



REPUBLIC OF KENYA



Mbugi & another v Kenya Commercial Bank Limited & another (Commercial Appeal E384 of 2022) [2023] KEHC 17785 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E384 OF 2022**

JWW MONG'ARE, J

MAY 26, 2023

BETWEEN

ANTONY WACHIRA MBUGI 1ST PLAINTIFF

MONICAH MUKUHI MACHARIA 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

WATTS AUCTIONS 2ND DEFENDANT

RULING

1. By a Notice of Motion dated October 4, 2022 brought under a Certificate of Urgency the Plaintiffs have moved to this court under Articles 50 and 159 of the Constitution of Kenya 2010, Under Provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 Rule 1, Order 40 Rule 1, 2, 3 & 9 of the Civil Procedure Rules 2010 and Section 90, 96 & 97 of the Land Act, seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court do issue an injunction restraining the Defendants whether by themselves, their agents, servants and employees from further advertising for sale, selling by public auction, trespassing, entering, charging disposing, transferring, accessing leasehold property known as Apartment Number A3, Block A erected on Land Reference Number 209/21335 pending the hearing and determination of this suit.
 - iv. Spent



- v. The Honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 - vi. That the Defendants do pay costs of this application.
2. The application is supported on the grounds set on its face and the supporting affidavits of Antony Wachira Mbugi and Monica Mukuhi Macharia, the Plaintiffs herein. The application is opposed and the Defendants have filed a replying affidavit sworn by Andre Bore, the Recovery Manager of the 1st Defendant company.
 3. The Plaintiffs are the registered owners of the premises known as Apartment Number A3 Block A erected on LR NO 209/21335, Riverside Drive, Nairobi, which they charged to the 1st Defendant to secure a loan facility. The Plaintiffs further allege that the said property is their matrimonial home and that the 1st Plaintiff gave consent to the 1st Defendant to charge the said property.
 4. On September 19, 2022, the Plaintiffs stated that they learnt of the advertisement for sale by public auction in the Daily Nation Newspaper which was intended to take place on October 6, 2022(now past). Both Plaintiffs argue that they were not served with the statutory notices as per requirements of the law. That no letter of demand or redemption notice was served upon the Defendants before the 2nd Defendant proceeded to advertise the property for sale.
 5. The 1st Plaintiff further states that the said property is their matrimonial home and the intended sale would greatly prejudice him and his family. That the Plaintiff's further argue that the valuation of the property at 38,200,000 is a gross under valuation as the current market value is in excess of 42,000,000.
 6. The Respondent opposes the application and insist that the property was charged vide a legal charge dated February 29, 2016 made between the 2nd Plaintiff and the 1st Respondent to secure a loan facility of Kshs 25,000,000/-. That the requisite statutory notices under Section 90(1), (2), (3) (e) and 96 of the Land Act were properly served on both the 1st and 2nd Plaintiffs through their shared postal address. Further, that the notification for sale was properly issued after the service of the 45-day redemption notice dated August 4, 2022. Under the said notice, the 1st Plaintiff was required to pay the sum of Kshs 17,993,171.60/- but instead paid Kshs 950, 000/- which was not compliant of the conditions set out in the redemption notice as demanded.
 7. The Respondents further submitted that in compliance with the law the charged property was valued prior to the sale to determine the current market by a competent professional valuation firm.

Analysis and Determination: -

8. I have considered the pleadings and the submissions filed by the parties and I have identified one issue for determination, to wit; “whether the Plaintiffs application has met the threshold for a grant of an order of injunction”. In the Locus Classica case of *Giella v Cassman Brown Company limited*,(1973) E A at page 353 and elaborated by the Court of Appeal in the case of *Nguruman Limited v Jan Bode Nielsen & 2 others*, (2014)eKLR, the court stated that “ 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. allay any doubts as to (b) by showing that the balance of convenience is in his favour.”



9. I have considered the facts of this case and in order for a grant of an order of injunction to issue, the facts of this case must be put through the three step test set out above. The first step is to establish whether a *prima facie* case has been established. In the case of *Mrao Limited vs First American Bank & 2 others* (2003) eKLR, Justice Bosire observed as follows;

“So what is a *prima facie* case? I would say in Civil Cases, it is a case which on 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 a rebuttal from the latter...The evidence must be that of an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly the standard, which is higher than an arguable case.”

10. From the evidence availed to the court by the parties, the following fact pattern emerge. Firstly, I note that it is not disputed that the 2nd Plaintiff obtained two loans from the 1st Defendant for Kshs 25,000,000/- repayable within 10 years and a short-term loan of Kshs 3,000,000/-. Secondly, a legal charge to secure the borrowing was created over the premises known as Apartment A3, Block A erected on L R No 209/21335 and that the 1st Applicant/Plaintiff gave consent as the spouse to the borrower in compliance with the law.

11. Thirdly, from the averments in the replying affidavit by the Defendant’ representative, the said loan stood at Kshs 17,993,171.60/- as at the time statutory notices and a redemption notice were issued. These facts have not been controverted by the Plaintiffs or denied. The Defendant further avers that it served the requisite statutory notices to the shared address of both Plaintiffs/Applicants but the Plaintiffs deny having received any such notices. In fact, the assertion by the 1st Plaintiff is that he became aware of the intended sale of the charged property through an advert by the 2nd Defendant in the Nation newspaper and moved quickly to avert the sale by making a payment of Kshs 950,000/-.

12. The 2nd Plaintiff who is the principal borrower is silent as to whether or not she was aware that the loan was in arrears. Other than the denial of not having received the alleged statutory notices, she has not provided any information to the court on how she was servicing the loans or at all. Instead, her testimony dwells primarily with the valuation of the charged property which she points out that despite its actual value being over Kshs 42,000,000/- the 1st Defendant had valued it for purposes of sale by public auction at Kshs 38,500,000/-.

13. I have considered the material provided by the Plaintiffs and I have observed from the evidence contained in the sworn affidavits of both that while acknowledging the existence of the loan, the Plaintiffs do not make proposals of how they intend to redeem the same. I further note that despite obtaining an interim injunction and a stay of sale in 2022, no material has been placed before the court to confirm if the Plaintiffs have either made any arrangements to repay loan or clear the loan arrears. While acknowledging that it is possible that the Defendants used the wrong address to send out the notices, after becoming aware that the loan was in default and since moving to the court in October 2022, the Plaintiff do not appear to have made any other move after the interim orders were granted. To my mind, the Plaintiffs case has failed test on whether a *prima facie* case exists to warrant a grant of an Order for Injunction.

14. In Ngurumani cited above, the Court of Appeal held that the three elements are to be applied sequentially such that if the first test of a *prima facie* case fails, the court is not required to consider the other two elements necessary for a grant of an order for injunction. I therefore find and hold that the application before me is without merit and I shall dismiss it. The Defendants are at liberty to exercise their statutory power of sale over the charged property.



15. Costs of this application are awarded to the Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2023.

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J W W MONG'ARE

JUDGE

In the Presence of: -

- 1. Ms Awuor for the Plaintiffs/Applicants.**
- 2. Ms Kosgey for the Defendants/Respondent.**
- 3. Moses- Court Assistant**

