



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngugi & another v Co-operative Bank of Kenya Limited (Commercial Suit E009 of 2023) [2024] KEHC 15019 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15019 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
COMMERCIAL SUIT E009 OF 2023**

**A MSHILA, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**PATRICK KARANJA NGUGI ..... 1<sup>ST</sup> PLAINTIFF**

**EVERTON ENTERPRISES LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT**

**RULING**

1. Before court is an application by way of Notice of Motion dated on 16<sup>th</sup> June, 2023 and brought under Articles 159(2) of *the Constitution*, Sections 3 and 3A of the *Civil Procedure Act*, Section 89, 90, 96, 97 and 102 of the *Land Act*, Order 40 rule 1, Order 51 rule 1, 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the law. The Plaintiffs/Applicants sought for orders:-
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this application, this Honourable court be pleased to issue orders restraining the respondent its workers, agents or anyone acting on its behalf from listing the Applicants and/or its directors in Credit Reference Bureaus on account of the purported loan balance.
  - d. That pending the hearing and determination of this suit filed herewith, this Honourable court be pleased to issue orders restraining the respondent by itself, its employees, servants and/or agents from attaching, auctioning, selling, transferring, re-advertising or in any other manner interfering with the applicant's properties known as LR, NOS. THIKA MUNICIPALITY BLOCK 8/178 and 189, THIKA, KIAMBU COUNTY.



- e. That pending the hearing and determination of this suit filed herewith, this Honourable court be pleased to issue orders restraining the respondent its workers, agents or anyone acting on its behalf from listing the Applicants and/or its directors in Credit Reference Bureaus on account of the purported loan balance.
2. The application is premised on the grounds that the applicants have been diligently servicing their loan and they were shocked to receive a Notification of sale from Nguru Auctioneers informing them that the suit properties were scheduled to be sold by way of public auction. That even if there was default by the applicants, the respondent failed to issue Statutory Notice of Sale, Notification of Sale and a forced valuation report.
3. PATRICK KARANJA NGUGI the 1<sup>st</sup> applicant herein swore his affidavit in support of the application herein on his own behalf and on behalf of the other directors of the 2<sup>nd</sup> applicant. He deposed that in 2017 the 2<sup>nd</sup> applicant entered into an agreement with the respondent for the advancement of Kshs. 35 million for the construction of a prime commercial facility but only Kshs. 28 million was disbursed which was to be paid for 180 months and monthly instalments of Kshs. 466,109.49. The facility was secured by a charge over LR. NOS. THIKA MUNICIPALITY BLOCK 8/178 & 189, THIKA, KIAMBU COUNTY. He averred that due to COVID-19 pandemic the company started struggling as such they wrote to the respondents to restructure so as to avoid default but the respondents failed to respond. That they were therefore, surprised to find a Notification of sale from Nguru Auctioneers dated 26<sup>th</sup> April, 2023 stating that the properties were scheduled for a public auction on 30<sup>th</sup> June 2023. He contended that he had not been served with notices of the intended sale from the respondent as well as the notification of sale before the advertisement. Further, that they were never served with the statutory notice of sale indicating their balance as well as a notification of sale with a forced valuation report. The court was urged to grant the interim orders sought as the actions of the respondent were said to be unfair and irregular.
4. DUNCAN MATISERO the respondent's Legal Manager, swore his replying affidavit dated 18<sup>th</sup> July, 2023. He deposed that the 2<sup>nd</sup> applicant borrowed Kshs. 35 million where Kshs. 28 million was approved and a charged was registered in favour of the respondent over LR THIKA MUNICIPALITY BLOCK 8/178 & 189. That the terms of the loan were varied vide a letter dated 11/5/2017 after a request by the applicants. That further the loan's interest was reduced from 14% to 13.5% which was communicated to the applicants through a letter dated 20/3/2018. That subsequently the 2<sup>nd</sup> applicant defaulted and the bank issued a notification of the outstanding liabilities on 22/5/2018. The applicant was said to have been in default as such the first demand notice was issued on 25/6/2018. That the 2<sup>nd</sup> applicant continued to be in default and a second demand notice as well as a notification were issued on 16/7/2018. That on 13/8/2018 the applicant was served with a pre-listing notification and a notification of the outstanding liabilities was issued on 29/10/2018 for Kshs. 29,376,403.78. That a further pre-listing notification was issued on 11/2/2019. He contended that despite the 2<sup>nd</sup> applicant applying for restructuring and consolidation of his loan facilities and the same being approved on 5/10/2020, the applicant continued to be in default and a notification dated 13/5/2021 was issued indicating that the account was in arrears. That a second notification was issued on 3/6/2021 and further on 12/11/2021. That a notice of listing at the CRB on 14/12/2021 was issued and despite all these demands and issuance of notifications as such a 90 day notice for sale on 17/1/2022 followed by the 40 days notification of sale issued on 18/6/2022 and thereafter the respondent instructed Nguru Auctioneers who issued a notification of sale and 45 days redemption notice dated 26/4/2023. That the sale scheduled for 30/6/2023 was stopped by the order of the court issued on 23<sup>rd</sup> June, 2023. The outstanding loan was said to be Kshs. 34,397,776.80 as at 10/6/2023. That prior to instructing the auctioneers a current valuation report dated 12/12/2022 had been issued by Abigael Mbagaya



& Associates Valuers and Property Consultants. He deposed that the respondent gave numerous demands and followed the laid down procedures and the applicants attempt to use the court in frustrating the defendant's statutory power of sale was said to be in bad faith as such the court was urged to dismiss the applicants' application.

5. In his supplementary affidavit dated 25<sup>th</sup> July, 2023, the 1<sup>st</sup> applicant avers that the charge is for 35 million and not 28 million as claimed by the respondent. The variation of the loan as claimed by the respondent was said to be untrue as the letter dated 25/10/2026 does not exist. The respondent was said to have clogged the 2<sup>nd</sup> applicant's equity of redemption as they failed to respond to their requests to restructure the monthly instalments. The respondent was said to have failed to demonstrate service of the alleged notices which are denied by the applicants. The respondent was accused of disbursing Kshs. 28 million when it had approved Kshs. 35 million as such straining the proposed construction. That the respondent undervalued the 1<sup>st</sup> plaintiff's property as the same was valued at Kshs. 150 million and not Kshs. 104 million.
6. The application was heard by way of written submissions.

### **Applicants' submissions**

7. The applicants submit that they have a prima facie case with a probability of success as the respondent advanced a lesser sum as agreed as well as failing to issue the required statutory notices. Reliance was placed in the case of Simiyu vs Housing Finance Company of Kenya (High Court Civil Case No. 937 of 2001). The applicants submit that they stand to suffer irreparable damage as they have invested a lot of money and time in acquiring the suit property and further developing the properties for commercial purposes. Reliance was placed in the case of Joseph Sire Oromo vs Housing Finance Company of Kenya (2008) eKLR. Lastly, it was submitted that balance of convenience should tilt in favour of the applicant. Reliance was placed in the case of American Cyanid vs Ethicon Ltd (1975) ALL ER 510-511. The court was urged to allow the application with costs.

### **Respondent's Submissions**

8. The respondent submits that before crystalizing its statutory power of sale issued the 90 day statutory notice by way of registered post, the 40 day statutory notice to sell before instructing the auctioneers as such acted within the confines of the law. The applicants were said to have failed to demonstrate a prima facie case with probability of success as they have a duty to service the loan of Kshs. 34,397,776.80. Reliance was placed in the case of Joseph Okoth Waudi vs National Bank of Kenya as cited in the case of Daniel Mbiti Mathiu vs Consolidated Bank of Kenya Limited & another (2012) eKLR. The applicants were accused of coming to court with unclean hands as they deny service of the statutory notices duly served on them as well as failing to pay the loan. The respondent submits that the applicants will not suffer irreparable harm as the loan continues to accumulate interest as such it is the defendants who stand to suffer as the properties may not be able to cover the loan amount. That the property being offered as security becomes a commodity for sale. Reliance was placed in the case of Elijah Kipng'eno Arap Bii vs Kenya Commercial Bank Limited (2001) eKLR. Parties were said to be bound by their agreement as such a court cannot rewrite the contractual agreement as such granting injunctive orders, the court will be interfering with the contract between the parties. Reliance was placed in the case of George Maina Kingori 7 another vs Bank of Baroda (Kenya) Limited & another (2018) eKLR. The balance of convenience was said to tilt in favour of the respondent to avoid the loan from accumulating further interest as well as allow the bank recover the outstanding debt. Reliance was placed in the case of Maithya vs Housing Finance Co. of Kenya & another (2003) IEA 133 as cited in the case of Eunice Rahel Achieng vs Co-operative Bank of Kenya (2022) eKLR.



## Analysis And Determination

9. I have considered the application herein, the respondent's replying affidavit and the rival submissions. The main issue for consideration is whether the applicants are deserving of the restraining orders sought.
10. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide as follows:
  - “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;
    - (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 order.”
11. The applicants sought for an order restraining the respondent from selling its properties by way of public auction pending the hearing and determination of the suit. The conditions for the grant of interim injunctions is well settled in the case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358 where it was held that: -
  - “The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, 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.”
12. The applicants submit that the bank disbursed less amount as applied for and as charged. That the respondent failed to issue the requisite statutory notices making the intended sale irregular as such they have established a prima facie case. The applicants contended that they will suffer irreparable damage if the orders sought are not granted as they have invested a lot of money in the construction project as such the balance of convenience should tilt in their favour.
13. The respondent avers that they issued the applicants with the required statutory notices by way of registered post before instructing the auctioneers hence the applicants are not deserving of the orders sought. The applicants were said to have a duty to pay the debt which they had failed to do hence they were said to have come to court with unclean hands. Further, the respondent contends that it will suffer irreparable loss if the orders sought are granted as the interest continues to increase as such the applicant might not be able to pay as well as the amount could exceed the security offered. The balance of convenience was said to tilt in favour of the respondent as there is need to recover the debt money.
14. There is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, *Civil Procedure Act* gives the court



discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.

15. The court in the instant application is required to satisfy itself that there is a prima facie case established. In the case of *Silvester Momanyi Marube –vs- Guizar Ahmed Motari & Another* (2012) eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively.

16. The court at this stage is not required to determine the merits and demerits of the applicants’ claim. The court is only required to determine whether the applicant has established a prima facie case. The applicants herein aver that they were shocked to receive a Notification of Sale from Nguru Auctioneers as the respondent had not served them with the required statutory notices as required by the law.

17. The applicants do not deny the debt, their main contention is that they were not served with the required statutory notices as provided by the law and that the amount of 28 million disbursed was not the borrowed and/or the charged amount of 35 million. The Court has carefully perused the record and on a balance of probability it is the court’s considered view that the applicants have defaulted in the payment of their loan and that the respondent has presented evidence of its numerous demand notices to the applicants as well as service of the statutory notices to the applicants before instructing the auctioneers who again served the applicants with the 45 days redemption notices among others.

18. See the case of *Labelle International Ltd Vs. Fidelity Commercial Ltd & Another* (2003) Z.E.A. where it was held that:-

“It is now established law that when part of the amount claimed is admitted or proved to be due, a charge cannot be restrained by an injunction.”

19. An injunction will not be issued hereof when the applicant’s claim is that of a dispute of the amount owed to the bank as this court has already established that indeed the applicant owes the bank an amount which needs to be ascertained.

20. In the circumstances, bearing the above, this Court finds that the applicants have not established a prima facie case to warrant granting the restraining orders sought.

21. The applicants contend that they are deserving of the orders sought as they stand to suffer irreparable damage as they have invested a lot of money and time in acquiring the suit property and further developing the properties for commercial purposes. The respondent urged the court that it is indeed the respondent who will suffer irreparable damage as the interest continues to rise and the applicants might not be able to pay as such the respondent will not be able to recover its money.

22. This court finds that the applicants have a duty to pay the debt the same having been advanced to them by the respondents. Subsequently, the applicants having offered their properties as security for the loan advanced the same becomes commodity for sale in the event of default. In this regard, reference is made on the case of *Kitur Vs. Standard Chartered Bank & 2 Others* (2002) IKLR as follows:-

“It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is henceforth a commodity for sale



or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”

23. Similarly, in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR the court stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

24. In the instant case, the court is not in doubt that the applicants are in default of the loan amount. There is ample evidence on the part of the bank that the applicants were served with the required statutory notices and theirs is just a mere denial of the service.

25. In the circumstances this court finds that it is indeed the bank which stands to suffer irreparable damage if they are restrained from exercising their statutory power of sale over the security offered by the applicants as the interest amount is rising fast and the applicants might not be able to pay hence the bank will be at a loss their right to recover the debt amount having crystalized.

26. In regards to the balance of convenience, this court finds that the same tilts in favour of the Respondent having demonstrated that they issued the requisite statutory notices, though denied by the applicants, and the applicants having failed to demonstrate what steps they are taking to offset the loan, and bearing in mind the in duplum rule, given that the interest amount is sky rocketing, it is necessary to grant the respondent the opportunity to realize the security so as to recover its debt amount.

27. Refer to the case of Amir Suleiman v Amboseli Resort Limited (2004) eKLR where Ojwang, Ag. J (as he then was), elaborated on what the “balance of convenience” means by stating that;-

“The Court in responding to prayers for interlocutory injunctive reliefs, should always/23 opt for the lower rather than the higher risk of injustice.”

### **Findings and Determination**

28. The court finds the application to be devoid of merit and it is hereby dismissed with costs to the Respondent.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Miss Angela for the Applicants

Mululu h/b for Karani for Defendant

