Redefining the legal threshold for grant of Interlocutory injunctions in cases where Banks are exercising their Right of Redemption

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A commentary on the decision in the case of Juja Coffee Exporters Limited & Others vs Bank of Africa Limited & Others Mombasa HCCC No. 57 of 2016.

Introduction.

On 25th January 2022, Mativo J, proceeded to deliver a ruling in what has been protracted litigation between a defaulting borrower, a guarantor and a financier seek to exercise their statutory power of sale. The borrower Juja Coffee Exporters Ltd, to whom the facilities were advanced provided security in the form of third-party charges in favour of TSS Transporters Limited and the late Tahir Sheikh Said Ahmed.

The late Tahir Sheikh Said Ahmed, popularly known as TSS, died in January 2017. He was a well-known business man in Mombasa with investments in real estate, tea & coffee export, and transport & logistics all operating within Kenya and the region. Some of the companies are Juja Coffee Exporters Limited, TSS Transport Ltd and TSS Investment Ltd

In the operations of the various businesses, various credit facilities were taken from financial institutions, such as National Bank of Kenya (NBK) and Bank of Africa Limited (BOA). In accordance with the terms of the credit facilities, security was provided as collateral for the funds advance, for purposes of this commentary various properties.

Summary of the Litigation between the Borrowers and BOA.

As is the case in any credit facility, repayment is an obligation of the borrower, and in the event that the facility is not repaid an event of default occurs. When an event of default occurs, and the same is not remedied, it triggers the financier to commence a recovery process, which may occasionally mean a foreclosure on the properties provided as security.

From the above, a borrower may move to court seeking to halt the recovery process in a suit seeking an injunction against the sale/disposal of assets held as security by auction or private treaty by the financier whilst exercising their statutory power of sale or right of redemption. In respect of TSS and the companies affiliated upon an event of default occurring, and the financier commencing their statutory power of sale various suit were instituted as follows

a. In 2016, Juja Coffee Exporter Limited, TSS Transporters Limited, TSS investment Limited and the Late Tahir Sheikh Said Ahmed *(jointly hereinafter referred to the borrowers)* instituted a *HCCC NO. 57 of 2016: Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited & Another* together with an application, seeking inter-alia an order of injunction to stop the bank from exercising its statutory power of sale over properties that had been charged, as security for a loan facility advanced by the Bank to Juja Coffee Exporter Limited. By a ruling dated 21st July 2016, Mwangi J, granted temporary injunction restraining the sale of the charged properties on condition that the applicants therein deposit USD 2.5 Million in an interest earning account opened in the joint names of the law firms on record for the parties therein.
b. Dissatisfied with the ruling, the Bank appealed in *Civil Appeal No 99 of 2016 Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others* following which the Court of Appeal by a ruling dated 25th January 2018 set aside the ruling of the high court, dismissed the Application for injunction and upheld the bank's right to exercise its statutory power of sale. Dissatisfied by the decision of the Court of Appeal, the borrowers returned to the High Court and sought similar injunctive relief. However, the High Court found that the application amounted to an abuse of the court process, *res-judicata* and the application was dismissed the Application vide the ruling of 5th April 2018.
c. On 21st September 2018, Mwangi J, proceed to dismissed the entire suit and vacated the *ex-parte* suit on grounds that the Plaintiffs therein being beneficiaries of the estate of TSS lacked the locus standi to institute the suit.

Following the death of TSS, the parties to the litigation morphed to include the beneficiaries or alleged beneficiaries of the estate of TSS, as follows;

a. On 27th April 2018, the alleged beneficiaries of the Estate of Tahir Sheikh Said Ahmed (the 4th Defendant in HCCC 57 of 2016) filed a different suit, *HCCC 29 of 2018: Sabir Tahir Sheikh Said & 6others v Bank of Africa Limited* seeking similar injunctive orders as those sought in HCCC 57 of 2016 over the same charged properties.
b. On 30th April 2018, an auction was held and one of the charged properties was sold, however, other did not attract any bids, thus, a further auction was to be held on 11th June 2018. And on 31st May 2018, the beneficiaries filed yet another application seeking to stop the auction of 11th June 2018, to which Otieno J, granted injunctive orders *ex-parte*. The bank filed an application to set aside the *ex-parte* orders, however, Otieno J, declined to set aside the orders directed that all application be heard by Mwangi J, on 30th July 2018.
c. On 21st September 2018, Mwangi J, proceed to dismissed the entire suit and vacated the ex-parte suit on grounds that the Plaintiffs therein being beneficiaries of the estate of TSS lacked the locus standi to institute the suit.
d. Again, the beneficiaries sought orders against herein in *Mombasa HCCC 80 of 2018: Osman Tahir Sheikh Said & 2 others v Bank of Africa Limited*. This being a suit by an alleged executor of the estate of TSS, again Otieno J, proceeded to grant interim orders. On 5th October 2018, Otieno J, dismissed the application for non-attendance by the Plaintiff therein. The Plaintiff filed an application to reinstate the application, which was strongly opposed by the bank, to which Otieno J, raised question if the application had any merit.
e. On 8th April 2019, the Plaintiffs therein filed yet another application for injunction, and the bank opposed the same. The application came for hearing on 10th April 2019, wherein the Plaintiffs therein proceeded to have the same withdrawn with costs to the bank. However, later that day another similar application went before Chepkwony J, who certified the same as urgent and granted interim orders and directed that parties take a date at the registry on priority basis.
f. On 30th April 2019, the Bank filed an application to set aside the interim orders, the Application this time went before Otieno J, who declined to set aside the interim orders and directed that the application be heard on 9th May 2019. On the day of hearing the Plaintiffs therein sought an adjournment, and the court allowed the adjournment, extended the ex-parte orders for another 14 days and placed the file before Chepkwony J.
g. As Chepkwony J, was not sitting the file was referred back to Otieno J, whom again declined to set aside the *ex-parte* injunction, and the matter was not fixed for hearing on 20th May 2019 for the applications by the beneficiaries seeking reinstatement and the bank's applications seeking dismissal of the suit and recusal of judge. However, on 20th May 2019, Otieno J, proceeded to direct that the matter be placed before the presiding judge and declined to set aside the interim orders.
h. Other proceedings between the parties continued with *Mombasa HCC No. 80 of 2018: Osman Tahir Sheikh Said & 2 Others v Bank of Africa Limited*, wherein the entire suit was dismissed and the orders of injunction given on 10th April 2019 set aside.
i. *Mombasa HCC No. 86 of 2019: Osman Tahir Sheikh Said & 2 Others -Vs- Bank of Africa Limited*, wherein the application for injunction dated 29th October 2019 was dismissed on 15th November 2019 on grounds of *res judicata.*
j. *Mombasa ELC No. 203 of 2019: TSS Investment Limited -Vs- Bank of Africa Limited & Another*. The Plaintiff therein filed several applications which were all dismissed as follows:
   a. An application for injunction to stop the sale of the charged properties which was dismissed in a Ruling delivered on 20th July 2020 and struck out the entire suit on grounds of res judicata.
   b. An application seeking a stay of the ruling of 20th July 2020 pending the intended appeal was dismissed on 26th January 2021 and the court ordered the charged properties to be sold in the event the Plaintiff does not pay the entire debt owed to the Bank within 30 days of the Ruling.
   c. An application seeking review of the Ruling of 26th January 2021 and extension of time to pay the entire debt from 30 days to 180 days was dismissed on 26th July 2021.
k. *Mombasa Civil Appeal No. 158 of 2018: Juja Coffee Exporters Limited & 2 Others v Bank of Africa Limited & Another*. Here, the appeal was sought to set aside a Ruling delivered on 5th April 2018 dismissing an application by the Plaintiffs herein on grounds of *Res judicata*. The Court of Appeal upheld the said Ruling and dismissed the appeal in a judgment delivered on 18th June 2021. **The Court of Appeal also ordered the Plaintiffs to fix the matter for full hearing on its merits at the earliest opportunity instead of filing interlocutory applications for injunction which were in any event res judicata.**
l. However, despite the above orders of the Court of Appeal the borrowers and the beneficiaries filed an application dated 11th August 2021, *in Mombasa HCCOMM No. 57 of 2016* wherein they again sought a temporary injunction against the Bank. The Application was heard and Hon. Justice John Mativo on 25th January, 2022, delivered the ruling, that is the subject of this commentary.

The law on Interlocutory Injunctions

A temporary/interlocutory injunction is a court order made in the early stages of a lawsuit or petition **which prohibits the parties from doing an act in order to preserve the status quo until a pending ruling or outcome**. The purpose of a temporary/ interlocutory injunction **is to keep the parties, while the suit is pending, as much as possible in the respective positions they occupied when the suit began and to preserve the court's ability to render a meaningful decision after a trial on the merits.**

Prior to the decision of Mativo J, the locus classicus case on granting of the interlocutory injunctions, was the case of Giella vs Cassman Brown[1973] E.A 358, a decision of the Court of Appeal of Uganda (Sir William Duffus , P & Law J.A.), in a matter that was mainly in respect of an employment dispute, the court set the principles for injunctions when it held;

> *The conditions for 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 be 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.*

As jurisprudence in the area has increased, judges have expounded on the above principles as follows;

Whether the applicant has shown *prima facie* case with a probability of success.

On what a prima facie case is the case of *Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR*, the Court of Appeal defined the same when the court held;

> "***So what is a prima facie case?*** *I would say that in civil cases it is a case in 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.***
>
> …
>
> *But as I earlier endeavoured to show, and I cited ample authority for it,* ***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.***"

In light of the above, therefore, the onus of establishing a prima facie case commences from the evidence adduced before the courts and that indeed the case of the applicant's case is one that is arguable with a probability of success.

Whether the applicant shall **suffer irreparable injury which cannot be compensated by damages.**

However, a prima facie case is not the only yardstick an Applicant must meet. In case of *Nguruman Limited Vs Jan Bonde Nielson & 2 Others [2014] eKLR*, the Court of Appeal expounded on this when it held that;

> "*In an interlocutory injunction application,* ***the applicant has to satisfy the triple requirements to****;*
>
> …
>
> *a. establish his case only at a prima facie level,*
> *b. demonstrate irreparable injury if a temporary injunction is not granted, and*
> *c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.*
>
> *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****. See* **Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86***. 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****.*
> ***the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."***

If the court is in doubt, then it can decide the application on a **balance of convenience.**

The last pillar for an applicant to meet, which lies on the court exercising some discretion and restraint, is for the court to consider on which end justice would lie, as noted in the English case of ***Films Rover International Vs. Cannon Films Sales Ltd (1986) 3 All ER 772*** in which the said judge made this point regarding the grant of injunctive relief:

> *A fundamental principle is … that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …*

From the above jurisprudence, the three principles are sequentially applicable for a court today prior to the granting an interlocutory injunction.

Expounding the Principle

In the ruling of by Mativo J, the learned judge went on delve in detail on the above pillars and affirming the same as follows;

a. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that the court should grant an injunction. The court noted the principles in Geilla v Cassam Brown (supra) are applicable. He further relied on the Canadian case of *R. J. R. Macdonald v Canada (Attorney General) (1994) 1S.C.R. 311*, wherein the court therein laid down a three-part test of granting an injunction as follows;
   a. Is there a serious issue to be tried?
   b. Will the applicant suffer irreparable harm if the injunction is not granted?
   c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").
b. In respect of the 'serious question to be tried' the learned judge went on to rely on the case of ***Mbuthia v Jimba Credit Corporation Ltd (1988) KLR 1***, wherein the court stated that it is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The strength of the probability, depends on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.
c. The court should which ever course that appears to carry the lower risk of injustice if it should turn out to have been "wrong". In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." And that it is beyond doubt that the *prima facie* case test represents the law in relation to the grant of interlocutory injunctions.
   a. Wherein the loan is not disputed, there is no contest that the applicant has defaulted in repaying a facility. The learned judge found that in such a scenario an applicant shall not necessary have proven a *prima facie* case with a likelihood of success. This further included wherein an applicant challenge or raised issues as the manner in which the auction was conducted.
   b. In respect of irreparable harm, the learned judge noted that in demonstrating irreparable harm, the same must cannot be quantified in monetary terms or which cannot be cured and that the Applicant must demonstrate that if they were to succeed, they cannot be adequately compensated by way of damages. And if it can be demonstrated that the Applicant can be compensated by damages then they have failed to demonstrate irreparable harm.
   c. On the third limb, balance on convenience, the learned judge proceeded to add that the burden of proof that inconvenience the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant. If the Applicant's case is strong on the merits or there is significant irreparable harm, then the court will seek to maintain the status quo in determining the balance on convenience lies. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element.
   d. A fourth limb was noted by the court, an injunction as discretionary remedy. The learned judge relied on various cases to uphold that to succeed in an application for injunction, **an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.**

In furtherance to the above ruling, in the case ***Stella Kavutha Muthoka & Another vs Kenya Women Microfinance Bank Ltd, Kitui HCCC No. E10 of 2021***, wherein the in a similar manner as the TSS cases proceed to first file ***Machakos ELC Case No. 51 of 2017 Stellar Kavutha Muthoka & Another vs Kenya Women Micro Finance Bank Ltd***, also seeking injunctive reliefs stopping KWFT from exercising its statutory power of sale. The ELC case was dismissed vide the ruling of 18th June 2021, wherein the court found that it lacked jurisdiction to hear the matter.

The borrower sought another just before the courts by filing in ***Kitui HCCC No. E10 of 2021***. In the ruling issued on 17th March 2022, Hon. Justice R.K. Limo went on to consider whether the applicants had established a case for relief (injunctive) and delved into the principles of injunctions;

a. The court noted the principles set out in the case of Giella vs Cassman Brown. However, the court noted that in this case the Applicant had not disputed service of the statutory notices.
b. That despite their being a dispute as to the amount owing the court factored in that this difference can be 'an ordinary consequence of the fact that loan arrears have been attracting interest and continue to do so.' Further as the Applicant had not demonstrated that they were not servicing the loan and therefore before the court with unclean hands.
c. The learned judge went to summarise the responsibility of a borrower by using a Kiswahili saying when he stated;

> *"There is a Kiswahili saying that resonates well with that maxim. It goes like this;* ***"Dawa ya deni ni kulipa"*** *which loosely translated simply means "****that a solution to a debt is to pay or attempts to repay". Had the applicant demonstrated efforts to pay then perhaps equity could have favoured them****."*

Conclusion

In light of the abovementioned decisions issued by Mativo J and Limo J, it important for borrower to not only seek restrain in seeking injunctive orders, but must now go beyond the threshold that was placed in the *locus classic* of ***Giella vs Cassman Brown***.

As for banks the two decisions also seek to enforce the bank right to redemption and this will result in courts less likely to grant injunctive orders against the banks, unless very exceptional circumstances are presented to the court.

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