Nile Laboratory Ltd v Equitorial Nuts Processors Ltd & 2 others (Civil Suit E278 of 2024) [2024] KEHC 14717 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14717 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E278 OF 2024

FG MUGAMBI, J

NOVEMBER 22, 2024

BETWEEN

NILE LABORATORY LTD .... PLAINTIFF

AND

EQUITORIAL NUTS PROCESSORS LTD .... DEFENDANT

AND

KENYA DEPOSIT INSURANCE CORPORATION AS THE RECEIVER MANAGER OF CHASE BANK (K) LTD [UNDER RECEIVERSHIP] .... 1ST RESPONDENT

UPSTATE KENYA AUCTIONEERS .... 2ND RESPONDENT

RULING

Background and introduction

1. This ruling determines the plaintiff's application dated 23rd May, 2024. In summary the applicant seeks leave to institute proceedings against the 2nd respondent and injunctive relief against the 2nd and 3rd respondents. The application is supported by the affidavit sworn by Joseph Mbui Magari, a director of the plaintiff, on 23rd May 2024.

2. He acknowledges that the 1st respondent was granted an overdraft facility of Kshs 15,000,000/= by the 2nd respondent (under receivership), secured by a mortgage over the plaintiff's land (L.R. No. 5842/15, formerly 5842/2/14, hereinafter the suit property). He contends that on 13th May 2024, the 3rd respondent advertised the property for public auction, scheduled for 28th May 2024, on grounds that the 1st respondent had defaulted in repayment of the overdraft facility.

3. The applicant claims that he has not been issued with up to date statements of account, statutory notices or a forced sale valuation report. He further contends that the reserve price for the property was grossly undervalued.

4. In opposition to the application, the 2nd respondent raised a notice of preliminary objection under sections 45(5), 50(5) and 56(1) of the Kenya Deposit Insurance Corporation Act (KDICA). It is contended that the suit against the KDIC is defective and should be struck out.

5. Through a replying affidavit sworn on 10th June 2024, Hellen Chepkwony, the Chief Executive Officer of KDIC confirms the appointment of KDIC as the receiver over Chase Bank (in liquidation), on 7th April 2016, through Gazette Notice No. 2320. Under the receivership and Section 9 of the *Banking Act*, the Central Bank of Kenya authorized the transfer of 75% of Chase Bank's assets and liabilities to SBM Kenya Limited. The remaining 25% of certain assets stayed with Chase Bank, which then entered liquidation.

6. As a result, she notes that the 2nd respondent Bank ceased to exist after this transition, and that the KDIC took over its liquidation. She argues that the application is misconceived and legally flawed, asserting that no cause of action can remain against the directors, management, or the institution prior to its liquidation.

7. Without prejudice to the above, she also confirms that as a result of an additional overdraft facility extended to the 1st respondent, the principal balance due to the 2nd respondent Bank increased to Kshs 410,470,316.84 as of May 2024. The debt continued to accrue interest due to non-payment, leading to an outstanding balance of Kshs 741,897,489.68. Despite attempts to negotiate full settlement, the negotiations failed, prompting the 2nd respondent Bank to exercise its rights under Section 90 of the *Land Act*. She contends that statutory notices were sent to the applicant by registered post to the address provided by the applicant.

8. James Karanja, a director of the 1st respondent also swore a Replying Affidavit on 21st June 2024. He confirms that indeed, additional facilities were granted to the 1st respondent without meeting the required prerequisites. He also acknowledges that the applicant was not served with the necessary statutory notices before the public auction. He takes issue with the 2nd respondent for their breach of the in duplum rule and contends that the amounts demanded are excessive.

9. The application was canvassed by way of written submissions which I have carefully considered alongside the application, response, evidence and authorities cited. The 2nd respondent did not file any submissions.

10. As correctly noted, once Chase Bank was placed under liquidation, it cannot sue or be sued directly. Control of the Bank was transferred to the KDIC. The applicant has brought the present suit against KDIC, not in its own capacity as contemplated under sections 45(5)(b) and 50(5) of the KDIA, but as the agent of Chase Bank (in liquidation). For such a suit to be maintained, the provisions of Section 56(1) and (2) of the KDICA come into play.

11. The central issue, therefore, is whether the applicant is entitled to leave to initiate proceedings against the 2nd respondent, Chase Bank, through KDIC. Section 56(2) of the KDICA provides:

> "No injunction or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the court."

12. This Court examined the rationale for the above provision in Rashik Kumar Punja Shah & Anor Chase Bank Limited (in liquidation) & Anor (2021) eKLR. It was held that:

> “ The intent and purpose of section 56 (2) is to eliminate any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to institute the proceedings if the court is satisfied that there is a case for further consideration. The requirement that the court sanctions the proceedings is designed to shield the liquidator from busy bodies with misguided or trivial complaints, and to remove the uncertainty as to whether a liquidator could safely proceed with his functions while court proceedings pend in court even though misconceived. The court is called upon to identify and filter out, at an early stage, claims which may be trivial or without merit”.

13. The court went on to state the threshold that must be met in an application under section 56(2) as follows:

> “ At this stage an applicant must show that: - (i) 'sufficient interest in the matter otherwise known as locus standi; (ii) that he/she is affected in some way by the decision being challenged; and, (iii) that he/she has an arguable case and that the case has a reasonable chance of success. The applicant has the burden of demonstrating that the application raises a serious issue. This is a low threshold. If the court is not persuaded as aforesaid, sanction will be denied and the matter proceeds no further. The facts relied upon must be clearly set out in the founding affidavit or draft pleadings or both. The court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party’s cases.”

14. I have considered the claim raised by the applicant in the plaint against the defendants and I am satisfied that in balancing the rights of the parties, and in the interests of justice, leave should be granted to pursue its claim. The preliminary objection is therefore dismissed.

15. I now proceed to determine the prayer for injunctive relief. In order to succeed, the applicant must satisfy the conditions established in Giella V Cassman Brown & Co, Ltd [1973] EA 358. These conditions require the applicant to demonstrate a prima facie case with a probability of success, show that they would suffer irreparable harm that could not be adequately compensated by damages, and, if the Court is in doubt, have the application determined on a balance of convenience.

16. These conditions are required to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if the applicant does not establish a prima facie case then the question of irreparable injury and balance of convenience do not require consideration. See: Nguruman Limited V Jan Bonde Nielsen & 2 Others, [2013] KECA 347 (KLR).

17. As to what constitutes a prima facie case, the Court of Appeal in Mrao Ltd V First American Bank of Kenya Ltd & 2 Others, [2003] KECA 175 (KLR) explained as follows:

> “ A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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”.

18. A prima facie case flows from the averments in the plaint, and the application and evidence presented before this court, which I have carefully considered.

19. The applicant argues that the sale of the suit property is unlawful due to the failure to issue the required statutory notices to wit a three-month notice, a 40-day notice, and a 45-day redemption notice. The applicant also contends that there was no resolution permitting Chase Bank to issue an additional loan to the 1st defendant. Furthermore, the applicant disputes that the mortgaged property is a continuing security and claims that the amounts demanded violate the in duplum rule. The applicant argues that the balance of convenience favors them, as they would face greater hardship from losing the property compared to the respondents.

20. I have carefully considered the rival arguments against the evidence on record. Regarding the facilities extended to the applicant, an offer letter dated 19th April 2010 confirms the overdraft facility of Kshs. 15,000,000/=. A subsequent facility application form dated 2nd May 2013 confirms that there were further facilities extended to the applicant in the form of and overdraft facility and term loan. The argument that the facilities extended did not follow procedure even if true cannot be used by the applicant at this point, after enjoying the facilities.

21. The applicant's debt is further confirmed by a report dated 23rd May 2024 authored by Interfirst Financial Investment Consultants. The report confirms that the applicant made a proposal for settling the outstanding amount, which proposal was not accepted by Chase Bank (in liquidation). It further confirms that the applicant was supplied with the bank statements and was aware of the default amount.

22. In any case, judicial pronouncements are vast on the point that a mortgagee cannot be precluded from exercising its statutory power of sale based solely on a disputed amount. The lender may only be estopped from doing so if the full loan amount is paid. In this case, as the loan has remained unpaid, to date.

23. Regarding the issue of service of statutory notices, the respondents further furnished this court with statutory notices dated 15th April 2019, 31st July 2019, 26th July 2021 and a Notification of Sale under the *Auctioneers Act* dated 7th March 2024. I note that the statutory notices were addressed to the applicant and its directors using the same address as that on the Letter of Offer. Additionally, the notices were sent by email and by registered post as evidenced by the certificates of postage.

24. At this point, I believe it is now obvious that the applicants have not made out a prima facie case with a probability of success. Their inquiry on whether they are entitled to an injunction ends at this point in line with the dicta in Nguruman Limited V Jane Bonde Nielsen & 2 Others, (supra). In any event, I find that any loss that is to be suffered by the applicants can ameliorated by an award of damages as per section 99(4) of the *Land Act*. The balance of convenience also tilts in favour of the respondent realizing their security as early as possible so that the value of the suit property is not outstripped by the ballooning debt.

Disposition

25. The upshot is that the application dated 23rd May, 2024 seeking injunctive relief has no merit and it is dismissed with costs. The interim orders are accordingly discharged.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE