



REPUBLIC OF KENYA



Khan & 3 others v National Bank of Kenya Limited & another (Commercial Case E002 of 2022) [2023] KEHC 1747 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E002 OF 2022
JN KAMAU, J
FEBRUARY 28, 2023**

BETWEEN

**MOHAMMED YAMIN KHAN 1ST PLAINTIFF
MOHAMED AKRAM KHAN 2ND PLAINTIFF
YASMIN MAJID KHAN 3RD PLAINTIFF
SARA BANU ALAM (SUING AS EXECUTORS OF THE ESTATE OF ABDUL
MAJID KHAN) 4TH PLAINTIFF**

AND

**NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT
KEYSIAN AUCTIONEERS 2ND DEFENDANT**

RULING

1. In their notice of motion dated March 2, 2022 and filed on March 4, 2022, the plaintiffs herein sought an order restraining the defendants, their agents, employees and/or anybody acting on their behalf from advertising for auction, selling by auction or otherwise disposing of the same in any other manner Land Reference Number Kisumu Municipality/Block 7/311 (hereinafter referred to as “the subject property”) pending the hearing and determination of this suit.
2. On March 2, 2022, the 1st plaintiff swore an affidavit on his own behalf and on behalf of the 2nd, 3rd and 4th plaintiffs in support of the said application.
3. The plaintiffs averred that they were the executors of the estate of the late Abdul Majid Khan Kherdin (hereinafter referred to as “the deceased”), who died on May 23, 2011, through his Will dated December 18, 2006. They stated that they were issued with Letters of Administration of the deceased’s estate on November 12, 2019 in Kisumu Succession Cause No 23 of 2018.



4. They asserted that they grew up living in the subject property and that during the deceased's lifetime, they never knew that the subject property was encumbered with a loan to the 1st defendant and he never mentioned the same when he wrote the Will.
5. They pointed out that on or about January 22, 2022, the 2nd defendant acting on behalf of the 1st defendant went to the subject property and served the caretaker with two (2) notices. The one dated January 20, 2022 was titled "Notification of Sale of Immovable Property" showing that the subject property was to be auctioned on the April 4, 2022. It had indicated the forced sale value as Kshs 69,000,000/=. However, it indicated the amount that was due to the 1st defendant or the party who was required to effect any payment.
6. They pointed out whereas the said notification was not addressed to any party in particular, the second notice that was dated January 21, 2022 was addressed to Supaco Bakery Limited and that it demanded payment of Kshs 333,279,776.55/= to the 1st defendant within forty five (45) days from the February 21, 2022 failure of which the 2nd defendant would proceed to advertise the subject property for sale by public auction.
7. They confirmed from an online search of the subject property that a loan to the 1st defendant was reflected thereon. They averred that one of the deceased's grandson visited the 1st defendant's Nairobi Branch Office without their knowledge and on instruction of the 3rd Plaintiff to find out about the loan and he was asked to give a proposal on the settlement of the loan.
8. They added that again without their authorisation, on April 30, 2021, the 3rd plaintiff wrote to the 1st defendant on a without prejudice basis proposing to settle the alleged charge Loan by paying Kshs 10,000,000/= which the 1st defendant rejected on September 6, 2021 and demanded the alleged forced sale value of the property of Kshs 69,000,000/= in settlement of the alleged debt.
9. They stated that their lawyers wrote to the 1st defendant with a copy to the 2nd defendant herein asking for copies of the charge document, true and complete statement of accounts relating to the alleged loan which had not been availed as at the time of filing the present application. They were categorical that the claim was statute barred under the Limitation of Actions Act and hence the recovery process was unprocedural and unlawful in any event.
10. They contended that Supaco Bakeries (hereinafter referred to as "the Company") was closed in 1990 and if indeed the 1st defendant lent it money, then it should have known that and taken action to recover the same from it and not to wait for thirty (32) years to demand payment from a dead entity and a dead guarantor.
11. They further averred that the money allegedly guaranteed was Kshs 3,000,000/= and that a demand to repay 111, 093, 258 times of the borrowed amount was not only unconscionable, immoral, contrary to public policy but that it was also against the in duplum rule and should be restrained by this court.
12. It was their case that the suit and their application herein had satisfied the laid down principles for the grant of interlocutory injunction and urged the court to grant the same.
13. In opposition to the said application, the 1st defendant filed a replying affidavit on June 15, 2022. The same was sworn by the 1st defendant's Remedial and Recoveries Analyst, Diana N. Kibunja, on May 30, 2022. The 1st defendant termed the plaintiffs' present application as unfounded, baseless, devoid of any legal pedestal and averred that the same did not meet any of the prerequisite condition for the grant of the orders that had been sought.



14. It contended that the plaintiffs had come to court of equity with unclean hands as they intentionally withheld from court critical facts and information to enable it truly adjudicate this matter and especially on the orders sought. It pointed out that the plaintiffs did not disclose that the deceased died and the Company was wound up.
15. It stated that the plaintiffs were the deceased's sons and daughters and that at all material times, the 1st and 2nd plaintiffs and the deceased were directors, owners and promoters of the company which was the borrower. It pointed out that the 1st and 2nd Plaintiffs had concealed how the company was secretly wound up without paying its debts or meeting other statutory obligations with the sole fraudulent purpose of avoiding and evading its creditors and regulators.
16. It averred that *vide* a letter dated July 5, 1988, the Company requested and that *vide* its letter dated July 29, 1988, it advanced the Company a term loan facility of Kshs 1,500,000/= and an overdraft facility of Kshs 1,000,000/= that were expiring on July 22, 1989. It explained that the facility was secured by a legal charge dated June 18, 1988 of Kshs 3,000,000/= over the subject property and the deceased's personal guarantee dated August 9, 1988 of the sum of Kshs 3,000,000/=.
17. It asserted that the deceased's indebtedness to it was two-fold and it was not correct that the loan was only secured by the personal guarantee as the Plaintiffs had averred. It was emphatic that the 1st and 2nd Plaintiffs as the Company's directors were directly involved in securing the said facility and could therefore not feign ignorance of the existence and terms of the credit facilities.
18. It pointed out that the Company defaulted in honouring its part of the loan contract on several occasions to which it had issued several demands between March 22, 1989 and August 27, 2021. The latter which was to the administrators and executors of the deceased's estate. It added that the 1st and 2nd plaintiffs and the deceased sought from it preferential treatment, concessions and restructuring of the credit facility which it granted them but they continued to default.
19. It contended that in its letter dated September 6, 2021, it rejected an offer from the 3rd Plaintiff's offer who was acting on capacity of one of the executors of the deceased's estate to redeem the subject property and restructure the debt downwards to Kshs 10,000,000/=. It added that it rejected another offer on the same terms from the Plaintiffs' advocates' that was made February 16, 2022. It was its averment the aforesaid two (2) letters rendered the plaintiffs' affidavit false and untruthful.
20. It further asserted that on March 29, 2022 it offered the plaintiffs to settle the loan at Kshs 40,000,000/= as full and final settlement for the outstanding debt of the borrower but the plaintiffs declined the offer.
21. It was emphatic that it had duly issued all the statutory notices in exercise of its statutory power of sale and that the plaintiffs as executors of the Will of the deceased were obliged under the law to ascertain and pay all the deceased's debts before paying out any legacy and to produce to the Probate Court a full and accurate inventory of the assets and liabilities of the deceased within six (6) months from the date of grant. It was their contention that the plaintiffs' efforts to run away from the obligation to pay the debt that stood at Kshs 333, 279,776/= was futile.
22. It therefore stated that the plaintiffs had not raised any *prima facie* case with any chance of success and that their contention that its rights under the charge were time barred was misplaced because as late as February 16, 2022, they acknowledged the existence of the debt and sought to settle it.
23. It added that the plaintiffs had not demonstrated that they stood to suffer any irreparable loss in the event the orders sought were not granted because they could be adequately be compensated by an award in for the reason that the subject property had been valued at Kshs 92,000,000/=. It pointed



- out that to the contrary it was the one that stood to lose irreparably as it could not realise the exact debt owing.
24. It asserted that the plaintiffs had acted in bad faith by rushing to court behind its back and yet they had not demonstrated any intention to repay the loan or even defray it. It was categorical that the balance of convenience tilted in its favour. It urged the court to dismiss the Plaintiffs' application for lack of merit.
 25. On June 28, 2022, the plaintiffs filed a supplementary affidavit in response to the 1st defendant's replying affidavit. The same was sworn by the 1st Plaintiff on June 24, 2022. They averred that the 1st and the 2nd Plaintiffs had not at any point denied that they were the Company's directors and that the issue that was before the court was the threatened sale of the suit property and not its alleged secret winding up.
 26. They stated that there was no charge dated June 18, 1988 of Kshs 3,000,000/= over the subject property as had been alleged by the 1st defendant herein but that there was an intention to create a charge for Kshs 2,500,000/= as per the letter of offer of the July 29, 1998 which was never executed by the deceased over the subject property and that a chargee's statutory power of sale could not arise in the absence of a legal charge duly executed, registered and enforceable.
 27. It was their case that a green card entry in Part C of the encumbrance section did not in itself amount to evidence of a charge in the absence of the charge document that was duly executed by the chargor and the chargee and registered as per the law. They added that at no time did the deceased admit owing the 1st defendant Kshs 333,279,776.65/= and that at no time did the 1st defendant serve him with a valid statutory notice to sell the subject property on account of enforcement of the statutory power of sale while he was alive.
 28. They asserted that according to the documents that the 1st defendant filed in court, the last communication between it and the deceased was a letter dated July 12, 1994 which clearly only addressed the guarantee of Kshs 3,000,000/=. They added that they never admitted the debt in any of their letters and that in any event, their April 30, 2021 to the 1st defendant was on a without prejudice basis while their advocates' letter self-explanatory.
 29. They added that none of the notices was a legal statutory notice within the meaning and interpretation of the law and that in any case, the letters dated September 30, 1992 and March 19, 1993 from the law firm of Ombija & Co Advocates were not addressed to the deceased's known address and there was no evidence before court to show that the deceased was served with the letters.
 30. They reiterated that the Company's account with the 1st defendant became dormant many years ago with its knowledge thus bringing into operation the law relating to Limitation of Actions which they had pleaded in their claim.
 31. The plaintiffs' written submissions were dated June 27, 2022 and filed on June 29, 2022 while those of the 1st Defendant were dated September 21, 2022 and filed on September 29, 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

32. The Plaintiffs reiterated the averments they had set out in their Supporting and further affidavits and pointed out that the duplum Rule in Kenya was introduced by Section 17 of the *Banking (Amendment) Act 2007* which incorporated section 44A and Section 44(6).



33. They placed reliance on the case of *Giella v Cassman Brown Limited* (1973) EA where it was held that in order to grant an order of injunction, the court must be satisfied that the applicant had established a *prima facie* case with a probability of success, that he or she stood to suffer irreparable loss which could not be compensated by an award of damages and that if court was in doubt, the application would be determined on a balance of convenience.
34. They further relied on the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR where it was held that a *prima facie* case was a case in which on the material presented to the court a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.
35. They also cited the case of *Marteve Guest House v Daniel Muiruri Njenga & 3 others* [2022] eKLR where the court held that a bank exercising its statutory power of sale had to comply with the provisions of section 45(1) of the *Law of Succession Act* where if the property to be sold belonged to a deceased person, the administrators and/or executors of the deceased proprietor were to be served with the necessary statutory notices.
36. They pleaded with the court to consider that the subject property was their family home for several years and that the advertised auction would undoubtedly deprive them of a property they intend to leave to their generations to come. It was their contention that the deprivation of real property had been held by courts to amount to irreparable loss.
37. In this regard, they relied on the case of *Naftali Kinyua v Patrick Gachure & another* [2015] eKLR where the Court of Appeal held that if there was doubt in the mind of the court as to whether an applicant had demonstrated a *prima facie* case or that he would suffer irreparable loss, the balance of convenience in that case tilted in the maintaining of the suit property pending hearing and determination of the suit.
38. They pointed out that in the above mentioned case the Court of Appeal dealt with the common law principle of *lis pendens* and held that the same principle was still applicable in Kenya by dint of the provisions of Section 107 (1) of the *Land Registration Act* and section 3(1) of the *Judicature Act* and added that courts should preserve properties in dispute pending hearing and determination of such disputes. They urged the court to find that the said doctrine was also applicable to this case and preserve the subject property pending the disposal of the suit.
39. On its part, the 1st defendant submitted that the plaintiffs had not demonstrated that they had a *prima facie* case with a high chance of probability. It invoked section 24, 25, 26, 30(3), 35 and 56 of the *Land Registration Act* whose common thread was that a holder of title or a registered proprietor of land held that certificate and land subject to charges and other encumbrances entered and subsisting in the register. They argued that the lands registry clearly showed that the subject property was charged to the 1st defendant for Kshs 3,000,000/= on August 18, 1988.
40. It reiterated its averments in the replying affidavit and contended that the Plaintiffs as the administrators of the estate of the deceased owed it a debt under a statutory charge which they defaulted and it therefore had every right to exercise its remedies under the law.
41. They further submitted that any loss that may be suffered by the Plaintiffs if the order was not granted could be adequately compensated in damages. It pointed out that it stood to suffer irreparable loss since the lease had an expired term of sixteen (16) years and there was no guarantee that the lease would be extended or renewed placing its security in jeopardy.



42. It was emphatic that it was a large financial institution in which the government of Kenya had a majority stake and most if not all government revenues and taxes were paid through it and in the event that the suit property was sold in exercise of the power of sale, it could compensate the Plaintiffs and the deceased's estate for any damage that they might suffer.
43. In this respect, it relied on the case of *Gulf African Bank Limited v Mobamud Sheikh Hussein* [2018] eKLR which cited the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (eKLR citation not given) where the common thread was that there had to be more than unfounded fear or apprehension on the part of an applicant seeking an order of interlocutory injunction. It also relied on the case of *David Ngungi Ngaari v Kenya Commercial Bank Limited* [2015] eKLR where it was held that charged properties were intended to acquire or were supposed to have a commercial value otherwise lenders would not accept them as securities.
44. It further argued that the Plaintiffs had not adduced any evidence to show that the subject property was a family home. It pointed out that the Plaintiffs had not explained what would happen at the expiry of the lease even as they claimed the subject property was a family home. It was its contention that the mere fact that a charged property was a home or a matrimonial property did not prevent a chargee from exercising its power of sale over such property.
45. In this respect, it relied on the several cases among them the cases *Nabasho K Mbatia v Finance Company Limited* [2006] eKLR, *Julius Mainye Anyega v Eco Bank Limited* [2014] eKLR and *Jimmy Wafula Simiyu v Fidelity Bank Ltd* [2014] eKLR where the common thread was that any property, whether it was a matrimonial or spiritual, once offered as security for loan/overdraft was made on the understanding that the same stood the risk of being sold by the lender if default was made on the payment of the debt secured.
46. It placed reliance on the case of *John Kaguu Githae v Kenya Commercial Bank Ltd & 2 others* [2014] eKLR where the court declined to grant an injunction on grounds that the applicant had approached it with unclean hands. It asserted that the Plaintiffs were acting in bad faith for the reason that the Grant of Administration of the estate of the deceased was made on November 12, 2019, the deceased having died on May 23, 2011 which the Plaintiffs chose not to inform it of the same. It termed that a blatant misrepresentation and withholding of facts and argued that the Plaintiffs had come to this court with unclean hands and they could not be permitted to benefit from the court of equity.
47. The power exercised by the courts in an application seeking interlocutory injunctive orders is discretionary. The discretion is guided by the principles established in the celebrated case of *Giella v Cassman Brown & Company Limited* (supra).
48. This court was hesitant to conclude that the Plaintiffs had demonstrated a *prima facie* case because they had acknowledged that the deceased's liability for the facility that was advanced by the 1st Defendant was Kshs 3,000,000/=.
49. Going further, this court was not persuaded to find and hold that the plaintiffs would suffer irreparable loss that could not be compensated by damages for the reason that the 1st defendant was a stable national bank that would be able to monetarily compensate the plaintiffs if at the conclusion of the trial, it was to be found that the sale of the subject property was unlawful, illegal and had no legal basis.
50. Having said so, the plaintiffs raised various issues which in the view of this court raised a *prima facie* case specifically the issue of the existence of a legal charge, the specific amount that is owed to the 1st defendant and the issue of the interest levied by the 1st defendant.



51. This court noted the plaintiffs' assertions that there was no legal charge in existence that was executed by the deceased and that the 1st defendant had failed to produce to court true and complete statements of Company's accounts so as to justify its claim for the colossal sum of money over Kshs 300,000,000/= and that no statutory notice of sale had been served upon them.
52. After carefully perusing the documents that the 1st Defendant annexed to its Replying Affidavit, this court saw a Guarantee dated 9th August 1988. It was duly executed by the deceased. Clause 3 of the said Guarantee indicated that the total recoverable from him was Kshs 3,000,000/=. There was no Charge document that was annexed to the 1st defendant's Replying Affidavit. However, there was an Entry dated 18th August 1988 in Part C- Encumbrance Section showed that there was a Charge against the subject property.
53. As the Plaintiffs had asserted that there was no Charge and none was annexed to the Replying Affidavit, this became a matter of evidence to be determined during trial. It is trite law that he who asserts must prove. Indeed, Section 107 (1) of the *Evidence Act* states that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of any facts which he asserts must prove that those facts exist.”
54. The argument that the Plaintiffs raised regarding the Dulum rule was pertinent to answer the question of how much was payable to the 1st Defendant, it at all.
55. The issue of whether or not the 1st defendant's claim relating to the debt was statute barred was relevant. There was need for the court to interrogate the same. This is because the debt appeared to have accrued on 18th August 1988 when the Charge was purportedly registered, the Company allegedly closed shop in 1990, the deceased died on May 23, 2011 and the 1st defendant wanted to exercise its statutory power of sale by way of public auction on April 4, 2022.
56. It was also necessary to establish whether or not the letter dated April 30, 2021 by the 3rd plaintiff to the 1st defendant constituted an acknowledgment of the debt thus rendering the Plaintiffs' argument that the 1st defendant's claim was statute barred moot. The question of whether or not proposals in correspondence that was exchanged on a “without prejudice” basis amounted to an admission of the debt was a critical question to be answered.
57. In addition, the forty five (45) days notification of sale was addressed to both the deceased and the Company that was said to have been wound up. The question of whether or not the same constituted valid notices and whether or not the 1st defendant served the plaintiffs as administrators with the statutory notices of sale was also an issue that needed to be addressed to determine whether or not the 1st Defendant's statutory power of sale had crystallised. Notably, the plaintiffs denied having been served with any statutory notices. The 1st defendant did not rebut that assertion.
58. Whereas this court would not have granted an order on injunction merely because the statutory notices were irregular and/or invalid for the reason that it could have ordered the 1st defendant to re-issue the statutory notices before realising its security notwithstanding the fact that the subject property was a family home because a charged property became a commodity of sale if the chargor defaulted in meeting its obligations under a charge, this court was of the considered opinion that the balance of convenience lay in this court granting an interlocutory injunction to give the court an opportunity to determine the issues it had set out hereinabove in a full trial.
59. It was not logical to permit the 1st defendant to sell the subject property merely because it had the financial might to compensate the Plaintiffs in the even their suit succeeded. It was more prudent



that this court invokes the *lis pendens* doctrine as the issues between the parties herein were heard and determined. In any event, this court noted in Paragraph 9 of the 1st defendant's replying affidavit that it would at the opportune time apply for the Company to be enjoined in the proceedings herein.

60. It therefore served the interests of justice that this court exercises its discretion by conserving and preserving the subject property temporarily pending hearing and determination of the suit.

Disposition

61. For the foregoing reasons, the upshot of this court's decision was that the plaintiffs' notice of Motion application dated March 2, 2022 and filed on March 4, 2022 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein. Costs of the application will be in the cause.
62. It is hereby directed that the plaintiffs file an undertaking as to damages within seven (7) days from the date of this ruling.
63. Matter to be mentioned on March 21, 2023 with a view to giving directions on the Pre-Trial Conference and/or for further orders and/or directions.
64. The court wishes to draw the attention of the parties to order 40 rule 6 of the Civil Procedure Rules, 2010.
65. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **28th** day of **February 2023**

J. KAMAU

JUDGE

HCCOMM NO E002 OF 2022	0
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