



Kabogo & another v KCB Bank Kenya Limited & another (Commercial Case E218 of 2023) [2023] KEHC 19422 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E218 OF 2023
DAS MAJANJA, J
JUNE 30, 2023**

BETWEEN

JOHN NGUGI KABOGO 1ST PLAINTIFF

DORIS NAMAYI ORIKO 2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

**BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING
SERVICE 2ND DEFENDANT**

RULING

1. The 1st Plaintiff is the registered proprietor of a five-bedroom double story house situated on a property; LR No. 4894/218, Garden Estate, Nairobi (“the suit property”). The 2nd Plaintiff is his spouse. The 1st Plaintiff charged the suit property to secure Kshs. 40,000,000.00 advanced to it by the 1st Defendant (“the Bank”) to purchase another property.
2. The 1st Plaintiff states that his business was affected when the club he was operating was demolished. It was also affected by the Covid-19 pandemic causing him to struggle to pay the loan. The Bank notified him that it would sell the suit property by public auction on account of Kshs. 68,313,071.26 owing as at 28th February 2023 thus precipitating this suit.
3. In the Plaint dated 19th May 2023, the Plaintiffs complain that they were not served with the 90-day statutory notice and the 40-day notice to sell under sections 90 and 96(2) of the *Land Act*, 2012 respectively. They further contend that the notices were sent to the wrong postal address not associated with them, P.O. Box 1251-00600 while the Bank was aware that the 1st Plaintiff had changed his address



- to P. O. Box 32378-00600, Nairobi. The Plaintiffs' aver that the 2nd Plaintiff, who gave the spousal consent, was not served with the statutory notices.
4. The Plaintiffs further aver that the valuation of the suit property undertaken by the Bank contains material falsehoods and is contrary to section 97 of the Land Act, 2012. It points out that the suit property had an open market value of Kshs. 71,300,000.00 and a forced sale value of Kshs. 53,475,000.00 according to the valuation report dated 9th September 2016 by Transcountry Valuers Limited allegedly commissioned by the Bank. It contends that the valuation by the 2nd Defendant done on 20th March 2023 places the market value at Kshs. 57,750,000 and the forced sale value at Kshs. 43,350,000.00. In their view, the value of the suit property should have appreciated hence they have a real apprehension that the suit property will be sold at an undervalue.
 5. The 1st Plaintiff avers that he does not owe the Bank Kshs. 68,313,071 as demanded. He states that he has paid over Kshs. 60,000,000.00 and that the amount claimed comprises purported interest, penalty interest, which is erroneous, unlawful, and illegal and is contrary to section 44 of the Banking Act (Chapter 488 of the Laws of Kenya) and the in duplum rule.
 6. In the Complaint, the Plaintiffs seek a declaration that the intended auction is illegal, null and void, a permanent injunction restraining the Bank from selling the suit property in exercise of its statutory power of sale and an order that the Bank render a complete, true and accurate statement of account showing the 1st Plaintiff's exact indebtedness. In the alternative, the Plaintiffs seek an order that they be allowed to sell the suit by private treaty.
 7. Based on the grounds set out in the Complaint and which I have outlined above, the Plaintiff has filed the Notice of Motion dated 19th May 2023 made, inter alia, under Order 40 rule 1 and 2 of the Civil Procedure Rules. The application is supported by the 1st Plaintiff's affidavit and supplementary affidavit sworn on 8th May 2023 and 10th June 2023. The Bank opposes it through the replying affidavit of its officer, Justus Wambua, sworn on 6th June 2023. The advocates supported their respective positions by brief oral submissions.
 8. Before dealing with the substantive application, I propose to deal with the preliminary objection raised by the Bank in the Notice of Preliminary Objection dated 6th June 2023. It has invoked section 6 of the Civil Procedure Act and contends that the court is deprived of jurisdiction and is sub judice as the Plaintiffs have filed a similar suit involving the same parties in KBU HC COMM No, E006 of 2023, John Ngugi Kabogo and Doris Namayi Oriko v KCB Bank Kenya Ltd and Legacy Auctioneering Services. At the hearing of the application, I ruled that the preliminary objection lacked merit and I now give my reasons. First, the issue of sub-judice, being a matter of evidence, is not in the nature of a preliminary objection within the meaning of the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696. The Court (Law JA at P. 700) observed that, "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit." In this instance and in the absence of an admission of the facts on which the objection is based, the court would need to acquaint itself with the facts and pleadings of the previous case. For this reason, I directed the Plaintiffs to file a further affidavit. Having considered the material of the Kiambu case, I am not convinced that this case is sub-judice. While the parties and the reliefs sought are the same, that case deals with a different property; Villa No. 70 situated on LR No. 19094/38. I therefore find and hold that this suit is not sub judice.
 9. The court is called up to determine whether the Plaintiffs have made out a case for grant of an interlocutory injunction. The principles upon which the court exercises its discretion were settled in *Giella v Cassman Brown & Co., Ltd* [1973] EA 358. First, an applicant must demonstrate a prima



facie case with a probability of success. Second, 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 and lastly, if the Court is in doubt, it will decide an application on the balance of convenience. The Court of Appeal in [Nguruman Limited v Jane Bonde Nielsen and 2 Others](#) NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR added that the three conditions outlined above are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Thus, if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration.

10. As to what constitutes a prima facie case, the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Limited and 2 Others](#) [2003] eKLR explained as follows:

A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.

11. To establish a *prima facie* case, the Plaintiffs raised three issues in the plaint and application. First that the 1st Plaintiff is not indebted to the extent alleged by the Bank. Second, that the Plaintiffs were not served with the requisite statutory notices and last, that the Bank intends to sell the suit property at an undervalue.
12. For a chargee to sell the charged property, the chargor must be in breach of the terms of the charge which include failing to pay the amount advanced in the manner agreed. The 1st Plaintiff does not deny that he is indebted to the Bank. He admits that it defaulted on payment due to the demolition of his business premises and the Covid 19 pandemic. He claims that he has paid over Kshs. 60,000,000.00 and that any additional amount constitutes illegal interest and charges, is unjustified and does not reflect the true nature of default. In response, the Bank asserts that he is truly indebted and, in that respect, it has attached statements of account for the two facilities demonstrating that he owes Kshs. 68,177,690.84 as at 29th May 2023.
13. I find and hold that the 1st Plaintiff is indebted to the Bank. Under the charge over the suit property dated 17th November 2014, the Bank reserved the right to consolidate the facility secured thereunder together with any other facility advanced by the Bank and secured separately. The Bank has also furnished statements of account for the two facilities. Section 176 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) creates a presumption in favour of the Bank that a copy of any entry in a banker’s book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded. The 1st Plaintiff has not shown that any of the entries in the statements of account furnished by the Bank are erroneous, false or fraudulent. I cannot therefore state at this stage that the amount claimed is in violation of section 44 of the [Banking Act](#) or the in duplum rule. In any case, it settled principle that a dispute as to the amount owed is not a sufficient ground to grant an injunction to restrain a chargee from exercising its statutory power of sale (see [Mrao Limited v First American Bank of Kenya Limited and 2 Others](#) (*Supra*) and [Joseph Okoth Waudi v National Bank of Kenya](#) CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR).
14. As the 1st Plaintiff was indebted, the Bank was entitled to exercise its statutory power of sale by issuing and serving valid statutory notices under the [Land Act](#), 2012 and the Auctioneer Rules. The 1st Plaintiff contends that if the Bank issued any notices, it served them at the wrong address and that it failed to serve his spouse, the 2nd Plaintiff, who had given consent to charge the suit property. It is settled that



- the onus is on the Bank to prove that it served valid notices on the Bank as was held by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260.
15. The Plaintiffs contend that the notices were sent to P. O. Box 1251-00600 and not P. O. Box 32378-00600, Nairobi, which is their address. The former address is the one indicated as the Plaintiffs' address in the charge dated 17th November 2014. The same address is used in the other facility advanced to the 1st Plaintiff supported by the charge dated 5th January 2018. The Bank is therefore correct to assert that the P. O. Box 1251-00600 is the correct address. There is no evidence on record that the Plaintiff informed the Bank that this was no longer its address of service or that it had changed its address of service. I cannot fault the Bank for sending the statutory notices to the address agreed on by the parties in the charge document.
 16. As regards service of the statutory notices, the Bank produced the following evidence of service. The 90-day statutory notice dated 26th September 2019 issued under section 90 of the *Land Act* was sent to the 1st Plaintiff by registered post on 9th October 2019 as evidenced by the Certificate of Posting No. RD 135566607. The 40-day notice to sell dated 14th April 2020 issued under section 96 of the *Land Act* was sent by registered post on 8th May 2020 as shown by the Certificate of Posting No. RD 138101593. The 45-day redemption notice dated 16th March 2023 issued under the *Auctioneers Rules* was served on the 1st Plaintiff personally and acknowledged by him on 20th March 2023 at 4.10pm. Based this evidence, I find and hold that the Bank has discharged the burden of showing that the 1st Plaintiff was duly served with the statutory notices necessary for it to exercise its statutory power of sale.
 17. The Plaintiffs further argue that the Bank cannot exercise its statutory power of sale as the 2nd Plaintiff was not served with statutory notices yet she had given consent to the 1st Plaintiff to charge the suit property. The Bank states that it served the 2nd Plaintiff, who in any case, shares the same address and rejects the argument that failure to serve her would be fatal and thus entitled the 1st Plaintiff to the injunction.
 18. Section 90(1) of the *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 in 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." A plain reading of this section imposes a duty on the chargee to serve the notice on the chargor. There is no requirement to serve the spouse of the chargor. The plain language of the statute means that no such requirement can be implied to the extent of nullifying the right of the Bank to sell once the statutory notice is served.
 19. On the other hand, the chargee is required to serve the notice to sell issued under section 96(2) of the *Land Act* and serve a copy thereof upon several persons enumerated in section 96(3) including, "a spouse of the chargor who has given consent." The notice dated 14th April 2022 was neither copied to the 2nd Plaintiff nor sent or served upon the 2nd Plaintiff. I reject the argument that merely because the Plaintiffs share the same address then the 2nd Plaintiff as deemed as served as she is entitled to be served in her own right. The Plaintiff therefore argues that he has established a prima facie case. He relies on *Simon Pasua ole Kaanto and Another v Family Bank Limited* [2018] eKLR where the court held that since the Plaintiff's spouse had not been served, the Plaintiff has made out a prima facie case with a probability of success. I agree with this position that the requirement to serve the persons set out in section 96(3) is mandatory and the court will not permit the charged property to be sold unless service has been effected on the enumerated persons (see *Julius Mainye Anyega v Ecobank Ltd* [2014] eKLR and *Wilstone Mdingi Mwawugunga v Kenya Women Finance Bank PLC* [2022]eKLR).



20. The final issue for consideration concerns the valuation of the suit property. The Plaintiffs have accused the Bank of undervaluing the suit property. Section 97 of the [Land Act](#) imposes on the chargee a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under Rule 11(b)(x) of the Auctioneers Rules, the charge must conduct a professional valuation of the reserve price not more than 12 months prior to the proposed sale. In this respect, the Bank commissioned Mwaka Musau Consultants to value the suit property. It prepared a report dated 7th November 2022 which placed the market value and forced sale value of the suit property at Kshs. 57,750,000.00 and Kshs. 43,350,000.00 respectively. The Plaintiffs complain that this valuation does not reflect the true valuation of the property having regard to a previous valuation by Transcountry Valuers Ltd instructed by Kwetu Merchants Limited that reflected a higher market and forced sale value in 2016.
21. While the Plaintiffs may have a point as to the value of the suit properties, they have not produced any contrary evidence as to what ought to be the purported ‘true and real’ value of the suit property at this time. A valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of properties based on accepted parameters. To displace a professional valuation, the Plaintiffs must produce clear evidence that the valuation is wrong or at least doubtful. Mere assertions or statements will not do (see [Palmy Company Limited v Consolidated Bank of Kenya Limited](#) ML HCCC No. 527 of 2013 [2014] eKLR). I thus find that the Plaintiffs’ assertions are mere and bare and do not elevate their case to a *prima facie* case with a probability of success. In any case, the clear remedy for undervaluation is damages. This ground by the Plaintiffs also fails.
22. From the analysis of the Plaintiffs’ case, they have only succeeded in demonstrating that the Bank did not serve upon the 2nd Plaintiff the 40-day notice to sell issued under section 96(2) of the [Land Act](#). Bearing in mind that the statutory notice under section 90 has been served on the 1st Plaintiff, the court cannot issue an injunction pending the hearing and determination of the suit when the Bank’s statutory power of sale has crystallized and when all the other steps have been taken in accordance with the law. I am guided by the following observations by the Court of Appeal in [National Bank of Kenya v Shimmers Plaza Limited](#) NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR:
- An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.
23. In the circumstances, I shall issue an injunction restraining the Bank from selling the suit property for the period necessary to effect the service of the copy of the 40-day notice under section 96(2) of the [Land Act](#) upon the 2nd Plaintiff. For the avoidance of doubt there is no requirement to issue any further notices as the 1st Plaintiff, who has the right of redemption, has already been served hence the Bank may proceed to exercise its power of sale on the expiry of 40 days of service of the notice on the 2nd Plaintiff.
24. For the reasons I have set out above, I allow the application dated 19th May 2023 on the following terms:
- a. The 1st Defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as LR No. 4894/218, Garden Estate, Nairobi until it serves on



the 2nd Plaintiff a copy of the statutory notice dated 14th April 2020 issued under section 96 of the [Land Act](#), 2012.

- b. The Defendants shall bear half the costs of the application.

SIGNED AT LONDON, ENGLAND

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 30th day of JUNE 2023.

F. MUGAMBI

JUDGE

Court of Assistant: Mr M. Onyango

Mr Kirui instructed by MGW Advocates LLP for the Plaintiffs.

Mr Abdullahi instructed by Garane and Somane Advocates for the Defendants.

