



Kigamba & another (Suing on Behalf of the Estate of Benard Kigamba Kiongo Deceased) v Credit Bank Limited & 2 others (Commercial Case E378 of 2023) [2023] KEHC 21847 (KLR) (Commercial and Tax) (31 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E378 OF 2023
DAS MAJANJA, J
AUGUST 31, 2023**

BETWEEN

**ANDERSON WAIYAKI KIGAMBA 1ST PLAINTIFF
GRACE WANJIRU WAIYAKI 2ND PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF BENARD KIGAMBA KIONGO
DECEASED**

AND

**CREDIT BANK LIMITED 1ST DEFENDANT
PETER KAMAU MUNENE 2ND DEFENDANT
ONESMUS MACHARIA T/A WATTS AUCTIONS 3RD DEFENDANT**

RULING

1. By letter of offer dated February 21, 2012 and November 16, 2011, the 1st Defendant (“the Bank”) offered a term loan facility of Kshs 3,900,000.00 and Kshs 4,500,000.00 respectively to the 2nd Defendant. The facility was secured by, inter alia, a guarantee and indemnity and legal charge issued by the Benard Kigamba Kiongo (“the Deceased”) in respect of his property Title No Kabete/ Nyathuna/2921 (“the suit property”). The Deceased passed away on January 28, 2013 and is represented in these proceeding by the Plaintiffs who are the Administrators of his estate.
2. Following default by the 2nd Defendant, as principal debtor, the Bank moved to exercise its statutory power of sale by scheduling the sale of the suit property by public auction on August 31, 2023 precipitating this suit and the application for injunction. The application is dated August 21, 2023 and is made, inter alia, under Order 40 rule 1 of the Civil Procedure Rules. The application is supported by



the Plaintiffs' affidavits sworn on August 21, 2023 and August 28, 2023. It opposed by the 1st and 3rd Defendants through the affidavit of the Bank's Head of Legal Department, Wainaina Francis Ngaruiya, sworn on August 23, 2023 and August 29, 2023. The respective counsel made oral submissions in support of their respective submissions supplemented by case digests.

3. The Plaintiffs' case is set out in the Plaint dated August 21, 2023. The Plaintiffs states that in consideration of providing the suit property as security, the 2nd Defendant promised to pay the Deceased Kshs 1,900,000.00 which he failed to do. As a result of the 2nd Defendant's default the Bank has threatened to sell the suit property.
4. The main issue for determination is whether the Plaintiffs have made out a case for grant of an injunction restraining the Bank from exercising its statutory power of sale. A plaintiff who seeks an interlocutory injunctive relief must satisfy the requirements set out in *Giella v Cassman Brown* [1973] EA 348. It must demonstrate that it 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 their favour.
5. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR, the Court of Appeal expounded on these requirements and clarified that they are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. This means that if the plaintiff 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, then the court will consider the other conditions. As to what constitutes a prima facie case, the Bank has also rightly cited the decision of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR which 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."
6. In order to establish a prima facie case with a probability of success, the Plaintiffs must make out a case consistent with what they have pleaded in the Plaint. In their Plaint, the Plaintiffs raise two broad issues for consideration. First, that the Bank cannot exercise its statutory power of sale to recover the principal amount and interest thereon as it is statute barred by the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya). Second, the Bank has not served on the Plaintiffs the relevant statutory notices as a prelude to the exercise of its power of sale.
7. On the first issue, the Plaintiffs contend that it has been 6 years since the 2nd Defendant defaulted in payment of the loan facility and that the Bank cannot purport to recover the amount due when it is almost 11 years since the 2nd Defendant defaulted in repaying the loan amount. The Bank rebuts this argument and points out the 2nd Defendant is truly indebted to the tune of Kshs 6,044,459.00 as at August 23, 2023. This this amount continues to remain due and the 12 years' limitation period under section 19 of the *Limitation of Actions Act* ("the LAA") has not lapsed.
8. The issue of limitation of action in respect of charged property is dealt with by section 19 of the *LAA* which provides as follows:
 19. Actions to recover mortgage money or proceeds of sale of land
 - (1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.



- (2) A foreclosure action in respect of mortgaged property may not be brought after the end of twelve years from the date on which the right to foreclose accrued: Provided that—
- (i) if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession does not accrue until the date on which his possession discontinued;
 - (ii) this subsection does not apply to a foreclosure action in respect of mortgaged land, but instead the provisions of this Act relating to actions to recover land apply to such an action.
- (3) The right to receive a principal sum of money secured by a mortgage and the right to foreclose on the property subject to the mortgage does not accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.
- (4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due: Provided that—
- (i) where a prior mortgagee or other encumbrancer has been in possession of the property mortgaged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, the subsequent encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrancer, or damages in respect thereof, notwithstanding that the period exceeded six years;
 - (ii) where the property subject to the mortgage comprises any future interest or life insurance policy and it is a term of the mortgage that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage, interest does not become due before the right to receive the principal sum of money has accrued.
- (5) This section does not apply to a mortgage on a ship.

9. From the aforesaid provision, I agree with the Bank and the Plaintiffs' also admit that the limitation period of 12 years reckoned from the date of default is yet to kick in. Counsel for the Bank cited the



case of *Habib Bank A.G. Zurich v Rajnikant Khetsi Shab* [2010] eKLR where the Court of Appeal dealt with this issue and observed as follows:

- (19) The first issue is whether the claim by the respondent seeking the discharge of charge was time barred, the legal charge being a contract. Counsel cited the provisions of section 4(1)(a) and 4(3) of the *Limitation of Actions Act* which provide that any action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The case of *Iga v Makerere University* [1972] EA 65 was cited where the predecessor of this Court held that a court of law has no power to grant any relief where a remedy is time-barred. We find the learned Judge interrogated this issue and appreciated that both parties made very robust arguments that each other's case was time barred by the limitation of statute. The Judge held and rightfully so that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filled either to recover the debt or to discharge the charge. The learned Judge was spot on this issue and we find ourselves agreeing that as long as the contract is tied to a legal charge that is a continuing security; until the debt is paid and the security is discharged none of the parties claim can be time barred. A cause of action under a continuing security never dies or lapses.
10. Assuming that the 2nd Defendant was in default as soon as the facilities were granted to him in 2012, the 12 years provided in section 19(1) of the *LAA* have not expired hence the limitation period has not set in. In any case, the Bank has just commenced the recovery process hence the issue of limitation does not arise. There is therefore no prima facie case with a probability of success on this issue.
11. The second issue raised by the Plaintiffs is that they were not served with statutory notices necessary for the Bank to exercise its statutory power of sale. It is settled that the onus is on the Bank to prove that it served valid notices on the Plaintiffs as was held by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260. In order to discharge this burden, the Bank produced in evidence the notices it sent to the Plaintiffs.
12. The Bank issued the 90-day statutory notice under section 90 of the *Land Act, 2012* by the letter dated 07.07.222. The notices were sent to the Plaintiffs through the address of the Deceased stated in the Charge document on January 6, 2023 as evidenced by the Certificates of posting of even date. The Plaintiffs did not dispute that this is their known address nor did they notify the Bank of any change of address. The 40-day notice to sell issued under section 96(2) of the *Land Act, 2012* was dispatched to the Plaintiffs by registered post on January 6, 2023. Lastly, the 45-day redemption notice dated June 27, 2023 issued by the 3rd Defendant was sent to the Plaintiffs on the same day as evidence by the certificate of posting. Based on the material before the court, I find and hold that Bank has discharged its burden of showing that it sent to the Plaintiffs the statutory notices as a prelude to the exercise of the statutory power of sale and on that basis no prima facie case has been established on this issue.
13. Despite having raised only two issues in the plaint, in subsequent depositions, the Plaintiffs raised additional issues that were not pleaded. As stated, a prima facie case is based on what is pleaded in the Plaint and a party is not permitted to raise additional issues not supported by the pleadings. Since the parties urged the issues, I will deal with it for the sake of completeness.
14. The Plaintiffs complained that the Bank intended to sell the suit property at an undervalue. 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. In this regard the Bank instructed Value Line Consulting Limited to carry out a valuation of the suit property. By the report dated June 19, 2023, it assessed its market value as Kshs 24,000,000.00 and the forced sale value at Kshs 18,000,000.00. In order to support their case, the



Plaintiffs commissioned Precision Valuer Limited to conduct a valuation. In the report dated August 25, 2022, it gave the market value as Kshs 32,000,000.00. The Plaintiffs argues that the report by Value Line omits key information including the fact that there is a semi-permanent building on the site and that there are 6 family graves.

15. The valuation of property is based on professional and expert opinion of a duly qualified valuer hence a valuation cannot be disregarded merely because there is a difference in professional opinion. In this case I would only note that the Plaintiffs' valuer did not assess the forced sale value which is what the law requires and it was commissioned for the specific purpose of this litigation and in response to the Bank's valuation hence its credibility is doubtful. Even if I were to accept that the suit property would as a result be sold an undervalue, then I would still consider whether damages would be an adequate remedy. I hold that damages would be an adequate remedy as it has not been shown that the Bank would not be in a position to compensate the Plaintiffs for the loss as a result of the sale suit property at an undervalue.
16. The Plaintiffs have not made out a *prima facie* case with a probability of success. The result is that the application dated August 21, 2023 is dismissed with costs to the 1st and 3rd Defendants.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Kinyanjui instructed by Mbuthia Kinyanjui and Company Advocates for the Plaintiff.

Mr Maitai instructed by Maitai Nyawira and Associates Advocates for the Defendant.

