



REPUBLIC OF KENYA



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**Greenfield Petroleum Limited & another v DIB Bank of Kenya & another
(Civil Suit E061 of 2022) [2023] KEHC 22160 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 22160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E061 OF 2022**

F WANGARI, J

MAY 25, 2023

BETWEEN

**GREENFIELD PETROLEUM LIMITED GREENFIELD PETROLEUM
LIMITED 1ST PLAINTIFF**

KIPYEGON STANLEY CHERUIYOT 2ND PLAINTIFF

AND

MUGA AUCTIONEERS & GENERAL MERCHANTS 1ST DEFENDANT

DIB BANK OF KENYA 2ND DEFENDANT

RULING

1. This ruling relates to an amended notice of motion application dated 26th September, 2022 amending the initial motion dated 20th September, 2022 and which sought for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That in the alternative, this Honourable Court be pleased to issue an interlocutory order of injunction restraining the Defendants whether by themselves, their agents, servants and/or employees from attaching, repossessing, selling, auctioning or in any other way alienating the Plaintiff's property known as property L.R. No. MN/I/15338 (Orig. No. MN/I/15266/73 and Mombasa/Block 1/431 pending the hearing and determination of this suit;
 - d. That an order do issue that land parcels known as L.R. No. MN/I/15338 (Orig. No. MN/I/15266/73 and Mombasa/Block 1/431 be valued by an Independent Valuer to ascertain its current market value;



- e. That an order compelling the 1st Defendant to render accounts to the Plaintiff showing how the sum claimed by the 1st Defendant in respect of the Plaintiff's loan at the Defendant's company;
 - f. That costs for of this application be provided for.
2. The application was strenuously opposed through a replying affidavit dated 19th October, 2022 and filed on 24th October, 2022. It was sworn by the 1st Respondent's Company Secretary and Head of Legal for and on behalf the 1st and 2nd Respondents.
 3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

4. I have considered the application, response, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination
 - a. Whether the Applicants have made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
5. Turning to the substance of the application, the facts are not in dispute. The 1st Applicant obtained a facility from the 1st Respondent which was secured by a creation of two charges over a suit property registered in the name of the 2nd Applicant and another over a suit property registered in the name of a third party by the name Hassan Ibrahim Adam (hereinafter Third Party). The first charge dated 16th October, 2019 is secured by Mombasa/Block 1/431 which is registered in the name of the Third party while the second charge dated 15th June, 2020 is secured by subdivision Number 15338 (Original Number 15266/73) Section I Mainland North registered in the name of the 2nd Applicant. The sum secured was Kshs. 29,600,000/= for the first charge and Kshs. 14,400,000/= for the second.
6. It is equally not in dispute that a default in terms of repayment of the loan occurred and the 1st Respondent sought to exercise its statutory power of sale. This is what has prompted the suit and application. On the part of the Applicants, it is contended that according to the representations made by the 1st Respondent's agent, the loan they were taking was a term loan with instalments of not more than Kshs. 500,000/= per month. Further, it was the Applicants' averments that though the loan sum was Kshs. 44,000,000/=: the 1st Respondent only advanced a sum of Kshs. 8,000,000/= and thereafter failed to disburse the balance thus frustrating the Applicants' intentions. They equally submitted that it was not until when they were expected to make repayments that they noticed that the instalment was not Kshs. 500,000/= per month but a higher amount and the loan was a revolving fund and not a term loan.
7. The Applicants averred that the 1st Respondent intentionally failed to disclose that the loan issued was a revolving fund and no provision of the payable instalment was captured on the initial documents of the financial arrangements. Despite the lamentations, the Applicants stated that they had made substantial payments until the COVID-19 pandemic hit the economy thus adversely affecting their business. The Applicants confirmed service of statutory and other notices but stated that they were not served as envisaged by the Land Act, 2012 thus any sale of the properties would be illegal. They also took issue with valuation of the suit properties and urged that it would be imperative that a valuation of the said properties be conducted to ascertain their true current market value.



8. In its response, the 1st Respondent took issue with the Applicants' averments more so on the type of facility that the Applicants applied for and were granted. The 1st Respondent averred that the 1st Applicant vide offer letters dated 3rd July, 2019 was granted three types of facilities, Wakala – Murabaha (Working Capital Facility) of Kshs. 38,000,000/=, Commodity Murabaha (Term Facility) of Kshs. 7,884,000/= and an Ijara Sale and Leaseback (Construction Finance Facility) of Kshs. 18,000,000/=. The facilities were executed on 2nd September, 2019. The Wakala Murabaha (working capital facility) was to be utilized over a period of twelve (12) months on a revolving basis with tranche disbursements valid for a maximum of thirty (30) days. The Ijara Sale and Leaseback (Construction Finance) would be availed for 84 months inclusive of a 6 - month moratorium on principal and profit with equal monthly instalment after the moratorium. The Commodity Murabaha (Term Facility) would be availed for 36 months with repayment in equal monthly instalments.
9. It was further submitted that the 1st Respondent rescheduled and rebooked the 1st Applicant's existing facilities on two occasions based on the 1st Applicant's application and request. It was stated that the full Commodity Murabaha facilities were disbursed contrary to the Applicants' averments. In totality, the 1st Respondent prayed that the amended notice of motion application dated 26th September, 2022 be dismissed with costs to the Respondents.
10. I have set out the parties' rival positions with a view of putting the issues for determination into perspective. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“...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.

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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant



if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...” (Underlying for emphasis)

11. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002) However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
12. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
13. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.¹ The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically.
14. So has the Applicant established prima facie case? In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: - “...In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter...”
15. In their submissions, the Applicants submitted that the 2nd Applicant proved that he is the lawful owner of subdivision number 15338/I/MN. They submitted that when they applied for the facility, the same was to be used to acquire parcel number Mombasa/Block 1/431. However, the 1st Respondent did not disburse the agreed amount thus Mombasa/Block 1/431 could not be acquired and thus the intended business could not be carried out. This is what they attributed to their failure to repay the advanced loan. It was equally submitted that if the orders are not granted, Subdivision Number 15338/I/MN is a family house where the 2nd Plaintiff resides with his family thus the risk of being displaced. It was also submitted that the 1st Applicant was not served with the requisite statutory notices as envisaged by the *Land Act* and thus any attempt to sell the suit properties is illegal.
16. In response to the submissions, the 1st Respondent relied mostly on the replying affidavit sworn by Njeri Waitimu wherein the issue of the facilities given, valuation, statutory notices and the amount advanced were dealt with extensively. The Applicants have contended that the facility they applied for was for Kshs. 44,000,000/= but what was disbursed was only Kshs. 8,000,000/=. In making a finding

¹ See *JM v SMK & 4 Others* [2022] eKLR



as to whether a prima facie case has been established, I shall isolate four key areas which the Applicants are relying on to show that a prima facie case has been established. These are; the facilities advanced and their nature, amount advanced, that the security is a family house and service of notices.

17. The 1st Respondent at paragraph 5 of its affidavit clearly set out the facilities that were extended to the Applicants. They were three namely; working capital facility, term facility and construction finance facility. They are all dated 3rd July, 2019. They are contained at pages 10 to 47 of the 1st Respondent's annexures. One of the three offer letters has been annexed to the Applicants' application and this is the term facility of Kshs. 7,884,000/= which was to be repaid in 36 months. I have no doubt in my mind that the three facilities were extended to the Applicants as evidenced by signatures that appear on each of the mentioned pages. They are not different from what they have annexed in their application.
18. Upon being served with the response, if indeed the Applicants were denying the documents at pages 10 to 47, they ought to have sought leave to file a supplementary affidavit to negate what the 1st Respondent had adduced. At this stage, the affidavit evidence by the 1st Respondent was not at all controverted on what facilities were extended to the Applicant. The Applicants equally denied knowing the type of facility that was granted. The facilities referred clearly indicated the type, purpose, amount, repayment period and frequency of payment. The Applicants would be pleading ignorance if they appended their signatures on what they did not know. In any event, ignorance is no defence. As already noted above, the 1st Respondent's evidence on the type of facility extended, amount disbursed, repayment period and mode of payment was not at all challenged. The 1st Respondent led evidence that the facilities were three (3) but one (1) being the construction facility was cancelled due to the Applicant's conduct of diverting working capital facility.
19. On the amount disbursed, the 1st Respondent adduced evidence in the form of statements showing the amounts that were disbursed. From the statements of account at pages 176 to 181 of the 1st Respondent's exhibits, on 31st May, 2021, a total of Kshs. 38,1022,245.01 was disbursed. On 30th June, 2020, a total sum of Kshs. 5,775,947.20/= was disbursed. The Applicants who bore the burden of proving that they received only Kshs. 8,000,000/= ought to have adduced more than mere statements. If indeed the 1st Respondent's averment on this score was not correct, nothing was harder than the Applicants adducing their own statements to negate the position on amounts.
20. On the issue that the 2nd Applicant is the owner of 15338/I/MN and which houses his family, when he signed the charge and the further charge, the consequences of default were well known and this of its own cannot avail a party an order of injunction. In *Julius Mainye Anyega v Eco Bank Limited [2014]* eKLR, it was held as follows: -

“...The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgageors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgageor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility...”



21. Therefore, the fact that the house is matrimonial or family does not in any event shield it from chargee's exercise of statutory power of sale. The Applicants did not raise any issue in relation to spousal consent and this should be deemed that they were alive to the consequences of default as enumerated at clause 8 of the charge document dated 16th October, 2019 and the further charge dated 16th June, 2020.
22. On the issue of notices, it has been held that the 90-day notice is a prerequisite for the exercise of the chargee's remedies including the power of sale. It must be served on the chargor in order to give him or her the opportunity to remedy the breach or otherwise redeem the property as security. In *Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020]* eKLR, Majanja, J held as follows: -
- “...Before exercising the statutory power of sale, the Bank must issue a 90-day notice in writing under section 90(1) of the *Land Act*. The notice which must state the nature and extent of the default by the chargor and if the default consists of the non-payment of any money due under the charge, it must state the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed. The notice must also state the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in the section, including sale of the property, in accordance with the procedures provided. The notice must also state the right of the chargor to apply to the court for relief in respect of certain remedies...”
23. The 2nd Applicant has not denied being served. The contention is about the 1st Applicant. The 1st Respondent at pages 184 to 187 of its annexures has exhibited two demand notices dated 12th May, 2021 and 11th August, 2021. The said demand notices did not elicit any response from the Applicants. A statutory demand notice under section 90 of the *Land Act* was issued on 23rd December, 2021, a period of more than four months since the demand from the 1st Respondent. The notice was sent to the 1st and 2nd Applicants, the 2nd Applicant's wife and the Third Party through registered post on 24th December, 2021. The postal address sent to was P.O. Box 40828 – 80100 and which address was the one which the offer letters were sent to. No evidence of return of the said letter was tabled by the Applicants and neither have they denied the said postal address.
24. I have considered the form of the notice dated 23rd December, 2021 and I have no doubt in my mind that it is compliant with the provisions of section 90 of the *Land Act*. It clearly states the nature and extent of default, the amount that must be paid to rectify the default since the default is on non-payment of the money advanced, the time within to pay and the consequences of default.
25. Similarly, a forty (40) days statutory notice in compliance with the provisions of section 96 of the *Land Act*, 2012 was issued on 5th April, 2022. The 1st Applicant, the 2nd Applicant, his spouse and the guarantors were all served through registered post and delivery slips have been annexed at pages 199 to 202 of the 1st Respondent's exhibits. They were sent on 7th April, 2022 to the addresses indicated in the offer letters and charge documents. I am thus satisfied that this was done.
26. Lastly, there is a requirement under Rule 15 of the Auctioneers Rules to serve a Notification of Sale. In *TSS Salt Manufactures Limited v NIC Bank Limited [2018]* eKLR, Olola, J held as follows: -
- “...I must however add that under Rule 15 of the Auctioneers Rules a Notification of Sale must be served prior to the sale of immovable property. The Notification of Sale should give the Chargor forty-five (45) days upon which to redeem the property. The Notification ought to be served on the registered owner or an adult member of his family residing or



working with him, and where the person refuses to sign the Notification, the Auctioneer needs to sign a Certificate to that effect...”

27. At pages 210 to 215 of the 1st Respondent’s bundle, Notifications of Sale under Rule 15 of the Auctioneers Rules have been exhibit by the 1st Respondent which show that they were served upon the Applicants, County Commissioner and the Third Party on 22nd July, 2022. Postage slips showing that they were sent on 25th July, 2022 have been annexed. The notices indicated that the properties were to be sold on 7th October, 2022 at the offices of Thara Auctioneers, West Bank Villa, Links Road, Nyali in Mombasa. The period from 25th July, 2022 to 7th October, 2022 is obviously more than forty-five days and I have no hesitation in holding that there was compliance with Rule 15 of the Auctioneers Rules. In any event, the Applicants have annexed the Notifications of Sale and therefore even without the 1st Respondent’s attaching the same, this is evidence enough. To this end, nothing turns on the allegation that statutory notices were not served as has been demonstrated above.
28. Before concluding on the four (4) issues the court isolated, it is settled that orders of injunction are equitable remedies. As such, he who comes to equity must come with clean hands. This court notes that the Applicants conveniently attached one offer letter when it was evident they had signed three. The one attached was for a sum of Kshs. 7,884,000/= and this is almost the same sum that the Applicants want the court to believe that it is the only amount it received. In *Tom Otwoma Omosa & another v Bank of Africa Kenya Limited & another [2021]* eKLR, the court (A.K. Ndung’u, J) while faced with a similar scenario as obtains herein had the following to say: -
- “...I have earlier on in this ruling alluded to the maxim that “he who comes to equity must come with clean hands.” The applicants have not demonstrated that they are before court with clean hands. Indeed, the facts on record show the contrary...”
29. Just as was held in the above case, I have no hesitation to say that the Applicants have been less candid and are guilty of material non-disclosure. They are speaking on both sides of their mouths. On one hand, they admit to be owing. On the other, they deny receiving the amount disbursed. These are not parties deserving of equitable remedy of injunction. One of the prayers sought by the Applicants was an order to compel the 1st Defendant to render accounts. For such an order to issue, they had to lay a basis that there were discrepancies on what they had received and what they had paid. Nothing of the sort to warrant such an order to issue was adduced. I respectfully hold that the order for accounts was simply engaging on a fishing expedition. Nothing was exhibited by the Applicants to show that they had applied for account reconciliation from the 1st Respondent and the same was denied. It is only upon such refusal that this court would come in and issue such an order. There being nothing to support the grant of an order to compel the 1st Defendant to render accounts, I say no more.
30. Finally, on the issue of valuation, the Applicants ought to have done their own valuation to counter that which the 1st Respondent had undertaken to enable the court arrive at a well-reasoned conclusion based on figures. If the court were to make an order for valuation of the suit lands by independent valuer, it would be acting on conjecture and speculation as there would be no figures to compare with those already on record. It is trite that courts do not act on conjecture and speculation but on solid evidence and sufficient grounds.
31. The upshot of the foregoing is that I find that the Applicants have not established a prima facie case to warrant the orders sought. The Third Party though served did not participate in the matter and being a guarantor, he shall suffer the same fate as the Applicants. As was held by the Court of Appeal in *Nguruman Limited (supra)*, if prima facie case is not established, then irreparable injury and balance of convenience need no consideration. Having found as above, I see no reason to engage the other limbs.



32. Having carefully read and considered the instant Application, the Affidavit in support, the Replying Affidavit, the written submission by the parties and the authorities cited, the Court finds and holds that the Amended Notice of Motion Application dated 26th September 2022, is not merited and the same is dismissed entirely with costs to the 1st Respondent.
33. Consequent to the above, the interim orders issued on 6th October, 2022 and extended on various occasions are now discharged.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MAY, 2023.

F. WANGARI

JUDGE

In the presence of;

Shisia Advocate h/b for Wameyo Advocate for the Plaintiff

N/A by the Defendants

