



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI**

**Civil Appeal 194 of 2004**

**EAST AFRICAN DEVELOPMENT BANK .....  
APPELLANT**

**AND**

**HYUNDAI MOTORS KENYA LIMITED .....  
RESPONDENT**

***(Appeal from a Ruling and Order of the High Court of Kenya at Milimani Commercial Courts (Hon. Mr. Justice Njagi) dated 11<sup>th</sup> day of November, 2003***

**in**

**H.C.C.C. NO. 503 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the superior court (Njagi, J.) delivered on the 11<sup>th</sup> November, 2003 in which the learned Judge granted an application for some injunctive orders in favour of **Hyundai Motors Kenya Limited** (the plaintiff in the superior court) against **East African Development Bank Limited** (the defendant in the superior court).

The dispute herein can be traced back to the *High Court Civil Suit No. 503 of 2003* in which the plaintiff, **Hyundai Motors Kenya Ltd.**, filed a plaint on 19<sup>th</sup> August, 2003 at the High Court of Kenya at Milimani. In that plaint the plaintiff sought judgment against the defendant, **East African Development Bank Limited**. As is usual with this type of litigation, the plaintiff filed a Chamber Summons application on the same day that the plaint was filed. The said Chamber Summons was brought under **Order XXXIX Rules 1,2,3 and 9** of the Civil Procedure Rules, **Section 3A** of the *Civil Procedure Act*, **Section 52** of the *Indian Transfer of Property Act* as amended by the *Indian Transfer of Property (amendment) Act 1959* and **Section 106** of the *Government Lands Act*. The plaintiff sought an injunction concerning **L.R. No. 209/9705 NAIROBI** and a second injunction relating to the winding up of the plaintiff. The two injunctions that were sought were basically in the following terms:-

***“1. THAT the defendant whether by itself, its servants or agents, or advocates or auctioneers or any of them or otherwise be restrained by a temporary order for injunction from doing the following acts or any of them, that is to say from interfering with the plaintiff’s rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise***

**howsoever interfering with the ownership of title to and/or interest in ALL THAT piece of land known as L.R. No. 209/9705 NAIROBI pending the hearing and determination of this suit.**

**2. THAT an order be made under Section 52 of the Indian Transfer of Property Act (amendment) Act 1956 that during the pendency of this suit THAT ALL FURTHER REGISTRATION or change of registration in the ownership leasing, subleasing, allotment, user, occupation or possession or in any kind or right, title or interest in ALL THAT parcel of land known as L.R. No. 209/9705, with any land Registry, Government Department, and all other registering authorities be prohibited.**

**3. THAT the defendant, whether by itself, its servants, advocates or agents or any of them be restrained by orders of injunction from commencing winding up proceedings advertising the same or otherwise taking any act/step towards the winding up of the plaintiff in any court in Kenya pending the hearing and determination of this suit.”**

The application was based on the grounds that the charge over the plaintiff’s property **L.R. NO. 209/9705** dated 25<sup>th</sup> August, 2000 lacked essential validity in law as a security; the execution by the plaintiff of the charge was witnessed by one witness only and not by two witnesses as required by **Section 59** of the Transfer of Property Act which requires that a mortgage/charge can be effected only by a registered instrument signed by the chargor and attested by at least two witnesses, and that therefore the charge was null and void and of no effect and not binding because it infringed the mandatory requirements of **Sections 59** and **69** of the Transfer of Property Act.

Further to the foregoing, it was the plaintiff’s contention that the defendant had been charging exorbitant, oppressive, illegal and non contractual interest rates and other charges and penalties on the plaintiff’s account and had unilaterally revoked its consent to the conversion of the suit premises to an Export Processing Zone which was malicious and capricious as such gazetment would have increased the revenue generation capacity of the plaintiff.

It was further contended that on 21<sup>st</sup> March, 2003 the defendant purported to issue a statutory notice threatening to sell the suit property by public auction and on the 3<sup>rd</sup> July, 2003 purported to issue a notice threatening to commence winding up proceedings against the plaintiff. Finally it was contended on behalf of the plaintiff that such winding up proceedings would cause substantial loss and suffering to the plaintiff’s business which loss cannot be compensated by way of damages.

The application was vehemently opposed by the defendant’s counsel who argued that the plaintiff had not established a prima facie case with a probability of success and that the plaintiff only disputed the amount owed but that such a dispute was not a ground for the grant of equitable remedy of injunction. It was further argued on behalf of the defendant that the plaintiff had not demonstrated that it would suffer irreparable loss that was incapable of compensation by an award of damages. Finally, it was the defendant’s contention that the defendant’s statutory power of sale had arisen and was being exercised properly and that the balance of convenience tilted in favour of refusal to grant the orders sought.

The learned Judge considered the rival submissions by the learned counsel appearing for their respective clients and came to the conclusion that the plaintiff was entitled to the equitable remedy of injunction as prayed in the Chamber Summons application. In concluding his judgment the learned Judge stated:

**“In all the circumstances set out above, it is necessary to accord this matter an opportunity to be thrashed out at a full hearing in order to accord the trial court a chance to give guidance on the issue of sections 59, 69 and 100 of the Transfer of Property, (sic) and also pronounce the way forward with regard to the remedies of a second creditor. It is further necessary to maintain the status quo until that time.”**

It was that order of injunction granted to the plaintiff that triggered this appeal by the defendant (the appellant herein). In its Memorandum of Appeal, the appellant, through its counsel, set out the following six grounds of appeal:-

**“1. The learned Judge erred in law and in the exercise of his discretion in granting injunction orders inspite of having correctly held that the respondent had not established a prima facie (case) with a probability of success as envisaged (and required) in GIELLA VS. CASSMAN BROWN AND COMPANY LIMITED (1973) E.A. 358.**

**2. The learned Judge erred in law and in the exercise of his discretion in granting injunction orders despite correctly finding that the respondent had failed to satisfy him that it might otherwise suffer irreparable injury (and or damage).**

**3. The learned Judge erred in law and in the exercise of his discretion when he misdirected himself on the law by granting interlocutory injunction orders after making a finding that the respondent had not satisfied the conditions set out in GIELLA VS. CASSMAN BROWN AND COMPANY LIMITED (Supra) for grant of interlocutory injunctions.**

**4. The learned Judge erred in law and in the exercise of his discretion in that he took account of considerations which he should not have when he granted the injunction orders for the reasons:-**

(a) of necessity to accord the trial court a chance to give guidance on the issue of sections 59, 69 and 100A of the Transfer of Property (Act) and also,

(b) pronounce the way forward with regard to the remedies of a secured creditors and;

(c) of necessity to maintain the status quo until that time (trial and determination of the suit)

**5. The learned Judge erred in law and in fact in the exercise of his discretion in that he failed to take into account that the grant of injunction orders altered the status of the parties to the detriment of the appellants who were restrained without any lawful reason from the exercise of their legal statutory power of sale of the charged property in recovery of the debt owed to it by the respondent.**

**6. The learned Judge erred in law and in fact in the exercise of his discretion in arriving at a decision that was in the circumstances plainly wrong.”**

These grounds of appeal were argued with considerable force when the appeal came up for hearing before us on 29<sup>th</sup> June, 2006. The response by the respondent’s counsel was equally forceful. Mr. Muigai, for the appellants, was assisted by Mr. Njagi. The respondent was represented by Mr. Kingara assisted by Mr. Simuyu.

Mr. Muigai’s main submission was that the learned Judge erred in law in granting the injunction despite having stated that the plaintiff (respondent herein) had failed to satisfy him on the principles laid down in GIELLA V. CASSMAN BROWN & CO. LIMITED (1973) E.A. 358. Mr. Muigai pointed out that the respondent had not denied owing the money but merely sought to rely on technicalities in a bid to avoid the day of judgment. Mr. Muigai contended that while the learned Judge applied the correct test he seems to have gone into the issues of fairness which, in Mr. Muigai’s view, were irrelevant in an application for equitable remedy of injunction.

Mr. Kingara, for the respondent, started his submission by stating that the Judge’s mind was tilted towards preserving the property. Mr. Kingara then pointed out that there was no valid charge and hence statutory power of sale could not arise. It was Mr. Kingara’s contention that the Judge was of the view that on balance of convenience the injunction was to be granted; and that the applicant could not be allowed to exercise two remedies i.e. winding up and statutory power of sale at the same time. He therefore asked us to reject this appeal.

As we have endeavoured to show, what was before the learned Judge was an application for equitable remedy of injunction. The conditions for the granting of an interlocutory injunction were set out in GIELLA VS. CASSMAN BROWN & CO., LTD. [1973] E.A. 358 at p. 360 where it was stated:-

***“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 (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”***

From the ruling of the learned Judge, it is clear that he was alive to the principles to be applied in an application for equitable remedy of injunction. Indeed, in his ruling the learned Judge stated:-

***“To every issue raised by the plaintiff, the defendant had an answer. I have warned myself that I am not expected to decide finally at this stage. But I have to state whether in my view, the plaintiff has shown a prima facie case with a probability of success. Secondly, an interlocutory injunction will not 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. These are the well settled principles which ought to guide the court as enunciated in GIELLA VS. CASSMAN BROWN & COMPANY LTD [1973] E.A. 358.”***

From the foregoing, it is clear that the learned Judge had the correct approach to what was before him. As can be seen from the memorandum of appeal the appellant’s appeal is anchored on the principles set out in GIELLA V. CASSMAN BROWN & CO. LTD. (supra).

In dealing with the first condition (prima facie case) the learned Judge considered the pleadings, the application and all the annexed documents in support of and against the application for injunction and made the following observation in his ruling:-

***“On the face of the record, it is my humble view that the plaintiff has not established such prima facie (sic) with a probability of success as envisaged in GIELLA V. CASSMAN BROWN & COMPANY LIMITED (supra), but it would be unfair to deny it the benefit of arguing Sections 59, 69 and 100 A of the Transfer of Property Act vis-à-vis the corresponding provisions of the Registration of Titles Act. This would assist the court in determining with finality the validity or otherwise of the charge instrument on the basis of which the statutory power of sale is sought to be exercised.”***

It is that finding of the learned Judge that the plaintiff had not established a prima facie case with a probability of success that galvanized the appellant (*the defendant in the superior court*) into challenging the grant of injunction. According to the learned Judge the respondent herein had not established a prima facie case with a probability of success. However, the learned Judge did not stop there. He went on to state that it would be unfair to deny the respondent the benefit of arguing points of law. We shall come to this issue of points of law a little later.

The learned judge very correctly went on to consider the second condition as set out in Giella’s case. On this second condition the learned Judge stated:-

***“The second limb of the formula laid down in GIELLA VS. CASSMAN BROWN & COMPANY LIMITED (supra) is that 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. The plaintiff has not placed any material before the court which would tend to show how an award of damages cannot adequately compensate the loss of the suit property in the event it was disposed off by way of security. Indeed, they suffered the property to be charged, they knew full well the risk of the failure to honour their undertaking. I think that this second limb is also not satisfied and to that extend I need not consider the balance of convenience.”***

From the foregoing, it is clear that the learned Judge was of the view that the plaintiff (respondent herein) had not placed any material before the court which would tend to show how an award of damages would not adequately compensate the loss of the suit property in the event it was disposed off by way of security. The learned Judge emphatically stated:-

***“I think that this second limb is also not satisfied and to that extent I need not consider the balance of convenience.”***

From what we have set out above, it cannot be denied that the learned Judge found that the plaintiff (respondent) had not met the test for granting of interlocutory injunction as enunciated in ***Giella’s*** case. The learned Judge was quite right when he said that he would not consider the balance of convenience. This was so because the learned Judge had already satisfied himself that the respondent had failed the two conditions of prima facie case with a probability of success and irreparable injury which would not adequately be compensated by an award of damages. Since the respondent had failed to satisfy the learned Judge on the first two limbs or principles there was no need to consider the balance of convenience. A court will only consider the balance of convenience where there is a doubt. But in the application before the superior court, the learned Judge made a finding to the effect that the respondent had failed to prove a prima facie case with a probability of success and that an award of damages would not adequately compensate the loss to be suffered in event that the suit property was sold off.

We now go back to the issue of points of law which the learned judge felt should be argued during the full trial. After the learned Judge found that the respondent had not established a prima facie case with a probability of success as envisaged in ***Giella’s*** case the learned Judge went on to state as follows:-

***“but it would be unfair to deny it the benefit of arguing Sections 59, 69 and 100 A of the Transfer of Property Act vis-à-vis the corresponding provision of the Registration of Titles Act. This would assist the court in determining with finality the validity or otherwise of the charge instrument on the basis of which the statutory power of sale is sought to be exercised.”***

It is the foregoing sentiments that must have influenced the learned Judge to grant the injunction despite the fact that the respondent had failed to satisfy the superior court on the essential conditions governing the granting of interlocutory injunction. What the learned Judge wanted to go for consideration in a full trial related to arguments in respect of ***sections 59, 69 and 100A*** of the ***Transfer of Property Act*** vis-à-vis the provisions of the Registration of Titles Act. With due respect to the learned Judge, these were points of law which did not require calling of evidence in a full trial. These were, in our view, points which could be considered by way of preliminary objection. In ***MUKISA BISCUIT MANUFACTURING CO. LTD. V. WEST END DISTRIBUTORS LTD [1969] E.A. 969 at p.700 Law JA*** stated:-

***“..... So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit .....*”**

and at p. 701 Law JA went on to state:-

***“..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

We are stating all this because it was the view of the learned Judge that points of law relating to the ***Transfer of Property Act*** and Registration of Titles Act needed to be argued during the full trial. As correctly pointed out by Muigai, in the course of his submission, questions of law required no trial since taking of evidence would not change the legal position.

As already pointed out earlier in this judgment, the learned Judge took the correct approach when he stated that the conditions for granting of injunction are those set out and in ***Giella’s*** case. Having stated so, he went on to make a finding that the respondent had indeed failed to satisfy any of those conditions. The learned Judge had actually tied his hands when he held that the respondent had failed the test set out in ***Giella’s*** case so that there was no any other option left. The learned Judge thought that the property had to be preserved. But had the respondent established a prima facie case with a probability of success? According to the learned Judge the respondent had not done so. Had the respondent placed before the

court material to show that an award of damages would not adequately compensate? Again the learned Judge found no material to that effect. Then on what basis could the interlocutory injunction be granted?

In NATIONAL BANK OF KENYA LTD & 2 OTHERS VS. SAM-CON LTD [2003] KLR 462 this Court adopted with approval the conditions for granting an interlocutory injunction as stated in GIELLA V. CASSMAN BROWN & CO. LTD (supra) and at p.464 went on to state as follows:-

*“With respect, these are arguable points. First, he attempted to have other circumstances apart from the conditions set out above to be considered. Such a course was roundly rejected by the Court of Appeal in ABEL SALIM & OTHERS V. OKONG’O & OTHERS [1976] KLR 42 at p. 48 where it was, inter alia, held:-*

*“In granting or refusing to grant an interlocutory injunction, a court exercises its discretion. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in GIELLA V. CASSMAN BROWN AND CO. LTD. [1973] EA 358 at 360.”*

*Secondly the court will decide an application on the balance of convenience only if it is in doubt. The finding by the learned judge that the respondent had no prima facie case was clear and express.”*

In view of the foregoing, we are satisfied that since the learned Judge made very clear findings as regards the conditions for granting an interlocutory injunction which were to the effect that the respondent had failed to meet these conditions then there were no other avenues open to the learned Judge to grant interlocutory injunction. An attempt to consider other circumstances apart from the laid down conditions was rejected in ABEL SALIM & OTHERS VS. OKONG’O & OTHERS (supra).

For the foregoing reasons, we allow this appeal and set aside the order of the superior court delivered on **11<sup>th</sup> November, 2003**. We further order that the respondent’s Chamber Summons Application dated **18<sup>th</sup> August, 2003** be dismissed. Costs of this appeal and those arising from proceedings in the superior court be awarded to the appellant.

*Dated and delivered at Nairobi this 22<sup>nd</sup> day of September, 2006.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**