



**Mbugua & another v Stanbic Bank Kenya Limited; D. Manji
Construction Limited (Interested Party) (Commercial Case E334 of 2022)
[2023] KEHC 984 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E334 OF 2022
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

FLORENCE WAIRIMU MBUGUA 1ST PLAINTIFF

FARMERS INDUSTRY LIMITED 2ND PLAINTIFF

AND

STANBIC BANK KENYA LIMITED DEFENDANT

AND

D. MANJI CONSTRUCTION LIMITED INTERESTED PARTY

RULING

1. There are two applications for consideration by the court in this ruling. The first application is the plaintiffs' notice of motion dated August 31, 2022 made, *inter alia*, under order 40 rule 1 of the [Civil Procedure Rules](#) ("the Rules") seeking to forestall the sale of land reference No. 209/1530, Pangani, Nairobi, registered in the name of the 2nd plaintiff ("the suit property"). The plaintiffs also seek to obtain a current loan statement for the facilities from the defendant ("the Bank") to inform a court mandated independent audit and determination of the plaintiffs' true level of indebtedness by an auditor jointly appointed by the parties or the court. The application is supported by the affidavit and supplementary affidavit of the 1st plaintiff, who is also a director of the 2nd plaintiff, sworn on August 31, 2022 and September 14, 2022 respectively. The bank opposes the application through the replying affidavit sworn on September 5, 2022 by Amos Mugambi, its Manager, Business Support and Recoveries officer.



2. The second application is by Dmanji Construction Limited (“Dmanji”). It is a chamber summons dated September 19, 2022 under order 1 rule 10(2) of the *Rules*. It seeks to be joined to the suit as an interested party. The application is supported by the affidavit of its director, Dipak Patel sworn on September 19, 2022. It is opposed by the plaintiffs through the notice of preliminary objection dated September 22, 2022 and grounds of opposition of the same date. It is also opposed by the bank through its grounds of opposition dated September 27, 2022.
3. When this matter came up for directions, I informed the parties that I would deal with both applications together. The parties have also supplemented their arguments through written submissions.

Background

4. The basic facts leading to this suit are not in dispute and are set out in the pleadings and depositions and are as follows. Sometime in September 2012, the 1st plaintiff applied for and was granted loan facilities of Kshs. 250,000,000.00 and Kshs. 137,000,000.00 by the bank for the purpose of constructing a commercial building on the suit property. The loan facility was secured by a legal charge and further charge dated March 10, 2014 and June 12, 2017 over the suit property respectively.
5. The plaintiffs fell into arrears in making repayments to the bank but after negotiations, the bank agreed to restructure the loan through the term loan letter dated November 9, 2016 where the Bank agreed to a compromise amount of Kshs. 218,500,000.00 noting that the outstanding amount stood at Kshs. 234,561,000.00 together with interest, which was then waived by the Bank.
6. While the plaintiffs had been making intermittent repayments to the bank, the bank claimed that they were insufficient to regularize their loan account and on February 3, 2022, the bank issued the plaintiffs with a 90-day statutory notice seeking installment arrears of Kshs. 12,771,290.08 while stating that the total outstanding debt stood at Kshs. 156,306,968.93. The bank followed this up with a 40-day notification of sale dated May 6, 2022 and after conducting a valuation of the suit property, it instructed auctioneers who served upon the plaintiffs a 45-day redemption notice dated July 12, 2022 and an accompanying Notification of Sale.
7. The auctioneers then advertised the suit property for sale by public auction in the newspapers on August 29, 2022 intimating that the sale was scheduled for September 13, 2022. It is this impending action by the Bank that prompted the Plaintiffs to file this suit together with the application for injunction. I now turn to consider the application for joinder.

Intended Interested Party’s application for joinder

8. DManji states that on October 23, 2012, it entered into an Agreement and Conditions of Contract for Building Works with the 2nd Plaintiff for construction of an office block on the suit property. That a dispute arose over non-payment of the contract sum and consequently, DManji filed HCCC No 286 of 2016; *D. Manji Construction Limited v Farmers Industries* seeking various reliefs including payment of outstanding money due to it. The suit is still pending determination before the court.
9. When the Bank advertised the suit property for sale, DManji became apprehensive that it would not recover any decretal sum due to it if its suit against the 2nd plaintiff succeeds as the suit property is the only asset owned by the plaintiffs. DManji contends that since the issues in both cases relate to the same parties and the same suit property, it would only be just and equitable that the orders sought herein be granted, to avoid a multiplicity of suits and that it will not prejudice the parties in the suit if DManji is joined to the suit as an interested party.



10. The plaintiffs oppose DManji's application. They contend that the issue of alleged breach of the Contract for Building Works entered into between DManji and the 2nd Plaintiff is pending determination in HCCC No. 286 of 2016, therefore, the said suit is *sub judice* and the court was barred from proceeding with the trial of the suit by the provisions of section 6 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya). That DManji is neither a secured creditor, a judgment-creditor nor a decree-holder as against the 2nd plaintiff. The Plaintiffs contend that the Contract for Building Works was a fixed costs contract which for which the 2nd plaintiff paid for in full hence DManji's chances of success are very thin.
11. The Bank opposes DManji's application. It submits that there is no legal basis for granting the orders sought as the dispute herein is between the 1st Plaintiff as borrower, the 2nd Plaintiff as chargor and the Bank as chargee arising from contractual obligations to which DManji is not a party. It therefore urges that DManji has not established any cause to be joined to these proceedings.
12. The bank states that DManji's application is an abuse of the court process since it has filed the suit HCCC No. 286 of 2016 which is pending determination and that DManji has filed another application HC Misc. No. E648 of 2022 which is similar to the application before this court and therefore its joinder to this suit would be superfluous. It avers that DManji's presence is not necessary for the Court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced and that its joinder will lead to practical problems in handling the existing cause of action, is unnecessary, will occasion unnecessary delay to the determination of the present application and suit and will raise the costs of litigation to the prejudice of the parties herein.
13. Under order 1 rule 10(2) of the *Rules*, the court has undoubted discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Pravin Bowry v John Ward & another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) where the Supreme Court of Uganda observed that:

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.
14. I am constrained to agree with the Bank that there is no nexus between the cause of action by the plaintiffs against the Bank and DManji's cause of action against the 2nd Plaintiff. The case before the court deals with the rights and obligations of the parties under agreements for the advancement of loan facilities secured by a charge of over the suit property. DManji is not a party to the agreements and neither does it have any interest in the suit property and has not demonstrated that it has a legal claim to the suit property. Its claim is, at best, speculative as it is based on the successful outcome of a pending suit. By filing suit against the 2nd plaintiff, it tacitly admits that its claim against the Plaintiffs is based on a Construction Agreement and the debt arising therefrom.
15. I therefore hold that DManji is not necessary to determine the rights of the parties and effectually determine the dispute between the parties to this suit. Even if DManji had an interest in the suit



property, that interest cannot override that of the Bank which holds a registered interest that is protected by section 25(1) of the Land Registration Act, 2012 which provides that ‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.’ (see China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others ML HCCC No. 76 of 2019 [2020] eKLR)

16. Since no meaningful purpose will be served by the joinder of DManji as an interested party to this suit, the application fails and is accordingly dismissed.

The Defendant’s application for injunction

17. As stated, the Plaintiffs seek to forestall the sale of the suit property on the ground that the intended sale is illegal, null and void. That the Bank’s intended sale of the suit property is a result of a delay of 8 days in paying Kshs. 10,225,000.00 for the 2nd quarter for the year 2022 which amount, together with the accrued interest and penalties all amounting to Kshs. 11,340,169.90, was duly paid by the 1st Plaintiff on August 8, 2022. The Plaintiffs aver that despite all the outstanding loan arrears having been cleared on August 8, 2022, which payment was duly acknowledged by the Bank, the Bank and the auctioneers have still advertised the suit property for sale and that the Bank has communicated to the Plaintiffs its intentions to re-advertise the unlawful intended sale of the suit property.
18. The Plaintiffs are apprehensive that the bank might proceed to dispose of the suit property thus exposing the Plaintiffs to irreparable loss and damage hence rendering this application nugatory and useless. That it is in the interest of justice that this application be allowed as prayed.
19. The bank denies that the plaintiffs have diligently serviced the loan facility on the due dates which for the year 2022 fell due on January 27, 2022, April 27, 2022, July 27, 2022 and October 27, 2022. The Bank avers that the facility is non-performing with arrears of Kshs. 10,264,850.10 and an outstanding balance of Kshs. 145,531,832.40 as at September 2, 2022 and that the quarterly installment that fell due on July 27, 2022 was yet to be paid. That the payment of Kshs. 11,340,169.90 alleged by the Plaintiffs to have been utilized for payment of the entire arrears was utilized to cover the quarterly installment which had fallen due on April 27, 2022 and that the installment which fell due on July 27, 2022 was yet to be paid. The Bank states it accommodated the Plaintiff on numerous occasions.
20. Regarding the allegation that the arrears were duly cleared on August 8, 2022, the Bank avers that the arrears amount as at August 8, 2022 was a figure of KES. 21,536,200.20 and that the plaintiffs subsequently paid an amount of Kshs. 11,341,000.00 on August 11, 2022 which was inadequate to regularize the arrears position. The Bank contends that through an email communication of August 25, 2022, the 1st Plaintiff acknowledged that the account was in arrears and proposed to clear the arrears by September 16, 2022. That in addition, the valuation costs debited to the account on May 4, 2022 are yet to be paid.
21. The Bank maintains that it has complied with all the statutory requirements to enable it exercise its statutory power of sale which has arisen and the entire debt of Kshs. 143,531,832.40 is now due. That it forwarded to the Plaintiffs the 90-day statutory demand notice on February 3, 2022 which was served via email to fXXXX@gmail.com and fXXXX@yahoo.com on Friday, February 4, 2022 at 1057hrs and that this is the same email address used to serve the 40-day notification of sale that the Plaintiffs have admitted receiving. The Bank adds that on February 8, 2022, it sent the 90-day statutory notice to the plaintiffs by registered post. In sum, the Bank states that it has complied with all the requisite



provisions of the law regulating the Chargee's statutory power of sale and that the Plaintiffs have not made out a case to warrant the grant of the orders sought.

Analysis and Determination

22. The principles governing the grant of an interlocutory injunction are well settled in *Giella v Cassman Brown* [1973] EA 348 and are still good law. In order to succeed, the applicant must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (supra)* and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.
23. As to what constitutes a *prima facie* case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained that 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 to call for an explanation or rebuttal from the latter.”
24. A *prima facie* case with a probability of success proceeds is grounded on the pleadings, in this case the plaint. In their plaint, the Plaintiffs aver that they are up to date with their loan repayment and that they rectified the default on August 8, 2022 by paying all the outstanding arrears, interest and penalties totalling to Kshs. 11,341,000.00 as advised by the Bank. They claim that they were not served with 90-day statutory notice as required under section 90 of the *Land Act*, 2012, that the Bank did not supply them with the statement of account showing the outstanding amount to warrant the advertisement for sale of the suit property and that no demand for payment has been made by the Bank particularly after receiving Kshs. 11,341,000.00 from the Plaintiffs on 8th August 2022. The Plaintiffs also plead that the charge documents are imprecise as to the amount borrowed and the remedies thereof, that no recent valuation of the suit property has been undertaken and that the Bank has improperly and unlawfully altered the rate of interest during the term of the loans without regard to the contracts between the parties and the law.
25. Having gone through the pleadings, depositions and submissions, I am unable to agree with the Plaintiffs that they have made out a *prima facie* case with a probability of success on the grounds raised in the plaint and application.
26. First and on the issue of indebtedness, I find that at the material time the Plaintiffs were not up to date with their loan repayments as they allege. Their averment that they rectified the default on 8th August 2022 by paying Kshs. 11,341,000.00 is negated by the 1st Plaintiff's email of 25th August 2022 addressed to the Bank where she expressly admits that she was still indebted and promised to pay arrears of Kshs. 10,225,363.75 on or before 16th September 2022 “without fail”. This correspondence was preceded by the 1st Plaintiff's request to the Bank on the outstanding arrears. The Plaintiffs' contention is further negated by the Bank which has annexed loan statements indicating a debit balance meaning that the Plaintiffs were still indebted to the Bank after the said 8th August 2022. Section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) creates a presumption in favour of the Bank that a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry,



and of the matters, transactions and accounts therein recorded. The Plaintiffs have not shown that any of the entries in the statement of account are erroneous, false or fraudulent.

27. I also find that the Bank has demonstrated that it served the 90-day statutory notice as evidenced by the certificates of postage. The Plaintiffs have not denied that the email addresses indicated therein do not belong to them. As stated, I find that the Bank actually forwarded a statement of account to the 1st Plaintiff indicating the amount owed and the 1st Plaintiff acknowledged receipt of the same and promised to make payment without disputing the extent of indebtedness.
28. Contrary to the assertion that the Bank has not carried out a recent valuation of the suit property, the Bank placed before the court a valuation report dated 12th April 2022 prepared by Hallmark Valuers Co. Limited. The valuation was carried out within four months before the suit property was put up for sale in line with section 97(2) of the Land Act, 2012 and the Auctioneers Rules.
29. I reject the Plaintiffs contention that the charge documents are imprecise as to the amount borrowed and remedies available to the Plaintiffs. In their application, the Plaintiffs actually state, with precision, the amount borrowed. They also do not deny that the amount borrowed was compromised by consent in court in HCCC No. 394 of 2015. I further find that the Plaintiffs' contention that the Bank has improperly and unlawfully altered the rate of interest during the term of the loans without regard to the parties' contracts is an afterthought as the Plaintiffs had already admitted indebtedness and did not raise issue about the rate of interest when the sums due were presented to them. In any case and as a general rule, a dispute in interest is not a basis for issuance of injunction against exercise of the chargee's power of sale unless it is easily discernible from the terms of the charge and law that usurious or illegal interest had been charged (see Charles Alex Njoroge v National Bank of Kenya Ltd and another ML HCCC No. 173 of 2014 [2015] eKLR). Even so, the allegation is vague, lacks particularity and is not supported by any evidence demonstrating the fact that terms of interest are contrary to the agreements between the parties and the law.
30. Having reached the conclusion that the Plaintiffs have failed to demonstrate a prima facie case with a probability of success, the inquiry whether they are entitled to an injunction ends at this point in line with the dicta in Nguruman Limited v Jane Bonde Nielsen and 2 others (*supra*). Further, since the Bank has already provided an updated loan statement that indicates the amount due and since the same is not substantially disputed, no further statement or audit is necessary to determine what the Plaintiffs owe the Bank at this point.

Disposition

31. The Plaintiffs' application dated August 31, 2022 lacks merit and is therefore dismissed with costs to the defendant.
32. Likewise, the application by the intended interested party dated September 19, 2022 is dismissed with costs to the plaintiffs and the defendant. The proposed interested party shall pay costs assessed at Kshs. 30,000.00 to the plaintiffs and the defendant respectively.

DATED and DELIVERED at NAIROBI this 17th day of FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mbabu instructed by Lawrence M. Mbabu and Associates Advocates for the Plaintiffs

Ms Mutisya instructed by Walker Kontos Advocates for the Defendant



Ms Olembo instructed by Nyiha, Mukoma and Company Advocates for the Intended Interested Party

