



Sinende Wholesalers v Transnational Bank Limited & another (Commercial Case E064 of 2023) [2023] KEHC 19363 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E064 OF 2023**

DAS MAJANJA, J

JUNE 30, 2023

BETWEEN

SINENDE WHOLESALERS PLAINTIFF

AND

TRANSNATIONAL BANK LIMITED 1ST DEFENDANT

SONJOMU AUCTIONEERS 2ND DEFENDANT

RULING

1. Before the court for determination is the Plaintiff's Notice of Motion dated February 22, 2023 made, *inter alia*, under Order 40 Rules 1, 2, 4 and 8 of the Civil Procedure Rules. The Plaintiff primarily seeks an injunction restraining the 1st Defendant ("the Bank") in conjunction with the 2nd Defendant ("the Auctioneer") from selling his property Cismara/Olulunga/14681 ("the suit property") in exercise of its statutory power of sale pending the hearing and determination of the suit. The application is supported by the affidavit and supplementary affidavit of Joseph Chepkoros Moindi who trades in the name and style of Sinende Wholesalers, sworn on February 22, 2023 and April 15, 2023 respectively. It is opposed by the Defendants through the affidavit of the Bank's officer, Valence Mmuka, sworn on March 20, 2023. The parties' advocates made brief oral arguments in support of their respective positions.
2. There is a dispute as to the facilities advanced to the Plaintiff by the Bank. In its Further Amended Plaint dated April 20, 2023, the Plaintiff states that the only facility he took was an overdraft of Kshs 15,000,000.00 advanced on December 19, 2016. It denies that the Bank offered it several facilities outlined in the Letter of Offer dated October 19, 2017 ("the Letter of Offer"). It points out the letter of offer produced by the Bank is not executed.
3. According to the Letter of Offer, the Bank advanced the Plaintiff an aggregate sum of Kshs 32,072,251.00 for the purpose of restructuring an existing term loan. The facilities included a term



loan amounting to Kshs. 14,799,650.00, asset finance of Kshs 4,549,848.50, an overdraft of Kshs. 9,722,152.74 and a temporary overdraft of Kshs 3,000,000.00. These facilities were secured by a First Legal Charge for Kshs 5,000,000.00, a Further Charge for Kshs 1,500,000.00, a Second Further Charge for Kshs 4,750,000.00 and a Third Further Charge for Kshs 5,250,000.00 over the suit property in addition to a Chattels mortgage over motor vehicles registration numbers KBZ 188Z, KBP 821B, KAZ 342V and KAY 266F. The Charges are reflected as encumbrances in the title to the suit property.

4. Although the Letter of Offer produced by the Bank is not executed by all the parties, it is signed by the Plaintiff. Its contents are however corroborated by the fact that the charges outlined therein are reflected on the encumbrances section on the title to the suit property. The Plaintiff argues that the Bank ought to have produced copies of the charges in order to prove that he is indebted to the extent urged by the Bank. With respect, the Plaintiff bears the burden of proving that he is entitled to an injunction. He has not produced any document to show that he was only advanced overdraft facilities by the Bank as alleged on December 19, 2016.
5. But this is not the end of the matter. The Plaintiff failed to disclose that he had filed a suit against the Defendants; Narok HCCC No 21 of 2018, John Chepkoros Moindi v Transnational Bank and Sarah Munge t/a Sanjom Auctioneers. In that case the parties recorded a consent on March 7, 2019 in the following terms:
 1. The total loan balance (overdraft, term loan, asset finance plus all interest accrued over time) owed to the 1st Defendant as of the date of this consent is Kshs 31,715,191/= (thirty-one million seven hundred and fifteen thousand one hundred and ninety one).
 2. The defendants to ensure that the registration of motor vehicle registration No KBZ 188Z Mercedes Benz lorry be transferred into the names of the interested party.
 3. The 2nd Defendant shall forthwith release four lorries registration number KAY 266F, KAZ 342V, KBP 821B and KBL 355W to the plaintiff. The plaintiff undertakes to dispose the said lorries except KBZ 188Z (Already sold to the interested party herein) within 30 (Thirty days) of release to the loan arrears with the supervision of his counsel who shall render an account to the bank in order to facilitate transfer of logbook to the purchaser.
 4. The 1st and 2nd defendants/respondents are hereby compelled to release the motor vehicle registration No KBZ 188Z Mercedes Benz lorry to the Interested Party.
 5. The auctioneer to file its attachment and storage costs in court for taxation which amount upon taxation shall be equally paid by the plaintiff and 1st defendant.
 6. The matter shall be mentioned in one month's time to confirm compliance.
6. The aforesaid consent recorded in court corroborates the Letter of Offer relied on by the Bank. Since it is a consent recorded by the parties, the Plaintiff is estopped from denying that it was not advanced facilities as contended by the Bank and that it is not indebted to the extent that is agreed on in the consent.
7. Turning back to the Plaintiff's case as set out in his Further Amended Plaintiff and application, it is trite law that for the Plaintiff to succeed in obtaining an interlocutory injunction, he must satisfy



the conditions laid out in *Giella v Cassman Brown* [1973] EA 348. He must demonstrate that he has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in his favour. The court must apply these three conditions as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR). This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, the court will consider the other conditions.

8. The first hurdle the Plaintiff must surmount is to establish a *prima facie* case with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that 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 to call for an explanation or rebuttal from the latter.” A *prima facie* is founded on what is pleaded in the plaint.
9. The Plaintiff raises three main issues for consideration. First, that while it is indebted, the amount claimed by the Bank is usurious and in breach of the in duplum rule and section 44 of the *Banking Act* (Chapter 488 of the Laws of Kenya) and that he does not owe the amount claimed by the Bank. Second, the Plaintiff avers that he was not served with the statutory notices which would entitle the Bank to exercise its statutory power of sale and last, that the Bank has not carried out a valuation of the suit property.
10. On the issue of indebtedness, the Plaintiff denies that it owes Kshs 33,459,951.00 due as at May 4, 2020 set out in the 40-day redemption notice served on it by the Auctioneer on May 5, 2020. The Plaintiff states that he has been dutifully servicing the loan until the Covid-19 pandemic affected his business. He requested to restructure the facilities, but the Bank failed to respond to his request and failed to give him a true and accurate statement of his account.
11. The Plaintiff further claims that he has paid Kshs 12,789,883.00 between December 19, 2016 and January 1, 2022. That the total interest expected to be paid for that period at 13% per annum is Kshs 1,950,000.00 hence it ought to have remitted Kshs 16,950,000.00 as at December 19, 2022. According to the Plaintiff, the balance is Kshs 4,160,117.00.
12. In its pleading, the Plaintiff prays that he be allowed to pay Kshs 4,160,117.00 he owes over a period of 24 months. In this respect the Plaintiff admits indebtedness. Although he disputes the amount claimed by the Bank, he cannot deny the level of indebtedness based on the consent he signed. Based on that consent order, he is estopped from claiming that the amount is usurious or is in breach of the in duplum rule. It is an established principle that the court will not grant an injunction merely on the ground the debt is disputed (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).
13. As the Plaintiff has admitted his indebtedness, the next question for resolution is whether the Bank has satisfied the procedure necessary for it to exercise its statutory power of sale. The Plaintiff denies that he has received any notices issued in compliance with sections 90 and 96 of the *Land Act, 2012* which are a condition precedent for the exercise of the statutory power of sale. The Bank bears the burden of showing that it has issued and served all the statutory notices on the Plaintiff. In *Nyagilo Ochieng & Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden to show that the statutory notice has been served does not rest on the chargor. That once the



chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.

14. In its replying affidavit, the Bank has annexed a statutory notice issued under section 90 of the [Land Act, 2012](#) dated June 7, 2019 prepared by Mbugwa, Atudo and Macharia Advocates on behalf of the Bank. It is addressed to Joseph Rongino Kirui and copied to John Chepkoros Moindi. At the material time, both Joseph Kirui and John Moindi were partners, but Joseph resigned from the partnership on August 17, 2019. The Bank's advocates issued a further notice to sell under section 96(2) of the [Land Act, 2012](#) addressed to Joseph Rongino Kirui. The Bank has not produced any evidence to show that both notices were served on the chargor either physically or by registered post. I therefore find and hold that the notices were not served as required by the law.
15. The Bank cannot exercise its statutory power of sale if it has not served statutory notices on the chargor. While the court may issue an injunction pending the hearing and determination of the suit, an injunction is an equitable remedy which the court may grant on such terms and conditions as it deems fit and just in the circumstances of the case. Having found that the Plaintiff is indebted to the Bank and the only issue is service of notices, I hold that granting an injunction pending the hearing and determination of the suit would not be in the interests of justice as the debt would continue to escalate and eat in the value of the suit property and the irregularity is incurable. In this respect I would do no better than cite what the Court of Appeal observed in [National Bank of Kenya v Shimmers Plaza Limited](#) NRB CA Civil Appeal No 26 of 2009 [2009] eKLR as follows:

"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."
16. I shall therefore grant an injunction but only limited to the period necessary for the Bank to comply with the law by issuing and sending to the Plaintiff statutory notices under section 90 and 96 of the [Land Act, 2012](#) and then proceed with all the other steps. It is thus not necessary to deal with the issue of valuation of the suit property as the Bank will be required to value it when it takes steps to sell.
17. I allow the Notice of Motion dated February 22, 2023 on the following terms:
 - a. The 1st Defendant be and are hereby restrained from exercising its statutory power of sale in respect of the property known as LR No Cismara/Olulunga/14681 unless it issues and serves on the Plaintiff fresh statutory notices under sections 90 and 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

Ms Auma instructed by Auma and Company Advocates for the Plaintiff.

Ms Odongo instructed by Robson Harris Advocates LLP for the Defendant.

