Travel House Limited & another v Chase Bank (Civil Appeal 143 of 2018) [2024] KECA 602 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 602 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 143 OF 2018

SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA

MAY 24, 2024

BETWEEN

THE TRAVEL HOUSE LIMITED ..... 1ST APPELLANT

MICHAEL MWATHE ..... 2ND APPELLANT

AND

CHASE BANK ..... RESPONDENT

((An appeal from the ruling and order of the High Court of Kenya at Nairobi (Obaga, J.) delivered on 6th February 2018 in ELC Case No. 401 of 2017)

JUDGMENT

1. The Appellants, The Travel House Limited and Michael Mwathe, are dissatisfied with the Ruling delivered on 6th February 2018 by which the Environment and Land Court (E.O. Obaga, J.) (ELC) dismissed their application dated 16th June 2017 in which they had sought an order of temporary injunction to restrain the Respondent, Chase Bank, from selling the property known as L. R. No. 209/12732 at Tsavo Court Estate, South C, Nairobi, pending the hearing and determination of their suit. In reaching that decision, the learned Judge expressed that the appellants had not established a *prima facie* case with a probability of success within the principles in *Giella vs Cassman Brown*

   Co. Ltd [1973] EA 358 and that, in any case, the appellants "can be compensated in case it turns out that they were overcharged interest."

2. The background in brief is that the 2nd appellant and his wife, Moniah Wangari, charged their property L. R. No. 209/12732 at Tsavo Court Estate, South C, Nairobi (the charged property) to the respondent (the Bank) to secure banking facilities by way of overdraft of Kshs. 2,000,000.00 extended to the 1st appellant.

3. Thereafter, the 1st appellant experienced difficulties in servicing the overdraft facility. In June 2013, it requested the Bank to convert the overdraft facility to a term loan, which according to the appellants stood at Kshs. 2,189,413.61 at the time of signing the letter of offer of conversion. It is the appellants' case that the Bank thereafter continued, illegally, to charge interest on the overdraft; that despite a repayment of Kshs. 3,000,000.00, the Bank, immorally, illegally and in violation of the in duplum rule under Section 44A of the *Banking Act*, is still claiming Kshs.3,953,378 on the overdraft and is adamant in exercising its right of statutory power of sale by dispossing of the charged property "to recover the claimed exorbitant sums of Kshs. 3,953,378 yet the outstanding loan plus interest has been repaid in full."

4. Against that background, the appellants filed suit against the Bank seeking an order to prohibit it from selling or disposing of the charged property; an order that the statutory notices issued by the Bank and the Auctioneer are null and void; an order that the additional interest on the overdraft as claimed by the Bank is illegal; and a declaration that the appellants have repaid and wholly settled the loan and interest.

5. Alongside the plaint the appellants filed the application dated 16th June 2017 to which we have referred seeking interlocutory injunction which was dismissed in the impugned ruling.

6. In opposing the application, the Bank asserted that the outstanding balance as at the date when the appellants sought conversion of the overdraft into a loan facility stood at Kshs. 2,296,706.26; that the appellants consented to the restructuing of the principal amount of Ksh. 2,000,000 which was secured by a legal charge over the charged property; that the Bank on various occasions notified the appellants of the default in repayment and ultimately in May 2015, and August 2015 and January 2016 made demands; that by the time the appellants were served with statutory notice of exercise of the power of sale on 25th January 2016, the outstanding amount was Kshs. 5,220,515.00 with interest accruing at the rate of 3.33% per month; that the requisite notices were issued and a valuation report obtained for purpose of obtaining the prevailing market price of the charged property; that as at 3rd July 2017 there was outstanding Kshs. 4,153,498.20; and that the Bank stood to suffer irreparable loss if prevented from exercising its power of sale.

7. Having considered the application, the affidavits and the submissions, the learned Judge delivered the impugned ruling which is challenged on grounds that the Judge disregarded the principles for the grant of injunctions; that the Judge misconstrued the nature of dispute regarding interest; and that the Judge made a premature determination at interlocutory stage and failed to have due regard to the in duplum rule.

8. During the hearing of the appeal, the appellants were represented by learned counsel Mr. Ngira. The advocates for the respondent did not appear despite having been served with notice of hearing. Whilst acknowledging that the grant or refusal of an interlocutory injunction entails the exercise of judicial discretion, Mr. Ngira, in prosecuting the appeal relied on the case of *Mrao Limited vs. First American Bank of Kenya and 2 others* [2003] eKLR and submitted that the Judge disregarded the principles for the grant of injunction; that the appellants had laid sufficient material to demonstrate a *prima facie* case with a probability of success; that following the conversion of the overdraft facility to a loan facility, an interest amount of Kshs. 189,413.00 remained and the assertion that the interest of Kshs. 189,413 on the overdraft account continued to earn interest "is an issue worth listening to both parties".

9. Counsel urged that the appellants had also established a *prima facie* case in light of the provisions of Section 44A of the *Banking Act* as the appellants paid Kshs. 3,000,000.00 against a principal amount of Kshs. 2,000,000 yet the respondent continued to demand Kshs. 6,690,226.13 "apparently from interest on the overdraft facility." It was submitted that the Judge misapprehended the nature of dispute as one of interest payable when the legal dispute was whether interest is payable at all.

10. Counsel submitted further that the appellants' loss which would result from the exercise by the respondent of its statutory power of sale is irreparable and incapable of compensation as the outstanding loan has been repaid and the ability of the respondent to refund is not sufficient ground to deny the appellant the relief of injunction. The case of *Olympic Sports House Limited vs. School Equipment Centre Limited* [2012] eKLR was cited in support. Counsel urged further that the Judge erred in prematurely pronouncing himself on an issue of legality of interest charged, which is an issue that could only have been determined after a trial.

11. Although, as indicated, there was no appearance for the respondent during the virtual hearing of the appeal on 12th February 2024, Ms. V. A. Nyamodi & Company Advocates for the respondent in their written submissions urged that having regard to the principles stated in *Mrao Limited vs. First American Bank of Kenya and 2 others* (above), there is no basis for interfering with the exercise of judicial discretion by the learned Judge; that the Judge was right that the appellants' application did not meet the threshold for the grant of injunctions as laid out in *Giella vs. Cassman Brown Co. Ltd*; that the respondent had complied with the statutory provisions under the *Land Act*, Act No. 6 of 2012 as well as the Auctioneers Rules, 1997 prior to exercising its statutory power of sale which had accrued and had arisen.

12. It was submitted for the Bank that a dispute on the quantum of arrears is not a ground for restraining the exercise of the statutory power of sale; and that any loss that the appellants would suffer is reparable by an award of damages which the respondent, a bank, would undoubtedly be in a position to pay. Cited in support was the case of *Andrew Muriuki Wanjohi vs. Equity Building Society Limited and 2 others* [2006] eKLR and *Francis J. K. Ichatha vs. Housing Finance Company of Kenya Limited* [2005] eKLR; that in any event, the balance of convenience lay in refusing the injunction as the learned Judge did.

13. We are aware that the main suit between the parties is pending hearing and determination before the lower court. We must therefore be guarded to avoid making pronouncements that might ultimately embarrass the trial judge or prejudice the parties. With that in mind, the circumstances in which this Court may interfere with the exercise of judicial discretion are limited. In the case in *Mrao Limited vs. First American Bank of Kenya and 2 others* (above) on which both parties have relied, the Court expressed that the power of the court in an application for an interlocutory injunction is discretionary and an appellate court may only interfere with such exercise of discretion if satisfied that the judge misdirected himself/herself on law, or misapprehended the facts, or took into account considerations he/she should not have or failed to take into account considerations he/she should have, or the decision is plainly wrong.

14. Madan, JA in *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd* [1985] eKLR articulated the principle 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."

15. One of the complaints the appellants have levelled against the decision of the learned Judge is that he pronounced himself on issues that "could only have been properly adjudicated over by parties giving evidence and documents being produced in that regard." However, contrary to that claim, the ruling of the Judge shows otherwise. In declining to entertain, at interlocutory stage, the appellants' pleas that the interest charged by the Bank is illegal and that the statutory notices and notices by the Auctiooneer are null and void for alleged non-compliance with the law, the Judge was careful not to transgress into the domain of the trial court. In that regard, the Judge state that "prayer 4 and 5 of the application cannot be granted at interlocutory stage as they are reliefs which can only be granted after a hearing of the main suit."

16. We can find no pronouncements by the Judge in the impugned ruling that would suggest that the Judge had conclusively determined matters in controversy.

17. The complaint that the Judge disregarded the principles for the grant of injunctions is similarly not supported. The long- standing principles expressed in *Giella vs. Cassman Brown Co. Ltd* require that an applicant should establish a *prima facie* case with a probability of success; that the applicant stands to suffer irreparable loss which cannot be adequately compensated by an award of damages; and that if the court is in doubt, the application be determined on a balance of convenience.

18. If an applicant fails to establish a *prima facie* case with a probability of success, the application is doomed. In this case the Judge was alive to those principles and took the view that a *prima facie* case had not been established. He nonetheless proceeded to consider the second limb on adequacy of damages. The Judge stated:

> "I do not therefore see what *prima facie* case the applicants have. Even on consideration of the second principle in the *Giella case*, the applicants can be compensated in case it turns out that they were overcharged interest. Once they offered the suit property as security, they were aware of the consequences in the case of default..."

19. We respectfully agree. Having been satisfied that the appellants had not met the first two tests in *Giella vs. Cassman Brown Co. Ltd*, and not being in any doubt in that regard, there was no need for the Judge to interrogate the balance of convenience.

20. In conclusion, we find no merit in the appeal and dismiss the same with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR