



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, KIAGE & MURGOR, JJ.A.)

CIVIL APPEAL NO. 307 OF 2013

BETWEEN

KEZIAH NJAMBI MAINGI T/A

ARRIVALS TEXTILE SHOP.....APPLICANTS

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

(Appeal from the Ruling and Orders of High Court of Kenya at Nairobi (J. Kamau, J.) dated 9th September 2013) in H.C.C.C. No. 773 of 2012)

JUDGEMENT OF THE COURT

This appeal is in respect of the ruling and orders in an application where the High Court declined to grant an injunction on the basis that *the appellant, Keziah Njambi Maingi trading as Arrivals & Textile Shop* was not a Chargor, and had no legal interest in LR No. 25404 Grant IR 87128/1 Tigoni (*“the charged property”*), contrary to the pleadings and documentary evidence on the record.

The facts of the case are that *Keziah Njambi Maingi (“Keziah”)* and her late husband *Samuel Maingi Kibe trading as Arrivals & Textile Shop (“the Borrower”)* applied for a business loan in the sum of Kshs. 16,000,000 from the respondent for the purposes of purchasing an owner/occupier residential house which the respondent approved vide a letter from its Retail Manager dated 29th June 2012. The Borrower executed and returned the respondent’s letter of offer which outlined the terms of the loan facility. Of pertinence, the letter of offer provided under the Special Conditions that,

- a) *Security to be perfected before draw down.*
- b. *Annual creditor life insurance premiums to be provided for as they fall due.*
- c. *Mortgage protection cover for Kshs. 16,000,000.00 to be taken over the borrower and pro rata premium amount for the period up to the last day of the month of February to be debited from account no. [particulars withheld].*
- d. *Loan repayments to be provided for as they fall due. Two missed repayments will be treated as an*

event of default and will trigger calling up the entire debt

e.”

The Borrower provided an irrevocable standing instructions to the respondent authorizing their account no. [particulars withheld] to be debited on the 20th day of each month with the monthly installments of Kshs. 329,627/-. The respondent was also instructed to debit the account with the monthly premiums of Kshs. 106,256/- for the Mortgage Loan Life Protection Cover and Fire Insurance Cover. They were referred to Kenya Alliance Insurance Company Ltd, the respondent’s insurer, for a medical examination so as to complete a proposal for the mortgage protection assurance, and on 12th July 2012, the Borrower was found eligible for the Group Mortgage Protection Policy for an assured sum of Kshs 16,000,000/- by the respondent’s insurer. On 6th August 2012 an equitable charge was executed over the charged property in favour of the respondent, and once the securities were registered on 13th August 2102 the loan was disbursed to the Borrower and payment to the respondent commenced on 21st August 2012.

Samual Maingi Kibe died on 1st September 2012 following an accident on the Tigoni property, and by this time, Keziah, being of the belief that, the respondent was fully insured under the Mortgage Loan Life Protection Cover and Fire Insurance Cover, with regular remittances of the monthly premiums being made to the insurer by the respondent, did not expect to make any further payments in respect of the loan advanced since, the risk insured had crystalized upon the demise of her husband. She pursued the expeditious processing of the mortgage life assurance cover in respect of her late husband, but despite several visits to the respondent’s office, no confirmation was forthcoming that the payment would be made. On 24th September 2012, the respondent wrote to the insurer informing them of the demise of Samuel Maingi Kibe and requested that the claims in respect of the outstanding loan amounts be processed. On 9th November 2012, Keziah was informed by the respondent that the insurer had advised that no insurance policy existed due to omissions on the Borrower’s part, as the proposal for loan protection assurance had not been finalized and the premiums remained unpaid. Upon seeking further particulars in respect of the omissions, the respondent’s advocates merely dismiss her as a loan defaulter. In a letter to the appellant dated 10th August 2013, the respondent recalled the entire loan facility for reasons that the appellant had defaulted in the monthly loan repayments, and threatened to realise the security over the charged property.

It was this letter that prompted the appellant to file a plaint on 23rd December 2102, together with a Notice of Motion dated 20th December 2012 and a sworn supporting affidavit of **Keziah Njambi Maingi** of the same date and a further affidavit sworn on 11th March 2013 seeking a temporary injunction to restrain the respondent from recalling the loan of Kshs.16,000,000/- and realizing the security in respect of the charged property and or in any other manner adversely dealing with mortgage loan account no. [particulars withheld] or acting in breach of the contract contained in the Letter of Offer dated 29th June 2012 and the Legal Charge dated 6th August 2012. In an affidavit before the High Court sworn by **Waweru Mathenge**, Legal Counsel for the respondent on 5th February 2013, the respondent deponed that the loan facility was advanced to two individuals namely, Keziah and her late husband trading as Arrivals Textile Shop and that the business became the sole responsibility of Keziah upon the demise of her late husband. The respondent continued that, the demise of one of the partners did not vitiate the onus of repayment of the loan by the appellant as the obligation was equally upon Keziah as well as with the deceased. The respondent contended that it reversed the insurance premiums debit remitted to M/s Pan Africa Life Insurance Co. Limited upon instructions of the Borrower, as they preferred the cover of Alliance Insurance Co. Limited, and had indicated that they would make the payments directly to the insurance company themselves. The respondent concluded that the appellant was aware of the reversal of the premium amounts which the respondent had effected, and since there was no mortgage protection policy in place, it had no option but to exercise its right to realize its security, and recall the loan pursuant to Section 90 of the Land Act.

In the respondent’s written submissions before the learned Judge dated 13th March 2013, the main thrust was that, there was a distinction to be drawn between the chargors and the borrower, and that the

appellant, who is the borrower in this case, had no proprietary interest in the charged property, and as such, had no *locus standii* to stop the respondent from exercising its Statutory Power of sale. As a consequence it would not be liable to suffer any irreparable harm. It was further submitted that an injunction cannot issue where there is default and further, where the outstanding debt remains unsettled.

In her ruling the learned Judge found that there was no insurance cover and that the liability of the business of Arrivals Textiles Shop devolved to the appellant upon the demise of her late husband. As a consequence, the appellant was liable to service the facility borrowed from the respondent. In so doing, the High Court declined to grant the injunction for the reason that the appellant did not have any proprietary interest in the charged property, and not being a chargor was not entitled to enjoy the interlocutory relief sought.

The High Court concluded that the appellant did not meet the threshold set out on ***Giella vs Cassman Brown Co. Ltd [1973] EA 358*** and took the view that the respondent was at liberty to exercise its statutory right of sale against the chargor herein, provided that it was in strict compliance with the laws regarding the issuance of the requisite notices under the Land Act 2012, and that the chargor was at liberty to exercise her equitable right of redemption.

Being dissatisfied with the ruling of the High Court, the appellant filed a memorandum of appeal where five grounds of appeal were advanced, namely that the learned judge was wrong in declining the injunction on the ground that the appellant was not the chargor, and had no legal interest in the charged property contrary to the pleadings and documentary evidence on record; that the learned judge fell into error in declining to grant the orders despite finding that there were triable issues; that the court made contradictory and inconsistent findings in respect of the appellant's position having reached a determination on the one hand that the appellant was not a chargor, whilst also holding that she was at liberty to exercise her equitable right of redemption on the other; and by failing to find that the purported notice of intention to sell the charged property was illegal and unlawful as it did not comply with the provisions of the Land Act 2012.

The appellants prayed for orders that:

1. *The Honorable Court be pleased to set aside the order of the High Court dismissing the appellant's application dated the 20th December 2012 and substitute the same with an Order for injunction as prayed for in the Notice of Motion dated the 20th day of December 2013 with costs, pending the hearing and determination of Civil Suit No. 773 of 2012 ;*
2. *That the Honourable Court be pleased to issue any other Conservatory Orders it may consider appropriate to issue pending the hearing and determination of Civil Suit No 773 of 2012.*

When the appeal came up for hearing, **Mr. Mwangi Kigotho**, learned counsel for the appellant submitted that the learned Judge was wrong in refusing to grant the injunction for the reason that the appellant did not have a proprietary interest in the property, as the records showed that the letter of offer dated 29th June 2012 was addressed to the appellant as one of the borrowers, and that both Keziah and her late husband signed the letter of offer. Additionally, both Keziah and her late husband were named as parties to the Legal Charge dated 6th August 2012 and signed the document accordingly, and finally, that the respondent addressed the letter of demand dated 10th August 2012 to the appellant. Counsel's further complaint was that in finding that the appellant was not a chargor, the learned Judge's conclusion that the appellant could also exercise her right of redemption was a contradiction to the court's finding that the appellant did not have a legal interest in the charged property. A further issue was that in reaching a finding that there were several triable issues, including a finding that the statutory notice was defective, the court wrongfully refused to grant an injunction. Counsel concluded that there was as yet no default of the loan by the appellant which warranted the recall of the loan and prayed that the appeal be allowed.

On her part **Ms. Stella Muraguri**, learned counsel for the respondent opposed the appeal and argued that the appellant had admitted defaulting on the loan repayments when she demanded that the loan arrears be

paid under the mortgage policy scheme. Counsel contended that the appellant and her late husband were joint tenants with equal rights and liabilities, and therefore the obligations that accrued to a joint tenant had not abated following the demise of one of the parties. Counsel contended that Clause 40 of the Legal Charge stipulated that the joint tenants were jointly and severally liable for the loan repayments, and hence, it was incumbent upon the surviving joint tenant to repay the loan. It was for this reason that the respondent had commenced the recovery process. On the issue of the insurance policy, counsel emphasised that the appellant was responsible for securing and depositing the policy with the respondent, and that without the existence of a policy, there was no basis upon which the court could establish that the loan would be repaid in the event of death of a party, or destruction of the charged property. Counsel continued that the insurance policy was not a contractual term of the letter of offer, the charge or the law, and as a consequence it was not possible for the charge obligations to be assigned. Counsel conceded that the appellant was indeed a chargor, but maintained that since there were no triable issues, a prima facie case had not been established. Counsel referred us to ***Mrao vs First American Bank of Kenya Civil Appeal 39 of 2002*** for the proposition that an injunction cannot issue where there is default and the outstanding debt remains unsettled. Counsel concluded that in any event the appellant could always be compensated in damages in the event of success in the suit.

In response, Mr. Kigotho stated that that it is trite that a prima facie case includes but is not limited to the establishment of a genuine and arguable case, which once established can be considered to be a prima facie case. (***See Mrao vs First American Bank of Kenya (supra)***).

We have carefully considered the pleadings, as well as the rival arguments of counsel, and the obtaining circumstances in respect of this appeal against the ruling and orders of the High Court.

In this appeal we must remind ourselves that this Court is not minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See ***Ephantus***

Mwangi & Another vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278.

We will turn first to the complaint that despite concluding that there were triable questions for determination, the court declined to grant an injunction. The principles of injunctions are to be found in the case of ***Giella vs Cassman Brown Co. Ltd (supra)*** where it was held that in order to grant the injunction as prayed the court must be satisfied that,

- “a) The applicant had established a prima facie case with probability of success;***
- b) The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***
- c. The court was in doubt that the application would be established on a balance of convenience.”***

With reference to the establishment of a *prima facie case* Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited [1975] AC 396*** stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”

In addressing the first aspect, the lower court properly considered whether there were indeed triable issues. In this respect the learned judge stated,

“29. The Court has carefully considered the pleadings and the parties submissions and noted that it was apparent that there was no Mortgage Life Protection Cover. There were accusations and counter accusations as to who was liable for not having effected the Insurance Policy.

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32. *However from the said letter of offer it appears that the Plaintiff and the deceased had applied for financing of the premiums and to have the same added to the loan. The court therefore finds itself persuaded by the defendant's submission that it was not the obligation of the Defendant to obtain the cover for the Plaintiff and the deceased. What the Defendant received were payment insurance instructions. However the court at the same time agrees with the Plaintiff's submission that the Defendant was mandated to deduct the said premiums as per the instructions in the letter of offer.*

33. *From the facts of this case there does appear to have been an omission and /or commission in respect of taking out the Mortgage Loan Protection Cover. The question that arises is who was liable? Was it the Plaintiff, the deceased or the Defendant? This is not an issue that can be determined from the scanty information before the court. This would indeed have been a triable issue that would satisfy the court to grant an interlocutory injunction to enable the court interrogate the issue further in a full trial.” (emphasis ours)*

From the relevant excerpt of the court's ruling which we have taken the liberty to reproduce, it is clear that the learned judge found that there were indeed triable issues for the consideration of the court that would warrant the issuance of an injunction, yet the court declined to grant the injunction sought.

The High Court further considered whether the respondent had the right recall the outstanding amounts, and concluded that by the time the respondent demanded repayment of the loan, the appellant was yet to default in liquidating the loan by 10th August 2012, which raised yet another triable issue on the basis of which the court should have been inclined to grant an interlocutory injunction pending the determination of the suit, but yet again declined to do so.

Upon a finding that there were triable issues, the learned Judge went on to address the second aspect set out in *Giella vs Cassman Brown (supra)* since, the conditions are dealt with sequentially. So that as seen in the case of *Kenya*

Commercial Finance Ltd vs Afraha Education Society [2001] 1 EA 86,

“... the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed...”

On the second aspect, as to whether the appellant stood to suffer irreparable loss, or being in doubt, the issue would be determined on a balance of convenience, the learned judge found that since the appellant did not have any proprietary interest in the charged property it was not entitled to the injunctive relief sought.

This brings us to the next issue which was that the learned Judge was wrong in declining to grant the Orders of injunction on the ground that the appellant was not the chargor, and had no legal interest in the charged property which was contrary to the pleadings and documentary evidence on record.

As we understand it, the question for our determination is whether the appellant who has brought the suit in the name of *Keziah Njambi Maingi trading as Arrivals Textiles Shop* had *locus standii* as chargor of the charged property to stop the respondent from exercising its Statutory Power of sale. The argument advanced by the respondent is that, a distinction should be made between the chargors, that is, *Keziah Njambi Maingi and Samuel Maingi Kibe*, who are the registered proprietors of the charged property, and *Keziah Njambi Maingi and samuel Maingi Kibe trading as Arrivals Textiles Shop*, a business partnership, and the borrower of the loan from the respondent.

From the charge documentation, the Letter of offer dated 29th June 2012 specified “*Keziah Njambi Maingi and Samuel Maingi Kibe T/A Arrivals Textiles Shop*” as the borrowers. It was clearly indicated in the Letter of Offer that:

“PROPERTY TO BE CHARGED TO THE BANK

- a) **First legal charge over property LR No I.R. No. 25404(7660) IR 87128/1 Tigoni to be created in the names of KEZIAH NJAMBI MAINGI AND SAMUEL MAINGI KIBE.**
- b) ...”

Accordingly, it was Keziah and Samuel Maingi Kibe who signed the Letter of offer as the borrowers of the loan.

A Legal Charge dated 6th August 2012 was created over the charged property, and on the one part, it specified the chargors as **Keziah Njambi Maingi and Samuel Maingi Kibe**. As chargors, Keziah and Samuel Maingi Kibe (deceased) signed the Legal Charge as such. On the other part, the Legal Charge specified the borrowers as, **Keziah Njambi Maingi and Samuel Maingi Kibe trading as Arrivals Textiles Shop**, and once again it was Keziah and her late husband who signed on behalf of the business partnership.

With the demise of Samuel Maingi Kibe, the partnership would become a sole proprietorship in the name and style of **Keziah Njambi Maingi trading as Arrivals Textiles Shop**, the appellant herein.

Though the loan documentation may seek to make a distinction between the chargors and the borrowers, we consider this to be a distinction without a difference. The chargors are, the registered proprietors, and joint tenants of the charged property, and are also partners in the appellant. They are not separate and distinct from each other, and whether chargors or borrowers, the individuals in this case are one and the same persons, both of whom retain ownership of the charged property, and personal responsibility for the loan. Given these circumstances, it cannot be said that the appellant did not have any proprietary interest in the charged property, and in disagreeing with the learned Judge, we find that Keziah, as chargor and borrower had the requisite *locus standii* to seek to estopp the respondent from exercising its Statutory Power of sale over the charged property.

Having said that, the issue of whether the appellant stood to suffer irreparable loss would at this stage require to be determined, so as to satisfy the conditions set out in **Giella vs Cassman Brown Co. Ltd (supra)**.

The appellant contends that besides the loan amount obtained, she has invested substantially in the charged property and enhanced its value, and further that the balance of convenience, tilts in her favour, as the respondent will continue to hold the security documents, and can fully recover the loan proceeds and interest upon the hearing and determination of the suit.

The respondent argues that the appellant is in default, and that an injunction cannot issue where there is default, and the debt remains unsettled.

Having regard to the circumstances of the case, we take the view that, there is a property with substantial development in existence, and it is charged to the bank as security for a loan of Kshs. 16,000,000/-. It is yet to be determined whether the appellant is in default or not, but after the determination of the suit the property will still be in existence. On a balance of convenience, there is no harm in the situation remaining as it currently stands, after all the respondent has not shown us what inconvenience or prejudice it will suffer if it is estopped from exercising its statutory powers pending the hearing and determination of the suit.

Given these circumstances, we find that the second aspect of **Giella vs Cassman Brown (supra)** is satisfied, and that the learned judge misdirected herself in concluding that the appellant was not entitled to the injunctive relief sought.

The final issue was that the learned judge contradicted herself when she concluded that the chargor was at liberty to exercise her equitable right of redemption having found that the appellant had no proprietary

interest in the charged property.

An equitable right of redemption is a mortgagor's or chargor's right to redeem a charged property before foreclosure by the chargee or a mortgagee, in order to cure a default. Such right is only available to a chargor or a mortgagor.

According to Halsbury's Laws of England Fourth Edition Vol 32 para 407:-

"...The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage is not to be redeemable or that the right is to be confined to a particular time or to a particular description of persons..."

Consequently, if the chargor, who was also the appellant, was possessed of redemptive rights over the charged property, then it followed that there were rights and interests that accrued to her of a proprietary nature. Without such interests, which include redemptive rights, what rights in the charged property would the appellant be exercising? With respect, we find that the conclusion reached was wrong, and a misdirection on the part of the learned Judge.

At this point, we remind ourselves that a decision to grant an injunction or not is within the judge's discretion, and we should hesitate to substitute the judge's discretion for ours, unless we consider that the court completely misdirected itself. In the case of Mbogo & Another vs Shah (1968) EA pg 93, Sir Clement de Lestang V.P. at page 94 stated thus:-

"I think it is well settled that a court will not interfere with the exercise of its discretion of 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 it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion."

Upon applying these principles, we find that the High Court misdirected itself, in declining to grant the injunction and as a consequence we consider it necessary to interfere with the discretion for the following reasons. Firstly, the learned judge reached the wrong conclusion that the appellant did not have a proprietary interest in the charged property, yet the averments in the pleadings pointed to the contrary, secondly, that the conclusion by the learned Judge that the chargor could exercise her equitable rights of redemption despite not having any interest in the charged property, was a contradiction and a misdirection.

As such, we do deem it necessary to interfere with the decision of the High Court, and accordingly allow the appeal. The respondent shall be responsible for the costs of this appeal.

DATED and DELIVERED at NAIROBI this 14th day of NOVEMBER, 2014.

G. B. M. KARIUKI

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JUDGE OF APPEAL

P.O. KIAGE

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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