Muthigoro v Stanbic Bank Kenya Limited & another (Commercial Case E005 of 2022) [2023] KEHC 21092 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 21092 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E005 OF 2022

DKN MAGARE, J

APRIL 28, 2023

BETWEEN

JOHNSON MUREI MUTHIGORO ..... PLAINTIFF

AND

STANBIC BANK KENYA LIMITED ..... 1ST RESPONDENT

THAARA AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. The Application dated 8/2/2022 which was supported by an affidavit sworn on 2/2/2022 and was filed under certificate of urgency and some orders were issued. Thereafter the urgency dissipated. The Application was filed on 8/02/2022, together with the plaint and supporting documents. The dispute related an auction reportedly to recover Ksh. 22,232,594/= being arrears for a loan given by the 1st defendant.

2. The auction was suspended by the court pending hearing and determination of the application dated 8/2/2022. We have had this application pending for one year and almost 6 months.

3. The issues raised in this matter are: -

    a. whether a notice under section 90 of the *Land Act* was not complied with 40 days' notice was not given.

    b. whether the bank unlawfully refused to give its consent under section 87 of the *Land Act*.

4. The applicant pleaded that he had a private treaty which were to sell the charged properties at Ksh 11,000,000/=. The suit property is said to consist of apartments B201 and 202 situate of LR No. 20458 (Original 3158 Section I Mainland North. The plaintiff urges the Court to refuse remedies under Section 104 of the *Land Act*.

Response

5. By an affidavit dated 6/5/2022 the 1st respondent gave a history of the dispute and stated that a statutory notice was issued on 29/12/2020 and a statutory notice was issued dated 21/7/2021. Further, another notice was affixed to the property. Subsequently, a 45-day notice was issued and it is set out at page 54 to 65 of the record of the notice of motion.

6. According to the defendant, the plaintiff is stated to have admitted the debt though an email dated 13/1/2022. He undertook to settle the same. According to the defendant, a sum of Ksh 21,308,553.78 as at 26/4/2022.

Analysis

7. The application of this nature, being an application for injunction, the plaintiff needs to meet the terms set out in *Giella v Cassman Brown & Co Ltd* (1973) EA, 358, 360 the court must be satisfied in the words or of Spry VP as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa.
>
> a. First, an applicant must show a *prima facie* case with a probability of success.
>
> b. 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.
>
> c. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

8. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a *prima facie* level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
>
> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

9. The main case was that there was no notice served. However, there is a notice on the file. Full accounts were also supplied.

10. To be able ascertain the three limbs, we need to start, to look at each at each sequentially. As regards to *prima facie* case, the high court at Kajiado, in *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR, had this to say:-

"13. The applicant relies on *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR on the definition of a *prima facie* case as one which on the material presented in court, a tribunal property 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 respondent."

11. In the case of *http://kenyalaw.org/caselaw/cases/view/10428/ Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR, the court of Appeal stated as doth: -

4. A prima facie case in a civil application includes but is 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 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.

5. The Court of Appeal took all relevant matters into question in deciding whether the appellants presented a *prima facie* case."

12. In *Catherine Mutheu Ndung'a v Kenya Commercial Bank Ltd & another* [2019] eKLR, Justice, P J O Otieno held as doth: -

> " In *Yellow Horse Inns Limited v Nduachi Company Limited & 2 others* [2017] eKLR the court of appeal said of the three pillars:-
>
> All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a prima facie case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there. Only where there is doubt as to whether a prima facie case is made out or as to the adequacy of the remedies in damages that the question of balance of convenience would arise. It must follow from this that the existence of a prima facie case does not permit the applicant to "leap-frog" to an injunction directly without crossing the other second, and probably the third hurdles in between."

13. In *Aldofo Guzzini & another v Emmanuel Charo Tinga* [2006] eKLR, justice W. Ouko, stated as doth: -

> " I have considered the arguments as well as the authorities cited in support of each party's case. It has now been established beyond peradventure that an interlocutory prohibitory injunction can only issue where the applicant has established a prima facie case with a probability of success. It will, however, not normally issue where damages are shown to be adequate to compensate the applicant. Finally, where there is doubt as to *prima facie* case or adequacy of damages, the court will decide the dispute on a balance of convenience. See the case of *Giella v Cassman Brown Ltd*, (1973) EA 358.

> In considering whether a prima facie case has been established the court must ensure it does not go into the merits of the parties respective cases as that is reserved for the trial of the dispute. At this stage the court is only concerned with a prima facie case as defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) KLR 125."

14. Looking at the application in its totality, it is clear that the Applicant is indebted to the defendant and has not paid. The notices have on a prima facie basis nit been impeached. In the circumstances, I am of the view that the Plaintiff has not established a prima facie case.

15. Having found that there is no prima facie case, it is not necessary to move to the other limbs set out in *Giella v Cassman Brown & Co Ltd* (*supra*). Therefore, it is unnecessary to address the other ground.

16. Consequently, I dismiss the Application for lack of merit.

Determination

17. The upshot of the foregoing, I make the following orders: -

    a. The application dated 8/2/2022 is dismissed with costs of 20,000/-

    b. The matter to proceed for directions forthwith.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Kabuga for the plaintiff

Ongeri for the defendant

Court Assistant - Brian