IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & GBM KARIUKI, JJ.A)

CIVIL APPEAL NO. 1 OF 2011

BETWEEN

NYANZA FISH PROCESSORS LIMITED.....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the Honourable Mr. Justice L. Kimaru

at the High Court of Kenya at Nairobi delivered on 17th April 2009 in

High Court Civil Case No. 40 of 2005)

BETWEEN

NYANZA FISH PROCESSORS LIMITED.....PLAINTIFF VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 140 OF 2006

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

AFRO MEAT COMPANY LIMITED.....1ST DEFENDANT

NYANZA FISH PROCESSORS LIMITED.....2ND DEFENDANT

KARIM MOHAMMED HASSANALI.....3RD DEFENDANT

MOHAMMED HASSANALI.....4TH DEFENDANT

JUDGMENT OF THE COURT

[1] Nyanza Fish Processors Limited which is the appellant in this appeal has come to this court challenging the ruling made by the High Court of Kenya (Kimaru J) dismissing its interlocutory application dated 21st January 2005. The appeal originates from a suit initiated by the appellant in the High Court through a plaint dated 21st January 2005. In the plaint the appellant sued Barclays Bank of Kenya Limited (herein the respondent), seeking *inter alia* declaration that the charge dated 15th June 1995 over Kisumu Municipality/Block 3/123 (*hereinafter '**the property'***) executed by the appellant in favour of the respondent is not valid; and a permanent injunction restraining the respondent by itself, its servant and or agents from selling, alienating or disposing off the property. Filed contemporaneously with the plaint in the High Court, was an application under certificate of urgency in in which the appellant's substantive prayer was for an interlocutory order of injunction restraining the respondent or its servants or agents from selling, alienating or disposing of the property during the pendency of the High Court suit.

[2] The appellant's chamber summons application was supported by an affidavit sworn by Karim Hassanali who is a director of the appellant. In turn the respondent filed a defence to the appellant's claim, and also responded to the application through an affidavit sworn by Alfornse Kisilu who is the respondent's head of corporate recoveries. Briefly, the undisputed facts are that the appellant and Afro Meat Co. Ltd have the same directors. The appellant is registered as a proprietor of leasehold interest of the property. By a resolution dated 30th June 1995, the appellant's board of directors authorized the directors of the appellant to do three things. First to give guarantee to the extent of 30,000,000/= for due payment by Afro Meat Co. Ltd. Secondly to charge the property, and thirdly to sign and execute such documents as may be required for the completion of the security documents. Subsequently, the appellant's directors duly executed a charge dated 15th June 1995 in favour of the respondent and the charge was duly registered against the title to the property.

[3] It would appear that sometimes in the year 2004, Afro Meat Company Limited defaulted in repaying the loan and the respondent through its advocates made a demand for payment and threatened to realize the security in exercise of its statutory power of sale. In response the appellant filed the suit in the High Court in an attempt to stop the sale of the property. The appellant maintained that the charge dated 15th June 1995 over the suit property was invalid and of no legal effect for three reasons. First that the charge not being a third party charge cannot confer upon the respondent the power to realize the suit property for debts of a third party. Secondly, that the charge did not comply with provisions of the **Registered Land Act Cap 300**. Thirdly, that the appellant did not receive any commercial benefit from either the respondent or Afro Meat Company Limited pursuant to the Charge. The appellant therefore urged the court to grant interlocutory orders restraining the sale pending the hearing of the suit.

[4] On its part the respondent maintained that the appellant's board of directors passed a resolution approving the guarantee to secure advances to be given to Afro Meat Co Ltd by the respondent; that the resolution provided that the guarantee be supported by a charge; that the appellants directors signed the charge and acknowledged having understood the meaning of **section 74** of the **Registered Land Act** which allowed the respondent to exercise its statutory power of sale in the event of default; that the charge having been duly registered the same is a valid security for the monies advanced to Afro Meat Co Ltd; that the appellants board of directors even made further resolutions to guarantee further advances to Afro Meat Co. Ltd; and that the appellant is therefore estopped from denying the validity of the charge.

[5] The learned Judge having considered the arguments by the parties delivered a ruling dismissing the appellant's application. Aggrieved by the ruling, the appellant lodged a notice of appeal on 22nd April 2009 and followed it up by filing a record of appeal that included a memorandum of appeal that lists 38 grounds of appeal. These grounds mainly gravitate towards the learned judge's exercise of his discretion in dismissing the appellant's application, the learned Judge being faulted for inter alia failing to appreciate the gravamen of the appellant's complaint, failing to apply the principles governing the issuance of an interlocutory injunction, and basing his decision on extraneous matters.

[6] At the hearing of the appeal, **Mr. Nagpal,** learned counsel for the appellant made oral arguments in support of the appeal. Learned counsel submitted that the appellant's case was that the charge was invalid because it was not supported by any consideration as no money was advanced to the appellant; that the

resolution of the board of directors did not constitute a request to lend money; that the appellant was not the borrower; and that the High Court ought not to have looked at anything other than the charge. Relying on the decision in **Salomon vs. Salomon (1897) AC 22** Counsel contended that each limited company is a separate entity there being nothing in law like sister company even where directors are the same. That although the appellant never disputed the amount owed it maintained that the money was never owed by the appellant. In regard to the guarantee Counsel conceded that there was a guarantee, but contended that the guarantee was the subject of a separate suit, and that the respondent was not relying on the guarantee but on the charge. **Mr. Nagpal** urged the court to allow the appeal pointing out that the learned Judge made conclusive findings that were prejudicial to the appellant's case which was yet to be determined in the High Court.

[7] Mr. Ogunde learned counsel for the respondent also made oral submissions in which he pointed out that the appellant has not sought any order for reinstatement of the injunction, but has only sought an order to set aside the order of dismissal that was made by the learned Judge. Further, that the appeal was unnecessary as the same issues could still be canvassed before the trial court, and the trial court would not be bound by findings made at the interlocutory stage. In counsel's view the learned Judge was justified in finding that there was no prima facie case as there was no dispute that the money was advanced to Afro Meat Co. Ltd and not the appellant; that **clause 4 (a)** of the **Charge** showed that the charge also covered monies paid on guarantee; that ***HCCC No.140 of 2006*** that was dealing with the issue of the guarantee was consolidated with ***HCCC No.40 of 2005*** and therefore the learned Judge had the benefit of the guarantee. On the issue of the form of the charge counsel submitted that the learned judge was right in relying on **Section 2** of **Cap 2** and finding that there was substantial compliance. Counsel concluded that the bottom line was that the appellant guaranteed Afro Meat Co. Ltd. pursuant to resolutions made by its board of directors, and that the learned judge did not therefore substitute the obligation of one company for the other.

[8] In reply Mr. Nagpal maintained that in his pleadings in ***Civil Suit No. 140 of 2006*** the appellant denied having guaranteed Afro Meat Co, Ltd, and that during the arguments in ***Civil Suit No. 40 of 2005***, the guarantee was not referred to. Counsel posited that the findings of the learned Judge in the interlocutory application were binding unless overturned by a higher court. He maintained that there was no substantial compliance with the form of the charge as the form used was entirely different from the Statutory Form RL9 provided.

[9] We are alive to the fact that what is before us is an interlocutory appeal and that the hearing of the substantive suit is still pending in the High Court. Therefore this Court has an obligation to refrain from expressing conclusive views on any issues that may need to be canvassed and determined in the pending trial (See ***BP (Kenya) Ltd V. Kisumu Market Service Station, CA No. 25 of 1992 and*** **David Kamau Gakuru v. National Industrial Credit Bank Ltd,** ***CA No. 84 of 2001)***.

[10] This appeal questions the decision of the learned Judge in rejecting an application for an interlocutory injunction. In this regard this Court has previously given guidance in ***Vivo Energy Kenya Limited v Maloba Petrol Station & 3 others [2015] eKLR (Civil Appeal No.21 of 2014)*** where the Court had this to say:

> ***"The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially."***

[11] Thus the issue that we must address is whether in dismissing the application for interlocutory injunction the learned Judge exercised his discretion judicially. In **United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd eKLR,** ***Civil Appeal No. 36 of 1983*** Madan J.A. (as he then was), aptly explained the essence of this approach as follows**:**

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given***

different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

[12] The principles for granting an interlocutory injunction are well known having been reiterated in the *locus classicus* case of **Giella v Cassman Brown & Co. Limited [1973] EA 358** where the court (Spry V.P.) held at page 360 as follows:-

"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 (E.A. Industries -Vs- Trufoods (1972) EA 420.)"

[13] The principles provides a three-stage test involving a sequential enquiry that the learned Judge was expected to test the facts before him against.

(See **Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others [2014] eKLR).** The three stages are applied as separate, distinct and logical hurdles, which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society & Others, Civil Application No. 142 of 1999 [2001] 1 EA 86.1**

[14] In **Habib Bank Ag Zurich v. Eugene Marion Yakub,** ***CA No. 43 of 1982 (unreported)*** the Court of Appeal considered the role of the court when determining whether or not a *prima facie* case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at that stage since proof is only required at the hearing stage."

[15] In **National Bank Of Kenya V. Duncan Owour Shakali & Another, CA NO. 9 of 1997** Omolo JA stated:

"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

[16] And in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR*** was described as follows:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

…

a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

[17] The appellant's case in the High Court is that the charge is invalid first because there was no consideration as no monies were advanced to them. Secondly, that the charge was not a third party and the appellant was not the borrower. Thirdly, that the charge did not conform to Form RL. 9 provided under the third schedule to the Registered Land Act.

[18] In his ruling the learned Judge properly directed himself on the test to be applied quoting **Giella versus Cassman Brown** (*supra*). However, in identifying the issue before him, the learned Judge posited the issue for determination as to whether the appellant had established a case to enable the court to grant the injunction sought. Unfortunately this was a misdirection as the appellant was merely required to establish a *prima facie* case with a probability of success. As a result of that misdirection, the learned Judge proceeded to make conclusive findings on the validity of the charge, an issue that is still pending for trial in the High Court.

[19] The following excerpt of the judgment reveals the conclusive findings

> ***"I therefore hold that despite the instrument of charge not specifying the amount that was advanced, the said charge was valid since the amount outstanding was disclosed when the defendant issued the statutory demand notice to the plaintiff. As regards whether the charge was invalid on account of the fact that it was not the third party charge, and whether there was no consideration given for the commercial benefit of the plaintiff company, I hold that having perused the charge, that the said charge was in respect of monies advanced either to the plaintiff or to a third party as guaranteed by the plaintiff. …….***
>
> ***I hold that the plaintiff cannot escape liability in regard to a valid charge that it executed in favour of the defendant to secure sums advanced to his associate company. The plaintiff cannot use the fact of the existence of two separate companies with the same directors and the same shareholders as a basis of frustrating the defendant from exercising his statutory power of sale. The existence of the two artificial persons (i.e. companies) with common shareholders and directors cannot be a basis upon which this court can reach a finding that where one company benefits from a loan advanced to it by a bank or security offered by the other company then the other company has thereby not acquired any benefitted (sic) and therefore cannot be held to pay the loan that it had guaranteed by offering the said security. The plaintiff in the circumstances has failed to establish a prima facie case to entitle this court to grant it the interlocutory injunction sought"***

[20] In **Kenya Pipeline Company Ltd v Richard Kioko Kiundi [2015] eKLR** this court faced with a similar question regarding the validity of a mortgage in an interlocutory appeal such as the present one stated as follows:-

> *"**The question for determination is whether or not the mortgage instrument in possession of the appellant was the proper one will fall to the trial court, which is in a better position to do so during the hearing of oral and documentary evidence during trial. This is a matter that is central to the determination as to whether the appellant was within its rights in issuing a statutory notice of sale and subsequently moving to realize the mortgage security. At this stage we are not suited to determine the validity of the mortgage instrument……"***

[21] It is evident from the extract of the judgment that we have quoted, that the learned Judge made conclusive findings concerning the validity of the charge and the appellant's liability in regard to the same. These are matters that are central to the substantive suit that is still pending in the High Court. By making such definitive findings the learned Judge in effect compromised the appellant' suit thereby highly prejudicing the appellant. Moreover we have no doubt that in coming to the conclusion that there was no *prima facie* case the learned Judge was influenced by his premature determinative findings regarding the appellant's suit.

Thus the learned Judge did not properly exercise his discretion as he misdirected himself by taking into account considerations of which he should not have taken into account.

[22] For these reasons, we come to the conclusion that we must interfere with the exercise of the learned Judge's discretion. Accordingly we allow this appeal, set aside the ruling and order of the High Court dismissing the appellant's suit. We direct that unless otherwise overtaken by events, the appellant is at liberty to have its chamber summons dated 21st January, 2005 heard afresh before any Judge of competent jurisdiction other than Kimaru, J. In light of the circumstances of this appeal, we direct that each party shall pay their own costs.

Dated and delivered at Nairobi this 22nd day of July, 2016

M. KOOME

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR