**Ndemi v UAP Insurance Co Ltd (Civil Case 14 of 2022)**
**[2023] KEHC 264 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 264 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL CASE 14 OF 2022**

**JM NGUGI, J**

**JANUARY 26, 2023**

**BETWEEN**

**NDEGWA GACHERU NDEMI ..... PLAINTIFF**

**AND**

**UAP INSURANCE CO LTD ..... DEFENDANT**

**RULING**

1. The Plaintiff ("Applicant") was an employee of the Defendant. On or around September, 2011, he took a staff loan with the Defendant. The loan amount was Kshs 5 million. As collateral for the loan, the Applicant charged his property known as Nakuru/Municipality Block 11/1036 (hereinafter, "the Suit Property").

2. The Applicant left the Defendant's employment in October, 2015. By that time he had not completed repayment of the loan. He admits in his suit papers that he did not service the loan anymore after that.

3. The Applicant says that he expected that the Defendant "would come up with a new repayment plan seeing that the direct deductions [were] no longer possible for reasons that [he] had left employment with the Defendant but no such arrangement was forthcoming." Instead, the Applicant says that he learnt that the Suit Property had been advertised for sale by public auction.

4. The Applicant brought suit vide a Plaint dated May 26, 2022 seeking, primarily, to stop the intended sale of the Suit Property by the Defendant. He also sought certain other reliefs related to the interest rates and amounts due.

5. Contemporaneously with the Plaint, the Applicant filed a Notice of Motion Application dated May 26, 2022 ("the Application"). It had the following prayers:

    1. Spent.

    2. Spent.

3. Thaton order of injunction do issue pending the hearing and determination of the suit herein restraining the Defendant, its agents and/or servants or any of them from disposing off, selling or otherwise interfering with title number Nakuru/Municipality Block 11/1036.

4. Thatthe costs of the application be provided for.

6. This is the Application is presently before me. It is opposed by the Defendant through a Replying Affidavit by Sheila Maina deponed on June 17, 2022.

7. The Application was argued by way of Written Submissions. I have carefully read the pleadings; Application and Supporting Affidavit; Replying Affidavit and submissions by both parties.

8. The elemental facts of the case are not in dispute as presented above. It is not disputed that the Applicant was an employee; and that he took out a loan of Kshs 5 million and charged the Suit Property. The terms of the Agreement between he parties are, also, not disputed – at least not as they were initially.

9. It is also not disputed that the Applicant left the Defendant's employment in August, 2015. Neither is it disputed that since then the Applicant has not paid any amount whatsoever towards the loan repayment. The Applicant contends that when he left employment he expected the Defendant to restructure the loan. He says that the failure of the Defendant to so restructure the loan is the true reason he did not continue servicing the loan. He also faults the Defendant for changing the interest rate from 6% to 14% -- and says that the unilateral modification led to unreasonable accrual of interests.

10. The Applicant also argues that no pre-disposal valuation has been conducted on the Suit Property and that, therefore, he is credibly apprehensive that the Suit Property will be sold at an inordinately low sum. He says that the Suit Property is his family home and that, therefore, he would be greatly prejudiced if it is sold.

11. On the other hand, the Defendant contends that the Applicant is in fundamental breach of the mortgage agreement because he failed to repay any amounts since August, 2015 and that, therefore, it is entitled to exercise its statutory power of sale. The Defendant says that it complied with all the statutory procedures to perfect its rights to sell by the Suit Property by public auction.

12. It is important to recall the procedural posture of this case. This is an application for injunctive relief. In our jurisprudence, consideration whether a party is entitled to an interlocutory injunction is now enshrined in a tripartite legal criterion set out in the celebrated case of *Giella v Cassman Brown* in the words of Spry, VP.:

> 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

13. Hence, the Court's first task is to determine if the Applicant has established a *prima facie* case with a probability of success once the full case is fully ventilated. It is important to recall that at this point the Court can do no more than form a necessarily provisional view of the case. Translated to our specific tasks, the question would be whether the Applicant has placed sufficient material on the table to warrant a provisional finding by the Court that upon full ventilation of the facts in the case he is likely to persuade the Court that the intended statutory sale of the Suit Property is irregular; and

that only putting it on pause will fairly calibrate the relationships of the two parties pending that full hearing.

14. The Applicant claims that he has a right to discharge the Suit Property and that it is the Defendant's fault that he has not been able to pay off the loan. He reasons that the Defendant is to blame because by the terms of the loan agreement, the Defendant was to deduct the loan due from his terminal dues as per Clause 1(b) of the Agreement between himself and the Defendant. Yet, he says, the Defendant failed to

> "settle the loan balance from the [Applicant's] dues amount to Kshs 1,600,000 thus creating the impression, and legitimately so that the loan balance had been settled as agreed...."

15. Additionally, the Applicant faults the Defendant for not making any attempts to settle the loan amounts and then springing up the statutory notice many years later – and only after calculating the arrears using a varied interest rate of 14% - up from the original 6%.

16. Two things immediately register from the case as pleaded and argued by the Applicant. The first one is that he does not deny taking the loan; and neither does he deny being in default. He only, rather incredulously claims that he "assumed" that the loan had been paid off because the Defendant paid him off his terminal dues. He suggests that the Defendant should have paid off the loan off first. In other words, default is not denied.

17. The second point is that the Applicant does not seriously allege or prove that the correct procedures for perfecting the Defendant's statutory power of sale was not followed. Indeed, the pleadings demonstrate that the Notices under section 90 and 96 of the *Land Act* were duly issued and served. Uncontroverted evidence was also placed before the Court to demonstrate that the 45 days Notification of Sale/ Redemption Notice under the Auctioneers' Rules was duly issued. Neither does the Applicant deny that there was an advertisement for the statutory sale as required by the law.

18. The only points of contestation by the Applicant seem to be two-fold. First, he claims that it was unfair and a breach of contract for the Defendant to alter the interest rate of the loan. That might be a valid point of contention but, unfortunately, it does not entitle the Applicant to an injunction to restrain the Defendant from exercising its duly perfected statutory power of sale. At most, it reduces the dispute to one of amounts owed and payable – a suit eminently capable of resolution by payment of pecuniary damages. See, for example, *Habib Bank AG Zurich v Pop-In (Kenya) Ltd & 3 others* [1995] eKLR.

19. Second, the Applicant claims that no pre-disposal valuation has been conducted. However, this was falsified through the Defendant tabling a Valuation Report and a Certificate of Value indicating the market value and the forced sale value of the Suit Property. The Applicant did not join issue or respond to this substantiation – leaving the Court to reach the provisional conclusion that section 97 of the *Land Act* had been complied with.

20. It seems fairly obvious at this point that the Applicant simply does not meet the threshold for the grant of the orders sought. On the material presented before the Court, no tribunal properly directing itself could conclude that there exists a right which has apparently been infringed by the Defendant as to call for an explanation or rebuttal from the latter (see *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR: the Applicant took out a loan; he defaulted in payments; the Bank deployed the correct procedure to perfect its statutory power of sale.

21. In any event, given the complaints that the Applicant raises, money damages would be sufficient to compensate even if he was ultimately successful in his claim. In coming to this conclusion, it is appropriate to remember that the Applicant charged the Suit Property himself – and therefore to

belatedly claim that it is family home which, presumably has more than commercial value, is unavailing to him.

22. Finally, in the circumstances of this case, the balance of convenience does not favour the applicant given the factors considered above.

23. The upshot is that the application dated May 26, 2022 is unmeritorious. It is hereby dismissed with costs.

24. Orders accordingly.

**DATED AT NAIROBI THIS 16TH DAY OF JANUARY, 2023**

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**JOEL NGUGI**

**JUDGE**

**DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2022**

.....

**HILLARY CHEMITEI**

**JUDGE**