, or otherwise realizing the mortgage by disposing of the suit property. In addition the appellant sought orders that any debt he owed to the 1st respondent was either fully settled or should be recovered through a civil suit.

[2] The appellant contended that although he signed the charge document by which the 1st respondent agreed to advance him a sum of Kshs.2,400,000/-, the 1st respondent never advanced him that amount; that the 1st respondent only granted the appellant an overdraft facility of Kshs.700,000/-; that despite the appellant having repaid a sum of Kshs.4,000,000/- towards the overdraft facility, the 1st respondent still

claimed an outstanding balance of Kshs.1,300,000/-. The appellant contended that the attempts by the 1st respondent to sell the suit property pursuant to a notice of public auction served on him on the 11th November, 2008, was fraudulent as he never received the sum of Kshs.2,400,000/- as agreed in the charge nor was he served with the required statutory notices.

[3] By a defence filed on 10th February 2009, the 1st and 2nd respondents contended that the appellant offered the suit property as security for facilities advanced to him to the tune of Kshs.2,600,000/- pursuant to which the appellant signed a charge, further charge, second charge and second further charge. The respondents denied that the sale of the suit property was fraudulent or illegal and maintained that all appropriate notices were served on the appellant; and that the suit property was successfully sold by way of public auction on the 11th November, 2008 to one ***James Muriuki Karaya*** (hereinafter *referred to as*"***the interested party"***).

[4] The interested party filed a defence and counterclaim in which he denied the appellant's claim and contended that he was a bonafide purchaser of the suit property pursuant to the public auction carried out by the 2nd respondent on the 1st respondent's instructions on the 11th November, 2008. The interested party sought an order compelling the appellant and his servants or agents to vacate the suit property and a permanent injunction restraining the appellant from encroaching on or in any way dealing with the suit property.

[5] By the Chamber Summons dated 12th November, 2008, filed on 13th November, 2008, the appellant sought interim orders under ***Order XXXIX Rules 1*** and ***2*** of the former edition of the Civil Procedure Rules, and ***section 3A*** of the Civil Procedure Act to restrain the respondents from selling the suit property pending the hearing and determination of the suit, and a further order prohibiting any registration or change of registration in the title to the suit property.

[6] The application which was supported by an affidavit sworn by the appellant was opposed by the respondents and the interested party, all of whom filed replying affidavits. In his ruling, ***Ojwang, J***. (as he then was), who heard the application dismissed the application, observing as follows:-

> ***"Such a setting does not, from the very beginning, disclose a prima facie case to be resolved at the interlocutory stage, through orders of injunction.***
>
> ***That position is confirmed by the evidence, which shows clearly that the applicant was unable to repay the loan advanced to him by 1st defendant; that a charge had been executed between lender and borrower, that this charge vested in the chargee the power of sale; that the chargee had not clogged the applicant's option of redemption; that proper notices under the charge were issued; that the chargee exercised the power of sale by public auction; that the interested party herein, an innocent purchaser for value, purchased the suit property at the public auction. This set of facts shows a valid exercise of the chargee's powers- the effect of which was to pass valid title to the interested party; and the same are to be safeguarded by the judicial process. This rules out scope for any judicial discretion in favour of the applicant, and excludes the possibility that he can have the injunctive relief which he seeks"***

[7] Being dissatisfied with the ruling, the appellant lodged this appeal raising nine grounds contending that the learned Judge misdirected himself in holding that there was no prima facie case established by the appellant; erred in failing to find that the charge was null and void for want of consideration as the appellant was never advanced the loan amount; in failing to find that the sum advanced against the title was only Kshs.700,000/- in respect of an overdraft facility and not a charge; in failing to find that the overdraft facility had been fully repaid; in failing to find that the statutory notices had not been duly issued or served on the appellant; and finally in failing to find that the injunctive relief was still available to the appellant as the suit property had not been transferred to a third party.

[8] By leave of court granted on 12th March, 2014, it was agreed that hearing of the appeal proceed by

way of written submissions. All the parties filed written submissions which were orally highlighted before the court.

[9] For the appellant, it was submitted that the charge was null and void as there was no consideration provided by the 1st respondent. Relying on an annexture to the appellant's affidavit filed in support of the Chamber Summons in which the 1st respondent referred to an overdraft facility of Kshs.700,000/-, it was maintained that this was the only amount that was advanced to the appellant. In support of this position, a copy of an official search dated 27th January, 2009 from the Land's Registry was referred to. The learned Judge was faulted for failing to note that there was no indication of a charge for Kshs.2,400,000/- registered against the title to the suit property but instead there were several charges whose total amounted to Kshs.700,000/-.

[10] With regard to the statutory notice, the learned Judge was faulted for treating the issue of proof of service casually and failing to find that the appellant was never served with the statutory notice; that the appellant's address as per the records with the 1st respondent was P.O Box **86261** Mombasa**,** while the statutory notice purportedly addressed to the appellant was sent to P.O Box **82261 Mombasa;** that no certificate of posting was produced to confirm receipt; that the notice ought to have been sent to the appellant's last known address which according to the charge document was **P.O Box 86261 Mombasa** and not P.O Box 82261 Mombasa indicated on the notice; and that the burden was upon the 1st respondent to prove that the statutory notice was duly served on the appellant before the exercise of the statutory power of sale (see ***James M. Matara v National Bank of Kenya Limited Kisumu H.C.C.C No. 349 of 2000***, (unreported)).

[11] It was argued that the learned Judge misapprehended the law in holding that the auction sale could not be interfered with; that the failure to serve the statutory notice vitiated the 1st respondent's statutory right of sale.(See ***Trust Bank Limited v George Ongaya Okoth Civil Appeal No. 177 of 1988*** and ***Trust Bank Limited v Eros Chemist Limited and Whitestone Auctioneer (K) Ltd Civil Appeal No. 133 of 1999***); that the sale was not complete as the interested party had only paid 25% of the purchase price and the property had not been transferred to the interested party; that the sale of the suit property to the interested party was fraudulent as it was tainted with irregularities, and that the irregularities included the rate of interest applied on the mortgage contravening ***section 44*** of the Banking Act, and the suit property having been grossly undervalued during the sale. The court was therefore urged to allow the appeal.

[12] For the 1st and 2nd respondents, it was submitted that the appellant having admitted owing at least Kshs.1,300,000/- the test in ***Giella v Cassman Brown & Company Ltd*** **[1973] EA 358** had not been satisfied as a prima facie case was established. (See ***Lavuna &Others v Civil Servants Housing Company Ltd & Another [1995] LLR 3021, ( CAK)*** and ***Mrao Ltd v First American Bank Kenya Ltd & Others [2002] LLR 3801(CAK)***); ***[2003] KLR 125***; that a dispute on the outstanding amount on a charge or the manner of calculation of interest cannot be the basis for granting an injunction restraining the exercise of statutory power of sale; that the appellant's equity of redemption was extinguished when the property was sold to the interested party by public auction on the 11th November, 2008; and that the equity of redemption could not be reinstated through an injunction (see ***Grant v Kenya Commercial Finance Company Ltd & Others[1995] LLR 4098 (CAK)***,***Okotch v East Africa Building Society [1996] LLR 468 (CAK)***). It was reiterated that there was a sum of Kshs.1,985,540/26 due and owing at the time the suit property was sold; that the loss of the suit property could be compensated by an award of damages; and that the interested party was a bona fide purchaser for value without notice and it would be inequitable to tie the hands of the interested party by injunctive orders;

[13] With regard to consideration, it was argued that the Charge was to secure first and future indebtedness and the appellant having admitted being advanced the sum of Kshs.700,000/-, that was sufficient consideration as consideration need not be adequate. With regard to the service of statutory notice, it was submitted that the interest on the mortgage was in arrears for a period exceeding two months and therefore under ***section 69A (1)(b)*** of the Transfer of Property Act of India 1882, a statutory notice was not necessary.

[14] For the interested party it was submitted that the granting of an injunction is an exercise of judicial discretion by the trial judge; that the appellant had not established a prima facie case; that the interested party, was an innocent purchaser for value, who had no notice of any irregularities or improprieties in the exercise of the statutory power of sale; that the provisions of ***section 69B*** of the Transfer of Property Act of India 1882 had not been met to justify the impeachment of the sale; and that the balance of convenience was in favour of the interested party. The court was therefore urged to uphold the ruling of the High Court.

[15] We have carefully considered this appeal, the submissions made before us and the authorities cited. Several issues stand out for determination. These are whether the appellant charged the suit property to the 1st respondent; if so, whether there was any money due and outstanding on the charge; whether the appellant was served with appropriate statutory notice; whether the 1st respondent's statutory right of sale had accrued; whether the appellant's equity of redemption had been extinguished; and whether the appellant had established a prima facie case for the granting of an injunction.

[16] It is evident that the learned Judge was dealing with an interlocutory application, and that some of the issues identified above can only be finally determined after the full hearing of the suit. For the purposes of the application, what was necessary was the establishment of prima facie evidence upon which the learned Judge could make preliminary findings. From the pleadings, the appellant conceded that there was a charge document dated 4th September, 1997, for Kshs.2,400,000/- signed by the appellant in favour of the 1st respondent. The dispute was whether the 1st respondent provided the agreed consideration for the charge. This notwithstanding, the appellant conceded that there were other charges registered against the suit property for which he did receive a total sum of Kshs.700,000/- as overdraft. At paragraph 11 of the plaint, the appellant pleaded that there was an outstanding balance of Kshs.1,300,000/-in regard to that overdraft facility. Although the appellant disputed the rate of interest applied, the following proposition from ***Halsbury's Laws of England 4th Edition*** which was adopted in ***Mrao Ltd v First American Bank Kenya Ltd & Others*** (supra), is instructive**:**

> **"… the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action or because the mortgagor objects to the manner in which the sale is being arranged.** *He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive" (*emphasis added*).*

[17] The principles governing the grant of injunctions as appropriately submitted by the parties are stated in the celebrated case of ***Giella v Cassman Brown& Co., Ltd*** (supra). This is to say, firstly an applicant must establish that he has a prima facie case with probability of success, secondly, that unless he is granted the injunctive orders sought, he is likely to suffer irreparable loss that cannot be adequately compensated in damages; and thirdly, if in doubt, the court will decide the case on a balance of convenience.

[18] A prima facie case was defined in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others*** (supra) as follows:

> "***A case in which on the material presented to the court, a tribunal 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 higher than an arguable case."***

[19] That definition has been adopted by this court severally, including in the case of ***Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR***. In the present case, it is common ground that a

charge instrument in favour of the 1st respondent securing a maximum sum of Kshs.2,600,000/- was signed by the appellant. What is in dispute is whether the secured debt was incurred. The burden of proof where an injunction is sought lies on the party seeking the injunction (see ***sections 107*** and ***109*** of the Evidence Act). That party must establish a prima facie case by demonstrating that he/she has a clear and unmistakable right that is directly threatened by the act sought to be restrained. The threat of infringement of the right has to be material and substantive and there must be an urgent need to prevent the irreparable damage that may result from the infringement (see ***Nguruman Limited v Jan Bonde Nielsen & 2 Others*** (supra).

[20] In this case it was apparent that there was some amount outstanding in regard to what the appellant called an overdraft. Indeed, in a letter dated 3rd May, 2002 written by the appellant to the 1st respondent, which letter was an annexture to the appellant's affidavit sworn in support of the application for interlocutory orders, the appellant acknowledged that he owed a sum of Kshs.1,697,447/60 and made proposals for payment of the debt. It was for the appellant to furnish proof that he had either commenced redemption proceedings or that he had paid what he thought was due from him, or had deposited the sum he thought was due in court. The appellant failed to take any such action. Thus, the prima facie evidence before the learned Judge was that there was money due and owing in regard to a further charge and second further charge registered against the suit property, and this provided sufficient justification for the 1st respondent to exercise his statutory power of sale subject to service of appropriate notices.

[21] This leads to an issue of crucial importance which is whether the appellant was served with appropriate statutory notice. The statutory notice relied upon by the respondent is dated 4th July 2005, which notice was purportedly sent to the appellant through registered mail. The appellant contested the service of the notice on two grounds: firstly, that it was never sent to him and secondly, that if at all service was sent through registered mail as alleged, then no evidence of the alleged service was tabled in court.

[22] The suit property herein having been registered under the Registration of Titles Act (now repealed), the charge agreement between the appellant and the 1st respondent was governed by the Transfer of Property Act, 1882 of India (Transfer of Property Act) formerly applicable in Kenya. Under ***section 69A*** of the Transfer of Property Act, the issuance of a notice requiring payment of the mortgage money is mandatory before a mortgagee can exercise his statutory power of sale. That section states as follows:

a. ***A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-***

a. ***Notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage –money, or of part thereof, for three months after such service.***

[23] The mandatory nature of this notice has been buttressed in several decided cases including ***Trust Bank Ltd v Eros Chemists Ltd & Another*** (supra). Worthy of note is that such a notice is only required in regard to the principal sum. Thus, the mortgagee can exercise the statutory power of sale for recovery of interest accrued under the mortgage, or breach of any other term of the mortgage agreement without the issuance of the three months statutory notice (see ***sections 69A (1) (b)*** & ***(c)*** of the Transfer of Property Act and ***Trust Bank Limited v Kiriam Ramji Kotedia [2000] eKLR***). The claim in this case was for the principal sum, and although it encompassed a claim for interest due, the mandatory three months notice on the principal sum had to be given.

[24] ***Section 102(2)(d)*** of the Transfer of Property Act, provided for service of a notice on a mortgagee to be effected through registered post. However two conditions had to be complied with. First, that the notice was addressed to the mortgagee by name to his last known postal address, and secondly, that the letter was not returned through the post office undelivered. The appellant asserted that the 1st respondent failed to issue the notice as no certificate of posting in regard to the notice was exhibited, and that in any event, the address of service on the face of the said notice was not his last known address. This was a crucial issue that should have been addressed by the learned Judge. However, though raised at the trial,

the learned Judge in his judgment made no mention of it

[25] On our part, we note that it is common ground that the notice dated 4th July 2005, was addressed to Julius M. Kyunga, P.O Box **82261** Mombasa. On the other hand, the charge document indicated the appellant's address of service as James Musili Kyunga of P.O Box **86261** Mombasa. The appellant swore in his affidavit filed in support of the application that the former address was not his. By extension, he denied ever having received the mandatory three months statutory notice. On the other hand, although no certificate of posting a registered postal article in regard to the notice dated 4th July, 2005 was availed, nor did the 1st respondent offer any explanation for using the unknown address, the 1st respondent reiterated that the notice dated 4th July 2005 was duly served. In light of the unknown address used in serving the appellant, there is a doubt as to whether the appellant was properly served. Without service of the appropriate statutory notice, the 1st respondent's statutory power of sale could not accrue.

[26] By failing to address the issue of service of the notice dated 4th July, 2005, the learned Judge erred in failing to find that the existence of the two requirements for service by registered post were not established. The want of service of the notice dated 4th July 2005, provided prima facie evidence that there was violation or threatened violation of the appellant's right in regard to the irregular exercise of the 1st respondent's statutory powers of sale. This would have provided an appropriate ground for the granting of interlocutory orders staying the exercise of the statutory powers of sale.

[27] Nevertheless, an order of injunction is an equitable and discretionary remedy. The 1st respondent exhibited letters indicating that following the issuance of the notice, there were discussions with the appellant and proposal for sale by private treaty to avoid the sale by public auction. This implied that the appellant was aware about the notice and the threatened sale. Indeed, the 1st respondent also exhibited a redemption notice under ***Rule 15*** of the Auctioneers Rules, served on the appellant by registered post, together with a certificate of posting a registered article confirming the service. These documents are both dated 7th August 2008. In addition, annextures 'JN 17' and 'JN 18' confirmed that the appellant was aware of the imminent auction sale and wrote the letters to the 1st respondent in September 2008, pleading that the sale be stopped and that he be given more time. Evidence was exhibited showing that the suit property was advertised for sale in the Standard Newspaper on 27th October, 2008, which was two weeks before the date scheduled for the auction sale. However, the appellant did not file his suit until 13th November 2008, two days after the auction sale had taken place.

[28] ***Section 60*** of the Transfer of the Property Act provided a right to a mortgagor to redeem the suit property, and to enforce the right through a redemption suit, provided that:

> "…***the right conferred by this section has not been extinguished by act of the parties or by order of a Court and is exercised before the mortgagee has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property***"

Needless to state the appellant sat on his right. Consequently, the public auction proceeded and the suit property was sold to the interested party who paid the required 25% and entered into a binding contract of sale for the suit property. There was no allegation in the pleadings nor was anything produced before the learned Judge to show that the interested party was not an innocent purchaser for value without notice. ***Section 69B(2)*** of the Transfer of Property Act provided that:-

> ***"(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-***
>
> ***a. that no case had arisen to authorize the sale; or***
>
> ***b. that due notice was not given; or***

***c. that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."***

[29] In this case, the appellant lost his right of redemption by virtue of the auction sale. As he was guilty of inordinate delay in bringing his suit, and the orders of injunction sought by him are equitable remedies, the appellant was caught up by the maxim "*equity aids the vigilant and not those who slumber on their rights*". Moreover, the appellant's remedy if any, was in an action for damages against the 1st and 2nd respondent for the impugned auction sale. Therefore, the suit filed by the appellant against the 1st and 2nd respondent could not sustain his prayers for interlocutory injunction which in effect sought to impeach the sale of the suit property to the interested party and the exercise of judicial discretion in his favour. For these reasons, we come to the conclusion that the order dismissing the appellant's application for interlocutory injunction must be sustained. Accordingly, we dismiss the appeal with costs.

***Dated and delivered at Mombasa this 12th day of February, 2015.***

**H. M. OKWENGU**

**……**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**F. SICHALE**

**……**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***