



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 93 of 2002

NATIONAL BANK OF KENYA LIMITEDAPPELLANT

AND

LAWRENCE OTWEYO GUMBE RESPONDENT

*(An Appeal from the ruling/order of the High Court of Kenya at Nairobi Milimani Commercial Court
(Osiero, J.) dated 25th February, 2002*

In

H.C.C.C. No. 2 of 2002

JUDGMENT OF THE COURT

This is an interlocutory appeal. National Bank of Kenya Limited (the appellant) was aggrieved by the decision of the superior court (Osiero, J) given on 25th February, 2002 in Nairobi High Court Civil Case No. 2 of 2002 and hence this appeal. In that decision the court granted Lawrence O. Gumbe (the respondent) an interlocutory injunction restraining the appellant from exercising what it alleged was an accrued statutory right of sale under **section 77** of the **Registered Land Act, Cap 300** Laws of Kenya (under RLA) over property known as Block 10/8 Kisumu Municipality which property is registered under that Act.

The facts giving rise to this litigation are short and straight forward. The property known as Kisumu Municipality /Block 10/8 is leasehold property. The original lessee was one Ezra Owiti Gumbe, since deceased. The respondent is presently registered as lessee and was registered as such on 1st July, 1994, the same date when a charge was registered against the title in favour of the appellant to secure a loan of Kshs.2 million advanced to Dr. Marina G.A. Gondi by the appellant. Dr. Marina G.A. Gondi as principal debtor allegedly defaulted in loan repayment with the result that the appellant took steps to realize its security.

In his suit before the superior court, the respondent avers in the plaint, inter alia, that he is registered as proprietor of the aforesaid property as administrator of the estate of Ezra Owiti Gumbe, and holds the same merely as trustee; that he agreed to charge the property in favour of the appellant on its representation and advice that as trustee he could legally do so, and that it was at the appellant's advice that the property was transferred into his own name to enable him to offer it as additional security to the bank for its loan to Dr. Marina A. Gondi (Dr. Marina); that the appellant later discharged encumbrances over the securities the principal debtor and another guarantor had given but deliberately left out the suit property. The respondent prayed for injunctive and declaratory reliefs and general damages for fraud.

Filed with the plaint was a chamber summons in which the respondent sought an interlocutory injunction to restrain the appellant and its agent, Garam Investments, a firm of Auctioneers, from advertising for sale or selling the suit property by public auction or otherwise, pending the hearing and determination of his suit. That application was heard by Osiemo, J., and on 25th February, 2002, he delivered his ruling in which he held that the respondent had by his application shown the existence of a *prima facie* case with a probability of succeeding upon trial. He then proceeded to grant the injunction as prayed in the chamber summons and thus provoked this appeal.

Five grounds of appeal were preferred by the appellant, as follows:-

- (1) The learned Judge erred in law and fact in holding that the application before him satisfied the rule in **GIELLA V. CASSMAN BROWN CASE**.
- (2) The learned Judge erred in law in holding that the suit property was a trust property and the sole registered owner had no capacity to offer the said property as security.
- (3) The learned Judge erred in law in holding that a trust property cannot be used as security for a loan.
- (4) The learned Judge erred in law in failing to appreciate the legal effect of the doctrine of **FALSA DEMONSTRATIO NON NOCET**.
- (5) The learned Judge erred in law in that he failed to exercise his discretion according to well settled principles of law.

Mr. A. Ojiambo, for the appellant did not argue each of those grounds separately, but he argued them together. His submissions were, inter alia, that the respondent is the sole registered owner of the suit property; there is no note on the certificate of lease showing that the property was held by him as trustee; there was no dispute that money had been lent to Dr. Marina, or that the suit property had been given by the respondent as security; there was further no dispute the respondent had executed the charge instruments. In those circumstances, he said, the superior court erred in holding that the respondent was a mere trustee of the suit property. He cited the case of **DIVSHAW BYRAMJEE & SONS V. A.G. OF KENYA** [1966] EA 198, in support of his submission that a certificate of title is conclusive proof of ownership. But Mr. Ojiambo conceded that the case concerned property registered under the Registration of Titles Act, **Cap 281** Laws of Kenya which does not have a provision similar to section 32 (2) RLA. In fact **section 23** of that Act expressly provides that a certificate of title issued under that Act shall be “taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof” So the decision cited by Mr. Ojiambo has to be viewed in that context.

In answer, Mr. Mwendwa, for the respondent submitted, on the main, that the appellant was obliged to, but failed to conduct a search on the register of the suit property, which, if it had done, would have shown that the respondent was registered as trustee and not as sole owner. It was his further submission that the fact that the respondent was registered as proprietor on the same day the charge was registered is clear evidence that the appellant was aware of the status of the respondent as trustee. Learned counsel concluded his submission with a statement that the respondent will, at the hearing of his suit before the superior court, adduce evidence to establish that fact.

We earlier said that this is an interlocutory appeal. The suit by the respondent is still pending for hearing before the superior court. That being the position, we must exercise care not to express conclusive views on the main matters in dispute as doing so might prejudice the parties’ respective cases. Among the issues we do not wish to say anything on is whether a Trustee can, without the consent of the beneficiaries charge any land which he holds in trust. The second issue is whether the respondent held the suit land in trust. We leave those issues to the trial court.

Principles for the grant of interlocutory injunctions are well settled and we can do no better than cite the often cited case of **GIELLA VS. CASSMAN BROWN & CO. LTD**, (1973) EA. 358 in which the

predecessor of this Court, the Court of Appeal for East Africa restated the principles thus:

“The conditions for the grant of an interlocutory injunction are now, I think, 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 the balance of convenience.” [Per Spry, J.A.].

It was the respondent’s contention that he is the administrator of the estate of his late father, Ezra Gumbe, who originally was the proprietor. Indeed a copy of the certificate of lease included in the record of this application clearly bears him out. His case is that he used a certificate of confirmed grant of letters of administration to effect transfer of the leasehold property into his name. A copy of the said grant forms part of the record of this application, but the same does not have the particulars of the suit property herein. The certificate does however, include property No. Kisumu Municipality Block 10/6, which the respondent says is erroneous as it should have read Block 10/8.

What is clear is that as yet we have no evidence as to what documents the Land Registrar used to effect the transfer of the suit property to the respondent’s name. The transfer having been effected after the death of Ezra Owiti Gumbe, the former owner, it is possible and probable that the respondent became registered as proprietor on the basis of a confirmed grant of letters of administration. It is not possible at this stage of the proceedings to rule out the possibility that the respondent is registered as trustee.

Section 83 of the Law of Succession Act, **Cap 160** Laws of Kenya as read with **section 95** of the same Act, sets out the duties and offences respectively by personal representatives of a deceased person’s estate. Among the duties of the personal representative is to retain on trust the net estate of a deceased person for the benefit of the beneficiaries, but he can only do so upon confirmation of the grant. We do not know what is contained in the confirmed grant of the estate of Ezra Gumbe. If the copy of the certificate of confirmation on record is the correct one some explanation is necessary either as to why the suit property was omitted or why it was mis-described. Whatever the position evidence is necessary to show how the respondent came to be registered, in what capacity he is holding the property and whether in such capacity he could charge the property without recourse to either the beneficiaries or the court. We believe all these queries will be answered at the trial. Besides, one point is clear to us. Assuming the respondent is registered as trustee then a sale of the suit property by the appellant will affect the rights of people who are not parties in this litigation.

Mr. Ojiambo submitted before us that we should accept the certificate of lease as conclusive evidence of the proprietorship of the suit land and reject the respondent’s contention that he is a mere trustee of the property. We stated earlier that this land is registered under the Registered Land Act, **Cap 300** Laws of Kenya. Unlike RTA, a certificate of title under RLA is merely prima facie evidence of the matters shown therein. (See **Section 32 (2)**.) Those entries are subject to the entries in the register, and overriding interests set out under **section 30** of the Act. We do not know what the land register for the subject property contains. Nor do we know whether or not there exists overriding interests, which would include occupation rights. So as we stated earlier if the suit land were to be sold it may affect rights of people who are not parties to these proceedings and who have so far not been given an opportunity to be heard.

Whether or not to grant an injunction is an exercise of judicial discretion and an appellate court can only interfere if it is shown that the discretion has not been properly exercised. In his ruling Osiemo, J. after setting out the law as he understood it, did not explain upon what basis he came to the conclusion that the respondent had shown a prima facie case with a probability of success. We think that he should have set out the basis upon which he came to that conclusion. An appellate court and the parties are entitled to know how a trial court arrived at its decision. That notwithstanding, on the basis of what we stated earlier, we have no basis for interfering with the learned Judge’s exercise of judicial discretion in this matter. We have come to the conclusion that the decision the trial Judge came to is justifiable and we accordingly dismiss this appeal with costs.

Dated and delivered at Nairobi this 26th day of May, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.