



**Shipside General Services Limited & another v Access Bank Kenya Plc & another
(Civil Suit E014 of 2024) [2024] KEHC 16892 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E014 OF 2024
F WANGARI, J
OCTOBER 31, 2024**

BETWEEN

SHIPSIDE GENERAL SERVICES LIMITED 1ST PLAINTIFF

SIDNEY ANTHONY NGATIA MBOTE 2ND PLAINTIFF

AND

ACCESS BANK KENYA PLC 1ST DEFENDANT

WATTS AUCTIONS 2ND DEFENDANT

RULING

1. By the Application dated 18/03/2024, the Plaintiffs sought the following reliefs:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That an order of temporary injunction do issue restraining the Defendants whether by themselves, and/ or their servants, agents or Auctioneers or any other person acting on the authority of the Defendants from proceeding with the sale by public auction or interfering with the Plaintiffs ownership and title and / or interest in property known as L.R. No. Mainland North/I/16632 pending the hearing and determination of the suit.
 - e. Costs of this Application be borne by the Defendants.
2. The Application is based on the grounds that the suit property, which was also the 2nd Plaintiff's matrimonial home, was scheduled to be sold by public auction on 05/04/2024, and statutory notices as required under section 90 (2) and 96 (2) & (3) of the Lands Act, had not been issued, hence the statutory power of sale had not accrued.



3. Further, in the in the supporting affidavit, the Plaintiffs averred that the money said to be due and owing to the Defendant Bank, being the remainder of the overdraft facility was Kshs 3,199,980 and not Kshs. 5,304,888.57 as per the redemption notice.
4. In addition to the above, the Plaintiffs aver that the suit property whose market value was way above Kshs. 46,000,000 was given a forced sale value of Kshs. 34,500,000, where if the Defendants are allowed to proceed with the intended auction the Plaintiffs would suffer great loss.
5. The 1st Defendant filed a Replying Affidavit sworn by one Fawzia Dear Kamto, dated 28/03/2024, substantially contending inter alia that notices were issued in accordance with the law, and as at 18/01/2024, the Plaintiffs total outstanding loan balance was Kshs. 5,304,888.57. The valuation of the suit property was done in line with the provisions of section 97 (2) of the Land Act.
6. In a further affidavit dated 23/04/2024, the Defendants averred that the plaintiff was advanced a further Kshs. 1,470,823, stating that the Plaintiff was in arrears of Kshs. 6,241,747.15. It was stated that the application by the Plaintiffs was an abuse of the court process and hence should be dismissed with costs.
7. It was directed that the application be canvassed by way of written submissions. Both parties complied by filing their rival submissions which I have considered.

Analysis

8. The Court has considered the Notice of Motion Application, Responses thereto and the submissions and authorities filed in support and opposition to the Application.
9. The singular issue that presents for this Court's determination is whether the Applicant has fulfilled the legal threshold for the grant of a temporary injunction pending the hearing and determination of the suit.
10. This court will be keen to draw border lines between the issues that would go to full trial and the issues necessary to establish the conditions for the grant of a temporary injunction.
11. The law that governs Applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 which provides as follows:-
 1. Where in any suit it is proved by affidavit or otherwise-
 - a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
12. The principles were laid down in the celebrated case of *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction;
 - (i) First the applicant must show a prima facie case with a probability of success.



- (ii) ii) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
- (iii) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
13. It is disputed that the advanced loan amount is outstanding and is due for payment. Whereas the Plaintiff's case is that the intended sale of the suit property is unlawful, the Defendants maintains that the statutory notices are proper since there is outstanding loan arrears.
14. Largely, these contested matters are of the nature to warrant a meritorious hearing to enable the court explore and analyze the available evidence and testimonies to arrive at a founded conclusion.
15. What is clear from the Application is that the Plaintiffs' apprehension of danger is premised on the fact that if the intended sale is not stopped, the Defendant will sell the suit property which will be unavailable and irredeemable should the court find, after hearing the main suit, in favor of the Plaintiffs.
16. On prima facie case, the amounts claimed and disputed are colossal. There is also a dispute as to the validity of the notices. The amount claimed by the bank is double the amount the Plaintiffs are admitting to be due and owing to the bank. These are evidential issues. They are substantial and raise a prima facie case.
17. On the second limb of irreparable damage, considering that the Plaintiffs have disputed the issuance of the statutory notices, and the fact that the value of the suit property has been undervalued with over Kshs. 10 million, in the event the suit is determined in favour of the Plaintiffs, the 2nd Plaintiff will have lost his matrimonial home which damage would be irreparable. As for the Defendant, the loss will not be insurmountable since the Defendant will still claim its dues, at a current value, and with interest.
18. In determining where the balance on convenience lies, considering the facts of this case in totality, I find that the balance of convenience tilts in favour of the Applicant.
19. In view of the above analysis and findings, the conclusion becomes irresistible that the Applicant's Notice of Motion dated 08/03/2024 is merited.

Determination

20. In the upshot, I allow the Plaintiffs' Application as follows:
- i. Pending the hearing and determination of the main suit, an order of temporary injunction is hereby issued restraining the Defendant whether by itself, its employees, successors, servants and/or agents or otherwise assigns and or any person whatsoever advertising for sale, selling, disposing, alienating or in any manner whatsoever interfering with the Plaintiffs proprietorship, occupation and use of the properties known as L.R No. MN/I/16632 (C.R No. 46642).
 - ii. That in consideration of the interests of the Defendants, matter shall be fast tracked with Case Management Conference being done in the next 21 days.
 - iii. That the above orders are subject to review if the Plaintiffs are found to intentionally delay the matter.
 - iv. Costs shall abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 31ST DAY OF OCTOBER, 2024.



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F. WANGARI

JUDGE

In the presence of;

M/S Nyaga Advocate for the Plaintiffs/ Applicants

M/S Kinuva Advocate h/b for Gakuo Advocate for the Defendants/ Respondents

M/S Salwa, Court Assistant

