



Mc Tough & another v National Bank of Kenya Limited & another (Civil Case E003 of 2023) [2023] KEHC 27486 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E003 OF 2023
MS SHARIFF, J
JULY 31, 2023**

BETWEEN

JAMES MICHAEL MC TOUGH 1ST PLAINTIFF

PATRICIA ANN MCTOUGH 2ND PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT

**GODFREY COLLINS OMONDI T/A COLINET AUCTIONEERS 2ND
DEFENDANT**

RULING

1. This ruling is in respect of the applicant’s application dated 20th February, 2023 in which the applicant seeks the following reliefs;
 - a. A temporary injunction restraining the respondents, their servants and or agents jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and or interfering whatsoever with the 1st applicant’s suit property known as Kisumu municipality block 11/219 pending the hearing and determination of this application.
 - b. A temporary injunction restraining the respondents, their servants and or agents jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and or interfering whatsoever with the 2nd applicant’s suit property known as Kisumu Municipality Block 11/53 pending the hearing and determination of this application.
 - c. A temporary injunction restraining the respondents, their servants and or agents jointly and severally from advertising for sale, auctioning, selling,



transferring, disposing, dealing and or interfering whatsoever with the 1st applicant's suit property known as Kisumu Municipality Block 11/219 pending the hearing and determination of this suit.

- d. A temporary injunction restraining the respondents, their servants and or agents jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and or interfering whatsoever with the 2nd applicant's suit property known as Kisumu Municipality Block 11/53 pending the hearing and determination of this suit.
 - e. Costs of the application.
2. The application is supported by the 1st applicant's affidavit in which he depones that he is the registered owner of the whole of that parcel of land known as Kisumu Municipality block 11/219 while land parcel Kisumu Municipality Block 11/53 is registered in the 2nd applicant's name. He states that he has established his home in his parcel of land while the 2nd applicant's parcel has an establishment known as Sovereign Hotel (hereinafter referred to as "the Hotel"). The hotel is owned and operated by Sovereign Hotel Limited where he is a co-director.
 3. The 1st Applicant further deposes that on 27th August, 2015, the 1st Respondent advanced to the hotel a sum of USD 5,846,000 towards mortgage and Kshs.10,000,000/- as an overdraft facility. A floating debenture in favour of the 1st Respondent was created in addition to a legal charge over the subject parcels of land being securities for the loan.
 4. It is stated that in the year 2018, the hotel took out a facility letter intended to restructure the repayment of the existing loan and make a provision of additional facilities in the form of overdraft. The 1st Applicant depones that whereas the negotiations on this front fell through, the hotel nonetheless continued paying the outstanding facility.
 5. The Applicants state that consequent to the outbreak of Covid-19 in the year 2020 the hotels' ability to adhere to the strict payment obligations was hampered by it's financial constraints whereupon the hotel held a number of meetings with the 1st Respondent and requested for rescheduling of the loan to a flexible payment mode by way of installments.
 6. The Applicants state that the meetings came to fruition *vide* a resolution that gave the hotel a 6-months moratorium on monthly installments payments and following subsequent negotiations, it was agreed that the hotel would pay USD 20,000.00 monthly installments which condition was duly complied with.
 7. The 1st Applicant depones that on 25th November, 2022, the 1st Respondent invaded the hotel and wrestled the management of the hotel from the Applicant and placed the hotel under receivership. The Applicants then moved court *vide* Kisumu HCC Insolvency Cause No E002 of 2022: *Sovereign Hotel Limited vs National Bank Limited & Kolluri Venkata Subbaraya Kamsastry* and obtained restraining orders against the Respondent's intention to place the hotel under receivership.
 8. The Applicants aver that despite pendency of the insolvency petition, the 1st Respondent has instructed the 2nd Respondent to proceed and auction the subject parcels of land herein. The 1st Applicant depones that the 1st Respondent's right to sell the property has not yet arisen and that the notice so issued is defective, premature and is not statutory compliant due to want of disclosure of the value of the properties. Further that the 2nd Applicant has not been served with the requisite notice as envisaged under Sections 90 and 96 of the *Land Act* and that the amounts claimed by the 1st Respondent is illegal in that the interest is exorbitant and unlawful.



9. It is the Applicants' case that the 1st Respondent has applied varying penal interest on the facility without prior notice to the Applicants and has unreasonably declined acceptance of various proposals made to it by the hotel towards liquidating the credit facilities. The 1st Applicant also depones that the 1st Respondent has failed to render an accurate account of the loan accounts maintained by it.
10. Paul Chelang'a filed a replying affidavit in opposition to the application admitting that the hotel was indeed advanced various credit facilities by the 1st Respondent. He also admits that the hotel applied for restructuring and refinancing of the facilities and by a letter dated 19/6/2018, the hotel's proposal was accepted. Subsequently the hotel defaulted on the rescheduled payment plan wherefore the bank issued the requisite notices under the debenture and finally appointed a receiver to manage the business. Further that there is an ongoing case over this appointment.
11. The 1st Respondent maintains that it commenced the process of recovery under the charges by issuing notices under Section 90 of the Land Act in July, 2021 addressed to the hotel and the Applicants. There being no response from the Applicants, the bank elected to exercise its statutory power of sale and the 40-day notice was issued thereafter.
12. The 1st Respondent states that in the wake of the default, it complied with all the prerequisite statutory provisions and its appointment of a receiver was lawful, proper and regular.
13. By directions of the court, the application was disposed of by way of written submissions. Both parties complied.
14. On the issue of whether the Applicants have established a prima facie case, they assert that they are the registered proprietors of the subject parcels of land which are now subject of statutory power of sale. They submit that the 1st Respondent's purported issuance of the statutory notice is premature and is driven by malice. In this regard, the case of Mrao Ltd V First American Bank of Kenya Limited & 2 others (2003) eKLR has been cited.
15. On the limb of irreparable harm, the Applicants argue that the 1st Respondent has simultaneously placed the hotel on receivership and also seeks to exercise its statutory power of sale over the subject properties and has thus subjected the Applicants to double jeopardy and they stand to suffer irreparable harm and damages.
16. On the limb of balance of convenience, it is submitted that the balance tilts in favour of the Applicants because they are in possession of the subject properties and the hotel is continuing to remit monthly payments to the 1st Respondent who is thus not suffering any prejudice.
17. On the part of the Respondents, reliance has been placed on Mrao Case (supra), Tengeri N. Ogoro V Standard Chartered Bank (K) Ltd and Legacy Auctioneering Services Nrb Comm Suit No. E120 of 2022. The Respondents thus submits that the Applicants do not have prima facie case because the 1st Respondent is seeking to exercise a lawful remedy recognized by both statute and charges executed by the Applicants.
18. On the aspect of irreparable loss the Respondents submit that once a property is offered as security, it becomes available to the creditor in realization of the debt. Counsel buttresses this position with the authorities in Wilstone Mdingi Mwawugunga V Kenya Women Microfinance Bank Plc (2022) eKLR, Elijah Kipngeno Arap Bii V Kenya Commercial Bank Limited (2001) eKLR and John Nduati Kariuki t/a Jobester Merchants V National Bank of Kenya Ltd (2006) eKLR. It is further submitted that the property was willingly offered as security for credit facilities obtained by the hotel.



19. On balance of convenience, the Respondents submit that the hotel has admitted being in default without any expression by the Applicants of their willingness to pay the amount so owed and that if the Applicants are granted the injunction orders, this court will have impliedly condoned the default and encouraged the Applicants to perpetuate the same.
20. On whether the Applicants are deserving of the orders sought, the Respondents submit that the Applicants have failed to make full disclosure of material facts and have overtly misled the court on their commitment to pay the loan facility wherefore their hands are tainted and thus undeserving the orders sought.

Analysis and determination

21. The facts in this application are fairly straight-forward. Firstly, the Applicants being the registered owners of the subject parcels of land offered the said properties as collateral for a financial facility obtained by the hotel and consequent thereto the properties were charged in favour of the 1st Respondent and the money was indeed disbursed.
22. Secondly, the Applicants admit that the hotel has defaulted in the repayment of the loan which they blame on the failure by the 1st Respondent to restructure the same and the outbreak of the Covid-19 pandemic. They also fault the process already initiated by the Respondents towards realization of security offered. The Applicants are also faulting the 1st Respondent for unilateral increase on the interest rates and it's imposition of harsh penalties.
23. It is common ground that there is another matter pending before the High Court in relation to the appointment of receivers by the Respondent pursuant to the debenture issued by the hotel. Save for this passing mention of that case, I will refrain from making any substantive reference to the same.
24. The issue that hence emerges for determination is whether, as per the material availed before me, the Applicants have met the threshold for a grant of temporary injunctive reliefs against the Respondents.
25. Given that the injunction orders sought are aimed at restraining a bank from exercising its statutory power of sale, I find the sentiments expressed in *Mrao Ltd* (*supra*) pertinent. In the matter, the court rendered itself as follows;

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

26. Ordinarily, grant of injunctive reliefs are governed by Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 which provides;

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 orders.

27. On the element of prima facie case, the parties freely admit that the subject properties were offered as security by the Applicants and the hotel has since defaulted in paying the loan as when the installments fell due. The Applicants on their part claim that whereas a consensus had been reached on the restructuring of the payments by way of instalments, the 1st Respondent has not been keen to actualize the restructured payment schedule and has acted in mala fides in commencing a two pronged onslaught upon the hotel.
28. The Respondents on their part blame the Applicants for not meeting the conditions of the restructured payment schedule as advised by the 1st Respondent.
29. It is trite law that a challenge on the amount of money owed by a borrower is no ground for issuance of an order of injunction against the sale by the mortgagee.
30. A prima facie case has been defined by case law to mean;

“ A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

See *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR

31. In this case, since there is no dispute that the properties sought to be sold off are charged on account of a loan facility provided by the 1st Respondent to the hotel and the Applicants are in default of payment of that loan facility. The allegation that there have been ongoing negotiations with a view of restructuring the facility does not in any way amount to a waiver by the 1st Respondent of its statutory power of sale or any other legal recourse available to it. I find that the Applicants have not established a prima facie case worth the grant of interim injunctive orders.
32. In light of the above finding the other elements that the Applicants are enjoined to establish for a successful outcome of their application for grant of orders of injunction fall by the wayside.
33. Whereas this court takes cognizance of the Applicants’ assertion that the 1st Applicant’s property is being occupied as his residence while the 2nd Applicant’s is where the hotel stands, the Applicants willingly offered the two parcels of land as security with the full knowledge of the consequences in the event of default in payment by the hotel; that the charged properties would be auctioned to recover the lender’s money. This position was captured in *Maithya v Housing Finance co. of Kenya & Another [2003] 1 EA 133* at 139 where Honourable Nyamu, J. stated as follows: -

“ Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”



34. In the instant application, even if the subject properties are registered in the applicants' individual names, they are charged properties with the risk of auction if the advanced sum remains unpaid.
35. Due to the above reasons, I find in the upshot that the application dated 20th February, 2023 is devoid of merit and is dismissed with costs to the Respondents assessed at Ksh.10,000.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 31ST DAY OF JULY 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Bruce Odeny for the applicants

James Tugee for the Respondents

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