IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 326 OF 2014

BETWEEN

ORION EAST AFRICA LTD ..... APPELLANT

AND

ECOBANK KENYA LTD …..... 1ST RESPONDENT

ONESMUS MACHARIA T/A

WATTS AUCTIONEERS …..... 2ND RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi (Kamau J.) dated 29th September, 2014

in

HCCC Case No. 98 of 2014)

****

JUDGMENT OF THE COURT

The appellant filed an application in the High Court seeking the following two substantive orders against the appellants:

a. ***an interlocutory injunction to restrain the respondents, their agents and/or servants from selling, transferring and/or otherwise dealing with properties known as L.R. No. Nairobi/Block 82/2039 and Nairobi/Block 82/2042 (hereinafter referred to as "the suit properties"), Plant, Machinery, Equipment and office furniture located within its factory in Nairobi pending hearing and determination of a suit which it had filed.***

b. ***an order directing the 1st respondent to render and deliver to the appellant true and correct accounts and the entire statement of account for the appellant's current and loan accounts operated with the 1st respondent for its mortgage loan, letters of credit/guarantee and overdraft facilities.***

In an affidavit sworn in support of the application **Ruo Maina,** the appellant's Managing Director, stated that the appellant operated a current account number 0050025009520801 at the 1st respondent's Chambers Branch. On or about 4th November 2010 the appellant applied for credit facility of a maximum of Kshs 29.1 million from the 1st respondent. The application constituted the following facilities:

a. ***overdraft – Kshs 10 million***

b. ***letter of credit/ Guarantee - Kshs 10 million.***

c. ***Mortgage over L.R. No. 12672/47 – Kshs 9.1 million.***

The appellant executed a letter of offer on 3rd December, 2010 which stated, ***inter alia***; that the mortgage facility was to be utilized for the

purchase of L.R. No. 12672/47 situate in Runda, Nairobi and that a first legal charge over Block 82/2042 and LR. No. 12672/47 for Kshs 29,100,000/= would be tendered as security.

Mr. Maina further deponed that at the time of execution of the letter of offer it was within the 1st respondent's knowledge that the appellant only had an agreement for sale of L.R No. 12672/47 and in terms of the agreement the appellant had already paid a deposit of Kshs 3,900,000/= and was required to provide an undertaking from a financier for payment of the balance of the purchase price of Kshs 9,100,000/=, which the 1st respondent had agreed to give once all the completion documents had been availed by the vendor. The 1st respondent was aware that the vendor of the said property had not obtained all the completion documents to warrant payment of the purchase price, Mr. Maina added.

Before all the completion documents had been availed, on 1st July 2011, the 1st respondent, and without any notice, proceeded to credit the appellant's account with the sum of Kshs 9,100,000/=, which the appellant alleged was erroneous and in breach of the terms of the letter of offer. The appellant drew the 1st respondent's attention to that anomaly but the latter did not act but instead started debiting the appellant's account with interest on the credited amount. The appellant averred that out of the principal amount of Kshs 9,100,000/= credited into its account, the 1st respondent had recovered Kshs 11,245,834/= and hence the entire mortgage loan had been repaid in full. The appellant even sought recalculation of interest rate and by a letter dated 3rd July, 2013, the 1st respondent admitted that there was an error in computing the same and purportedly made a refund of Kshs 1,667,716.71, the appellant claimed.

The appellant further stated that the 1st respondent cancelled the letters of credit that it had issued to a company by the name Cheminova A/s. The cancellation led to re-exportation of a consignment that the appellant had imported thus causing the appellant massive losses.

With regard to letters of credit issued by the 1st respondent at the appellant's request to a company known as Xinxiang Yatelan Food Co. Ltd for US $ 21,600.00 for purchase of noodles, the appellant averred that out of the 1st respondent's negligence in failing to ensure that all requisite documents including a food quality inspection report had been availed before payment, the Kenya Bureau of Standards condemned the noodles for failing to meet Kenyan standards. The appellant again suffered loss and damage.

Regarding the letter offer for credit facilities, the appellant stated that a charge was to be created over L.R. Nairobi/Block 82/2042 and L.R. No.12672/47 only, L.R. No. Nairobi/Block 82/2039 had not been offered as security but the appellant realised that it had also been included as one of the charged properties. By an email dated 24th December, 2010 the appellant indicated to the 1st respondent that it was not agreeable to charge the said property. However, the appellant executed the charge document dated 6th

April, 2011 which was over Nairobi/Block 82/2042 and Nairobi/Block 82/2039. The titles over the two properties had been previously charged to NIC Bank and Equity Bank and when the 1st respondent agreed to extend to the appellant the credit facilities its advocates obtained the title documents from the said financiers. Mr. Maina alleged that the execution page of the charge was forwarded to the appellant and together with his co-director signed it

"under the impression that it was in relation to the premises set out in the letter of offer". Mr. Maina further alleged that neither he nor his co-director appeared before the advocate who is shown to have witnessed their signatures. For that reason, he contended, the charge is vitiated by fraud and is invalid for want of proper execution and attestation.

On 27th January, 2014 the appellant wrote to the 1st respondent demanding release of its securities, stating that the amount of Kshs 9,100,000/= erroneously disbursed as mortgage loan had been repaid in full. The 1st respondent did not agree and instead on 29th January, 2014 it served upon the appellant notifications of sale of the charged properties to recover an outstanding sum of Kshs 24.87 million. The appellant contended that it had never been served with the mandatory statutory notice and therefore the intended sale of the charged properties was invalid.

At Paragraph 41 of Mr. Maina's affidavit he stated:

> ***"41. THAT I am advised by our Advocates which advice I verily believe to be correct, that the intended sale of the Plaintiff's properties L.R. Nos. Nairobi/Bloc 82/2042 and Nairobi/Block 82/2039 is unlawful, null and void ab initio for the following reasons:-***
>
> ***a. No valid exercise of a statutory power of sale can accrue from a property that was fraudulently charged and which does not constitute part of the securities provided in the letter of offer.***
>
> b. ***The Plaintiff's entire liability under the 'mortgage loan' has been repaid in full and any interest charged is unlawful for want of consideration and contravenes the express terms of the letter of offer.***
>
> c. ***Besides, if there is any interest chargeable which is contested, the same can only be levied on simple interest basis at the rate stated in the letter of offer of 15.75% p.a which has been fully repaid and the Plaintiff is therefore entitled to a discharge of its properties.***
>
> ***d. The notification of sale is not preceded by a statutory notice of sale or a valid statutory notice of sale.***
>
> e. ***The notification of sale is not preceded by a forced sale valuation of the premises."***

For the aforesaid reasons, the appellant urged the court to restrain the respondents from selling the suit properties.

In response to the appellant's application, the 1st respondent through an affidavit sworn by one **Gilbert Rono**, its Branch manager at Chambers Branch, stated, ***inter alia***, that on 29th November, 2010 the appellant applied for a facility of Kshs 29.1 million and offered L.R. No. Nairobi/Block 82/2042 and L.R. No. Nairobi/Block 12672/47 as security. But in the course of the transaction the 1st respondent's advocates, **M/s Nyachae & Ashitiva,** informed the lender that they could not secure relevant documents regarding L.R. No. Nairobi/Block 12672/47 from the advocates who were then acting for the seller of the property to the appellant.

In the meantime, Mr. Maina delivered to the 1st respondent the titles to the suit properties, that is L.R. No. Nairobi/Block 82/2042 and 82/2039. Subsequently, the 1st respondent's advocates discovered that the said titles were charged to NIC and Equity Banks. The advocates secured discharge of the said charges and proceeded to register the charges in favour of the 1st respondent. Meanwhile, the appellant was silent as regards the status of L.R. No. 12672/47 while it was at all times intended that a legal charge over the said title would be registered once a title over the same was provided.

Regarding disbursement of Kshs 9,100,000/= into the appellant's account, the 1st respondent stated that it was done upon perfection of the securities as agreed. It was not arbitrary, unfair and without justification as alleged by the appellant, Mr. Rono stated; rather, the appellant was making urgent requests for working capital even before perfection of the securities. The appellant utilised the funds for its business operations.

Turning to the issue of the charge over L.R. No. 82/2039, the 1st respondent refuted the appellant's allegation that it was done fraudulently.

There was an amended letter of offer dated 8th December, 2010 that indicated the security that was to be availed as: "**First Legal charge over Title No. Nairobi Block 82/242 and Nairobi Block 82/2039 each of Kshs 29,100,000/=."** The amended letter of offer was duly signed under seal by the appellant's directors. Mr.Rono further stated that he had been informed by **Ruth Lemlem Kithua**, the advocate who attested the legal charge, that both **Ruo Maina** and one **Lynn Muiya** appeared before her and signed the legal charge; and that Mr Maina assisted her in securing the execution of the discharge of charge in respect of the said property by NIC Bank.

The 1st respondent stated that it was not privy to the appellant's transaction with the vendor of L.R. No. 122672/47 and did not know why the appellant did not complete the purchase of that property.

Regarding cancellation of the letters of Credit, the 1st respondent denied that it cancelled the one issued to Cheminova A/s. It also denied that the noodles for which the letter of credit issued to Xinxiang Yatelan Food Co. ltd was issued were condemned by the Kenya Bureau of Standards because of its negligence as alleged.

The 1st respondent averred that its advocates, Kale Maina & Bundotich, had issued a statutory notice to the appellant on 15th October 2013 through the appellant's known address, P.O. Box 10170 – 00100, Nairobi. But regarding valuation of the suit properties for purposes of establishing the market value and the forced sale value, the 1st respondent stated that it was going to undertake the same and advise the auctioneers accordingly before the sale was conducted.

Upon full hearing of the application, the trial court **(Kamau, J.)** found, **i*nter alia,*** that:

- **The appellant had not disclosed the existence of the amended letter of offer dated 8th December, 2010 which clearly indicated that L.R. No. Nairobi/Block 82/2039 was one of the appellant's properties that were to be charged.**
- **The charge document was properly executed by the appellant and duly attested to by the 1st respondent's advocate.**
- **The sum of Kshs 9,100,000/= was properly credited to the appellant's account and utilised by the appellant.**
- **There was no proper service of the statutory notice upon the appellant by the 1st respondent.**
- **The suit properties had not been valued in accordance with the provisions of section 97 of the Land Act and so the 1st respondent had not fully complied with the provisions of the law before it could exercise its statutory power of sale. However, that was an issue that could be remedied without any prejudice being suffered by the appellant and without interfering with the 1st respondent's statutory power of sale.**

  · **The appellant was truly and justly indebted to the 1st respondent. The appellant could not keep the suit properties and keep the 1st respondent from realising its security.**

The trial court came to the conclusion that the appellant had not made out a ***prima facie*** case with a probability of success and dismissed its prayer for the interlocutory injunction but granted the prayer for delivery of the appellant's statements of accounts. The court however directed that the 1st respondent shall not exercise its statutory power of sale of the suit properties until it re-issues a statutory notice and conducts a valuation of the suit properties.

The appellant was dissatisfied with the aforesaid decision and preferred an appeal to this Court. The memorandum of appeal raises seven (7) grounds of appeal as follows:

> ***"1. THAT the learned judge erred in law and in fact in finding that the appellant had not made a out a prima facie case as set out in the case of Giella vs Cassman Brown Company Limited despite having found that there was no proper service of a valid statutory notice.***

2. ***THAT the learned judge erred in law and in fact in finding that the appellant had not made a out prima facie case as set out in the case of Giella vs Cassman Brown Company Limited despite having found that there was no compliance with section 97 of the Land Act in that no forced valuation of the suit premises had been carried out before the 1st Respondent could exercise its statutory power of sale.***

3. ***THAT the learned judge erred in law and in fact in finding that the appellant was truly indebted before a trial on merits could be carried out yet held elsewhere in the ruling that there were issues that needed ventilation at trial.***

4. ***THAT the learned judge erred in law and in fact in finding that there was no fraud or coercion demonstrated by the appellant even before witnesses could be called and a trial on merits undertaken.***

5. ***THAT the learned judge erred in law and in fact in finding that the appellant had failed to disclose material facts hence disentitling it to the equitable remedy of injunction.***

6. ***THAT the learned judge erred in law and in fact in finding that the 1st respondent is at liberty to exercise its statutory power of sale even after finding that it had not complied with the law in the sale that was under challenge in the proceedings.***

7. ***THAT the learned judge erred in law and in fact in failing to appreciate sufficiently or at all the appellant's submissions."***

Before this Court, it was agreed by consent that the appeal be disposed of by way of written submissions, though learned counsel, **Mr. Ng'ang'a** for the appellant and **Mr. Koech** together with **Mr. Terer** for the respondents, briefly highlighted their respective submissions. We have considered the submissions and our findings are as follows:

Grounds 1 and 2 relate to the trial judge's finding that the appellant had not established a ***prima facie*** case with a probability of success, notwithstanding that there was no proper service of statutory notice and compliance with **section 97** of the **Land Act** regarding valuation of the suit property before the 1st respondent could exercise its statutory power of sale. In **TRUST BANK LIMITED V. OKOTH [2000] 1 EA. 274 (CAK)** this Court considered the importance of proper service of a statutory notice and delivered itself thus:

> ***"As indicated at the beginning of this judgment, the object of a statutory notice under Section 69A (1) (a) of the Act is to protect the rights of the mortgagor and that notice may be in form of demand for immediate payment, with an intimation that if the mortgage money is not paid before the expiration of three months from the date of service, the mortgagee will proceed to sell the mortgage property. Such notice would equally be effective if it required the mortgagor to pay the mortgage money at the end of a period of three months. Short of the foregoing, such notice would be ineffective as it would not be in conformity with the aforementioned subsection, the result whereof being that the exercise of the morgagee's statutory power of sale would not have accrued. That was the case in the instant appeal. Consequently, the learned superior court judge cannot be faulted in holding as he did and in granting the orders sought by the Respondent in his***
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> ***Chamber Summons as are outlined in this judgment; for if the exercise of the Appellant's statutory power of sale had not accrued, any sale of the suit properties by the Appellant as a mortgagee would be illegal. In the upshot, I would dismiss the Appellant's appeal with costs to the Respondent."***

Section 96 (2) of the **Land Act No. 6 of 2012** states that:

> ***"Before exercising the power to sale of the charged land, the chargee shall serve on the chargor the notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least 40 days have elapsed from the date of service of that notice to sell."***

Regarding valuation of property before sale, **section 97 (2)** of the **Land**

Act No. 6 of 2012 provides that:

> ***"A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer."***

In arriving at the conclusion that the appellant had not established a prima facie case, the trial court took into account the totality of the evidence as contained in the affidavits that were placed before it, and not just the omissions on the part of the 1st respondent relating to service of statutory notice and valuation of the suit property. The court was satisfied that contrary to the appellant's averment that L.R. No 82/2039 had not been offered as part of security, there was an amended letter of offer which the appellant had not brought to its attention and which included the aforesaid property as an additional security.

The trial court also considered the affidavit of Ruth Lemlem advocate who deponed that she accompanied Mr. Maina to NIC and Equity Banks to secure discharge of charges in respect of L.R. No. 82/2042 and L.R. No 82/2039. The said advocate had also attested the signatures of Mr. Maina and Lynn Muiya, the appellant's directors, on the charge.

The trial court, in exercising its discretion, was of the view that if the 1st respondent was restrained from realising its security until the appellant's suit was heard and determined, there was every likelihood that the outstanding amount could outstrip the value of the suit properties. Consequently, the court declined to grant the interlocutory injunction as sought by the appellant but stated that ***"the 1st Defendant shall not exercise its statutory power of sale of the subject property until it re-issues a statutory Notice and conducts a valuation of the said property."***

In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case, not only to the strength of the applicant but also to the strength of the defence advanced by the respondent then make an appropriate order. In **HUBBARD V. VOSPER** [1972] 1 ALL ER, 1023 at Page 1029,

Lord Denning MR, in setting aside an interlocutory injunction granted by a trial court stated:

> ***"We are told that practitioners have been treating these cases as deciding that, if the plaintiff has an arguable case, an injunction should be granted so that the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.***
>
> ***I would like to say at once that I cannot accept the propositions stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead."***

This manner of handling interlocutory injunction applications has been employed by our courts over the years. The first principle as stated in **GIELLA V. CASSMAN BROWN & CO. LTD [1973] E.A. 358** is that an applicant must

show a prima facie case with probability of success. In **MRAO LTD FIRST AMERICAN BANK OF KENYA LTD & 2 OTHER [2003] eKLR,** a prima facie case (in civil cases) was defined as *"**a case in 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."***

Bosire, J.A. rightly stated that a prima facie case is more than an arguable case, it is one whose evidence shows an infringement of a right and probability of success upon trial.

In the appeal before this Court, the trial judge did not find that the appellant had established a prima facie case. The appellant was unable to show any serious infringement of its rights; the trial court held. Evidence on record showed that the charge had been properly drawn and executed, substantial amount of money credited to the appellant's account and the money had been drawn and utilised by the appellant. The appellant had however not fully repaid the money and the accruing interest. Although the trial court dismissed the appellant's notice of motion, it nevertheless restrained the 1st respondent from exercising its statutory power of sale until it had re-issued a statutory notice to the appellant and conducted a valuation of the suit property.

The circumstances in which a mortgagee may be restrained from exercising its statutory power of sale are set out in *Halsbury's Laws of England*, volume 32 (4th edition) paragraph 725 as follows:

> ***"725. When mortgagee may be restrained from exercising power of sale.***
>
> ***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."***

The appellant did not demonstrate either before the trial court or before this Court that it had repaid the money advanced to it by the 1st respondent.

In view of the foregoing, we do not find any merit in the appellant's contention that the trial judge erred in law in finding that a prima facie case had not been made out. The trial court however required the 1st appellant to re-issue a statutory notice to the appellant and re-value the suit properties to determine the forced sale value before it exercised its statutory power of sale. That, in our view, was proper exercise of the judge's discretion in dealing with the application that was before her. We dismiss grounds 1 and 2 of the appeal. This finding also disposes of ground 6 of the appeal.

Turning to ground 3 of the appeal where it is alleged that the learned

judge erred in law in finding that the appellant was truly indebted to the 1st respondent before the trial could be carried out, we think that the trial court was entitled to express its opinion on the issue, having considered the bank statements that were annexed to the affidavits sworn by

the parties. The appellant had alleged that it had fully repaid the money that had been advanced to it but there was no evidence to that effect. At paragraph 67 of the Ruling, the trial judge stated:

> ***"67. The Plaintiff utilised the funds and now purports to rely on technicalities to run away from its obligations arising under the Charge. If its directors executed the execution page of the Charge without seeing the whole document, but which this court was not convinced was the cases, then it can only be liable for its own omissions, negligence or folly as the amounts that were being disbursed to it were no small change."***

There was sufficient material to enable the judge reach a prima facie finding that the appellant was still indebted to the 1st respondent. We do not think the judge can be faulted for that finding.

We shall conclude by considering grounds 4 and 5 together. The particulars of fraud alleged in the plaint under paragraph 27 were:

> ***" (a) charging L.R. Nairobi Block 82/2039 without the consent of the plaintiff.***
>
> b. ***charging L.R. Nairobi Block 82/2042 in contravention of the letter of offer."***

The trial court looked at the charge that had been duly executed by the appellant. The first page showed, and in capital letters, that the charge was over the two properties aforesaid. The trial court weighed the appellant's evidence against that of the 1st respondent and it was inclined, and for good reason, to disbelieve the appellant's contention that the charge was vitiated by fraud. A trial court can make such preliminary finding at an interlocutory stage of proceedings. And that does not necessarily mean that an applicant cannot lead oral evidence during the trial to demonstrate that there was fraud. However, each case has to stand or fall on its own facts and evidence.

In any event, the trial court held that on the basis of the material that the appellant had supplied to it, it was guilty of material non-disclosure. The court was satisfied that the appellant was aware of the amended letter of offer dated 8th December, 2010. The court considered the affidavit sworn by the advocate who witnessed NIC and Equity Banks executing the discharge of charge in respect of the two properties at the request of the appellant. The appellant had also caused the two properties to be valued by Dayton valuers Ltd for purposes of the charge. The court was right in holding that the appellant was seeking an equitable relief with unclean hands. In **DALIP SINGH V. STATE OF U.P & OTHERS, 2010 (2) section 114,** the Supreme Court of India stated, inter alia, *"**... it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."***

We are not saying that the appellant herein should not expect any relief from the trial court after the full hearing, but on the basis of the trial judge's findings as highlighted hereinabove, we are satisfied that the appellant's application for interlocutory injunction to restrain the 1st respondent from exercising its statutory power of sale was rightly rejected.

We find no merit in this appeal and dismiss it with costs to the respondents.

Dated at Nairobi this 29th day of May, 2015

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR