



**Benja Properties Limited & another v Standard Chartered Bank
Kenya Limited & another (Commercial Case E090 of 2022)
[2023] KEHC 4027 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E090 OF 2022**

**A MSHILA, J
APRIL 28, 2023**

BETWEEN

**BENJA PROPERTIES LIMITED 1ST PLAINTIFF
USAFI SERVICES LIMITED 2ND PLAINTIFF**

AND

**STANDARD CHARTERED BANK KENYA LIMITED 1ST DEFENDANT
PHILIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT**

RULING

1. The Notice of Motion dated 21st March 2022 brought under Sections 1A, 1B, 3A and Section 63 (b) and (e) of the *Civil Procedure Act*, Order 40 Rule 1, 2 and 4 of the *Civil Procedure Rules*; Section 90, *Land Act*; and Article 40, & Article 50(1) *Constitution* for the following orders;
 - a. Pending the hearing and determination of the suit filed herewith, the Court to grant a temporary injunction restraining Defendants/Respondents whether by themselves, directors, employees, servants, agents and/or otherwise anyone claiming under its authority from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a Chargee to lease, let, charge or otherwise howsoever interfering with the Applicant's quiet possession, ownership of and title to all that parcel of land known as Land Reference Number 209/477/24.



- b. The Court to grant such other Orders as it may deem fit and necessary to give effect to the justice of this dispute and to preserve the Subject Matter in this Suit being Property as Land Reference Number 209/477/24.
 - c. The costs of the Application be provided for.
2. The Application was supported by the sworn Affidavit of Geoffrey Chege Kirundi and by the grounds on the face of it.

Applicants' Case

3. It was the Applicants' case that the facility advanced to the 2nd Plaintiff dated 4th May, 2020 which the Defendant Bank seeks to realize was not secured by the 1st Plaintiff (Guarantors) charged property and therefore the Defendant Bank cannot purport to exercise a non-existent statutory power of sale over the charged property.
4. The 1st Plaintiff (Guarantor) cannot be held liable for the debts of the 2nd Plaintiff (Borrower) noting that the said debt is not secured by the 1st Plaintiffs (Guarantor's) charged property and therefore the Defendant Bank cannot purport to exercise its rights over the 1st Plaintiff (Guarantors) property.
5. It is not in contention that on or about April, 2015, the 2nd Plaintiff/ Applicant approached the Defendant Bank for a facility in the sum of KES 41,000,000/= which the Bank approved and the same was secured by a charge dated 2nd April, 2015 over the property known as Land Reference Number 209/477/24 (the charged property).
6. It was also the Applicants' submission that the facilities dated 20th December, 2019 and 4th May, 2020 advanced to the 2nd Plaintiff (Borrower) not being secured by the 1st Plaintiffs (Guarantor's) charged property, the Defendant Bank cannot purport to exercise a non-existent statutory power of sale over facilities that were not secured by the charges registered against the 1st Plaintiffs (Guarantor's) charged property and therefore the statutory notices issued are null and void as the Defendant Bank does not have a registered charge securing the said facilities it now seeks to realize.
7. The Defendant Bank cannot therefore purport to hold the 1st Plaintiff (Guarantor) liable for debt owed by the 2nd Plaintiff (Borrower) and which debt has not been secured by the Guarantor's charged property. The 1st Plaintiff (Guarantor) cannot be treated as the principal debtor and it is not liable for the amount claimed from the Defendant Bank emanating from facilities advanced to the 2nd Plaintiff and which facilities were not secured by the Guarantor's charged property and therefore the Court should not allow the Defendant Bank to recover the amounts owed by the 2nd Plaintiff (Borrower) by selling the 1st Plaintiffs (Guarantor's) property without the said facilities being secured by the charged property. The Bank is simply attempting to exercise a non-existent statutory power of sale over the Suit Property, and the said actions should not be enforceable in law.
8. The notices issued by the Defendant are therefore null and void as the same was issued in regard to facilities not secured by the charged property. The other facilities secured by the charged property are performing and the Plaintiffs have not defaulted. The facility of KES 30, 000, 000 having been almost fully repaid with a balance of KES 3M, the Plaintiffs were shocked that the Defendant Bank after advancing facilities not secured by the charged property (dated 20th December, 2019 and 4th May, 2020) with the last amount being disbursed on 29th March, 2021 came guns blazing threatening to sell the Suit Property alleging that the facilities were in arrears of eleven (11) days in the sum of KES 156, 814.95 and the Plaintiffs are apprehensive that the same is a ploy to depose the 1st Plaintiff of its



property strategically located in CBD with an aim of selling it at a gross undervalue, for facilities not secured by the Property.

Respondents' Case

9. In response, the Respondent submitted that the Plaintiffs have not met the indispensable and requisite threshold for the grant of the orders sought in the Application. The Plaintiffs have not adduced any credible evidence to show any infringement of a clear and unmistakable right, and the probability of success of their case at trial.
10. Further, the Plaintiffs have not attempted to demonstrate that damages would not be an adequate remedy in the circumstances and that the 1st Defendant would be incapable of paying such damages if their suit succeeded at trial. The Respondent asked the Court to take judicial notice that the 1st Defendant is one of Kenya's largest and most profitable banks.
11. On the issue of irreparable harm, it was the Respondents' submission that the Plaintiffs have argued that they stand to suffer irreparable damage if the Suit Property is sold by the 1st Defendant in the exercise of its Statutory power of sale since the sale would be at undervalue and would fetter the Plaintiff's equity of redemption because they intend to sell it themselves.
12. It was the Respondent's contention that once a charge is taken over a property, it becomes a commercial commodity in the market which in the event of default may be sold by the chargee in exercise of its power of sale as was held in *Matex Commercial Supplies Limited & Ano. Vs Euro Bank Limited (in liquidation) [2007]* eKLR.
13. The balance of convenience tilts in the Defendants' favour because it would be unconscionable for the Plaintiffs to require the 1st Defendant to wait indefinitely for them to regularize their finances whilst owning and/or occupying the suit Property they offered as security under binding contracts.

Issues for Determination

14. Having considered the Application and the written submissions by the respective parties; the court frames only one issue for determination:
 - a. Whether a temporary injunction should issue against the Respondent?

Analysis

15. In determining this issue, it is pertinent to state the law and principles on granting temporary injunctions. The law on granting of a temporary injunction is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules*.
16. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited (1973) EA 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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.”



17. The test for granting of an interlocutory injunction was considered in the American Cyanamid Co. v Ethicom Limited (1975) 1 AER 504 where three elements were noted to be of great importance namely: -
- i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
18. The case of Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others (supra) defined prima facie as follows:
- “A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
19. It was the Applicant’s case that the Defendant Bank should not purport to hold the 1st Plaintiff (Guarantor) liable for debt owed by the 2nd Plaintiff (Borrower) and which debt has not been secured by the Guarantor’s charged property. Further, the facility advanced to the 2nd Plaintiff dated 4th May, 2020 which the Defendant Bank seeks to realize was not secured by the 1st Plaintiff (Guarantors) charged property and therefore the Defendant Bank cannot purport to exercise a non-existent statutory power of sale over the charged property.
20. The court has had a chance to peruse the evidence adduced by the parties and it is notable that the facility advanced to the 2nd Plaintiff dated 4th May 2020 states clearly that;
- “The Facility Letter shall constitute an amendment and restatement of the previous facility letter dated 20th December 2019 (the Previous Facility Letter). All securities executed pursuant to the previous facility letter shall remain in full force and effect to secure the obligations of each borrower to the bank under this facility letter unless otherwise agreed by the Bank and the Borrower.”
21. Further to the above, the parties herein that is the 1st and the 2nd Plaintiff both signed the said facility binding themselves to the terms of the bank and in the process agreed to secure the facility with the previous security.
22. The Applicant was well aware that the charged property secured the 2nd Plaintiff’s facility and cannot purport to claim otherwise at a stage when the Bank intends to realize the charged property to recover the debt owed to it.
23. It is not disputed that there is default in the repayment of the loan or that the requisite notices for the exercise of the statutory power of sale were not duly served on the Plaintiffs.
24. Based on the evidence before the court the Applicant has failed to establish a prima facie case with probability of success. Having failed to establish the same, the court will not delve into considering the other principles for the grant of an order for temporary injunction.
25. The upshot of the above is that the Court is not satisfied that the Applicant has made a prima facie case for the grant of the interlocutory injunction it seeks.



Findings And Determination

26. From the forgoing this court makes the following findings and determinations;

i. This court finds that the application seeking temporary injunctive orders to be without merit and it is hereby dismissed;

ii. The applicant shall bear the costs of this application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Mwangi for plaintiff/Applicant

Karanja for the Defendant

Sarah-----Court Assistant

