



REPUBLIC OF KENYA



**Langat & 2 others v Atticon Limited & another (Commercial Case E201 of 2021)
[2024] KEHC 16138 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E201 OF 2021
DO CHEPKWONY, J
NOVEMBER 22, 2024**

BETWEEN

**ARNOLD KIPKURUI LANGAT 1ST PLAINTIFF
BARONS ESTATE LIMITED 2ND PLAINTIFF
NONIKO HOLDINGS LIMITED 3RD PLAINTIFF**

AND

**ATTICON LIMITED 1ST DEFENDANT
FRANKLIN MITHIKA LINTURI AND OTHERS 2ND DEFENDANT**

RULING

1. This ruling is in relation to the Plaintiffs/Applicants Notice of Motion application dated 14th May, 2024, which seeks for the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of the suit herein, an injunction be and is hereby issued restraining the 5th Respondent by itself, its agents, assigns, servants and/or any other person whomsoever acting on the 5th Respondent's behalf from selling, alienating, disposing of, auctioning and or otherwise exercising the Respondent's statutory power of sale pursuant to the statutory notices dated 5th April, 2022 and 2nd April, 2024 over the Applicants' property flat No. C7 erected on LR. No.209/3213 (IR.97523) Land Title No.12239/23 (IR. No.143885).



- e. That pending the hearing and determination of the suit herein, an injunction be and is hereby issued restraining the 5th Respondent by itself, its agents, assigns, servants and/or any other person whomsoever acting on the 5th Respondent's behalf from selling, alienating, disposing of, auctioning and or otherwise exercising the Respondent's Statutory Power of Sale against LR. NO. NTIMA/IGOKI/4432; LR. NO. NTIMA/ IGOKI/4432; NAIROBI BLOCK 93/1563; NAIROBI BLOCK 93/1564 and NAIROBI BLOCK 93/1565.
 - f. The 5th Respondent do provide the full statement of Accounts of the Borrowers, Atticon Limited to the Chargors from the time the loan was disbursed to date;
 - g. The Honourable Court does grant such other or further orders as it deems fit in the interest of justice, expediency and good order.
 - h. The costs of the application be provided for.
2. The 3rd Plaintiff/Applicant's case, as set out in the grounds on the face of the application and elaborated in the affidavit sworn by its Director, Arnold Kipkurui Langat, is based on the following assertions: that the 5th Defendant advanced loan facilities to the 1st Defendant and, as security for the said loans, created charges dated 10th July, 2017 and 24th July, 2017 over several properties owned by the Applicant. The Applicant claims that it neither consented to the creation of the charges nor participated in the loan agreement. The Applicant further contends that the legality of these charges is the central issue in the main suit before this court.
 3. To protect its rights, the Applicant states that on 3rd April, 2019, the parties recorded a consent order before Hon. Lady Justice Grace Nzioka. This consent order stipulated that there would be no further interference with the suit properties until the matter is heard and determined. The Applicant asserts that despite the consent, the 5th Respondent has acted in violation of the agreement, necessitating this court's intervention.
 4. According to the Applicant, the 5th Respondent disregarded the consent order by issuing a 40-days Statutory Notice demanding payment of the principal loan amount of Kshs.158,922,355.35, together with accrued interest. The Applicant claims that this notice was issued unlawfully, as it preceded the mandatory statutory notices required under Section 90 of the Land Act, 2012.
 5. The Applicant further alleges that it is merely a guarantor for the loans advanced to the 1st Defendant and accuses the 5th Defendant of colluding with the 1st Defendant to withhold statements of accounts. This alleged collusion, according to the Applicant, has made it impossible to ascertain the actual loan balances, thereby prejudicing the Applicant's position.
 6. The Applicant has urged that the court should maintain the status quo, as previously agreed in the consent order, to prevent irreparable harm and ensure justice. The Applicant emphasizes that the borrower, who is the 1st Defendant herein, has expressed willingness to continue repaying the loan. It is the Applicant's argument that allowing the 5th Respondent to proceed with the Statutory Power of Sale would result in an unlawful sale of its properties. This, in turn, would violate the Applicant's constitutional right to property under Article 40 of the Constitution and render the pending suit nugatory.
 7. In response, the 5th Respondent filed a Replying Affidavit sworn by its Manager of Legal Services, Sylvia Wambani, on 24th May, 2024. The Respondent refutes the Applicant's claims and accuses it of attempting to mislead the court.



8. The Respondent clarifies that the Consent Order recorded on 3rd April, 2019 in HCCC No.E029 of 2019 only restrained the 5th Respondent from registering further legal charges over certain properties, namely Flat No. C7 erected on L.R. No.209/3213 (I.R. 97523) and Land Parcel No.12239/23 (Original No.12239/8/9). That the Consent Order did not, however, bar the 5th Respondent from exercising its statutory power of sale over these or any other properties.
9. The 5th Respondent further outlines the legal status of the properties subject to the current application as follows:
 - a. L.R. Nos. NAIROBI/BLOCK 93/1563, BLOCK 93/1564, and BLOCK 93/1565: These properties were the subject of HCCC No. 138 of 2018, where an application for interlocutory injunction was dismissed by the court in a ruling delivered on 20th June, 2019.
 - b. L.R. No. NTIMA/IGOKI/4432: This property was the subject of Meru CMCC No. 39 of 2019, where an application for injunctive relief was struck out on 19th June, 2019.
10. The Respondent argues that these rulings affirm its right to exercise its statutory power of sale over the said properties.
11. The 5th Respondent maintains that it has complied with the statutory notice requirements under the Land Act. Specifically, it has issued the requisite 90-days Statutory Notices under Section 90(1) and 40-days Notices under Sections 96(2) and 90(3)(e) of the Land Act. Proof of service has been provided in the form of postage receipts.
12. The Respondent clarifies that it has not yet issued the 45-days redemption notice or advertised the properties for sale. It argues that the Applicant is attempting to evade its contractual obligations under the guise of constitutional rights. Regarding the Applicant's request for statements of accounts, the Respondent asserts that it has no obligation to disclose such information, as the Applicant is not a borrower in a direct client-bank relationship.
13. In response to the Replying Affidavit, the Applicant filed a Further Affidavit sworn by its director on 3rd June, 2024, reiterating its claims and responding to the Respondent's assertions. Subsequently, both parties filed submissions as directed by the court.
14. The Applicant's submissions, dated 3rd June, 2024, emphasize the alleged irregularities in the statutory notices and the Respondent's disregard of the Consent Order.
15. The 5th Respondent's submissions, dated 10th June, 2024, defend its statutory and contractual rights, highlighting the Applicant's failure to demonstrate a prima facie case.
16. I have carefully considered the parties' submissions, alongside the affidavits and annexures filed in this matter. While I will not reproduce the submissions in full, I have taken them into account in my analysis and determination.

Analysis and Determination

17. After carefully considering the application, affidavits sworn in support and in rebuttal of the application, submissions, and authorities cited by both parties, the court has identified the following issues for determination: -
 - a. Whether the Applicant has satisfied the conditions for the grant of an interlocutory injunction.
 - b. Whether the balance of convenience favors granting the orders sought.



18. On the first issue, the principles for granting an interlocutory injunction were well established in *Giella -vs- Cassman Brown* [1973] EA 358, which provides that an Applicant must demonstrate:
 - a. A prima facie case with a probability of success.
 - b. That they will suffer irreparable harm that cannot be compensated by damages if the injunction is not granted.
 - c. That the balance of convenience tilts in their favor.

Prima Facie Case

19. A prima facie case, as defined in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, is one where the evidence presented demonstrates a right that has been infringed by the opposing party, necessitating judicial intervention.
20. In this case, the Applicant argues that the consent order recorded on 3rd April, 2019 in HCCC No. E029 of 2019 barred the 5th Respondent from interfering with the suit properties until the suit was determined. However, the 5th Respondent clarified that the consent order only restrained it from registering further legal charges over the properties and did not prohibit the exercise of its Statutory Power of Sale.
21. Upon examining the terms of the consent order, this court clarifies that Order (b) thereof not only preclude further charging of the properties but also barred further interference with the suit properties until the suit was heard and determined. This court also take judicial notice that in the present case, the Applicants allege that the signatures authorizing the creation of charges over the suit properties were forged. The Applicants contend that they did not consent to the creation of the charges or participate in the loan agreement between the 5th Respondent and the 1st Defendant. This allegation of forgery raises serious legal and factual questions about the validity of the charges and the propriety of the statutory notices issued pursuant to these charges and by extension the propriety of exercising the 5th Respondents Statutory Power of Sale. Therefore, in my view, proceeding with the statutory power of sale before determining the authenticity of the signatures would be prejudicial to the Applicants and could render the pending suit nugatory. In the circumstances, this court finds that the Applicant has established a prima facie case.
22. On whether the Applicant has demonstrated that the sale of the properties would result in irreparable harm that cannot be adequately compensated by damages. By seeking to exercise its Statutory Power of Sale, the 5th Defendant is actually interfering with the suit property. This is because if left to proceed with the said process, it would lead to the sale of the suit properties by public auction which would amount to interference and hence prejudicial.
23. In light of these concerns, the court finds it necessary to preserve the suit properties until it has been determined whether as the Applicant contends that if the injunction is not granted, its properties will be sold unlawfully, causing it irreparable harm. While the potential sale of the properties poses a serious concern, the harm must be one that cannot be remedied by an award of damages. However, considering the substratum of the case at hand, and while considering that the properties in question uniquely form the basis of the Applicant's financial and personal interests, the loss of these properties would result in significant prejudice to the Applicants, particularly if the court later finds the charges to be invalid due to forgery.
24. Lastly, this court is of the view that, the balance of convenience tilts in favor of maintaining the status quo to preserve the suit properties until the forgery allegations and validity of the charges are fully



adjudicated. Thus, allowing the Respondent to exercise its statutory power of sale at this stage would disrupt the subject matter of the litigation and undermine the Applicants' constitutional right to property under Article 40 of *the Constitution*.

25. As regards, the Applicant's request for a full statement of accounts from the 5th Respondent, this court is of the view that the same is a reasonable and justified demand, particularly given the unique circumstances of the case especially the allegations on forgery. Therefore, furnishing such statements is not only a matter of procedural fairness but also a fundamental requirement to uphold transparency and accountability in financial dealings. Even in the absence of a direct client-bank relationship, lenders owe a duty of transparency to guarantors whose properties are at risk of sale. The Applicant's properties were charged as security for the loan, making the Applicant an interested party with a right to information about the loan account. Transparency in financial dealings is essential to maintaining the integrity of the lending process. In the case of *Kenya National Capital Corporation Ltd –vs- Albert Mario Cordeiro & Another* [2014] eKLR, the court emphasized that lenders must provide full disclosure, including account statements, to parties whose rights may be adversely affected by the lender's actions.
26. Without access to the account statements, the Applicant is unable to ascertain the actual outstanding loan amount, the application of payments made, and whether any charges or penalties were unlawfully imposed. This lack of information creates a risk of the Applicant's properties being sold to recover sums that may not be accurately calculated. Providing account statements would mitigate this risk and ensure that any statutory sale is based on verified and legitimate claims. Furthermore, Section 44 of the *Evidence Act* obligates any party relying on financial transactions to produce evidence, such as account statements, to support their claims.
27. Similarly, Section 97(2) of the *Land Act*, 2012 requires that all recoveries under Statutory Power of sale be based on a fair valuation and calculation of the outstanding debt. Without furnishing account statements, the Respondent risks contravening this provision by proceeding with a sale based on unverified figures. The court should therefore grant the Applicant's request for the 5th Respondent to provide a full statement of accounts as part of its fiduciary duty and in the interest of justice while the prayer for injunction fails.
28. Accordingly, the court finds merit in the application dated 14th May, 2024 and proceeds to grant the same in the following terms:-
 - a. That pending the hearing and determination of the suit herein, an injunction be and is hereby issued restraining the 5th Respondent by itself, its agents, assigns, servants and/or any other person whomsoever acting on the 5th Respondent's behalf from selling, alienating, disposing of, auctioning and or otherwise exercising the Respondent's statutory power of sale pursuant to the statutory notices dated 5th April, 2022 and 2nd April, 2024 over the Applicants' property flat No.C7 erected on LR. No.209/3213 (IR.97523) Land Title No.12239/23 (IR. No.143885).
 - b. That pending the hearing and determination of the suit herein, an injunction be and is hereby issued restraining the 5th Respondent by itself, its agents, assigns, servants and/or any other person whomsoever acting on the 5th Respondent's behalf from selling, alienating, disposing of, auctioning and or otherwise exercising the Respondent's Statutory Power of Sale against LR. No. NTIMA/IGOKI/4432; LR. NO. NTIMA/ IGOKI/4432; NAIROBI BLOCK 93/1563; NAIROBI BLOCK 93/1564 and NAIROBI BLOCK 93/1565.



- c. The 5th Respondent to provide the full statement of Accounts of the Borrowers, Atticon Limited to the Chargors from the time the loan was disbursed to date.
- d. Costs of the application shall be in the course of the main suit.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS22ND DAY OF NOVEMBER..... 2024.

D.O CHEPKWONY

JUDGE

