



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 76 OF 2012

BETWEEN

ENOKA WATAKO MAKOKHA APPELLANT

AND

CO-OPERATIVE BANK OF

KENYA LIMITEDRESPONDENT

(An appeal from a Ruling of the High Court of Kenya at Bungoma, (Muchelule, J.) dated 13th March, 2012

in

H.C.C.C. NO. 9 OF 2010)

JUDGMENT OF THE COURT

1. The appellant is aggrieved by the ruling of the High Court (A. O. Muchelule, J) delivered on 13th March 2012 dismissing his application for temporary injunction. In that application, the appellant sought a temporary injunction from the court to restrain the respondent from selling his property known as North Wanga/ Matungu/ 1890 that he had charged to the respondent to secure a loan facility. The respondent contended that the appellant defaulted in repayment of the loan facility and sought to exercise its statutory power of sale under the charge to recover the debt.
2. Learned counsel for the appellant submitted that the learned judge of the High Court erred in declining to grant the injunction yet the respondent failed to serve him with the requisite statutory notice; that the auctioneers notice was also not served on him; that a substantial amount of money that the appellant had paid to the bank had not been taken into account and the right to exercise the respondent's power of sale had not accrued or arisen. In those circumstances, counsel argued that the appellant had fulfilled the requirements for the grant of a temporary injunction and the learned judge erred in refusing to stop the sale with the result that the appellant's property as well as those of the guarantors were wrongly sold.
3. Opposing the appeal learned counsel for the bank Mr. Anwar submitted that the learned judge

properly and correctly exercised his discretion by declining to issue the injunction. Counsel argued that the instrument of legal charge provided for the manner of service of notices which was by sending the notices to the last known postal address of the appellant or by personal service; that the requisite notices were duly served on the appellant by registered post in accordance with the legal charge; and that on the authority of the High Court decision in **Kyangovo vs. Kenya Commercial Bank Ltd and another [2004] 1 KLR 126** service of notice by registered post is effective service.

4. On the question of outstanding debt, counsel submitted that the appellant acknowledged his indebtedness to the bank in his affidavits filed in support of his application before the court; that the appellant is dishonest because some of the deposit slips showing payments he made to the bank, which he claims were not reflected in the statement, were payments made before the loan was granted and could not therefore have reduced the indebtedness. In any event, counsel argued, a dispute over the amount claimed cannot be a basis for stopping the bank from realizing its security under the charge. In that regard Mr. Anwar referred us to the decision in the case of **John Nduati Kariuki t/a Johester Merchants vs. National Bank of Kenya Ltd [2006] eKLR.**
5. We have considered the appeal and the submissions. As counsel informed us that the substantive dispute between the parties is still pending determination before the High Court, we must exercise restraint in our pronouncements in this appeal, lest we should prejudice the determination of the dispute by the lower court. That said, the grant or refusal of a temporary injunction by the lower court guided as it is by the principles in **Giella vs. Cassman Brown [1973] E. A 358** is an exercise of judicial discretion. The circumstances in which this court can interfere with the exercise of judicial discretion are limited. In **Mbogo and Another vs. Shah [1968] E A 93** this Court stated that it is well settled:

“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
6. In the impugned ruling, it is not manifest to us that the learned judge took into account irrelevant considerations or that he failed to take into account relevant considerations in arriving at his decision. We are also not able to say that the decision he reached is plainly wrong. Accordingly, we do not have any basis for interfering with the ruling of the learned judge.
7. For those reasons, the appeal fails and is dismissed. The costs of the appeal will abide the outcome of the pending suit in the High Court, which we direct should be disposed off by that court on a priority basis.

Dated and delivered at Busia this 30th day of July, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR