



Kanamai Timber & Hardware Ltd & 4 others v Family Bank Limited (Civil Suit E055 of 2021) [2023] KEHC 602 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E055 OF 2021
OA SEWE, J
JANUARY 30, 2023**

BETWEEN

**KANAMAI TIMBER & HARDWARE LTD 1ST PLAINTIFF
JACKSON NJERU NJOKA 2ND PLAINTIFF
ROSELINE M NDWIGAH 3RD PLAINTIFF
PETER MUNENE NJOKA 4TH PLAINTIFF
VERONICA WAWIRA GITONGA 5TH PLAINTIFF**

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. The Notice of Motion dated May 26, 2021 was filed by the plaintiffs along with their *Plaint of even date*. It was filed under a Certificate of Urgency pursuant to Sections 1A, 1B, 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 40 Rule 1 of the *Civil Procedure Rules, 2010*, for the following orders:
 - (a) Spent;
 - (b) Spent;
 - (c) That a temporary injunction be issued to restrain the defendant and/or its servants and agents, or any other person acting under the instruction or behest of the defendant and/or its agents and servants from advertising, selling either by private treaty or public auction or in any other way, purporting to sell, disposing off and/or dealing with the properties known as Land Title Number CR Number 24867 and Land Title Number Kilifi/Mtwapa/4573 pending the hearing and determination of this suit.



- (d) That the costs of the application be awarded to the plaintiffs.
2. The application was predicated on the grounds that it came to the attention of the plaintiffs by way of the Daily Nation newspaper advertisement placed on May 24, 2021 issue that the defendant had advertised for sale their properties, known as Land Title Number CR Number 24867 and Land Title Number Kilifi/Mtwapa/4573 (hereinafter, 'the suit properties'). They complained that the defendant had neither issued the statutory notices required under Sections 90 and 96(2) of the Land Act, nor complied with the mandatory requirements of Section 97 of the Land Act as to valuation of the suit properties. The plaintiffs further complained that the defendant had blatantly refused to share the bank statements in respect of the borrowing with them; and that they believed this to be a mischievous effort to conceal material facts from them.
 3. Thus, the plaintiffs contended that the actions of the defendant are of such weight and magnitude, either individually and/or combined, as to amount to an unlawful clog of their equity of redemption. They therefore posited that the impugned conduct and actions of the defendant constitute substantive illegalities and irregularities which taint the validity of the impending auction; hence the application. The plaintiffs relied on the Supporting Affidavits sworn by Jackson Njeru Njoka (the 2nd plaintiff), Roseline M Ndwiga (the 3rd plaintiff), Peter Munene Njoka (the 4th plaintiff) and Veronica Wawira Gitonga (the 5th plaintiff).
 4. In his affidavit, the 2nd plaintiff explained that he is one of the directors of the 1st plaintiff, Kanamai Timber & Hardware Ltd; that the 3rd defendant is his wife; and that they reside on the suit property, Land No CR 24867 as their matrimonial home. The 2nd plaintiff further averred at paragraph 3 of his affidavit that the other property, Land Title No Kilifi/Mtwapa/4573 belongs to the 4th respondent who is his brother; and that they charged the two properties to the defendant as security for a loan advanced to the 1st plaintiff. He averred further that they were caught unawares by the impending public auction because the defendant did not serve the plaintiffs with the statutory notices.
 5. At paragraph 4 of the 2nd plaintiff's affidavit, he deposed that no valuation of the suit property was done by the respondent prior to the intended auction. In the same vein, the 2nd plaintiff averred that the defendant has blatantly refused to share the bank statements in respect of the subject borrowing; thereby suggesting mischief and ill-will. Accordingly, the 2nd plaintiff deposed that it is in the interest of justice that the orders sought by the plaintiffs be granted.
 6. In her Supporting Affidavit, the 3rd plaintiff reiterated the averments of the 2nd plaintiff and added that the suit property constitutes their matrimonial home; and that she only got to learn on May 25, 2021 that the suit property had been charged to the defendant. She added that at no time was she, as a spouse, served with a statutory notice of the intended sale as required by Sections 90 and 96(1) of the Land Act, 2012. She likewise complained that she was not served with the Redemption Notice under the Auctioneers Rules, 1997. She otherwise restated the averments of the 2nd plaintiff as to valuation of the suit property and the fact that the defendant did not honour the plaintiffs' request for documents.
 7. On his part, the 4th plaintiff, Peter Munene Njoka, averred that he came to learn of the impending auction which was advertised in the Daily Nation newspaper issue of May 24, 2021. He added that he was caught unawares because the defendant had not served him with the statutory notices under the provisions of Section 90 and 96(2) of the Land Act. He otherwise reiterated the averments of the 2nd plaintiff, almost word for word.
 8. The 5th plaintiff averred that she is the wife of the 4th defendant; and that, although she has spousal rights and interest over the piece of land known as Land Title No Kilifi/Mtwapa/4573, she was never served with the requisite statutory notices for purposes of Sections 90 and 96(2) of the Land Act. She



- added that, to the best of her knowledge the 1st plaintiff has been servicing the loan in question and kept the bank accounts up to date.
9. The application was opposed by the defendant vide its Replying Affidavit sworn on its behalf by its Legal Officer, Sylvia Wambani. She averred that the application is nothing but a mischievous attempt by the plaintiffs to embroil it in unnecessary litigation. In response to the averments made by the plaintiffs in their respective Supporting Affidavits, Ms Wambani explained that the 1st plaintiff applied for various banking facilities from the defendant worth Kshs 47,201,271.23; and that over time, the facilities have been restructured to accommodate the 1st plaintiff's circumstances. Ms Wambani further averred that the 1st plaintiff had been effecting payments haphazardly, thereby causing the loan account to fall into arrears. She therefore asserted that the defendant's statutory power of sale had crystalized and that the requisite notices were duly served on the plaintiffs before the suit properties were advertised for sale by public auction. Copies of the Letters of Offer, the Charge, statements of account and the statutory notices were annexed to the Replying Affidavit and marked Annexures 'SW-1' to 'SW-7'.
 10. Ms Wambani further deposed that the defendant did cause the suit properties to be valued prior to the intended sale, in compliance with the law; and added that it would have worked against the defendant's interest to sell the suit property at an undervalue. Copies of the valuation reports were also annexed to the Replying Affidavit as Annexure 'SW-8a' and 'SW-8b'. And, in response to the 3rd and 5th plaintiff's Supporting Affidavits, Ms Wambani averred that, once the 3rd and 5th plaintiffs consented to the suit properties being given as security, they became commodities for sale. She accordingly prayed for the dismissal of the application with costs.
 11. The application was urged by way of written submissions pursuant to the directions given herein on February 15, 2022. Thus, learned counsel for the plaintiffs, Mr Oduor, relied on his written submissions dated April 12, 2022. He proposed only one issue for determination, namely, whether the plaintiffs have satisfied the threshold for grant of an order for injunction. He relied on *Giella v Cassman Brown* [1973] EA 358 and submitted that the three-fold test discussed therein has been met by the plaintiffs. Counsel reiterated the plaintiff's stance that no notice was served on the 1st, 3rd or 5th plaintiffs. Counsel further urged the Court to note that, instead of posting the statutory notices to PO Box 88514-80100 in accordance with Clause 39 of the Charge Instruments, the defendant used the wrong postal address, namely, PO Box 88514 00800 Mombasa. Mr Oduor relied on [*Robert Kipyegon Chepkwony v Barclays Bank of Kenya Limited & Another* \[2019\] eKLR](#); [*Moses Kibiego Yator v Eco Bank Kenya Limited* \[2014\] eKLR](#); [*Kenwood Property Developers Limited v Family Bank Limited; Onesmus Ngige Munyambu & Another \(Interested Parties\)* \[2020\] eKLR](#) and [*Manasseh Denga v Eco Bank Kenya Limited & Another* \[2015\] eKLR](#) for the proposition that a notice sent to the wrong address is no notice at all; and therefore that the plaintiffs have established a prima facie case with a probability of success.
 12. On whether the plaintiffs are likely to suffer irreparable harm, Mr Oduor urged the Court to follow *Robert Kipyegon Chepkwony v Barclays Bank of Kenya Ltd & Another* (supra) and hold that failure to serve notice would inevitably cause the plaintiffs irreparable harm in the event that the suit succeeds in the end; and therefore that the balance of convenience tilts in favour of the plaintiffs.
 13. Counsel for the defendant, Ms Onsare, also relied on *Giella v Cassman Brown* as to the conditions that the plaintiffs needed to prove to support their application. She reiterated the defence contention that all the requisite notices were duly served. She relied on *Moses Kibiego v Eco Bank Kenya Limited* (supra) for the submission that where, as in this instance, service of statutory notices was effected by registered post, it is presumed that the chargor must have received the notices; and therefore it is improper and insincere for the plaintiffs to claim that they never received the notices.



14. Ms Onsare further submitted that the obligation of the defendant under Section 97(1) and (2) of the Land Act is to obtain the best possible price reasonably obtainable at the time of sale. She added that, by instructing Transcountry Valuers Limited to conduct a valuation of the subject properties, the defendant fulfilled the requirements of Section 97(2) of the Land Act. On the authority of Zum Zum Investment Limited v Habit Bank Limited [2014] eKLR, Ms Onsare pointed out that the plaintiffs have not availed any evidence to support their allegations that the defendant is intent on selling the properties at an undervalue.
15. Further to the foregoing submissions, it was the assertion of Ms Onsare that the plaintiffs do not stand to suffer any damage that cannot be compensated in damages. In response to the plaintiffs' claim that the suit properties are matrimonial properties, counsel relied on Isaac Litali v Ambrose W Subai & 2 Others, Nairobi HCCC No 2092 of 2000 (UR) in which it was held that land, once given as security for a loan, becomes a commodity for sale by that very fact, and is therefore no different from a chattel such as a motor vehicle or any other form of security. Thus, Ms Onsare submitted that it is inconsequential that the suit properties are matrimonial residences of the plaintiffs.
16. As for balance of convenience, Ms Onsare urged the Court to take into consideration that, to date, the 1st plaintiffs' loan account is in arrears; and that no steps have been taken to rectify the default. She submitted that there is a real risk that the debt may outstrip the value of the suit properties, thereby exposing the defendant to irrecoverable loss. Ms Onsare quoted an excerpt from Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR at paragraph 51 of her written submissions to buttress her assertion that speculative injury will not do, and that there must be more than an unfounded fear or apprehension on the part of the plaintiffs. She posited that, if anything, it is the defendant that is likely to suffer irreparable harm because the debt continues to accrue interest and with time, may surpass the value of the charged property. Counsel further submitted that the conduct of the plaintiffs does not meet the approval of the court of equity. She accordingly urged for the dismissal of the application dated May 26, 2021 with costs to the defendant.
17. I have given careful consideration to the application and perused the affidavits filed by the parties. I have likewise considered the submissions made by learned counsel and the authorities they relied on. The agreed facts are that the 2nd and 4th plaintiffs are the registered owners of the suit properties, namely, Land Title No CR Number 24867 and Land Title No Kilifi/Mtwapa/4573 which they charged to the defendant as security for facilities advanced by the defendant to the 1st plaintiff. It is also common ground that the 1st plaintiff defaulted in making repayments; and that the defendant acceded to the plaintiffs' request for restructure, in the first instance, before commencing the process of realizing the securities by way of sale.
18. The plaintiffs main cause for complaint is that the defendant's statutory power of sale is yet to crystalize in that they are yet to be served with the requisite statutory notices. They also asserted that the suit properties are yet to be valued. In the premises, the issue for determination is whether the plaintiffs are entitled to a temporary injunction pending the hearing and determination of their suit.
19. The principal provision under which the instant application has been brought is Order 40 Rule 1 of the Civil Procedure Rules. It provides that:

' Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree 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.'

20. Since the relief is discretionary, principles have been developed to guide the courts in the exercise of such discretion. Hence, in *Giella vs Cassman Brown & Co Ltd* (supra), 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.'

21. Accordingly, the first question to pose is whether the plaintiffs have established a prima facie case. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 a prima facie case was defined thus:

' A prima facie case in a civil application includes but not confined to a genuine and arguable case. 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.'

22. It is trite that, in considering whether or not a prima facie case has been made out, the Court need not go into an exhaustive evaluation of the merits of the Plaintiff's case. This caution was aptly expressed by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR thus:

'In considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

23. The contention of the plaintiffs was that they were not served with the requisite statutory notices under Sections 90 and 96 of the *Land Act*. They also contended that Section 97 of the *Land Act*, which requires that a current valuation of the charged property be obtained prior to sale, was not complied with. It is therefore crucial to ascertain whether these allegations have been proved, albeit on a prima facie basis.

(a) On Whether the Plaintiffs were served with the requisite Statutory Notices under Sections 90 and 96 of the *Land Act*:

24. At paragraphs 2, 5 and 6 of the 2nd plaintiff's Supporting Affidavit he averred that, on May 24, 2021, a close family friend and business associate went to his home with a newspaper sharing the abrupt news that his property known as Land Title No CR No 24867 as well as his brother's property known as Land Title No Kilifi/Mtwapa/4573 had been advertised for sale by way of a public auction scheduled



for May 28, 2021. He averred that he was caught unawares as no notice had been served as required by Sections 90 and 96(2) of the *Land Act*. Section 90 of the *Land Act* provides as follows in part:

- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--
 - (a) The nature and extent of the default by the chargor;
 - (b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--
 - (a) Sue the chargor for any money due and owing under the charge;
 - (b) Appoint a receiver of the income of the charged land;
 - (c) Lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) Enter into possession of the charged land; or
 - (e) sell the charged land.

25. Section 96 of the *Land Act*, on the other hand, provides that:

- (1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.
- (2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

26. The defendant has however refuted those assertions by exhibiting copies of the statutory notices as Annexures 'SW-5' and 'SW-6' to the defendant's Replying Affidavit. They show that they were



addressed to the agreed address as per Clause 39 of the Charge Instruments, namely PO Box 88514-80100 Mombasa. It is noteworthy however that the postage document in support of service of the initial Section 90 notice does show the address to be PO Box 88514 – 00800 Mombasa. There is therefore a variance in the postal code. That does raise a doubt as to service of that notice; and therefore it is of no consequence that the Section 96(2) notice was sent to the correct address.

27. I agree entirely with the expressions of Hon Kamau, J in *Manasseh Denga v Eco Bank Kenya Limited & Another* (supra) that:

' Both parties were bound by the terms of the Charge, Further Charge and Lease that clearly stipulated to which postal address the notices were required to be sent. All notices had to be sent to that address. However, the statutory notices were not sent to the Postal Address that had been contracted between the Plaintiff and the 1st Defendant. Such notice sent to any other address therefore has no legal basis. It therefore followed that the notices, purportedly sent to the Plaintiff were therefore null and void ab initio.'

28. Further to the foregoing, there is no proof that the 3rd and 5th plaintiffs who gave spousal consent to the Charge Instruments, were notified of the impending sale, and yet Section 96(3)(c) provides that:

' A copy of the notice to sell served in accordance with subsection (2) shall be served on a spouse of chargor who had given the consent.'

29. The plaintiffs have therefore shown that, prima facie, they have a valid cause for complaint as to service of the statutory notices.

(b) On Whether there was failure by the 1st Defendant to comply with Section 97 of the *Land Act*:

30. Before exercising the statutory power of sale, a chargee is under obligation to obtain a current valuation of the charged property. In this regard Section 97 of the *Land Act* provides as follows:

- (1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-
 - (a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and
 - (b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

31. Hence, while the provision imposes a duty on the chargee to ensure the best interest of the chargor while exercising its statutory power of sale, that duty is limited to ensuring the best sale price is



obtained by undertaking a forced sale valuation before sale. In this instance, the defendant relied on the two Valuation Report dated February 16, 2021 prepared by Transcountry Valuers Ltd exhibited as Annexures 'SW-8a' and 'SW-8b'. The reports do give the market value of the suit properties as well as their forced sale value. In the premises, for the plaintiffs to show that the defendant had purposed to sell the suit properties at an undervalue, valuation reports were necessary to counter the defendant's.

32. In *Zum Zum Investment Limited vs Habib Bank Limited* [2014] eKLR it was held that:

' Once the Defendant has undertaken a forced valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was done way before the time of the intended sale.'

33. Granted my finding that the crucial Section 90 notice was not sent to the correct address, it is apparent that the plaintiffs are at the risk of unjustifiably losing the suit property by way; and therefore stand to suffer irreparable harm. While I agree that a charged property, including a matrimonial home, is compensable by way of damages, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory should never issue. In this connection I would endorse the expressions of Ringera, J (as he then was) in *Waitbaka -vs- Industrial and Commercial Development Corporation* [2001] KLR 374 that:

' It is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses.'

34. As to whether the balance of convenience is in favour of the Plaintiff, courts have opted for the path that leads to the lower rather than the higher risk of injustice, in line with the case of *Suleiman vs Amboseli Resort Ltd (2004) 2 KLR 589* in which Hon Ojwang Ag J (as he then was) quoted the following words of Justice Hoffmann in the English case of *Films Rover International vs Cannon Film Sales Ltd (1986) 3 All ER 772*:

' The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'.'

35. In the instant matter, the path leading to the lower risk of injustice would be to stop the impugned auction. Nevertheless, it is my considered view that, in a scenario such as this, the justice of the case demands that once this anomaly is rectified, the defendant should be at liberty to proceed with the



exercise of its statutory power of sale. In this regard, I am in agreement with the observation of the Court in *Olkasai Limited vs Equity Bank Limited [2015] eKLR* that:

' An injunction which is granted on the ground that the notices issued are not proper or none was issued at all, is not an absolute prohibition; such injunction will only subsist for as long as the Bank has not issued a proper Notice. It follows, therefore, that immediately the Bank herein issues a proper Notice of not less than 40 days under section 96(2) of the *Land Act*, nothing prevents it from giving instructions to the auctioneer who shall upon those instructions issue the Redemption Notice and Notification of Sale as per Rule 15 of the *Auctioneers Act*, and proceed to sell and conclude a contract of sale of the charged property.'

36. In the result, I would allow the plaintiff's application and issue an injunction in the manner sought vide Prayer 3 of the Notice of Motion dated May 26, 2021, namely:

- (a) That a temporary injunction be and is hereby issued to restrain the defendant and/or its servants and agents, or any other person acting under the instruction or behest of the defendant and/or its agents and servants from advertising, selling either by private treaty or public auction or in any other way, purporting to sell, disposing off and/or dealing with the properties known as Land Title Number CR Number 24867 and Land Title Number Kilifi/Mtwapa/4573 pending service of the requisite statutory notices on the plaintiffs by the defendant, who will thereafter be at liberty to proceed with the sale as by law required.
- (b) That the costs of the application be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JANUARY 2023

OLGA SEWE

JUDGE

