



Mohamud v Standard Chartered Bank Kenya Limited & another (Commercial Case E007 of 2024) [2024] KEHC 15366 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E007 OF 2024
MN MWANGI, J
NOVEMBER 22, 2024**

BETWEEN

ABDIKADIR MOHAMED MOHAMUD PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 11th January 2024, pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rule 1(a) & (b) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Sections 90 & 96 of the Land Act, No. 6 of 2012. The plaintiff seeks an order of injunction restraining the defendants from advertising, selling, transferring, altering, registering and/or interfering with their quiet possession, use, and enjoyment of the suit property, pending the hearing and determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit and further affidavits sworn on 11th January 2024, 23rd January 2024 & 27th May 2024, by Abdikadir Mohamed Mohamud, the plaintiff herein. The plaintiff's case is that on 10th December 2019, he entered into a loan agreement with the 1st defendant. He stated that the loan was secured by a charge registered in favour of the 1st defendant over all that parcel of land known as L.R. No. 12251/3, House No. 8, Swara Gardens, off Papai Road Karen Area, Nairobi, registered in his name. He averred that despite diligently servicing the loan and proposing repayment plans, the 1st defendant issued irregular Notices threatening to sell the property due to alleged arrears.
3. He further averred that the 1st defendant has not conducted a valuation on the suit property as required by law, it has failed to issue him with a 30-day demand Notice under Section 90(1) of the Land Act,



the mandatory 90-day Notice under Section 90(2)(b) of the Land Act, and the 40-day Notice under Section 96(2) of the Land Act. He stated that he only became aware of the intended sale of the suit property by the defendants through a Newspaper advertisement. He asserted that he is willing to settle any arrears promptly.

4. In opposition to the application, the 1st defendant filed a replying affidavit sworn on 19th January 2024 by Boniface Machuki, the 1st defendant's Manager of Legal Collections and Recoveries Department. He averred that the plaintiff secured a Musharakah Home Loan Facility of Kshs.45,500,000/= (or its USD equivalent) from the 1st defendant on 9th February 2018. That the loan was secured by a charge registered in favour of the 1st defendant against the suit property, and it was a term of the Loan Agreement that the plaintiff would repay the loan with interest accrued thereon to the 1st defendant by making monthly instalments. Mr. Machuki averred that after the loan of USD 467,241.74 was disbursed to the plaintiff on 7th February 2020, he defaulted in his loan repayment obligations, thus breaching the Agreement.
5. Mr. Machuki contended that the 1st defendant issued several notices to the plaintiff including, a 14-day demand letter dated 26th April 2021 via e-mail, a 3-month Statutory Notice dated 18th October 2022 via registered post, a 40-day Statutory Notice dated 22nd March 2023 in person, and a 45-day Redemption Notice dated 10th November 2023 via email and registered post. He asserted that despite service of the aforesaid Notices, the plaintiff failed to rectify the default, leading to the advertisement of the property for sale on 8th January 2024. The 1st defendant stated that as at 15th January 2024, the plaintiff was in arrears of USD 22,968.41, plus accrued interest. The 1st defendant urged this Court to dismiss the instant application, discharge the interim orders, and allow it to exercise its statutory power of sale over the suit property.
6. In a rejoinder, the plaintiff filed further affidavits sworn by himself, on 23rd January 2024 & 27th May 2024. He averred that he has paid USD 26,450 (equivalent to Kshs.4,232,000.00) towards his loan, thus fully redeeming the default amounts, and that he is no longer in arrears. In the supplementary affidavit sworn on 23rd January 2024, the plaintiff stated that he had made payments totaling Kshs.5,615,050.00, leaving a balance of USD 5,713.00, which was within 60 days. In another supplementary affidavit sworn by the plaintiff on 5th March 2024, he reported having paid Kshs.275,000.00 on 16th February 2024, which did not initially reflect in his account but was later confirmed by the 1st defendant to have been applied to the loan. He averred that on the same date, the 1st defendant debited his account with Kshs.287,239.00. The plaintiff asserted that he is not in loan arrears having cleared the entire pending loan.
7. The 1st defendant filed a further affidavit sworn on 23rd January 2024 by Boniface Machuki, the 1st defendant's Manager of Legal Collections and Recoveries Department. He contended that the plaintiff has acknowledged his indebtedness to the 1st defendant and made payments totaling to USD 26,306.00 towards the settlement of his loan arrears being USD 17,856.00 on 15th January 2024 and USD 8,450.00 on 22nd January 2024. Mr. Machuki stated that the said payments had not fully covered the outstanding arrears, which stood at USD 14,518.41 (106 days in arrears) as at 23rd January 2024. He averred that the sale of the suit property could only be deferred once all the arrears and recovery charges were cleared.
8. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 24th September 2024 by the law firm of Ojienda & Company Advocates, whereas the defendants' submissions were filed on 20th September 2024 by the law firm of Muthomi & Karanja Advocates.



9. Mr. Ojienda, learned Counsel for the plaintiff relied on the decisions in *Giella v Cassman Brown* [1973] EA 358, and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, and submitted that the plaintiff has made out a case to warrant this Court to exercise its discretion in his favour and grant him an order of interlocutory injunction. He further submitted that the defendants had not afforded the plaintiff the opportunity to explore his right to equity of redemption, such as his proposals for payment of the outstanding arrears that were rejected by the 1st defendant, before exercising its statutory power of sale over the suit property. The plaintiff urged this Court to allow him to exercise his right to equity of redemption, noting that he has demonstrated good faith and willingness to pay the outstanding arrears by clearing the said arrears.
10. Mr. Karanja, learned Counsel for the defendants equally relied on the case of *Giella v Cassman Brown* (supra) and submitted that the plaintiff has failed to establish a prima facie case with a probability of success in view of the fact that the 1st defendant has demonstrated that it served the plaintiff with all the requisite statutory notices. He relied on the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, and submitted that the plaintiff has not established that he will suffer irreparable damage in the event the instant application is not allowed. He contended that in any event, the 1st defendant is one of Kenya's largest and most profitable banks, thus it cannot fail to meet an award of damages in the event that the plaintiff's suit succeeds at trial.

Analysis and Determination.

11. I have considered the application herein, and the affidavits filed in support thereof, and the replying & further affidavits by the 1st defendant, and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiff has made out a case to warrant being granted an order for injunction.

Whether the plaintiff has made out a case to warrant being granted an order for injunction.

12. The instant application has been filed pursuant to the provisions of Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010 which provides as hereunder-

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.
13. The leading authority on interlocutory injunctions is the case of *Giella v Cassman Brown* (supra). In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, when dealing with an application for injunction, the Court held as follows -

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. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

14. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a prima facie case and stated thus -

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. 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.

15. The plaintiff's contention is that he was not served with all the requisite Statutory Notices before the 1st defendant attempted to exercise its statutory power of sale over the suit property. He deposed that he has since cleared all the outstanding arrears due to the 1st defendant, thereby establishing a prima facie case with a probability of success.
16. The 1st defendant in its replying affidavit averred that as at 15th January 2024, the plaintiff was in arrears of USD 22,968.41, plus accrued interest. The plaintiff has however demonstrated by way of affidavit evidence that he made payments totaling Kshs.5,615,050/=, leaving a balance of USD 5,713.00, which was within 60 days repayment period. The 1st defendant on the other hand filed a further affidavit asserting that the plaintiff had not disputed his indebtedness to the 1st defendant, and that he has even made payments totaling to USD. 26,306 towards the settlement of his loan arrears. The 1st defendant contended that these payments had not fully covered the outstanding arrears, which stood at USD 14,518.41 (106 days in arrears) as at 23rd January 2024.
17. The 1st defendant averred that the sale of the suit property could only be deferred after all arrears and recovery charges had been cleared. In response, the plaintiff filed a supplementary affidavit where he averred that he paid Kshs.275,000/= on 16th February 2024, which did not initially reflect in his loan account, but it was later confirmed by the 1st defendant to have been applied to the loan, and the 1st defendant also debited his account with Kshs.287,239.00 on the same day, a fact which was not disputed by the 1st defendant.
18. From the foregoing, it is evident that there is a dispute as to the status of the debt, with the plaintiff asserting that he has fully settled the same, whereas the 1st defendant contends that there is still an outstanding amount that is yet to be settled. At this juncture, it is impossible to ascertain whether or not the plaintiff is still indebted to the 1st defendant, since the 1st defendant did not produce before this Court an updated statement of the plaintiff's loan account, showing the amount at which, the plaintiff was indebted to the 1st defendant as at 23rd January 2024, and/or 16th February 2024, with the latter being the date when the plaintiff states to have made the final instalment.
19. On the issue of whether the 1st defendant issued the plaintiff with all the requisite Statutory Notices before exercising its statutory power of sale over the suit properties, on perusal of the 1st defendant's replying affidavit and the annexures thereto, the 1st defendant has demonstrated service of the 14-day demand letter dated 26th April 2021 via e-mail, as well as the 3-month Statutory Notice dated 18th



October 2022 via registered post. Service of the 40-day Statutory Notice dated 22nd March 2023 was confirmed as the said Notice was received by the plaintiff in person as can be seen on the face of the copy annexed to the 1st defendant's replying affidavit. A 45-day Redemption Notice dated 10th November 2023 was sent via email and through registered post to the plaintiff.

20. In view of the above, and the fact that the said Notices to the plaintiff were sent to his registered postal address, and to the email address he provided to the 1st defendant when he entered into the Loan Agreement, I am persuaded that the 1st defendant duly complied with the provisions of Sections 90(1) & 96(2) of the Land Act, 2012 and Rule 15 of the Auctioneers Rules before exercising its statutory power of sale over the suit property.
21. However, in view of the fact that the plaintiff's debt to the 1st defendant is disputed, and uncertainties that I have pointed out as to whether or not the plaintiff is still indebted to the 1st defendant, it is my finding that the plaintiff has demonstrated that he has a prima facie case with a probability of success.
22. As to whether he stands to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, this Court holds that having demonstrated that he has a prima facie case with a probability of success, and in the event that the instant application is not allowed, the suit property will be sold on an uncertainty, yet the plaintiff has exhibited evidence of having made payments to the 1st defendant. Allowing the sale to proceed without concrete proof of the debt from the 1st defendant will be an infringement of the plaintiff's right to property enshrined under Article 40 of the Constitution of Kenya. I am therefore satisfied that the plaintiff is likely to suffer irreparable injury if the sale of the suit property is authorized to take place. To this end, I am bound by the Court of Appeal's holding in the case of Muiruri v Bank of Baroda (Kenya) Ltd [2000] KLR 183, cited by the Court in the case of Peter Kimani Nene v Kenya Commercial Bank Limited [2016] eKLR where it was held that-

“...disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”
23. I am live to the fact that Courts are reminded time and again that selling of a person's property amounts to infringing of the person's right to own property as enshrined under Article 40 of the Constitution of Kenya, 2010, especially where an applicant has established a prima facie case with a probability of success. Despite the 1st defendant having issued the requisite statutory Notices, this Court at this juncture cannot ascertain whether or not the 1st defendant's exercise of its statutory power of sale over the suit property had accrued to warrant selling of the suit property.
24. This Court further notes that the suit property is still charged to the 1st defendant, which has not alleged that the outstanding loan amount has outstripped, or is on the verge of outstripping the value of security, for this Court to conclude that the 1st defendant stands to be prejudiced in the event the orders sought herein are granted. In the premise, I am persuaded that the plaintiff has demonstrated that in the event the order sought herein is not granted, he will suffer damages that cannot be adequately compensated by an award of damages.
25. The issue of balance of convenience does not arise since this Court is not in doubt, in any event, the balance of convenience tilts in favour of the plaintiff.
26. The upshot is that the application herein is merited. It is hereby allowed in the following terms –
 - i. I hereby grant an order of injunction restraining the defendants, Standard Chartered Bank (Kenya) Limited and Phillips International Auctioneers, jointly and/ or severally from



advertising, offering for sale, disposing of, alienating, transferring, causing to be transferred, altering, registering or in any other way whatsoever interfering with the plaintiff's quiet possession, use and enjoyment of the suit property pending the hearing and determination of this suit; and

- ii. Costs are awarded to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. S.O. Ojienda for the plaintiff/applicant

Mr. Lucas Mwangi h/b for Mr. Karanja for the defendants/respondents

Ms B. Wokabi – Court Assistant.

