



REPUBLIC OF KENYA



**Muthusi v NIC Bank Limited & another (Civil Suit E086 of 2022)  
[2023] KEHC 18629 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E086 OF 2022  
DKN MAGARE, J  
APRIL 28, 2023**

**BETWEEN**

**RITAH NDUKU MUTHUSI ..... PLAINTIFF**

**AND**

**NIC BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed suit seeking the following orders: -
  - i. That this application be certified as urgent and service be dispensed within the first instance and the Application be heard Ex parte.
  - ii. That pending hearing and determination of this application, this Honourable Court be pleased to issue orders restraining the Respondent by themselves, their employees and/or agent from attaching, advertising, auctioning or selling the applicant's property known as LR No MSA/MS/Block1/337A and/or interfering with the Applicant's right to quite possession.
  - iii. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order compelling the respondent herein to produce the Mortgage Protection Insurance Policy.
  - iv. That pending hearing and determination of this suit, this Honourable Court be pleased to issue orders restraining the respondent by themselves, their employees and/or agent from attaching, advertising, auctioning or selling the Applicants property known as LR No MSA/ MS/ Block 1/ 337A and/or interfering with the Applicant's right to quite possession.
  - v. That the Cost of this Application be provided for.



2. The Plaintiff was filed together with a notice of motion dated November 28, 2022. The said notice of motion was supported by the affidavit of the applicant setting out the matters in dispute in 28 long paragraphs.
3. The Applicant's main contention is that the administration of the estate of her late husband, one David Waiganjo (deceased) is yet to be determined vide Nairobi P & A E097/2020 before Justice Maurine Odero, the Presiding Judge of the Family Division. The applicant indicates that due to the succession the estate has been unable to service the loan. In addition to that there was an insurance over the loan in case of death. Though they paid, she does not have a copy of the insurance policy.
4. According to the Applicant Insurance should pay a substantial amount of loan. The plaintiff, is a co-borrower and as such also bound to pay. She however, maintains that she will pay her part.
5. There was a public auction scheduled for November 29, 2022 which was stayed by the Court. The orders are subsisting to date.
6. There is an also a claim that a statutory Notice under Section 90 of the *Land Act*, 2012 had not been issued and or served on the Deceased's estate.
7. The notification of sale was equally said not to have been issued nor was there valuation. The Applicant indicates that the loan was taken out by the husband and her. However, the husband died on September 10, 2022 though a road traffic accident.
8. By a Replying affidavit dated December 9, 2022 and filed on December 13, 2022, sworn by Ibrahim Mbogo Ngatia, Counsel for NCBA Kenya Pc, successor of the Respondent, the Respondent states that the application ought to be dismissed.
9. They are of the view that the death resulted in the title being passed to the survivor and does not form part of the estate of the deceased. The applicant should as such shoulder the entire amount as a burden to the title to which she is now a sole proprietor.
10. In their view, there is no need of awaiting succession. Both parties consented to the charging of the suit property and as such it is available as a chose in action for sale. The purpose of the loan was to create a facility on the suit land, Mombasa/Ms Block 1/ 337A. The parties fully accepted the terms of the loan and the parties were joint owners, and as at now the property belongs to the Applicant.
11. To there all notices were sent by Ms Wainaina Iren Advocates LLP. They set out how they were sent. Vide MN 16, the Respondent said they served 30 days' Notice on the estate of the late David Waiganjo. The letter is said to have been served on December 9, 2021. Annexed to the affidavit was a valuation report with a forced sale value of Ksh 18,750,000/= and marked value of Ksh 25,000,000/=.

## **Analysis**

12. The court noted that at the time of sending notices to the late Waiganjo, he was not late. However, he was served as late. I am perplexed by the valuation. Though ordinarily the valuation should not be the main cog, in such applications, something is not adding up in the instant case. The property was bought and charged for Kshs 28,440,000/= in 2015. This was said as per the letter of offer to be a certain fraction of the value.
13. There was to be evidence of a deposit of Kshs 6,560,000 being the Applicant and the husband's share. The property was valued at that time at Ksh 31,600,000/= in 2015. This was before erection of the building financed by the Respondent. After erection of the building the value of the property apparent plummeted to 25,000,000/=, 8 years later.



14. None of the parties have shown this there was a disaster or drastic slump in the market to have property initially valued at 31.6 million, 8 years ago to depreciate to 25,000,000/= after a house is built on it. To that extent I agree with the Applicant of under valuation has been shown to be triable issue and a prima facie case has been shown
15. The second aspect of prima facie is the issue of service of Notice. There are joint owners of the suit property, and there is no explanation as to who was served on behalf of the estate of the deceased. Failure to serve the deceased's administrators with the notice is apparent there is an affidavit of service purporting to have served the notices. They are not attached to the affidavit. We cannot know the content of such a notice.
16. I have seen other aspects that point out to an illegal sale. However, I may not fully address them at this stage without evidence being tendered and without expressing a priori opinion.
17. I am therefore satisfied that the Applicant has established a prima facie case in terms of the decision of *Giella v Cassman Brown & Co Ltd [1973] EA, 358, 360*. The 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. 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 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.'

18. 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.'



19. The Court of Appeal was of the view that these tests are sequential and as such, the Applicant must also satisfy the other limbs.

### **The irreparable loss.**

20. The issue of irreparable is not strictly issue of non-financial loss. Where there is a possibility and a rent one at that is being subjected to an illegal process, the Court will find that such an irreparable loss. It has already been shown that there was no service on the deceased or his estate. Further the value in the valuation is over 20% less than it was before the house was built 8 years ago.
21. Once sold, the property is sold, it will be impossible to get the correct value of the house is either demolished or improved. There is a clear disconnect between the valuations. The prior valuation is higher than the later. Whereas ordinarily land appreciates, this particular one depreciated so much. This is in spite of the improvements thereon. There is no way of getting the correct value after sale. This can only be settled during the hearing. The parties may need to agree on joint valuations of separate valuations. I cannot direct the same while dealing with this matter.
22. The balance of convenient tilts in favour of the Applicant. The Respondent still has securities which can be realized. In the case of *Brenda Karanja v Mweki Dominic [2021] eKLR*, the court stated: -

' The courts are duty bound to determine matters on a balance of probability whilst taking into consideration the facts and evidence that has been placed before them. In the case of *Arbuthnot Express Services Limited vs Manchester Outfitters Suiting Division Limited & Another [1989] LLR 5515 (HCK)* the court observed as follows:-

'The general principle of law is that as far as possible, the courts should lean in favour of the trial and determination of proceedings on merits. There are yet other principles viz that delay defeats equities and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts.'

23. In the circumstances, I find the Application merited and I allow the same.
24. Prayer 3 of the application not anchored in the plaint. In any case, given that existence of the insurance is not denied, the Defendant has a duty to have the same produced by didn't of section 112 of the *evidence act*. I need not say the consequences of the same being availed. Section 112 of the *evidence act* provides as doth: -

' In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

25. I shall not grant that prayer. It does not however, mean that it is not merited. Discovery is yet to be exhausted.

### **Determination**

26. The upshot is that the Application dated November 28, 2022 is merited and I allow the same in the following terms: -
- a. A temporary injunction do issue restraining the Respondent by themselves, agents, successors, employees, assigns, auctioneers and or agents from selling by public auction or private treaty or in any way exercising the statutory power of sale of all that parcel of land known as LR No MSA/MS/ Block



- 1/ 337A and/or interfering with the Applicant's right to quiet possession pending the hearing and determination of this suit.
- b. Prayer 3 is declined as the same is not anchored in the plaint.
- c. The injunction shall automatically lapse on April 27, 2023.
- d. The plaintiff should thus take all steps to prosecute the suit before then.

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

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

**Miss Olwe for the Plaintiff**

**Nzamsa for Ms Omote for the Defendant**

**Court Assistant - Brian**

