



**Echuka County Estates Limited v HFC Limited (Commercial Case E357 of 2022)
[2023] KEHC 20141 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E357 OF 2022
JWW MONG'ARE, J
JUNE 30, 2023**

BETWEEN

ECHUKA COUNTY ESTATES LIMITED PLAINTIFF

AND

HFC LIMITED DEFENDANT

RULING

1. By a notice of motion application brought by way of a certificate of urgency dated 2/9/2022 under section 1A, 1B, 3A, 63 of the *Civil Procedure Act*, order 40 rules 1(a), rule 3, 4(1) and 51 of the *Civil Procedure Rules*, seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing of this suit or until any further orders of the court, there be and is hereby issued an order of injunction restraining the Defendant, its servants, or agents, advocates or auctioneers or any other person acting for /and/or on its behalf from doing the following acts or any of them, that is to say from advertising for sale, disposing off, selling by public auction or otherwise howsoever from completing by conveyance or transfer of any sale concluded by auction and/or private treaty, leasing, letting and/or otherwise howsoever interfering with the ownership of title /to and/ or interest in the property known as L.R. No. 155/89, 155/93 and 155/15.
 - iv. That costs of the application be borne by the Defendant.
2. The application is supported by the grounds set within it and the Supporting Affidavit of Beatrice C. Sang sworn on 21/9/2022. The application is opposed and the Respondent has filed a Replying



Affidavit sworn by Emmanuel Yebei, the debt recovery officer with the Defendant sworn on 20/3/2023.

3. While it is not disputed that the Applicant was advanced a loan facility for Kshs.74,000,000/- secured by a legal charge over several properties including L.R. No. 155/89, 155/93 and 155/15 the Applicant argues that the same has been fully recovered through a sale of the several units at a price of Kshs.138 million It is the Applicant's position that the Defendant has fully recovered the amount advanced including the interest and all charges associated with the loan. The Applicant argues that the Defendants move to advertise for sale the three properties namely L.R. No. 155/89, 155/93 and 155/15 is illegal as the loan has been fully redeemed and therefore the same will greatly prejudice the Applicant.
4. The Respondent on the other hand argues that it is within its right to exercise its power of sale to recover the loan balances as was reiterated in HCCOMM. No. E085 of 2021 between the same parties despite the purported attempt by the Plaintiff to withdraw it. While acknowledging that the loan advanced to the Applicant was Kshs.72,000,000/- and that pursuant to a deed of settlement in the said suit the Defendant has recovered a substantial portion of the loan, the Defendant refutes the allegations by the Plaintiff that the loan plus accrued interest if fully discharged.
5. The Respondent therefore reiterates that the Plaintiff is still indebted to the Defendant and that the loan account maintained by the Defendant for the Plaintiff still reflects a substantial unpaid balance and therefore the Defendant is within its legal rights to dispose of the charged securities to recover the same.

Analysis and Determination

6. I have considered the pleadings and the submissions together with the list of authorities filed by the parties and I have identified one issue for determination, to wit; "whether the Plaintiff/Applicant 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 in the Court of Appeal 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."

7. 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.”

8. From the material placed before this court it is admitted by both parties that indeed a loan for development of several properties was advanced to the Plaintiff for Kshs.72,000,000/- with interest. I note that both parties confirm in their separate affidavits that indeed a portion of this loan has been settled through sale of various units within the charged property and the same applied towards the redemption of the loan. While the Plaintiff insists that the sale realized Kshs.138 million pursuant to the deed of settlement entered into by the parties in previous litigation, the Defendant insist that the sale fetched 93 million and therefore leaving outstanding loan balances in the Plaintiff’s loan account. To my mind, the issues between the parties really border on taking of accounts and reconciliation as effort has been taken to redeem the loan advanced. I am therefore persuaded that the Plaintiff has established a prima facie case with high chances of success.

9. The second parameter the court needs to consider before granting an order for injunction is whether the Plaintiff stands to suffer irreparable loss if the order is not granted. In *JM v SMK & 4 others* [2022] eKLR, Justice Odunga defined irreparable loss as follows:-

“The equitable remedy of temporary injunction is issued to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstratable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their mount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never adequately remedy”.

In the matter before me the Plaintiff lays part of the blame in the period it took to finish the project on the Defendant and argues that a substantial amount of the loan is interest and the same would have been averted if the Defendant had been cooperative during the subdivision process of the charged property. The Plaintiff has demonstrated that it has ensured that despite the same and once the project was completed the Defendant was able to recover in excess of the amount agreed upon after reconciliation. From the deed of settlement referred to in extensio by the Respondent, the court notes that from a loan of Kshs.72,000,000/- it rose to Kshs.180,901,013/- but the parties agreed to have the same capped at Kshs.123,882,586/-. The Plaintiff contends that the sale of the units in the deed of settlement fetched the sum of Kshs.138,000,000/- way in excess of the amount agreed in the deed of settlement and accordingly, the Defendant has been fully paid. To my mind, the Plaintiff has demonstrated that indeed is the charged property is allowed to be sold by the Defendant, the Plaintiff will suffer a double loss as, in her view, it has already repaid the loan in full. Accordingly, I am persuaded that a sale of the charged property will greatly prejudice the Plaintiff. In any event, should the Defendant succeed in the end, the security will still be available as the said legal charge remains intact and in place until the full determination of the suit herein.

10. On a balance of probabilities, I am persuaded that the same tilts in favour of the Plaintiff since the land in question is under charge, it is therefore impossible for the Plaintiff to deal with the land at the expense of the Defendant until the suit herein is heard in full.

11. I find and hold that the application herein has merit and I shall allow it with costs to the Plaintiff/Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2023

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J. W. W. MONG'ARE

JUDGE

In The Presence Of

- 1. Mr. Wepo holding brief for Mr. Echessa for the Appellant.**
- 2. Mr. Mutua for the Respondent.**
- 3. Sylvia- Court Assistant**

