



**Mbugua t/a Mbugua Ng'ang'a & Co Advocates v Orion East Africa Limited & another
(Civil Suit E611 of 2023) [2024] KEHC 9825 (KLR) (Civ) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT E611 OF 2023
FG MUGAMBI, J
JULY 26, 2024**

BETWEEN

**GEORGE NG'ANG'A MBUGUA T/A MBUGUA NG'ANG'A & CO
ADVOCATES PLAINTIFF**

AND

**ORION EAST AFRICA LIMITED 1ST DEFENDANT
PETER RUO MAINA 2ND DEFENDANT**

RULING

1. The plaintiff instituted the suit before court vide a plaint dated 11/12/2023 amended on 21/1/2024. The plaintiff's claim amongst others, an outstanding loan amount of Kshs 18,200,000/= together with interest at the rate of 14% per annum from 25th February 2023 until payment in full. The plaintiff further claims an amount of Kshs 480,040/= on account of stamp duty and registration fees together with interest at the rate of 14% per annum from 21/12/2022 until payment in full and Kshs 23,200/= on account of marketing expenses, plus costs and interest. The dispute arises from an alleged undertaking that was given by the plaintiff on behalf of the 1st defendant in a land purchase agreement. It is the plaintiff's case that despite the transaction having been completed, the 1st defendant and the 2nd defendant as director of the 1st defendant have failed to pay the monies expended by the plaintiff.
2. Alongside the plaint, the plaintiff filed the Motion application dated 11/12/2023 seeking injunctive relief pending the hearing and determination of this suit. The injunctive orders sought relate to Land Reference No 12672/47 (the subject property).
3. In the supporting affidavit and further affidavit both sworn by the plaintiff, the plaintiff contends that pursuant to an agreement dated 24/8/2022 (the Agreement), the defendants owe Kshs 18,680,040/



- = monies advanced to them as a loan to enable them complete purchase the subject property. The plaintiff contends that the defendants have expressly admitted the disbursement of the loan amount
4. The plaintiff further confirms that he holds the certificate of title for the subject property as a lien and security for repayment of the money. That the defendants, who are formerly clients of the plaintiff, have defaulted in repayment of the monies hence the application and suit before this court.
 5. The defendants oppose the application by way of a replying affidavit sworn by the 2nd defendant on 4/1/2024. They contend that the Agreement is a forgery and that there is no evidence on record to prove that the monies were disbursed to the defendants. The defendants further take issue with the legality and validity of the said Agreement and term the plaintiff's demand as exaggerated. The defendants further filed Grounds of Opposition dated 6/3/2024.

Analysis

6. I have carefully considered the pleadings, evidence and the submissions filed by the parties. The issue for determination is whether the applicant has met the threshold for granting of an interlocutory injunction.
7. The conditions for granting interlocutory injunctions are set out in Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules 2010](#). These conditions have been interpreted and given effect through numerous judicial pronouncements. Amongst the most celebrated of these is the case of *Giella v Cassman Brown & Co. Ltd*, (1973) E.A 385. The Court at page 360 (Spry J) held that:

“The conditions for the grant of an interlocutory injunction are 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.”
8. In determining what amounts to a *prima facie* case, the Court of Appeal in the case of [Mrao Limited v First American Bank of Kenya and 2 others](#), (2003) KLR 125, stated:

“A *prima facie* case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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 but 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.”
9. Has the applicant therefore demonstrated that he has a *prima facie* case with a probability of success? A cursory look at the record, confirms the existence of an Agreement dated 24/8/2022 between the applicant (as the lender) and the 1st respondent (as the borrower), guaranteed by the 2nd respondent. The face of the Agreement states that it is in respect of completion of the sale of all that property known as LR No 12672/47 from the Framers Cooperative Society Limited and the subsequent sale of the aforementioned property to a third party.
10. Paragraph (E) of the Agreement states that the lender shall advance to the borrower the amount of Kshs 9,100,000/=. Clause 7 of the Agreement states that the amount repayable shall be Kshs 18,200,000/= either upon resale of the property contained in the subject property or 180 days from the effective date,



whichever comes earlier. The agreement is signed by the parties, sealed by the seal of the 1st respondent and witnessed.

11. I note that the respondents have taken issue with the authenticity and validity of the said Agreement. The respondents have also annexed a similar Agreement to their documents, albeit unexecuted. The issues raised by the respondents are matters for further interrogation at a substantive hearing and I therefore will not say more on the point. However, based on the evidence on record, I am satisfied that the applicant has established that he has a *prima facie* case worthy of rebuttal by the respondents.
12. The second consideration for grant of an injunction is whether the applicant has shown that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The applicant states that if the injunctive orders are not granted the suit property is bound to dissipate and that there is no other known asset owned by the respondents. I note that this issue has not been controverted by the respondents.
13. In any case, considering the totality of the evidence and the facts as stated by the parties, I am inclined to concur with the Court in the *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others*, [2016] eKLR. The Court cited with approval from the *Halsbury's Laws of England*, in a view that was also captured by Warsame, JA in *Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others*, [2008] eKLR. This was to the effect that:

“Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law...a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”
14. Finally, I find that the inconvenience to be suffered by the applicant would be greater than that which would be suffered by the respondents if the injunctive relief is not issued and the respondents are allowed to sell the subject property.

Disposition

15. Accordingly, the application dated 11/12/2023 is allowed in terms of prayers 3 and 4 of the said application. Consequently, I make the following orders:
 - i. That pending the hearing and determination of the suit, an order of injunction be and is hereby issued restraining the Respondents from selling, charging or in any manner alienating Land Reference No 12672/47.
 - ii. That pending the hearing and determination of the suit, an order of restriction be issued and registered against the title for Land Reference No 12672/47 prohibiting alienation by way of sale, charge or lease.
 - iii. That the costs of the application be in the main cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE

