



**Mugoiri Development Company Limited v Mentor Sacco Society Limited & another (Commercial Case E152 of 2023) [2023] KEHC 21624 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21624 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE E152 OF 2023**  
**DAS MAJANJA, J**  
**AUGUST 24, 2023**

**BETWEEN**

**MUGOIRI DEVELOPMENT COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MENTOR SACCO SOCIETY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERING SERVICES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff is a limited liability company incorporated in 1976 by a group of now elderly residents from Mugoiri Location, Kahuro Sub-county within Murang'a County. It is the registered proprietor of the property LR No 209/14864 situated in Ngara area within Nairobi County ("the suit property"). The property is charged to the 1<sup>st</sup> defendant which has threatened to sell it by public auction through the 2<sup>nd</sup> defendant ("the auctioneer"). Following this threat, the plaintiff filed this suit accompanied by the application dated April 13, 2023 seeking, *inter alia*, orders restraining the defendants from selling or otherwise disposing of the suit property by public auction. The application is supported by the affidavit of its director, Venanzio Mugo Karigi, sworn on April 13, 2023 and opposed by the defendants through the affidavit of the 1<sup>st</sup> defendant's Chief Executive officer, Joyce Ndegwa, sworn on May 9, 2023. The application was urged by written submissions.
2. The plaintiff's case, as set out in the plaint dated April 13, 2023 and its deposition in support of the application, is that in 2016 its directors negotiated a joint venture agreement with the 1<sup>st</sup> defendant for the development of a five-storey commercial and residential building with a basement to be built on the suit property. The plaintiffs allege that the 1<sup>st</sup> defendant agreed to invest Kshs 114,241,000.00 and that it engaged the architect and engineer to carry out the construction and supervise the project.



3. The plaintiff further contends that the general intended agreement was that for all intents and purposes the 1<sup>st</sup> defendant would thereafter recoup its investment in the suit property through rent paid by the prospective tenants into the plaintiff's account held by the 1<sup>st</sup> defendant. That instead of registering the 1<sup>st</sup> defendant's interest in the property as a joint venture, the 1<sup>st</sup> defendant misled the plaintiff into entering into a normal commercial business loan agreement and a charge over the suit property through misrepresentation, duress, undue influence and forcing the plaintiff into an unconscionable bargain.
4. The plaintiffs allege that on August 26, 2016, the 1<sup>st</sup> defendant's officials signed/forged the acceptance for the business loan agreement themselves with the intention to mislead the plaintiff's elderly directors. Further, that the charge dated August 5, 2016 over the suit property was drawn and witnessed by the 1<sup>st</sup> defendant's Advocate and the plaintiff did not have independent legal advice. That the plaintiff did not get the drawdown of the entire Kshs 114,241,000.00 into its account with the 1<sup>st</sup> defendant yet it continued charging interest for the entire sum contrary to the agreement between the parties hence the demand of Kshs 187,017,083.82 is unwarranted and lacks any basis. The plaintiff accuses the 1<sup>st</sup> defendant of demanding the aforesaid sum despite receiving rent from the tenants at the suit premises to the exclusion of the plaintiff.
5. The plaintiff complains that the defendants have threatened to auction the suit property and have fixed its forced sale value at Kshs 112,500,000.00 while the property is worth more than Kshs 300,000,000.00. That the alleged forced sale value is inadequate to pay the alleged loan balance of Kshs 187,017,083.82 which is an outright illegality.
6. Based on the facts I have outlined, the plaintiff seek several reliefs including a declaration seeking to annul the business loan agreement between the parties, a declaration that the parties' intention was to create a joint venture agreement and not a business loan agreement and a permanent injunction restraining the defendants from selling the suit premises.
7. The 1<sup>st</sup> defendant opposes the plaintiff's case and rebuts the contention that the parties entered into a joint venture agreement to develop the suit property. The 1<sup>st</sup> defendant states that in 2016, the plaintiff applied for and obtained a loan from the 1<sup>st</sup> defendant to develop the suit property. That the plaintiff presented to the 1<sup>st</sup> defendant minutes of meetings held on June 11, 2016 and June 10, 2026 by its members and board of directors respectively, with resolutions that the plaintiff would obtain a loan from the 1<sup>st</sup> defendant to develop the suit property.
8. Following the resolutions, the plaintiff through its then authorized officers, One Charles Chege Ngari, Josephat Kariuki Mwangi and Venanzio Mugo Karigi, as the chairman, secretary and treasurer, respectively, applied for a loan of Kshs 114,241,750.00 by signing the business loan application form which the 1<sup>st</sup> defendant received on June 7, 2016. The parties executed a loan agreement registered on September 27, 2016 and a charge dated September 5, 2016 registered by the plaintiff over the suit property on September 5, 2016 in favor of the 1<sup>st</sup> defendant to secure the repayment of the loan sum, interests and related costs.
9. The 1<sup>st</sup> defendant states that the plaintiff appointed all the consultants and the contractor who implemented the project and that it also supervised the works through the said consultants while the 1<sup>st</sup> defendant paid for the construction on fee notes and interim certificates raised by the plaintiff's consultants accompanied by the plaintiff's minutes of site meetings and progress reports.
10. The 1<sup>st</sup> defendant avers that the plaintiff defaulted in the repayment of the loan and despite accommodation from time to time, it failed to settled the debt. The 1<sup>st</sup> defendant therefore issued and served upon the plaintiff the requisite statutory notices towards exercising its statutory power of sale



over the suit property. It also valued the suit property for a forced sale value and thereafter instructed the auctioneer to sell the property by public auction in exercise of the 1<sup>st</sup> defendant's statutory power of sale to realise the debt from the plaintiff which as at January 2023 stood at Kshs 187,017,083.82, excluding interest from the date and costs of realizing the debt

11. Based on the conflicting factual contentions, the court is called upon to determine whether it should issue an injunction restraining the 1<sup>st</sup> defendant from exercising its statutory power of sale. It is trite law that in order for the plaintiff to succeed it must satisfy the three conditions necessary for the grant of an injunction laid down in *Giella v Cassman Brown* [1973] EA 358. First, the applicant must show 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. Third, if the court is in doubt, it will decide an application on the balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions and added that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then it need not consider the other conditions. On the other hand, if a prima facie case is established, then the court will consider whether the applicant has satisfied the other conditions.
12. Regarding what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR stated as follows:

A prima facie case in a civil application includes but is 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 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.
13. The first plank of the plaintiff's case is that it entered into a joint venture agreement and not a business loan agreement with the 1<sup>st</sup> defendant. The plaintiff has not produced any document that show that there is in fact such an agreement. As part of its evidence, it has produced a letter of offer from the 1<sup>st</sup> defendant dated August 26, 2016 (“the letter of offer”). The letter of offer is clear that the plaintiff is the borrower while the 1<sup>st</sup> defendant is the lender and that the plaintiff seeks a business loan of Kshs 114,241,000.00 for purposes of development to be secured by a charge over the suit property. The executed letter of offer was followed by the charge dated September 5, 2016. In the recital the charge references the letter of offer. Based on the plaintiff's own documentation, I reject the contention that the parties intended to enter into a joint venture agreement to develop the suit property. The documentation presented by both parties does not support this contention.
14. The plaintiff further contends that the 1<sup>st</sup> defendant falsely misrepresented to the plaintiff and its directors the nature of the relationship, allegedly forged the letter of offer and took advantage of the directors' naivety. It is trite law that allegation of fraud are serious and must be proved to a standard higher than the balance of the probabilities (see *Kinyanjui Kamau v George Kamau* [2015] eKLR and *Kuria Kiarie and 2 Others v Sammy Magera* [2018] eKLR.) Further, I am also cognizant of the fact that at this stage the court is not required to conduct a mini-trial but must nevertheless be satisfied that a prima facie case has been presented to warrant the grant of an injunction (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* (*supra*)). In this case, the 1<sup>st</sup> defendant has produced minutes of meetings by the plaintiffs' members and directors confirming that they approved the loan process. All the documents, which the plaintiff has not rebutted, tend to show that the process resulting in the loan was voluntary and at the instance of the plaintiff. Further, the loan transaction was carried out in 2016 and from that time the parties have continued to engage on that basis. The fact that the issue of a



different arrangement, forgery and misrepresentation are raised seven years later while the parties have engaged freely tends to negate the plaintiff's case. I also hold that the allegations of forgery are feeble and without basis as the plaintiff has not stated whose signature, among the several signatures that executed the documents, were forged and none of the directors who signed the various documents have positively deponed that their signatures were forged. I would also add that the plaintiff's directors not only appointed the architect and engineers as demonstrated by minutes of meeting produced by the 1<sup>st</sup> defendant, the evidence is also clear that the plaintiff's directors engaged with the service providers actively throughout the construction period.

15. The third plank of the plaintiff's case for an injunction is that the suit property may be sold at an undervalue. Before I deal with this aspect of the case, it is worth noting that the plaintiff does not contend that the 1<sup>st</sup> defendant's statutory power of sale has arisen. From what I understand, it denies that the 1<sup>st</sup> defendant lent it the monies that it borrowed. The 1<sup>st</sup> defendant has produced correspondence showing the plaintiff borrowed the amount and the plaintiff accepted indebtedness.
16. On the point of indebtedness, the plaintiff wrote to the 1<sup>st</sup> defendant a letter dated September 27, 2019 stating the its directors and shareholders had met on June 22, 2019 and proposed to request the 1<sup>st</sup> defendant to convert the business loan into a project loan. In the letter the plaintiff admitted that it owed Kshs 153,322,694.00. There is also correspondence from Sampesa Agency Limited dated February 18, 2020 confirming a meeting between it, the plaintiff and the 1<sup>st</sup> defendant where the proposal was discussed by Sampesa to take over the plaintiff's liabilities amounting to Kshs 116,600,909.25. The 1<sup>st</sup> defendant also produced minutes of a meeting with the plaintiff on December 5, 2020 where the issue of the outstanding loan was discussed and it was agreed that the 1<sup>st</sup> defendant would facilitate the plaintiff seek another financier to take over the facility. This was followed up by another meeting on December 24, 2020 where it was agreed the plaintiff would look for another financier by January 21, 2021 and if this fails, it would have upto February 28, 2021 to look for a purchaser for the suit property. The plaintiff also held a special general meeting on February 5, 2021 to discuss the way forward on the suit property. The members noted that both it and the 1<sup>st</sup> defendant had agreed to dispose of the suit property and on its part it directed the directors to dispose of it for not less than Kshs 300,000,000.00. All this correspondence shows that the plaintiff was aware of the nature of its relationship with the 1<sup>st</sup> defendant, it never contested the validity of the lending agreements and the charge and that it admitted its indebtedness.
17. As the plaintiff has admitted its indebtedness, the 1<sup>st</sup> defendant was entitled to exercise its statutory power of sale by issuing statutory notices in accordance with the provisions of the [Land Act, 2012](#). The issue of statutory notices was neither raised nor contested by the plaintiff. The 1<sup>st</sup> defendant has in any case, produced the notices in its deposition.
18. Turning to the issue of valuation of the property, under section 97 of the [Land Act](#), the chargee has 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. The 1<sup>st</sup> defendant commissioned Upcounty Valuers who produced a report dated January 31, 2023. it assessed the open market value at 150,000,000.00 and the forced sale value at Kshs 112,500,000.00. The plaintiff's contend that the value of the suit property is Kshs 300,000,000.00. It relies on the report by Metrocosmo Limited dated January 18, 2021 which shows that the market value to be Kshs 270,000,000.00 and the price guide as Kshs 300,000,000.00.
19. The value of a property is a matter of professional opinion and the court will not intervene merely because two experts take different positions. I note that the report by Metrocosmo Limited does not state the forced sale value which is relevant when the chargee puts up the property for sale. In order



to displace a professional valuation, the plaintiffs must produce clear evidence that the valuation is wrong or at least doubtful. Mere assertions or statements will not do (see *Palmy Company Limited v Consolidated Bank of Kenya Limited* ML HCCC No 527 of 2013 [2014] eKLR). I am unable to find any basis to elevate the plaintiff's case to a prima facie case with a probability of success on this issue. Even if I accept that the issue of valuation constitutes a prima facie case, I find that any difference in value in case of a sale would amount to a fixed sum which the 1<sup>st</sup> defendant would be able to compensate the plaintiff particularly given that the plaintiff is already indebted to the 1<sup>st</sup> defendant.

20. Having considered the factual basis of the plaintiff's case, I have come to the conclusion that the plaintiff has failed to demonstrate a prima facie case with a probability of success. The relationship between the plaintiff and the 1<sup>st</sup> defendant is that of borrower and lender, charger and chargee and that the plaintiff has admitted its indebtedness to the 1<sup>st</sup> defendant. The fact that the 1<sup>st</sup> defendant statutory power of sale is not disputed inevitably leads to the conclusion that an injunction is not warranted in the circumstances. Guided by the holding in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* (supra) the inquiry comes to a halting end.

### **Disposition**

21. The Plaintiff's application dated April 13, 2023 is dismissed with costs to the defendants. The interim orders in force are now discharged.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF AUGUST 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court of Assistant: Mr M. Onyango**

**Mr Ng'ang'a instructed by Njoroge Ng'ang'a and Company Advocates for the Plaintiff.**

**Ms Mwangangi instructed by Florence Mwangangi and Company Advocates LLP for the Defendants.**

