



REPUBLIC OF KENYA



KENYA LAW
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**Njiraine v Co - operative Bank of Kenya Limited (Civil Suit E040 of 2021)
[2023] KEHC 19338 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E040 OF 2021
FG MUGAMBI, J
JUNE 30, 2023**

BETWEEN

CATHERINE NJOKI NJIRAINÉ APPLICANT

AND

CO - OPERATIVE BANK OF KENYA LIMITED RESPONDENT

RULING

Brief Facts

1. Before the court is the application dated September 13, 2021 brought under section 1A, 1B, 3A, 63(c) and (e) of the *Civil Procedure Act*, order 40 of the *Civil Procedure Rules*, section 103 of the *Land Act* and all other enabling provisions of the law.
2. The application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. That an order of temporary injunction do issue restraining the respondent/respondent from advertising for sale, selling, taking possession of, alienating, disposing either by private treaty or public auction or in any other manner interfering with the title to land title number Kajiado Kaputei- North/12380, land title number Kajiado/kaputei- North/7212, land reference number Kajiado Kitengela/20308 and land title no Kajiado/kitengela/21712 pending the hearing and determination of this suit.



- vi. Costs of this application be provided for
3. The application was based on the grounds stated on the application, supporting affidavit and supplementary affidavit sworn by Catherine Njoki Njiraini and submissions dated January 17, 2022. The applicant's case was that on diverse dates it acquired loan facilities from the respondent bank against securities which included a guarantee and charges over 4 properties. The applicant fell into arrears and the guarantee was recalled. The applicant approached the bank seeking to restructure the loan. It was agreed that one of the secured properties would be sold and the proceeds applied to reducing the amount due.
 4. The applicant's bone of contention is that the said proceeds were not applied to reduction of the overdraft but were instead applied towards the payment of the loan arrears on the mortgage facility which then stood at Kshs 3,948,000/=. Subsequently the applicant avers that she also sold land title number Kajiado/kaputiei-north/30540 at the price of Kshs 5,500,000/= which was also paid to the respondents. The respondents received the money but failed to restructure the loan as had been agreed.
 5. Subsequently the applicant held discussions with the respondent which culminated in an agreement being reached on April 15, 2021. During the pendency of the agreement and negotiated terms, the bank served the applicant with 90-day statutory notices under s. 90 of the Land Act informing her of its intention to dispose of the remaining securities.
 6. The applicant's case is that the conduct by the respondent was fraudulent and illegal and that the loan balance was arrived at through an unclear computation. The applicant further contended that the respondent's failure to restructure the loan caused her great loss and damage and that the respondent levied punitive penalties thus making the loan accumulate huge sums. Counsel submitted that the respondent had not kept proper records in respect to the loan amounts with respect to the loan amounts owed by the applicant.
 7. The application was opposed by a replying affidavit dated October 4, 2021 and a further affidavit dated January 22, 2022, both sworn by Mike Njuki and submissions dated September 29, 2022. The respondent stated that it was not in contest that the applicant took different facilities from the respondent and the same were secured by the applicant's properties. It was further averred that the applicant did not contest defaulting in the loan facilities and her main concern is to have her restructured and have the amount recalculated.
 8. The respondent's position was that the court could not compel the respondent to restructure the loan as the same is akin to breaching the respondent's freedom to contract. The respondent contended that on various occasions the applicant requested to sell the securities to offset the loan and the same was allowed by the respondent. The respondent further stated that the terms for restructuring proposed by the applicant were not acceptable to the respondent.
 9. With regard to the injunction, counsel submitted that the applicant did not avail any evidence to show that the respondent infringed on its right. The respondent submitted that failure to pay a debt rendered the applicant unworthy of injunctive orders. That dispute in accounts was not a basis for an injunction. Counsel submitted that the applicant did not establish a prima facie case with probability of success and was not likely to suffer irreparable harm.

Analysis

10. I have considered the application, the affidavits and the submissions on record. The main issue is whether the applicant has met the threshold for granting an injunction to restrain the respondent from exercising its statutory power of sale.



11. The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that:

Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or;
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

12. The conditions for the grant of a temporary injunction were laid out in the celebrated case of *Giella v Cassman Brown & Co Ltd* (1973) EA 385, at page 360 where Spry J. held that

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

13. Going by this now accepted threshold, the first question would be whether the applicants have shown that they have a *prima facie* case with a probability of success. In [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] KLR 125, Bosire, JA defined a *prima facie* case as follows:

"...I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter...a *prima facie* case 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 the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

14. From the facts presented in court, it is not in dispute that the applicant was advanced different facilities by the respondent and the same were secured by different properties. The applicant admits having failed in her obligation to repay the amounts due as agreed under the loans to the respondent. The terms of the contract were that in the event of default the respondent would exercise its statutory right of sale. This too is admitted by the applicant.

15. The applicant's gravamen is with regards to the respondent's refusal to restructure the loan facilities and levying punitive, arbitrary and unexplained penalties. On this account, I will agree with the respondent that the restructure of the loan was not an automatic right to the applicant but rather a relief extended to the client by the bank. It was not provided for in the contract and therefore the applicant was not entitled to a restructure by right. It is therefore not a ground of proving a *prima facie* case with a probability of success.

16. On the issue of punitive and unexplained damages, courts have overtime held that a bank would not be stopped from exercising its statutory power of sale on grounds of disputed interest rates.



17. In *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 (CCK) it was held that: -

“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest...in any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction. “

18. It is therefore my finding that the applicant has not established a prima facie case with a probability success. Having so found, as in *Nguruman Limited v Jane Bonde Nielsen and 2 others* Nrb civil appeal No 77 of 2012 [2014] eKLR since the applicant has not established a *prima facie* case with a probability of success, the issue whether the damages are sufficient to compensate the applicant in the event the suit succeeds does not arise. There also arises no need to determine the balance of probabilities.

Determination and orders

19. In light of the above, the application dated September 13, 2021 fails and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 30th DAY OF JUNE 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

