



Circuit Business Systems Limited & 2 others v Housing Finance Company Limited (Commercial Civil Suit E274 of 2022) [2023] KEHC 17784 (KLR) (Commercial and Tax) (26 May 2023) (Ruling) (with dissent)

Neutral citation: [2023] KEHC 17784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E274 OF 2022**

FG MUGAMBI, J

MAY 26, 2023

BETWEEN

CIRCUIT BUSINESS SYSTEMS LIMITED 1ST PLAINTIFF

GODFREY OCHIENG OWINO 2ND PLAINTIFF

MARGARET MUENI OWINO 3RD PLAINTIFF

AND

HOUSING FINANCE COMPANY LIMITED DEFENDANT

RULING

Brief Facts

1. The respondent bank offered a loan facility of Kshs 134,939,786 to the 1st applicant vide a letter of offer dated 24th December 2021. The facility was secured by property known as LR No. 214/469 (herein the suit property) and deeds of guarantee and indemnity executed by the 2nd and 3rd applicants who are the directors of the 1st applicant. It was a term of the facility that in case of default in making the payments, the bank would realize the security.
2. The 1st applicant defaulted and the bank began the process of realizing the security. Statutory notices were sent to the applicants who then filed a suit on 20th July 2022 seeking to stop the bank from selling the suit property. They also filed the application before the court which is dated 20th January 2023. It was brought under sections 1, 1A, 1B, 3, 3A, 63(c) & (e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 20, Order 40 rules 1, 2, 4 & 8 and order 51 rule 1 of the *Civil Procedure Rules* 2010 and Section 103 of the *Land Act* 2012.
3. The application seeks the following orders;



- i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to grant a temporary injunction restraining the respondent whether by themselves, agents, employees and/or servants from dealing, interfering, alienating or otherwise selling by public auction, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the Plaintiffs' ownership of and title to all that residential development erected on property known as Land Reference Number 214/469 situate in Muthaiga, Nairobi pending the hearing and determination of this suit.
 - iv. That the defendant be directed to render and deliver to the plaintiffs true and correct accounts and the entire statements of accounts of the Plaintiffs' accounts operated by them in respect of the loan account.
 - v. That the Honourable Court do order for valuation of the suit property by an independent valuer or by a valuer appointed by both parties to ascertain the market and forced sale value of the suit property.
 - vi. That the costs of this application be provided for.
 - vii. That the court be pleased to issue such other or further order and directions as may appear to it just and convenient.
4. The application is premised on the grounds on the face of it and supported by the affidavit of Godfrey Ochieng Owino sworn on 20th January 2023. They also filed their written submissions dated 21st February 2023.
 5. The applicants acknowledge that they obtained a loan facility from the respondent against such securities as earlier stated. They also acknowledge that they ran into arrears setting in motion the process for the respondent to exercise its statutory power of sale. The applicants' main contention is that the respondent had greatly undervalued the suit property in breach of section 97(2) of the Land Act for failing to obtain the best available value for the security.
 6. The argument by the applicants is based on previous valuations carried out on the subject property. It has been submitted that when advancing the loan to the applicants, the respondent commissioned a valuation. The valuation report dated 28th January 2020 returned an open market value of Kshs. 270,000,000/= and a forced market value of Kshs. 202,500,000/=.
 7. The applicants aver that a later valuation report dated 25th May 2022 also commissioned by the respondent had returned a value of Kshs. 240,000,000/= and 180,000,000/= respectively. This was the report that the respondent was using as the value of the property for purposes of the sale.
 8. The applicants allege that the latter is an understatement of the true value of the suit property. It is their case that if allowed to proceed to the sale with the current valuation, they will be greatly prejudiced. Counsel submitted that in order to ascertain the true value of the property there should be an independent valuation of the suit property.
 9. The second ground of contention is that the purported sale is based on a loan amount that is erroneous, disputed and grossly overstated. It is their case that the sale ought not take place so as to allow for proper accounts. The applicants specifically faulted the respondent for unconscionable interest rates



and unjustified legal fees which according to the applicants had further inflated the loan amount. Counsel took the position that determination of the actual amount due required an analysis from the court.

10. The respondent opposed the application vide a replying affidavit dated 3rd February 2023 sworn by Hedaya Malesi and written submissions dated 8th March 2022. The respondent's position was that the application was an abuse of court process, frivolous and a waste of the court's time as the applicants had previously filed an application dated 20th July 2022 seeking similar orders. This application was still pending for directions before the court.
11. The respondent confirmed that an independent valuation as stated by the applicants had been commissioned on the suit property. The value returned on the property was confirmed as stated by the applicants. It was however the respondent's case that despite having indulged the applicants in several ways including accepting to sell the property by private treaty, the loan amount remained unsettled.
12. In particular, the respondent argues that the respondents have been in arrears since March 2022 and the alleged discrepancy in the account does not prevent the respondent from making the requisite installment payments. It was further averred that the huge outstanding amount could not be a basis for seeking an injunction since the respondents had on 11th May 2022 given approval to the bank to sell the property by way of private treaty.
13. In the submissions, counsel stated that the applicants had not proved that they had a prima facie case with a probability of success since the debt was admitted and the valuation had been conducted by an independent valuer. Counsel submitted that the fact that there was a dispute in the amounts outstanding should not be a bar to the respondent exercising its statutory right of sale. This is particularly because the applicants admit that they are in default and that notices had been served on them. Finally, the respondent invited this court to find that the applicants would not suffer irreparable injury and the balance of convenience tilted in favour of dismissing the application.

Analysis

14. I have carefully considered the pleadings, authorities and rival submissions presented before the court. The primary issue before the court is to determine whether the application dated 14th December 2021 has met the requirements for grant of the equitable remedy for injunctive relief.
15. The law on granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules](#) 2010 which provides that:

“Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or;
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”



16. The conditions for the grant of a temporary injunction were laid out in the celebrated case of *Giella v Cassman Brown & Co. Ltd*(1973) EA 385, at page 360 where Spry J held that

“The conditions for the grant of an interlocutory injunction are 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.”

17. Going by this now accepted threshold, the first question would be whether the applicants have shown that they have a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, Bosire, JA defined a prima facie case as follows:

“...I would say that in civil cases 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 as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

18. The applicants have contested the valuation of the suit property by the respondent on grounds that it was undervalued and not in compliance with Section 97 of *Land Act*. Section 97(1) and (2) of the *Land Act* provides as follows:-

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

19. The record shows that the bank instructed Centenary Valuers to undertake valuation of the suit property on 25th May 2022. The open market value was reported as 240,000,000/= whereas the forced sale value was 180,000,000.00/=. Prior to this, the applicants' position was that on 28th January 2020 the suit property was valued at Kshs. 270,000,000/= and Kshs. 202,500,000/= respectively. It is on this basis that the applicants are of the view that the suit property was undervalued.

20. In *Zum Zum Investment Limited versus Habib Bank Limited* [2014] eKLR the court held;

–“It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The plaintiff must satisfactorily demonstrate why the valuation report that the defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”



21. Likewise, in *Palmy Company Limited vs Consolidated Bank of Kenya Limited* [2014] eKLR the Court stated as follows:

“The onus of establishing on prima facie basis, that the applicant’s right has been infringed by the respondent by failing to discharge the duty of care under section 97(1) of the *Land Act* lies on the applicant....The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the *Land Act* by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.”

22. Applying the principles derived from the foregoing decisions to the circumstances of this case, I find that the applicants have not discharged this burden. What the applicants have done is to give a comparison between the two valuation reports. They have not challenged the competency of the valuers or the valuation with cogent evidence.

23. The applicants have also taken issue with the accounts as rendered by the respondent. The respondent has referred this court to decisions by this court to the effect that that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive orders. The court in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* referred to the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale. They referred to the *Halsbury’s Laws of England*, Vol 32 (4th Edition) paragraph 725. It states as follows: -

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.

24. The applicants ought to have remitted the amount claimed or a reasonable amount of it before challenging the accounts. They have remained in arrears since 2022, a fact that is not controverted. Having regard to the analysis above, I am not convinced that the applicants have shown that they have a prima facie case with a probability of success.

25. The second consideration for grant of an injunction is whether the applicants have shown that they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The court in *Paul Gitonga Wanjau v Gatbuti Tea Factory Company Ltd & 2 Others* [2016] eKLR referred to the Halsbury’s laws of England on what irreparable loss is and stated that:

“By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

26. The applicants have not denied the right of the respondent to realize its security arising from the loan arrears. In order to balance out between the interests of parties who find themselves in a similar situation like that between the applicants and the respondent, the law provides an avenue for redress. Section 99(4) of the *Land Act* provides that any person prejudiced by an unauthorized, improper or



irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

27. From the foregoing, I am convinced that the balance of convenience tilts in favour allowing the bank to exercise its statutory power of sale as it carries the greater risk of injustice.

Determination and Final Orders

28. In my view, the applicants have failed to demonstrate that they meet the conditions necessary for grant of an injunction. I find no merit in the application and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

