



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO 32 OF 2006

BETWEEN

KENYA PIPELINE COMPANY LTD.....APPELLANT

AND

RICHARD KIOKO KIUNDIRESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Azangalala, J.) made on the 19th day of January 2006

in

H.C.C.C. No 633 of 2005)

JUDGMENT OF THE COURT

Richard Kioko Kiundi, the respondent herein, was once an employee of Kenya Pipeline Company Limited, the appellant herein. During the course of his employment, he obtained a mortgage facility from the appellant. The mortgage instrument was signed by both parties on the 16th April 2001. As a result he was granted a loan facility of Kshs 4,328,520.00 on the security of L.R. No 4894/311 Nairobi. On 16th April 2003 the respondent was dismissed from his employment. Being aggrieved by the said dismissal, the respondent filed a suit in the High Court alleging that his dismissal was unlawful, malicious, and wrongful, high handed, unprocedural, and in blatant and wanton breach of his contract of employment. Since the relationship ended, the appellant demanded a full settlement and/or payment of the whole outstanding mortgage facility. The respondent thought that the appellant was acting in bad faith by reducing the repayment period of 13 years which was agreed between the parties.

As a consequence of the alleged violations, the respondent filed a plaint dated 18th June 2003 together with chamber summons application seeking an interlocutory injunction to restrain the appellant from selling the property pending the hearing and determination of the suit. The grounds upon which that application was based, are that the mortgage instrument is invalid as it infringes on the mandatory requirements of Section 59 and 69 of the Transfer of Property Act, 1882 of India; that the respondent purported to issue a statutory notice to the appellant expressing its intention to exercise its statutory power of sale; that the appellant is using the threat of the sale to exert pressure on the respondent to pay the full amount and thus interfering with the equity of redemption; and that there was danger of irreparable loss

and damage to the respondent unless the order of interlocutory injunction was granted.

The appellant denied the claims made by the respondent. It filed a defence and affidavits in opposition to the application of injunction, wherein it claimed that the loan advanced to the respondent was payable in instalments, and that one of the terms of the mortgage instrument was that the entire mortgage debt as well as any interest accrued thereon would become payable on demand, and that the statutory power of sale would become exercisable without any further notice should the employment of the respondent cease for any reason. The appellant therefore claimed that upon the termination of the respondent's employment in 2003, the mortgage debt became due and owing, that it demanded payment of the same, and after the respondent neglected to honour this demand, the appellant served the statutory notice.

In support of his application for injunction, the respondent annexed to his affidavits a copy of the mortgage instrument in his possession, as well as one from the Registrar of Titles, which did not have any clauses on the payment of the mortgage amount in monthly instalments. In addition, those copies indicate that the respondent's signature was witnessed by one advocate. On the other hand, the appellant accused the respondent of misleading the court and annexed a mortgage instrument which indicated that the mortgage amount would be paid in monthly instalments and that the mortgage debt together with interest would immediately become payable if the employment of the respondent with the appellant was for any reason terminated.

The application was heard and determined by Azangalala J., (as he was then) who granted the interlocutory injunction in the following terms:

“these two clauses are in my view central to a determination either way of the Plaintiff’s application. Yet the two clauses are missing from the documents exhibited by the Plaintiff including the one allegedly obtained from the Registrar of Titles. If the position taken by the Defendant is correct it is obvious that the matter will involve criminal investigation. On the other hand if the position taken by the Plaintiff is the true position, then his complaints against the mortgage instrument will have to be entertained. In my view, the validity of the mortgage instrument is a grave matter that goes to the root of the relationship between the Plaintiff and the Defendant. This is so because if the instrument is invalid for whatever reason and it fails the consequences flowing from the result are quite different from the contrary position. The entire transaction could fail. If I were to decline the injunction sought and it turns out at the trial that in fact a mortgage instrument is invalid, the plaintiff would lose the suit property on the basis of an invalid instrument. On the other hand if I were to grant the injunction and it turns to that the mortgage instrument is valid, the Defendant will still proceed to exercise its statutory power of sale. In the premises I am satisfied that the Plaintiff has shown a prima facie case with a probability of success at the trial as set out in Giella v Cassman Browns case; and that damages would not adequately compensate the plaintiff.”

Being aggrieved with that ruling, the appellant has approached this court. His grounds of appeal principally fault the learned judge in his application of the law and principles of granting of interlocutory injunctions. The appellants submit that the learned judge erred in granting the injunction because the respondent had admitted the debt, and that the averments that the mortgage instrument was invalid had no basis as it had annexed the correct copy of the mortgage instrument. The appellant submits that the mortgage instrument annexed by the respondent is incomplete and has been interfered with in order to mislead the court. The respondent on his part opposed the appeal, and reiterates that the validity of the mortgage instrument was seriously in question, and that the appellant was using an invalid mortgage instrument to pressure him into paying the mortgage debt before the same was due, thus clogging his right to redeem the property. For these reasons, the respondent maintains that he stands to suffer irreparable damage and loss should the property in question be sold.

We have considered the memorandum of appeal, the affidavits in support and in opposition thereto, and the rival submissions of counsel. Our duty as a first appellate court, as succinctly stated by this Court in **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212** is to:

“[first], reconsider the evidence, evaluate it itself and draw its own conclusions Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

The principles on the grant of injunctions have long been settled, starting with the locus classicus of *Giella Versus Cassman Brown And Company Limited* (1973) EA 358 in which it was held that:

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. 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 a balance of convenience”

We are mindful that the grant of an injunction is an exercise in discretion. See *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR (Civil Appeal No.21 of 2014) where the Court expressed itself on this point in the following manner:

“The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially.”

It is with these principles in mind that we now embark on determining whether the order of interim injunction granted was proper. The meaning of the term ‘prima facie case’ was discussed by this Court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR (Civil Appeal No 39 of 2002) where it stated that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.

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a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”

In their written submissions, the parties made extensive reference to the mortgage instruments annexed by both parties. Briefly, the appellant’s position is that the mortgage instrument produced by the respondent was improperly photocopied, and that was so in order to mislead the court and that for this reason, the learned judge erred in the exercise of his discretion by paying undue premium towards it. The respondent’s position is that the mortgage instrument that he has, and that was also registered with the Registrar of Titles, contains material differences from the one relied upon by the appellant. The primary differences are the manner in which the mortgage debt would be paid, and the time at which it would become due and owing in full.

The question for determination is whether or not the mortgage instrument in possession of the appellant was the proper one will fall to the trial court, which is in a better position to do so during the hearing of oral and documentary evidence during trial. This is a matter that is central to the determination as to whether the appellant was within its rights in issuing a statutory notice of sale and subsequently moving to realise the mortgage security. At this stage we are not suited to determine the validity of the mortgage instrument but suffice it to say, we entertain great doubt as to the matters raised by the respondent. Upon weighing the matter, the contentions of the appellant appear to be more plausible. In the premises, we think the respondent did not demonstrate a prima facie case with a probability of success.

We now turn to consider whether the respondent would stand to suffer irreparable damage. As pointed out by the learned judge in his ruling, should the respondent's position carry the day after the hearing in the High Court, then it is possible that he may be deprived of his property based on an invalid mortgage instrument. On the other hand, should the appellant's position hold sway, then they still have recourse as they can exercise their statutory power of sale and consequently realise the security.

It is however not lost on us that it was not disputed by the respondent that by the time the respondent filed suit in the High Court, two years had elapsed since the termination of his employment, and the evidence shows that in those two years, he did not make any payments towards his mortgage account despite being given opportunity to do so. Even if the respondent was to be believed, and the mortgage debt was owed thirteen years after execution of the instrument, that time elapsed in 2014, and as we were informed by the appellant in submissions, the respondent has made no move to settle the debt that he admits he owes.

The appellant has urged us to consider this appeal in tandem with the holding of this Court in ***Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd [2005] eKLR (Civil Application 108 of 2005)*** where a prayer for injunction was refused by the Court. In that case, the court declined to grant the injunction on the ground that the dispute therein was primarily on the rate of interest to be charged. It was therefore a dispute of a mathematical nature, and the Court, drawing from the finding of the Court of Appeal for East Africa in ***Shah v Devji [1965] EA 91*** held that the existence of a dispute of that nature was not a valid ground for restraining a financial institution from exercising its statutory power of sale. That case is similar to this appeal in that the statutory right of the lender to redeem the property had accrued.

The Hon. Judge with respect did not appreciate the principles in ***Giella vs Cassman Brown***, in that the grant of an injunction must be based on adequate consideration of the 3 yardsticks set in the Giella case. One, whether an applicant who annexes or produces two mortgage documents, which are different from the one held, prepared and registered by the lender, can by virtue of that claim it to be a ground for a grant of an injunction. Secondly and more important, is the failure of the trial judge to give proper and adequate appreciation and/or consideration to the two remaining principles. Perhaps to capture the central issue is the failure of the respondent to meet his contractual relationship after the employment was terminated. It is quite clear to us that a person who derives a benefit from a contractual instrument cannot be allowed to rubbish it after the relationship is terminated by either party. Another issue which is so fundamental, to which the trial judge did not attach any premium, is that the mortgage instrument was signed on 16.4.2001 and that the respondent was dismissed from his employment on 16.4.2003, which means the respondent was enjoying and servicing the loan during that period without any hitch. He must have paid a particular sum or that a certain amount was being deducted from his salary, therefore it cannot be true that he did not know the repayment sum or monthly instalments.

We are persuaded that the applicant had not demonstrated that should he succeed in his appeal, he would not be adequately compensated by an award of damages. We find that a similar situation arises here. Even if the respondent was to succeed in his suit against the appellant, there is no material before us to show that the respondent would not be adequately compensated by an award of damages.

Lastly, we think the balance of convenience tilts in favour of the appellant, who through an employment relationship with the respondent expended public money, which it is unable to recover from the respondent after the termination of his employment.

In the premises, we agree with the appellant that the respondent did not deserve the order of injunction. We hereby allow the appeal and set aside the impugned ruling dated 19th January 2006. The appellant shall have the costs of this appeal.

Dated and delivered at Nairobi this 10th day of July 2015

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR