



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okicon General Works Ltd v SBM Bank (Kenya) Ltd (Commercial Case  
E005 of 2023) [2023] KEHC 17661 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17661 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E005 OF 2023**

**RE ABURILI, J**

**MAY 25, 2023**

**BETWEEN**

**OKICON GENERAL WORKS LTD ..... PLAINTIFF**

**AND**

**SBM BANK (KENYA) LTD ..... DEFENDANT**

**RULING**

**Introduction**

1. The plaintiff Okicon General Works Limited vide a Notice of Motion application dated 16th March 2023 and filed on the same date under Certificate of Urgency seeks the following reliefs against the defendant SBM Bank (Kenya Ltd):
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That while pending the hearing and final determination of this suit an Interim Order of Injunction do issue restraining the defendant, its agents and/or assigns or any of them from advertising for sale, disposing of, selling or otherwise interfering with the plaintiff's use and occupation of land parcel No Kisumu Municipality/Block 12/434.
  - e. Costs of this application be borne by the defendant.
2. It was the plaintiff's case that it was the owner of the suit property parcel No Kisumu Municipality/Block 12/434 that the defendant in exercising its statutory power of sale intended to sell by public



auction on 17<sup>th</sup> March 2023 at 0900hrs. This court did issue a temporary reprieve to the plaintiff/applicant, staying the said sale pending delivery of this ruling.

3. The plaintiff's case and averment is that it obtained a loan of Kshs 54,600,000 secured first by a legal charge over the suit property, fixed and floating debenture over the entire assets of the plaintiff and personal guarantee and indemnity from each of the directors of the plaintiff and that it was to pay monthly instalments of Kshs 1,267,617.60.
4. It was further averred by the plaintiff that it diligently paid the monthly instalment until 17<sup>th</sup> February 2022 when it sought a restructuring of the loan vide a letter of the same date and that as of 15<sup>th</sup> March 2023 it had repaid a total of Kshs 28,248,945.
5. The plaintiff further pleaded that the intended auction of its property was not only illegal but also unprocedural as the defendant did not serve or issue the plaintiff with the statutory notice and the notification of sale as envisaged under the provisions of Section 90 and 96 (2) of the Land Act, 2012.
6. It was further pleaded that the advertisement for sale of the suit property in the Daily Nation Newspaper of 2<sup>nd</sup> March 2023 was invalid as the same was in contravention of the Auctioneers Act.
7. The plaintiff pleaded that unless the orders sought were issued, he stood to suffer irreparable loss and damages of business and income for the plaintiff and that the application was made without undue delay as the plaintiff became aware of the intended sale through a third party on the 14<sup>th</sup> March 2023.
8. Opposing the application, the respondent vide a replying affidavit sworn on the 5<sup>th</sup> April 2023 and a supplementary replying affidavit sworn on the 17<sup>th</sup> April 2023 by Martha Kanyinge deposed that on or about the 28<sup>th</sup> September 2020, the Defendant bank agreed to advance the Plaintiff a Term Loan facility via a Letter of Offer dated 28<sup>th</sup> September 2020 which letter of offer was signed by the plaintiff's directors indicating that they had read and understood the terms and conditions therein and agreed to be bound by the same.
9. Ms. Kanyinge further deposed that a Legal Charge instrument dated 15<sup>th</sup> April 2021 was thereafter prepared over the property LR Number Kisumu Municipality/Block12/434 which loan facility was thereafter disbursed to the Plaintiff who poorly managed the same and ran into arrears prompting the Bank to send various demand letters informing the Plaintiff's directors that the account was in arrears and requiring them to regularize the account but that nonetheless, the demand letters failed to draw positive responses from the Plaintiff and its directors.
10. It was the respondent's contention in deposition that the bank issued a three months' Statutory Notice dated 5<sup>th</sup> May 2022 over the charged property to the directors of the company requiring them to pay the outstanding arrears then to the tune of Kshs 7,795,426.10/- in strict compliance with the provisions of the Land Act but that despite service of the Three months' Statutory Notice, the Plaintiff still ignored, refused and/or rejected to clear the outstanding sum prompting the Defendant to issue a 40 days' Notice to sell the property. the said Notice as annexed is dated 23<sup>rd</sup> August 2022, demanding for the payment of the entire outstanding sum now amounting to Ksh. 56,731,613.85.
11. Ms. Kanyinge further deposed that the Plaintiff responded to the 40 days' notice via a letter dated 5<sup>th</sup> October 2022 where they admitted default and made a payment proposal but the belated proposal was rejected by the defendant who subsequently through its agent, Colinet Auctioneers, served the Chargor its directors with the 45 Days Redemption Notice dated 8<sup>th</sup> December 2022 together with Notification of sale, personally and via registered post. All these Notices are annexed to the affidavit of Ms Kanyinge.



12. It was the defendant's further case that it also issued instructions to Legend Valuers Limited to value the property as required under the law and a valuation report dated 25<sup>th</sup> November 2022 was duly prepared indicating that the Market Value as Kshs 61,500,000 and the Forced Sale Value as Kshs 46,125,000. The Valuation Report is also annexed.
13. The defendant further contended that the Chargor's failure to rectify the default prompted the Defendant bank through its agent Colinet Auctioneers, to advertise the suit property in the Daily Nation Newspaper of 2<sup>nd</sup> March 2023 as the outstanding balance was Kshs 67,746,342.00 as at 29<sup>th</sup> March 2023 which amount continued to accrue interest at the contractual rates until settlement in full and thus it was in the interest of justice that the Defendant bank be allowed to proceed with the sale to recover the said sum.
14. It was the defendant's case that it had followed due process in law and had issued all the requisite statutory notices in compliance with the provisions of the Land Act and Land Registration Act thus the right to sell the charged property and to recover the outstanding sum had crystalized and additionally, that the plaintiff had failed to disclose any right that was threatened with infringement as it had admitted default.
15. The application for injunction was canvassed by way of written submissions with each of the parties complying with directions of the court on the set timelines.

#### **The Plaintiff's Submissions**

16. It was submitted on behalf of the plaintiff that it had met the conditions precedent for the grant of a temporary injunction as set out in the case of *Giella v Cassman Brown* (1973) EA 358 and further by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.
17. It was further submitted that the plaintiff had made out a *prima facie* case with a probability of success as the respondent had stated that they did serve the Applicant with the 40 days, notice to sell through registered post though they had not annexed any document to wit; certificate of postage; to demonstrate that they indeed sent the said notice to the plaintiff and/or its directors.
18. As to whether an award of damages sufficed to the Plaintiff, it was submitted that damages were not a suitable remedy as it had established a clear legal right/breach. Reliance was placed on the case of *Niaz Mobamed Jan Mobamed v The Commissioner of Lands* (1996) eKLR where it was held *inter alia* that "It is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turns out to have been the case."
19. The plaintiff submitted that the balance of convenience tilted in its favour as it was the party in possession of the suit property and as such, the court ought to find in its favour.

#### **The Defendant's Submissions**

20. On behalf of the defendant/Respondent, it was submitted that the defendant served the plaintiff and its directors with all the requisite statutory notices but the plaintiff failed to respond positively prompting the defendant to initiate the redemption process. The defendant urged the court to find that it had sufficiently proved that it sent the requisite statutory notices to the Plaintiff as required by law and therefore the Defendant's statutory right to sell the charged properties had crystallized. Reliance was placed on the case of *Rieny Distributors of Kenya Limited v Consolidated Bank of Kenya Ltd & another* [2021] eKLR.



21. As to whether the plaintiff had satisfied the court that it warrants grant of temporary injunction, it was submitted that firstly the plaintiff had not established a *prima facie* case as it had admitted that its account is in arrears and further that the plaintiff had stopped paying the monthly instalments sometime in February 2022 and thus based on the Plaintiff's own admission of indebtedness and failure to repay the loan facility as agreed, coupled with the fact that the Defendant duly served all the requisite statutory notices to the Plaintiff, the Plaintiff had not established a *prima facie* case.
22. The defendant relied on the case of *Tom Otwoma Omosa & another v Bank of Africa Kenya Limited & another* [2021] eKLR where the court held inter alia that "the 1st respondent's right to statutory power of sale cannot be denied where the chargor fails to repay the loan and where there is evidence that spousal consent was obtained and that all requisite notices were served on the appellants."
23. As to whether the Plaintiff would suffer irreparable harm which would not adequately be compensated by an award of damages, it was submitted that should the Plaintiff be aggrieved by the intended sale, its loss could be compensated by an award of damages as the plaintiff was protected by Section 99 (4) of the *Land Act*, 2012 which provides that "a person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."
24. The defendant also relied on the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others* [2006] eKLR where the Court held *inter alia* that "by offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property."
25. The defendant further submitted that being a banking institution it was in a position to pay the damages should the same be ordered. Reliance was placed on the case of *George Githee Kamunya & another v Napoleon Wakukha Murende & another* [2017] eKLR where the court stated that "On the issue of damages, it is necessary to observe that the 2<sup>nd</sup> Respondent is a bank. As a corporate body, it is a going concern and I do not think payment of damages would be a problem." It was thus submitted that this court should find that monetary compensation would be an adequate remedy should the Plaintiff be aggrieved by the intended sale.
26. The defendant submitted that the plaintiff's debt had surpassed both the Open Market Value of the suit property and that should the property not be sold now, there was a real danger that the bank would never recover the loan balance, whereas the Defendant could compensate the plaintiff in case of damages thus in the circumstances, the balance of convenience tilted in favor of the Defendant.
27. It was submitted that the plaintiff had not demonstrated a *prima facie* case or that any loss would be suffered as a result of the Defendant's exercise of its statutory power of sale and that therefore, the defendant prayed that the plaintiff's application be dismissed with costs to the Defendant.

### **Analysis and Determination**

28. Having considered the pleadings by the plaintiff applicant, the annexures and the replying affidavit together with annexures thereto as well as the written submissions for and against the application and the judicial pronouncements as well as the statutory provisions relied on by both parties, the issue for determination in this application is whether the plaintiff is deserving of the orders sought.
29. It is not in dispute that the plaintiff took was advanced a loan by the defendant and that the plaintiff has defaulted in the repayment of the said loan facility. The questions arising from the default and the attempt by the defendant to exercise its statutory power of sale are: two-fold, first, the validity of the



statutory notices allegedly served by the defendant and secondly whether the plaintiff has established a case for an injunction to restrain the defendant from exercising the statutory power of sale.

30. It is manifestly clear that the Plaintiff enjoyed a bank facility from the defendant of which it has continued to be in default prompting the Defendant to issue demand notices for payment as well as statutory notices as required under the Land Act 2012. The Plaintiff pleaded and submitted that it was not served with a statutory notice as required by section 90 of the Land Act.
31. A statutory notice issued under section 90(2) of the Land Act triggers the security realization process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3) of the Land Act. The notice is issued where there is default or breach of any covenant under the charge.
32. Section 90 of the said Land Act provides that:

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a. the nature and extent of the default by the chargor;
  - b. if the default consists of the non-payment of any money due under the charge, 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;
  - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
  - d. the consequence 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 this section in accordance with the procedures provided for in this sub-part; and
  - e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
33. Concerning service of the 90 and 40-day Notices under sections 90 and 96 of the Land Act, the plaintiff denied receiving any statutory notices of sale. This shifted the burden to the respondent to prove that it indeed served the notices as required under sections 90 and 96 of the Land Act.
  34. The defendant in its replying affidavit sworn on the 5<sup>th</sup> April 2023 by Ms Kanyinge annexed a 90-day statutory notice dated 5<sup>th</sup> May 2022 and a 40-day Notice dated 23<sup>rd</sup> August 2022. I observe that both notices, the contents comply with the provisions of sections 90 and 96 of the Land Act. Further, there was also a letter from the plaintiff dated 5<sup>th</sup> October 2022 in which the plaintiff acknowledged the default and made proposals renegotiating the terms of the loan repayment which the defendant rejected vide the letter dated 19<sup>th</sup> October, 2022. In addition, albeit the plaintiff claims that the



intended sale is contrary to the *Auctioneers Act*, there is a certificate of service sworn by Godfrey Collins Omondi on 19<sup>th</sup> December, 2022, pursuant to Rule 15(c) of the *Auctioneers Rules, 1997*, showing service of the 45 days' redemption Notice and Notification of Sale upon the plaintiff. that affidavit is not impugned by the plaintiff.

35. In the circumstances I am satisfied that the service of the Statutory Notices were dully issued and served in accordance with the law. Furthermore, Annexure MK4b is evidence of certificate of posting as it has the Postal Corporation's stamp.
36. I observe that the plaintiff freely and voluntarily charged the suit property and was clearly aware that in the event of default in servicing the debt, the properties would be liable to be sold. The Plaintiff in this case is bound by the agreement it entered into with the Defendant on the terms of the loan repayment and no illegality has been demonstrated nor breach of any rights of the plaintiff by the defendant.
37. In case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd* (2006) eKLR the court held as follows:

“Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.”

38. Having found that the defendant issued and served the plaintiff with statutory notices as required by law, I now turn to consider whether the plaintiff has established the conditions for the granting of an injunction as laid down in the case of *Giella v Cassman Brown* (supra) case where the court stated as follows:

“The conditions for the grant of an interlocutory injunction are now 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 doubt, it will decide an application on the balance of convenience.”

39. A *prima facie* case was defined in the case of *Mrao Limited v First American Bank Limited & 2 others*, [2003] KLR 125 to mean:

“... a case in which on the material presented to the 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 latter.”

...

But as I earlier endeavored to show, and I cite ample authority for it, a *prima facie* 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 success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case”



40. Bearing in mind the conditions for the grant of an interlocutory injunction as now settled, the question is whether the plaintiff has met those conditions to warrant grant of the injunction sought against the defendant. It is not in dispute that the plaintiff failed in its obligation to repay the amounts due under the loan to the defendant. The defendant served the plaintiff with all the statutory notices to its postal address and therefore this court finds no *prima facie* case established against the defendant for it to be denied its right to exercise its statutory power of sale.
41. On whether damages would adequately compensate the plaintiff should the injunction not issue, by offering the suit properties as security, the chargor was equating them to a commodity which the chargee may dispose of, so as to recover the loan together with interest thereon. Therefore, if the chargee were to sell off the suit properties, the chargor's loss could be calculable on the basis of the real market value of the said property. Furthermore, the Defendant conducted a valuation of the suit property through the firm of Legend Valuers Limited and a valuation report dated 25<sup>th</sup> November 2022 was duly prepared indicating the Market Value as Kshs 61,500,000 and the Forced Sale Value as Kshs 46,125,000 in compliance with Section 97 (2) of the [Land Act](#) which provides that:
- “A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer”.
42. It is noteworthy that “he who comes to equity must come with clean hands.” The plaintiff has not demonstrated that it is before this court with clean hands. Indeed, the facts on record show the contrary.
43. On whether the balance of convenience tilts in favour of the plaintiff/ applicant, this court is not in doubt that the defendant complied with the law regarding the exercise of statutory power of sale and is not in doubt at all that that right crystallized. Having therefore carefully read and considered the instant Application, the Affidavit in support, the Replying Affidavit and the written submission by the parties, this court is satisfied and it finds and hold that the Notice of Motion Application dated 16<sup>th</sup> March 2023, is not merited and the same is hereby dismissed with costs to the defendant.
44. Mention on 20/9/2023 for pretrial directions under Order 11 of the [Civil Procedure Rules](#).
45. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MAY, 2023**

**R.E. ABURILI**

**JUDGE**

