



**Muotia v National Bank of Kenya Limited (Commercial Case E193 of 2023)
[2023] KEHC 19412 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E193 OF 2023
DAS MAJANJA, J
JUNE 30, 2023**

BETWEEN

GEOFFREY WAHOME MUOTIA PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. It is not in dispute that the Plaintiff is the registered proprietor of the property known as LR No. 209/12544 situated at Upper Hill, Nairobi on which he runs a business known as Upper Hill Hotel (“the suit property”). He charged the suit property to the Defendant (“the Bank”) to secure a principal sum of Kshs. 281,000,000.00. As the Plaintiff defaulted in repaying the loan, the Bank evinced its intention to sell the suit property thus precipitating this suit.
2. Together with the Plaintiff, the Plaintiff filed the Notice of Motion dated 5th May 2023 seeking an injunction restraining the Bank from exercising its statutory power of sale. He also invoked sections 104 and 105 of the *Land Act*, 2012 to request the court to extend the time for him to rectify the default set out in the auction notice dated February 16, 2023 for a period of 12 months or in the alternative postpone or suspend the exercise of the Bank’s statutory power of sale for a period of 12 months.
3. The application is supported by the Plaintiff’s affidavit sworn on May 5, 2023. The Bank has responded to it through the replying affidavit of its officer, Rhoda Sirma, sworn on May 15, 2023. Both parties have filed written submissions which I have considered in reaching this decision.
4. The thrust of the Plaintiff’s case as set out in the Plaintiff and application is that he is committed to repaying the loan advanced to him, but he has faced certain challenges. He states that his business was affected for a period when the entrance to the hotel was blocked when the Government was constructing and upgrading the road in Upper Hill area, Nairobi. That he was involved in a road traffic



accident in 2022 which required him to travel out of the country to seek medical help. He adds that he has now secured a purchaser for the suit property in order to settle the entire debt. He avers that before the transaction could be completed, the Bank advertised the suit property for sale on an online platform thereby undermining his efforts. He contends that the Bank has acted in an unconscionable manner as it had led him to believe that it would not advertise the property for sale while the negotiations were ongoing. The Plaintiff also complains that he is apprehensive that the Bank will sell the suit property at an undervalue as the value advertised is based on the valuation conducted in 2017 contrary to section 97(2) of the *Land Act*, 2012.

5. The Bank opposes the application and asserts that the Plaintiff is not deserving of an injunction or any relief. It avers that the Plaintiff had filed a previous suit; ML HC COMM No. 23 of 2015, *Geoffrey Wahome Muotia v National Bank of Kenya Limited*. In that case the Plaintiff sought an injunction seeking to restrain the Bank from exercising its statutory power of sale. Although the court (Okwany J.) dismissed the application on 31st May 2019, it noted that the Bank had not complied with the provisions of sections 90 and 96 of the *Land Act*, 2012 as it had not serviced the statutory notices in accordance with the law. The court however directed the Bank to comply with the law. The suit was subsequently dismissed for want of prosecution on May 30, 2023.
6. After the court dismissed the Plaintiff's application, the Bank states that it proceeded to issue and serve the statutory notices. It issued the statutory notice dated June 3, 2019 under section 90 of the *Land Act*, 2012 which was served by hand delivery and registered post as evidenced by the affidavit of service sworn by George Pongo sworn on 7th June 2019 and Certificate of Postage (No. RD131466342KE) respectively. The Bank served the notice to sell dated 4th September 2019 issued under section 96(2) of the *Land Act*, 2012 as evidenced by the Certificate of Postage (RD1336399097KE). The Bank also instructed the Auctioneer to issue and serve the 45-day redemption notice dated December 6, 2019 and the notice to sell the suit property on February 11, 2020 which the Plaintiff duly acknowledged receipt of. The Bank denies that it has advertised the suit property on an online platform as alleged by the Plaintiff.
7. The Bank denies that it has not valued the suit property in compliance with section 97(2) of the *Land Act*, 2012. It avers that as a result of the Plaintiff frustrating it from accessing the suit property and valuing it, it moved the court at the instance of its Auctioneer in CM Misc. No. E578 of 2023 in which the court granted the auctioneer orders to access the suit property. Based on the order issued on April 27, 2023, Realty Valuers East Africa Limited proceeded to value the suit property. It prepared the report dated May 10, 2023 placing the market value and forced sale value of the suit property at Kshs.370,000,000.00 and Kshs. 277,500.000.00 respectively.
8. The Bank states that the Plaintiff is undeserving of any injunction as it has not remitted any payments since the facilities were granted over nine years ago and that the total outstanding debt stands at Kshs. 447,789,971.22 as at May 11, 2023. It states that it has indulged and co-operated with the Plaintiff to enable him to secure a buyer since 2017 but none of the efforts have materialised so far leaving it to exercise to its rights.
9. In order to succeed to in the application, the Plaintiff must satisfy the conditions for the grant of an injunction 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 held that those conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.



10. From the pleadings and depositions, the essence of the Plaintiff's case is that it seeks indulgence in order to secure a buyer for the suit property. He does not deny that he is indebted to the Bank. Following the dismissal of the previous suit he had filed against the Bank to restrain it selling the suit property in exercise of its statutory power of sale, the Bank proceeded to comply with all the prerequisites necessary for doing so. It issued and served the relevant notices under sections 90 and 96(2) of the *Land Act*, 2012 on the Plaintiff. The Plaintiff has not controverted these facts by way of a supplementary affidavit. It has also issued the 45-day auctioneers notice of redemption and proceeded to value the suit property within the period prescribed by the Auctioneer's Rules, that is within one year of the intended sale. I therefore find and hold that the Bank's statutory power of sale has arisen, and the Bank has complied with all conditions for it to sell the suit property.
11. Can the court issue an injunction to facilitate the Plaintiff obtain a buyer for the suit property? In this case the Plaintiff avers that he has obtained a serious buyer who wishes to purchase the suit property. It has annexed a sale agreement dated March 11, 2021 between himself and a purchaser, MR seeking to purchase the suit property for the sum of USD 21, 472,940.00 which sale was to be completed within 120 days from the date of execution. He has also produced a letter dated April 4, 2023 from IKM Advocates confirming that it would act for him in the sale of the suit property and an email dated 3rd February 2023 in which the Plaintiff informed the Bank that as he wanted to proceed for medical treatment overseas, he wished to discharge the suit property. The Bank replied by informing him that it had already agreed to accept Kshs. 300,000,000.00 subject to the deposit being paid in December 2022 which deposit had not been paid.
12. The Bank has produced three letters dated August 11, 2017, May 27, 2020 and May 9, 2023 from the Plaintiff informing the Bank that it has secured a purchaser for the suit property and seeks the Bank's assistance to facilitate the sale. On its part, the Bank addressed a letter dated 17th October 2019 accepting the Plaintiff's offer to pay Kshs. 482,000,000.00 by March 30, 2020. There is also another letter dated December 1, 2022 addressed to the Plaintiff by the Bank referring to a meeting held with the Plaintiff. The Bank stated that it was prepared to receive the Plaintiff's specific, firm and time bound commitments to settle the debt.
13. It is trite law that the court is bound to enforce the contractual rights and obligations of the parties hence it is inconceivable that the court could issue an injunction restraining the Bank from exercising its statutory right to sell the suit property when the Plaintiff has not demonstrated any wrong or breach of the Plaintiff's legal right. The court cannot force the Bank to accept the Plaintiff's proposal to sell the suit property in a manner not contemplated by the agreement as this would amount to re-writing the parties' contract and bargain. In *Muigai Enterprises Limited v Kenya Commercial Bank Limited* ML HCOMM No. 473 of 2015 [2016] eKLR, the court expressed the view that, "[T]he court cannot compel the defendant to accept the plaintiff's proposals. I so find because it is not a matter of an entitlement bestowed upon the plaintiff, whether by statute or by contract."
14. From the totality of evidence of the parties none of the Plaintiff's proposals have materialized despite the Bank granting him indulgence. Even the evidence he provided is rather thin. The sale agreement he relies on was executed on March 11, 2021 and nothing appears to have come of it. Nothing shows that the completion date, which is way past, had been extended. Even accepting that the court may have jurisdiction to grant the prayers it seeks, a party who seeks the court's intervention must be candid and make full disclosure of all facts necessary for the court to make an informed decision. There is no evidence that the Plaintiff has received an offer to purchase the suit property. The fact that he has instructed a firm of advocates to act for him in a transaction whose antecedents are unknown is simply inadequate.



15. I therefore find and hold that the Plaintiff has failed to demonstrate a prima facie case with a probability of success. The Plaintiff is indebted to the Bank and since the requisite notices have been properly issued and served upon the Plaintiff, the Bank's statutory power has arisen and has now crystallized. There is no valid reason why the impending sale should not proceed.

16. The Plaintiff's application dated May 5, 2023 is dismissed with costs to the Defendant.

SIGNED AT LONDON, ENGLAND

D. S. MAJANJA

JUDGE

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

F. MUGAMBI

JUDGE

