Access Bank Kenya PLC v Mengich & another (Civil Appeal E003 of 2024) [2025] KEHC 5546 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E003 OF 2024

RB NGETICH, J

APRIL 30, 2025

BETWEEN

ACCESS BANK KENYA PLC ..... APPELLANT

AND

MICHAEL MENGICH ..... 1ST RESPONDENT

WILLY KIPRPOTICH CHEROGONY ..... 2ND RESPONDENT

(Appeal from the Ruling and order of Hon.C.R.T Ateya SPM at chief magistrates' at Kabarnet delivered on 20th December 2023 in civil case no.E054 of 2023)

JUDGMENT

1. The Respondent filed suit against the Appellant before the trial court seeking declaration that the Respondents had breached Section 90(3), 96(2) and 97 of the *Land Act* 2012 when they advertised the 2nd Respondent's Land parcel Baringo/Kapropita/1692 for sale by way of Auction and permanent injunction to restrain, bids, selling, auctioning or disposing by any way whatsoever the respondents/ Applicants' plus general, Special damages and costs.

2. The applicants filed application dated 18th October 2023 seeking to restrain the appellant/defendant from selling and or disposing the 2nd plaintiff's parcel of land Baringo/Kapropita/1692 which was charged to the appellant.

3. By ruling delivered on 20th December 2023, the trial court allowed prayer C only thus restraining the 1st and 2nd Respondents from inviting bids, selling, Auctioning or disposing by any way, the 2nd applicant's parcel of land Baringo/Kapropita/1692.

4. Being aggrieved and dissatisfied by the said ruling, the appellant who was the 1st Respondent in the trial court filed memorandum of appeal dated 18th January 2024 on the following grounds:

a. The learned Magistrate erred in law and misdirected herself by finding that the Respondents were entitled to an order for interlocutory injunction restraining the Appellant disposing property title number Baringo/Kapropita/1692, in exercise of its statutory power of sale.

b. The learned Magistrate erred in law and misdirected herself by finding that the Respondents had satisfied the grounds for the grant of the interlocutory injunction.

c. The learned Magistrate erred in law and in fact by refusing or failing to consider the pleadings filed and the evidence on record thereby arrived at erroneous and/or wrong decision that the Respondents had established a prima facie case with probability of success.

d. The learned Magistrate erred in law and in fact by allowing the Respondents' Application dated 25th October 2023. There is no cross appeal filed in the matter.

5. Along with the Memorandum of Appeal, the Appellant filed an application dated 23rd January, 2024 seeking stay of proceedings in the trial Court. By ruling delivered on 22nd May 2024, the Appellant's Application partially succeeded, and the 1st Respondent was ordered to pay half the outstanding sum within 45 days.

6. The appeal was canvassed by way of written submissions, only the Appellant filed their submissions.

Appellant's Submissions

7. The appellant submits that by ruling issued by this court on 22nd May 2024, the 1st Respondent was directed to pay half of the outstanding loan amount, then at Kshs.1,390,674.00 within 45 days, however, to date, the 1st Respondent has not attempted to pay part thereof; that the Respondents have not made good the default despite filing the case at the trial court and the Appellant continues to suffer loss and damage.

8. The Appellant submits that the Appeal raises the following issues for determination:-

i. Whether the trial Court in granting the Respondent's prayer to restrain the Appellant from exercising statutory power of sale, by an order of temporary injunction properly exercised her discretion.

ii. Whether the trial Court misdirected herself and arrived at a wrong decision.

iii. What are the orders as to costs.

9. The Appellant submits that this is a first appeal from trial Court and the Honourable Court has a duty by way of retrial, to consider the matter including to evaluate the evidence adduced at the trial as held by Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR 4.

10. The Appellant humbly submits that this Honourable Court should therefore relook at the evidence presented by the parties in the trial Court, that is, the Affidavits and documents filed, and make its own conclusions on the application of the law by the trial court in regard to such evidence and issues before it.

11. On whether the trial magistrate in granting the Respondents' prayer to restrain the Appellant from exercising statutory power of sale, by an order of injunction properly exercised her discretion, they submit that the test for the grant of an interlocutory injunction under Kenyan law has been settled by

the case of Giella v Cassman Brown & Co Ltd [1973] EA 35 and the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR which further held that: -

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.... If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between..."

12. The appellant submit that the Respondents did not establish a prima facie case with a probability of success and what constitutes a prima facie case was explained by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd and 2 others [2003] KLR 125.

13. The appellant argues that the Respondent was required to adduce evidence to show an infringement of a right but failed to do so ; that the 1st Respondent owes substantial amounts of money to the Appellant and he equally admitted that the loan has not been repaid.

14. Further that despite an express court order issued on 22nd May 2024, the 1st Respondent has not made any part payment of the outstanding loan which was Kshs.1,390,674.80 as at November 2023; further that the money was secured by security whose validity has not been questioned and by acting on these securities to recover the sums owed, cannot be said to have infringed any of the Respondents' rights.

15. The appellant further submit that vide a Letter of Offer dated 25th May 2015 [at pages 21-32] of the Record of Appeal, signed by both Respondents, the Respondents voluntarily accepted to offer Land Reference Number Baringo/Kapropita/1 692 (hereinafter "the security") as security to secure the 1st Respondent's indebtedness to the Appellant and Subsequently, a legal charge [at pages 37-64 of the Record of Appeal] was perfected; the appellant argue that the charge grants the Appellant power to exercise the statutory power of sale in the event of default as per clause 10 of the charge. That failure to pay any outstanding sums on the due date is contrary to "covenant to pay" under clause 1 of the charge signed by the parties.

16. The appellant further submits that before perfecting the Charge, the 2nd Respondent who was also a party to the Charge, executed a Guarantee [at pages 34-35 of the Record of Appeal] for Kshs.1,000,000/- to the Appellant as a condition for the Appellant to advance a loan facility to the 1st Respondent and the Loan ought to have been repaid in 36 months from May 2015 and should have therefore been cleared as at May 2018.

17. Further that on grounds of the Amended Notice of Motion dated 25th October 2023, at page 10 of the Record of Appeal, the Respondents admitted that as at 2020, the 1st Respondent had not repaid the loan in full; that the Respondents expressly admitted that the 1st Respondent advanced him a loan which he has not repaid.

18. The appellant submit that they served notices on the Respondents and proceeded to appoint Auctioneers to issue the statutory notices in exercise of the Bank's powers under the charge and

cited the case of Tengeri N. Osoro v Standard Chartered Bank & Another HCC No. E120 of 2022 (Unreported) where Prof. Nixon Sifuna J stated thus:

> " 22. To my mind, a property after being charged as security for a loan becomes a commodity for sale. Subsequently, and consequently, the default by the chargor to repay the loan or in any other way honour his or her obligations under the charge, then actualizes the property as a commodity for sale. After all one of the prime rights of a charge is the exercise of the statutory power of sale. It is also one of the terms that the chargor will have signed for, not only in the charge, but also in the loan agreement."

19. The Appellant further submit that the Respondents admitted having received the requisite statutory notices preceding sale which has not been challenged; that the Respondent did not redeem the property nor make any substantial payment for the loan and allegations that the Respondents have always been making monthly repayments has not been supported by any evidence.

20. That further, since the issuance of the statutory notices and ruling of this Court, the Respondents did not make any attempt to exercise their redemption rights by settling the outstanding debt and the Respondents have therefore failed to demonstrate good faith and were not entitled to any equitable relief by this Honorable trial Court and relied on the case of Tengeri N. Osoro v Standard Chartered Bank & Another.

21. Further that the Respondents did not pass Giella test and the application for injunctive relief should have failed at that juncture and even if the Respondents had established a prima facie case, damages would be an adequate remedy if the Respondents prove their case against the appellant. That weight of judicial authority leans against a party who charges his property and then turns around to claim that sale of the same property would cause him irreparable harm.

22. The appellant submits that Section 99(4) of *Land Act*, 2012 captures this position in the following terms:-

> " A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

23. Similarly, in the case of Stephen Wainaina & 2 others v Overseas Private Investment Corporation HCC 450 of 2009 (unreported) Justice L. Njagi stated as follows:

> " ...A financial loss is not irreparable since it is quantifiable, monetary, and can be adequately compensated by an award of damages...From the utterances of the Applicants, it is certain to me that they would be pacified as long as they can back their money. Put in the language used in the GIELLA'S CASE (supra), the Applicants can be adequately compensated in monetary terms by an award of damages."

24. That in the final analysis, the Respondents did not meet any of the first two limbs of the Giella V. Cassman Brown [1973] EA 358. test and the balance of convenience tilts in favor of the Appellant. That consequently, the Honorable Magistrate misdirected herself in issuing the injunction against the Appellant.

25. The appellant urge this court to determine whether the Respondents established a prima facie case with a probability of success before the trial Court and whether irreparable injury would result if the injunction was not granted and whether there was evidence that the balance of convenience was in

favor of the Respondents and further submit that the trial Magistrate misapplied the recent test set in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014]KECA 606(KLR) which requires that the principles in Giella be surmounted sequentially.

26. Further that the Hon. trial Magistrate clearly misdirected herself and failed to first determine whether the Respondents had a prima facie case and instead without any justification and/or legal backing, was quick to point out at paragraph 7 of the Ruling (at Page 101 of the Record of Appeal) that:

> " While it is true that judicial authority leans against a party who has charged his property, in the present case, the person who charged the property was not the one who was advanced the facility. At this juncture, the Court cannot go into the merits of the case suffice to say that the Plaintiff has established a prima facie case..."

27. The Appellant further submit that there is compelling evidence showing that the 2nd Respondent voluntarily issued his property as security and guaranteed the loan also and the Respondents had not challenged the properly issued statutory notices; that the trial magistrate failed to appreciate that the subject Charge is a creation of the law and should be treated like an any other legal charge with respect to remedies to the Chargee;that Section 56 of the *Land Registration Act*, Cap 300 Laws of Kenya recognizes that a proprietor may charge his property in any manner to secure money or any other conditions.

28. That the 2nd Respondent, the proprietor of the charged land voluntarily executed the instrument of charge and was duly served with all statutory notices in exercise of the statutory power of sale and in finding that the said 2nd Respondent would suffer irreparable harm having consciously charged his property to guarantee the 1st Respondent, was clearly a wrong legal finding.

29. The appellant further submit that they are alive to holding in the case of Mbogo & Another v Shah [1968] EA 98 where the court stated as follows:

> " .....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

30. And submit that the trial magistrate was clearly wrong, and this Honourable Court should interfere with the exercise of discretion and set aside, in entirety, the injunction issued in the lower court matter.

31. In conclusion, the appellant submits they have demonstrated that the Respondents were not entitled to any injunctive relief and the trial court erred in both law and fact when she granted the injunctive order. Consequently, the said order restraining the Appellant from realizing the security should be set aside in its entirety. The appellant urges this court to allow this appeal with costs to the Appellant.

Analysis And Determination

32. This appeal is hinged on exercise of judicial discretion which is at the heart of the decision-making process of any magistrate or judge. In the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 where some of the considerations in decision-making process are expressed as hereunder: -

> " It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions

> often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

33. Under Order 40 Rule 1 & 2 of the Civil Procedure Rules on temporary injunction, the purpose of the same is to prevent an irreparable harm which outweighs the expected irreparable harm imposed as a result of temporary injunction. The issuance therefore of injunction and the scope of the relief ordinarily rests in the sound discretion of the trier of facts. As the court in EM Loews Enterprises INC v International Alliance of Theatrical Stage Employees et.al 127 conn 415, 419, (1941) stated: -

> " An action for an injunction being equitable, whether or a plaintiff is entitled to relief is determined, not by the situation existing when it begun, but by that which is developed at the trial"

34. It is evident from the record and averments by parties that the 1st respondent has outstanding loan balance of Kshs.1,390,674.00. The 2nd respondent contends that he was only offering a security for the 1st Respondent to secure a loan with the Appellant only for the 1st Respondent to default in payment. It is against this backdrop that the trial court granted the respondent the injunctive orders against the appellant bank.

35. The objectives upon which a court exercises discretion to grant a temporary injunction namely: -

    a. To maintain the status quo,

    b. To preserve the court ability to render meaningful decision,

    c. Managing the risk of error likely to occasion prejudice or injustice to the other party.

36. What I consider to be in issue is whether the application before the trial court met threshold for grant of an order for injunction. I note that the appellant seeks to invoke the appellate jurisdiction under Order 42 of the Civil Procedure Rules to challenge the findings of the trial court. That therefore brings me to the standard of review of the inferior court decision at the interlocutory stage by this court. The function is typically guided by the principles in Michael Murage v Dorcas Atieno [2019] eKLR and Mbogo v Shah [1968] EA 93.

37. The assorted factors to be considered in reviewing the trial court's decision are whether there was misdirection on the evidence, the law and the overall facts of the case, whether the trier of facts took into account irreverent material or acted in excess of jurisdiction. No single factor is dispositive, rather each factor must be considered by this court to determine whether there was an overreach with the exercise of discretion so as to review the impugned ruling.

38. In the instant case, the trial court was asked to consider the guiding principles for grant or refusal of an injunction as stipulated under Order 40 Rule 1 & 2 of the CPR. The trial court was required to

consider whether the applicant demonstrated that there was a prima facie case which was likely to succeed on the merits. Second that they will suffer irreparable loss which could not be remedied by damages. Thirdly, was a question on the balance of convenience.

39. It is not in dispute that the suit property had been offered by the 2nd respondent as security to the appellant bank to secure loan advanced to the 1st respondent. From pleadings and record herein, it is not disputed that the 2nd Respondent executed charge document and also guaranteed the loan advanced to the 1st Respondent. The property was therefore properly charged to the bank.

40. The appellant argue that the respondents have not made attempts to repay the loan even after being ordered to pay half the decretal amount by this court within 45 days from 23rd may 2024 and continued default in loan repayment is causing irreparable damage to the appellant. From the averments herein, statutory notices were issued but the respondents did not take steps to redeem the property.

41. The law as it relates to injunction calls for courts of equity to look at both sides of the coin to serve the interests of justice. It is not in dispute that the loan was issued to the 1st Respondent and the 2nd respondent committed himself by offering his title deed to secure the loan. By executing the charge and depositing in the bank his title, there is no doubt that he agreed to lose his property in the event of default by the 1st Respondent. He further guaranteed the loan thereby committing himself to pay the loan in the event the 1st Respondent defaulted.

42. In the case of Sambai Kitur v Standard Chartered Bank & 2 Others, Eldoret HCC No. 50 of 2002 where Emukule J, held that: -

> " ....it must also be noted that when a chargor lets lose its property to a charge as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a charge, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the chargor. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale claim that he is likely to suffer loss and injury incapable of compensation of damages? Such an argument is definitely misplaced and has no merit. It is immaterial that the property is a family residence, a fact well known to the chargor at the time of offering it as security to the charge."

43. From the foregoing, the 1st respondent in taking the loan from the appellant bank and the 2nd Respondent's acceptance to offer the property as a security for the loan, conditionally transferred his proprietary rights in the suit property to the appellant bank as the value of the loan advanced for 1st Respondent's primary use. That is to say, that at the time that the 2nd respondent accepted his property to be charged as security for loan, he was fully aware that the property could be sold in the event of default in loan repayment.

44. In view of the above, I find that the trial magistrate acted in error by holding that the person who charged the property was not the person who was advanced the facility and would result in loss that cannot be compensated by damages and found that on that basis found that a prima facie case had been established. From the foregoing, I find that the trial magistrate acted in error by failing to consider that the 2nd respondent volunteered his title to the bank as security for loan advanced to the 1st respondent and going ahead to hold that damages would not be adequate for the 2nd respondent in the event the suit succeed.

45. The trial court further failed to address the prejudice the appellant bank was likely to suffer in the event the injunction turns out to have been wrongly granted. For the above reasons, it is my finding that the

lower court misdirected itself on the law and facts and consequently, I find that the decision of the trial court must be set aside and reversed with costs to the appellant.

Final Orders: -

a. Injunctive Orders issued on 20th December, 2023 are hereby set aside.

b. Costs of this appeal to the appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30TH DAY OF APRIL, 2025

.....

RACHEL NGETICH

JUDGE

In the presence of:

Sila holding brief for Kotonya for Appellant.

No appearance for the Respondent.

Court Assistant – Elvis.