



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, GITHINJI & WAKI, JJ.A.)

CIVIL APPEAL 53 OF 2002

BETWEEN

KENYA COMMERCIAL BANK LTD.....APPELLANT

AND

KIPSANG SAWE SISEI.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Osiero J) dated 18th January, 2002

in

H.C.C.C. NO. 1613 OF 2001)

JUDGMENT OF THE COURT

The appellant, *Kenya Commercial Bank Ltd* (**Bank**) appeals against the order of the superior court (Osiero J) dated 18th January, 2002 dismissing with costs its application dated 14th November, 2001 seeking to set aside an ex parte order of injunction in favour of the respondent herein, made on 8th November, 2001.

On 31st October, 1997, the respondent as a guarantor to *M/s. PENGUIN ENGINEERING LIMITED*, the Borrower, executed a legal charge over his land Title Number Moi's Bridge/Ziwa/Block 12/Cheukta/60 in favour of the Bank to secure an overdraft of Shs.700,000/= advanced to the borrower. The borrower defaulted in repayment of the overdraft and the Bank advertised the respondent's land for sale by public auction on 23rd October, 2001. On 22nd October, 2001, a day before the scheduled public auction of the charged property, the respondent filed a suit against the Bank seeking two reliefs, namely, an order of injunction to restrain the sale of the property and a declaration that the scheduled auction was illegal as the Bank had not served the mandatory statutory notice on the respondent. The plaint was accompanied by an application for an inter locutory injunction which was fixed before the Judge for hearing ex parte in the first instance. An ex parte injunction was granted on 22nd October, 2001 and the application was fixed for hearing inter partes on 30th October, 2001. The Bank complied with the ex parte order of injunction and cancelled the scheduled auction. The Bank entered appearance on 29th October, 2001. On 30th October, 2001, the date fixed for hearing of the application for injunction inter partes, Mr. Mwangi appeared for the Bank while Mr. Odipo appeared for the respondent. According to the record, Mr. Odipo

asked the court to grant the order of injunction as the Bank had not filed a replying affidavit or grounds of opposition. Mr. Mwangi is not shown to have addressed the court.

On 8th November, 2001 the superior court in a short ruling allowed the application for injunction saying that the application was not opposed. By a notice of motion dated 14th November, 2001, made under **Order 50 Rule 17** and **Order 39 Rule 4** of the Civil Procedure Rules the Bank asked the superior court to set aside the ex parte orders of 8th November, 2001 on the ground that failure to file replying papers was excusable. Alternatively, the Bank asked the court to set aside or discharge or vary the orders of injunction given on 8th November, 2001.

That application was dismissed by the superior court on 18th January, 2002, thus provoking this appeal. The Bank appeals against the dismissal of the application on 14 grounds. The general complaint as shown in ground No. 14 is that the learned Judge misdirected himself in fact and in law by failing to exercise his wide discretion or exercising his discretion on the wrong principles. The ruling impugned is brief. The learned Judge states in the relevant part thus:

“This application by the defendant now seeks order to set aside that order of 8.11.2001. The application is opposed on the ground that the ex parte order of 8.11.2001 was made regularly and no error or omission has been shown on the part of the court. To me this application is unnecessary. If the application was granted because of non compliance of the provisions of the Registered Land Act (Cap 300) and the provisions of the Auctioneers Act No. 5 of 1996 as to mandatory Notice to the plaintiff, all that the plaintiff need to do is to comply with the said provisions and go ahead to exercise its statutory power of sale.

The orders of 8.11.2001 were meant to stop the sale, which was scheduled for 23.10.2001 and not future advertisement after compliance with the provisions of the law. In any case, no good reason has been given for setting aside my previous order”.

This is an appeal against a discretionary order. The principles upon which an appellate court may interfere with exercise of a discretion by a trial judge have been stated in many decisions of this Court (see = *Mbogo v Shah* [1968] EA 93, *The Francois Vieljeux* [1984] KLR 1 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125).

The application which the Bank filed in the superior court was essentially an application for setting aside the order of injunction given ex parte on 8th November, 2001. It is **Rule 4 of Order XXXIX**, Civil Procedure Rules, which the Bank correctly invoked, that specifically gives the court power to set aside, discharge or vary an order of injunction whether given ex parte or otherwise. An appeal lies as of right from an order made under **Rule 4 of Order XXXIX (see – Order XLII 1 (1) (x)** Civil Procedure Rules.

Rule 16 (1) of Order L required the Bank, as a respondent if it intended to oppose the application for injunction, to file and serve on the respondent a replying affidavit or a statement of the grounds of opposition not less than three clear days before the hearing date. **Rule 16 (3) of Order L** provides that if a respondent fails to file a replying affidavit or a statement of grounds of opposition the application may be heard ex parte. In this case the Bank failed to file a replying affidavit or a statement of the grounds of opposition before the hearing date of the application inter partes.

However, Mr. Mwangi Njeru, the counsel instructed by the Bank appeared on the hearing date. Mr. Mwangi Njeru gave the reasons why he did not file the replying affidavit or statement of the grounds of the opposition in the affidavit in support of the application to set aside the ex parte orders. According to him he was served with the application by the respondent’s counsel on 22nd October, 2001. He immediately sought instructions from the auctioneer on the respondent’s allegation that he was never served with the statutory notice. He received the auctioneer’s instructions on 29th October, 2001, a day before the hearing date.

The letter from the auctioneer dated 29th October, 2001 was attached to that affidavit. Lawi Kimathi Njuki, a Bank Manager who also filed a supporting affidavit to the same application deposes, inter alia,

that because of some delay by the auctioneer in forwarding the explanation on documents served, the Bank's advocates had no sufficient time to reply to the respondent's allegation of irregular service of statutory notice before the hearing date.

Mr. Mwangi Njeru further deposed that he attended court on 30th October, 2001 with instructions to seek an adjournment to file a replying affidavit; that prior to attending the court he had communicated to the respondents counsel who had indicated his willingness to concede to an application for adjournment on condition that the ex parte orders were extended; that he made an application before the learned Judge but the application was refused and the respondent's counsel ordered to proceed with the application ex parte and that the hearing of the application proceeded ex parte although he was physically present.

That version of what happened on the hearing date of the application was repeated before the learned Judge at the hearing of the application for setting aside the ex parte orders. Mr. Odipo the learned counsel for the respondent confirmed before us that indeed the appellant's counsel made an application for adjournment before the learned Judge which was rejected. None of this was recorded by the learned Judge.

We have already quoted the relevant portion of the short ruling of the superior court appealed from. The ruling of 8th November, 2001 by which the order of injunction was granted was equally brief. It is a 1½ page ruling in which the learned Judge merely referred to the respondent's assertion that the scheduled auction was illegal as the mandatory provision of the Registered Land Act and of the Auctioneers Act as to notice had not been complied with and concluded:

“That is the position and the application is not opposed. The plaintiff's application is allowed ...”.

The learned Judge, with respect, does not seem to have considered the well known principles for granting an injunction.

It is apparent from the ruling of 18th January, 2002 that the learned Judge dismissed the application for setting aside the order of injunction for two reasons. The first and the main reason was that the application was unnecessary because the order of 8th November, 2001 was only meant to stop the sale scheduled for 23rd October, 2001 and the appellant could still exercise its statutory power of sale after issuing a valid notice.

The appellant challenges that finding in grounds 1, 2, 3, and 9 of the grounds of appeal and states that the learned Judge misapprehended and misdirected himself on the import and purport of his order of 8th November, 2001 Those grounds are indefensible because the order of injunction given on 8th November, 2001 was not limited to the public sale scheduled for 23rd October, 2001 as stated by the learned Judge. On the contrary the learned Judge on 8th November, 2001 granted an order of injunction in terms of prayer 3 of the Chamber Summons dated 19th October, 2001, that is, until the hearing and the determination of the suit.

Secondly, the application was dismissed because:

“in any case, no good reason has been given for setting aside my previous order”.

This appears to have been a subsidiary ground for dismissing the application. This finding of the court is the subject matter of grounds 4, 5, 6, 7, 8 and 10 of the grounds of appeal. In essence the appellant contends that the learned Judge erred in law in failing to appreciate and accept the reasons given for failure to file a replying affidavit in time. The appellant also complains that its application for adjournment was not recorded nor a ruling made on the application. Again, these grounds are indefensible. As the ruling shows, the learned Judge failed to consider and evaluate the reasons given to support the application nor give reasons for his decision.

Further, the learned Judge failed to consider that the appellant genuinely intended to oppose the

application for injunction as the appellant's counsel had applied for adjournment to file a replying affidavit and had proceeded to file the application to set aside the order of injunction with promptitude – within a week of the grant of the order of injunction.

Lastly, in dismissing the application to set aside, the learned Judge failed to appreciate that an order of injunction is an equitable remedy and that the court can only exercise its equitable jurisdiction judicially, if all the parties have been fully heard and if all the material facts are before the court. The learned Judge should have further appreciated that the policy of our law does not favour the grant of an ex parte injunction except in extremely urgent cases where the purpose of the injunction would be defeated by delay or the sustenance of an ex parte injunction beyond 14 days (*see – Order XXXIX Rule 3 (1) and 3 (2)* respectively).

For those reasons, we are satisfied that the learned Judge did not take into account all the relevant matters; that he misdirected himself in law in several respects and that he misapprehended the consequences of the order of injunction.

In the result, we allow the appeal with costs. We set aside the order of the superior court dated 18th January, 2002 and allow the appellant's Notice of Motion dated 14th November, 2001 with costs. The order of injunction given on 8th November, 2001 is set aside. The respondent's Chamber Summons for an order of injunction dated 19th October, 2001 shall be heard de novo before another Judge. The appellant is at liberty to file a replying affidavit to that application within 14 days of this judgment.

Dated and delivered at Nairobi this 10th day of June, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI J

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR