



**Najasha Import & Export Company Limited v Gulf African Bank Limited (Civil Case E091 of 2023) [2024] KEHC 13278 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13278 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E091 OF 2023  
JK NG'ARNG'AR, J  
OCTOBER 30, 2024**

**BETWEEN**

**NAJASHA IMPORT & EXPORT COMPANY LIMITED ..... PLAINTIFF**

**AND**

**GULF AFRICAN BANK LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion application dated 11<sup>th</sup> December 2023 under Certificate of Urgency pursuant to Section 1A, 1A and 63 of the *Civil Procedure Act*, Order 40 Rule 1, 2, 3, Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The Plaintiff/Applicant seeks for orders that pending the hearing and determination of the suit filed herewith, there be a temporary injunction restraining the Defendant, its servants, agents or employees or any other person acting under the Defendant's instructions from advertising for sale, alienating, selling by way of public auction, or dealing with all that property known as Plot Number 2101/1/MN, and that cost of this application be awarded to the Plaintiff/Applicant.
3. The application is premised on grounds on its face and the Supporting Affidavit of Jamala Mahamood Karim, the Managing Director of the Plaintiff/Applicant, sworn on 11<sup>th</sup> December 2023 that the Plaintiff/Applicant is the owner of all that parcel of land and premises on Plot Number 2101/1/MN and that they secured a charge on 28<sup>th</sup> July 2015 using the suit property for a sum of Kshs. 12,000,000 and a further charge of Kshs. 10,000,000 on 12<sup>th</sup> May 2016. That the Plaintiff/Applicant has been paying the monthly instalments to the Defendant but has been affected by the harsh business environment leading to the said application falling into arrears. That the Plaintiff/Applicant has been unable to make payments regularly due to the existence of a difficult tenant who was unable to pay rent arrears in the suit premises that was to be used to settle the loan as required. That the Defendant/Respondent has never issued a statutory notice of sale to the Plaintiff/Applicant. That however, the



- Defendant/Respondent has instructed M/S Thaara Auctioneer to sale by public auction the suit property and recover the said amount which is Kshs. 49,823,833.82 that remains unpaid to date.
4. The Plaintiff/Applicant averred that they are willing to settle the unpaid amount but in instalments which would be reasonable at this time and has sought the same without any success. That the Plaintiff/Applicant has secured a partnership with M/S Nairobi Homes (Mombasa) Limited which has agreed to meet the costs of renovating the suit premises and convert the same into affordable units that would give more rent and income to settle the rent arrears. That the Plaintiff/Applicant will suffer irreparable loss and damage should the suit property be sold as it has been valued at much less by the Defendant/Respondent and the Plaintiff/Applicant will be required to make further payment beside losing the property.
  5. The Defendant/Respondent in their Replying Affidavit sworn by Lawi Sato, the Defendant's Senior Legal Officer, on 14<sup>th</sup> December 2023 stated that the Plaintiff admits receipt of the statutory notice under Section 90 of the Land Act 2012 and a notice by the Auctioneer on 3<sup>rd</sup> November 2023 but waited until the eve of the auction scheduled for 14<sup>th</sup> December 2023 to approach the court. That the Plaintiff was served with the forty (40) day notice to sell under Section 96 of the Land Act 2012 as well as the forty-five (45) day redemption notice and notification of sale. That the Defendant is not bound to accept the Plaintiff's proposal to repay the loan, especially with default dating back to the year 2017.
  6. The Defendant/Respondent averred that there is nothing tangible in the Plaintiff's proposal as the Kshs. 500,000 that it promised to pay has not been paid since the letter dated 10<sup>th</sup> November 2023. That renovation of the suit property is not evidenced by any actual works with a definite completion timetable. That the counter valuation report by the Plaintiff is insufficient to fault the Defendant's valuation report. That according to the Plaintiff's valuation report, the suit property is valued at Kshs. 25,000,000 and the Defendant is therefore unsecured to the tune of close to Kshs. 25,000,000. That the balance of convenience is therefore heavily in favour of allowing the Defendant to realise its security immediately. That an injunction would lead to an increase in the debt, a reduction in the value of the security and thus expanding the dispute even further, which would be unjust and inequitable.
  7. The court gave directions for the application to be canvassed by way of written submissions. However, as at the time of writing this ruling, only the Defendant/Respondent had filed their submissions. The Defendant/Respondent in their written submissions dated 17<sup>th</sup> May 2024 contended that there is no *prima facie* case as if there was a denial that service was effected, the burden shifts to the Defendant to prove service by providing a certificate of posting to show that the notice was properly addressed and dispatched according to the case of Jampen Enterprises Limited v NIC Bank Kenya PLC & Another (2019) eKLR. That the burden then shifts to the Plaintiff to show that a letter properly addressed and posted did not reach it.
  8. That on the alleged undervaluation, the Defendant/Respondent submitted that valuation by a professional is not to be discounted by presenting a counter valuation but pointing to the specific deficiencies in the valuation report sought to be discounted as was held in William Kanyi Hezekiah v Equity Bank Ltd & Another (2017) eKLR. That a general dispute on valuation is no ground for granting an injunction. On refusal to accommodate the Plaintiff, the Defendant/Respondent cited the case of Seabawk General Logistics Limited & 2 Others v Stanbic Bank Kenya Limited (2021) eKLR and that the Plaintiff has presented lofty promises but nothing of substance to show that the default would be rectified within a reasonable time. That six months after coming to court, there is no end in sight to the Plaintiff's default and that where there are no reasonable prospects of rectifying the default within a reasonable time, the courts must not intervene.



9. The Defendant/Respondent further submitted on no irreparable injury absent injunction that it is the Plaintiff's obligation to demonstrate to the court, in specific terms, the irreparable injury that it will suffer. That apart from claiming generally that it will suffer irreparably absent an injunction, the Plaintiff does not specify how that will be so. That according to the holding in *William Kanyi Hezekiah v Equity Bank Ltd & Another* (2017) KLR, when a party offers land as security, it becomes a commodity for sale whose loss cannot be classified as irreparable injury.
10. On the balance of convenience, the Defendant/Respondent submitted that the amount owed is Kshs. 49,823,833.82 and that even if they were to take the value of Kshs. 25,000,000 assigned to the suit property, it still leaves the Defendant exposed to the tune of close to Kshs. 25,000,000. That in those circumstances, granting an injunction would have the effect of enhancing the Plaintiff's obligations by the increasing debt and at the same time diminish the Defendant's security as was held in the case of *John Mwashigadi Mwakisha v Housing Finance Co. Ltd* (2020) eKLR.
11. I have considered the Notice of Motion application dated 11<sup>th</sup> December 2023, Replying Affidavits sworn on 14<sup>th</sup> December 2023 and submissions. The issue for determination is whether the application is merited for grant of the orders sought.
12. The conditions for grant of temporary injunction have been set out in the case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 as follows: -

“Firstly, 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.”
13. Further, in the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR, the court held that: -

“...these are the three pillars on which rest 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... 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 are 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.”
14. It is not in dispute that the Plaintiff/Applicant secured a charge on 28<sup>th</sup> July 2015 for a sum of Kshs. 12,000,000 and a further charge of Kshs. 10,000,000 on 12<sup>th</sup> May 2016 with Plot Number 2101/1/MN as security. It is also not in dispute that the Plaintiff/Applicant fell into arrears and that Kshs. 49,823,833.82 remains unpaid to date.
15. According to the Plaintiff/Applicant, they are willing to settle the unpaid amount but in instalments and have sought the same without any success. That they secured a partnership with M/S Nairobi Homes (Mombasa) Limited to renovate the suit premises and convert the same into affordable units that would give more rent and income to settle the rent arrears.



16. The Defendant/Respondent maintained that there is nothing tangible in the Plaintiff's proposal as the Kshs. 500,000 that it promised to pay has not been paid since the letter dated 10<sup>th</sup> November 2023. That renovation of the suit property is not evidenced by any actual works with a definite completion timetable and that the default dates back to the year 2017.
17. Subject to the foregoing, I am not satisfied that the Plaintiff/Applicant has established a prima facie case to warrant grant of the orders of temporary injunction. Having found that a prima facie case has not been established, it is not necessary to consider the other conditions of irreparable injury and balance of convenience.
18. The Notice of Motion application dated 11<sup>th</sup> December 2023 is therefore not merited and is dismissed. Costs be in the cause.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

No appearance Advocate for the Plaintiff/Applicant

Kongere Advocate for the Defendant/Respondent

Court Assistant – Mr. Samuel Shitemi

