



REPUBLIC OF KENYA



**Noonkanas v Mayfair CIB Bank Limited & 2 others (Commercial Case E036 of 2023)
[2023] KEHC 21372 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E036 OF 2023
JWW MONG'ARE, J
AUGUST 15, 2023**

BETWEEN

SAIMON NTASIKOI NOONKANAS PLAINTIFF

AND

MAYFAIR CIB BANK LIMITED 1ST DEFENDANT

DIANA MWANGI 2ND DEFENDANT

BLITZ LOGISTICS LIMITED 3RD DEFENDANT

RULING

1. On January 30, 2023 by a notice of motion application filed pursuant to section 1A,1B and 3A of the *Civil Procedure Act*, cap 21, laws of Kenya; order 40 rule 1, 2, 3,4 & order 51 rules 1 of the *Civil Procedure Rules* the Plaintiff has moved this court seeking the following orders;
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this application herein, the honourable court be pleased to issue an interlocutory injunction restraining the 1st defendant/respondent by itself, servants/employees, agents or in any manner adversely dealing with the land parcels known as Kajiado/Mailua/4696, Kajiado/Mailua/10038 and Kajiado/Mailua/10086 in the purported exercise of its statutory power of sale pursuant to the charge instruments dated 19/9/2022.
 4. That pending the hearing and determination of the main suit herein, the honourable court be pleased to issue an interlocutory injunction restraining the 1st defendant/respondent by itself,



servants/employees, agents or in any manner adversely dealing with the land parcels known as Kajiado/Mailua/4696, Kajiado/Mailua/10038 and Kajiado/Mailua/10086 in the purported exercise of its statutory power of sale pursuant to the charge instruments dated 19/9/2022.

5. That pending the hearing and determination of this application and the suit herein, the 1st defendant/respondent be restrained from enforcing or purporting to enforce the personal deed of guarantee and indemnity dated 19/9/2022 as against the plaintiff/applicant.
 6. That pending the hearing and determination of the main suit herein, the 1st defendant/respondent be ordered to provide to the plaintiff/applicant the letters of offer dated January 25, 2022, March 10, 2022, March 25, 2022 and the addendum dated September 23, 2022.
 7. That pending the hearing and determination of the main suit herein, the 1st defendant/respondent be ordered to provide to the plaintiff/applicant a certified copy of Blitz Logistics Loan Statement showing disbursements and repayments to-date in relation to the impugned loan facility as well as the business proposal for the project(s) financed by the Bank or any other document to show what the financing was sought for.
 8. That costs of this application be borne by the defendant/respondents.
2. The application is supported by the grounds set within it and the supporting affidavit of Saimon Ntasikoi Noonkanas sworn on 31/1/2023. The application is opposed and the 1st defendant/respondent has filed a replying affidavit sworn by Nicholas Karanja on 16/3/2023. The 2nd defendant has filed a preliminary objection dated 27/2/2023. The application and the preliminary objection were canvassed together during the highlighting of the written submissions herein.
 3. There are two issues for determination in this matter. The first arises from the preliminary objection filed by the 2nd Defendant herein. The first issue is “Whether this Honourable Court has jurisdiction to hear and determine this matter” while the second issue “Whether the Applicant is deserving of the reliefs sought”.

Analysis and Determination:

4.
 - 1) Whether this honourable court has jurisdiction to hear and determine this matter.” Courts and tribunal have been urged to in the outset determination the issue of jurisdiction where a challenge for the same arises in a matter before them. In the locus classica case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR Justice Nyarangi stated as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
5. In urging the court to down its tools the 2nd defendant argues that the matter before it relates or touches on issues related to land and should therefore be canvassed in the lands court in line with article 162 of the *Constitution* and the *Environment and Land Act*. It is important to note that under article 165(3) the High Court has original and unlimited jurisdiction over civil and criminal matters save for



those that are the preserve of the specialised courts of equal status established under article 162 of the Constitution. In determining whether the matter herein falls in the Environment and Land Court or the commercial division of the High Court, the court is guided by the principle of the dominant legal question before it for determination. In the matter before this court, the dominant issues relate to the contractual obligations created by the instrument of personal guarantee issued by the plaintiff to the 1st defendant to guarantee the loans advanced to the 3rd defendant and secured by a legal charge over the properties owned and registered in the name of the plaintiff. At a glance, the issue dominant in the suit herein is of a commercial nature and the jurisdiction to determine commercial disputes is vested in the High Court and not in the Environment and Land Court as argued by the 2nd defendant herein. This is as was established in the case of Co-operative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 others (2017) eKLR(Civil Appeal No 83 of 2016) where the Court of Appeal held:-

“.....the jurisdiction of the Environment and Land Court is limited to areas specified under article 162 of the Constitution. Section 13 of the Environment and Land Act and section 150 of the Land Act, none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matter is without doubt for determination under article 165(3) of the Constitution”.

The upshot of the holding of the Court of Appeal is that this court is the proper court for determination of the issues surrounding the dispute before the court which is one that relates to commercial transactions and contractual obligations. I therefore find and hold on this issue that the court has jurisdiction to entertain this matter and dismiss the preliminary objection as filed.

6. The second issue is “whether the applicant is deserving of the reliefs sought”. The applicant has moved the court seeking, *inter alia*, the following order:-

“That pending the hearing and determination of the main suit herein, the honourable court be pleased to issue an interlocutory injunction restraining the 1st defendant/respondent by itself, servants/employees, agents or in any manner adversely dealing with the land parcels known as Kajiado/Mailua/4696, Kajiado/Mailua/10038 and Kajiado/Mailua/10086 in the purported exercise of its statutory power of sale pursuant to the charge instruments dated 19/9/2022”.

The applicant has moved the court to restrain the 1st defendant from exercising its statutory power of sale. In other words, the plaintiff seeks an order of injunction to stop the sale of the three properties charged to the bank to secure the borrowing by the third defendant.

7. It is instructive to note that the third defendant who is the principal debtor herein has not filed any pleadings in response to the suit herein and so the court is denied the opportunity to interrogate and establish the status of the loan herein from the borrower’s perspective. The court in *Giella –v- Cassman Brown*(1973) EA 358 held that for an order of injunction to issue the following elements must be satisfied:-

“ An applicant has to demonstrate firstly, that he has a prima facie case with a probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that an award for damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the 2 above requirements, then it will decide the application on a balance of convenience”.



The plaintiff contends that he has a *prima facie* case that raises substantive issues pertaining to the validity of the deed of guarantee, indemnity and the commercial benefit agreement created between himself and the defendants as well as the charges' created over the plaintiff's properties. The Plaintiff alleges that he was taken advantage of by the 2nd defendant, an employee of the 1st defendant, to offer his titles as security for the loans advanced to the 3rd defendant which arrangement left him legally and financially exposed, without the benefit of independent legal advice. The plaintiff avers that there was a scheme to fraudulently deprive him of his properties and the 1st defendant was fully aware of the scheme and orchestrated it through the 2nd defendant, who was its employee and therefore an agent of the 1st defendant. The plaintiff further avers that he has, without much success, sought for information on the status of the loan, how much was disbursed and if at all the 3rd defendant had made any efforts to redeem it but the 1st defendant has not provided that information and has not been forthcoming in providing the necessary information to the plaintiff. The counter arguments by the 1st defendant is that the plaintiff was a beneficiary of the loan disbursed and cannot claim ignorance as he had entered with the 3rd defendant into a commercial benefit agreement from which he was to be paid 10% of the loan funds.

8. Justice Bosire in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR described a *prima facie* case as follows:-

“So what is a *prima facie* case? 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.”

I have considered at length the submissions by the parties herein and the averments and conduct of the 2nd and 3rd defendant and i am satisfied that the plaintiff rights will be infringed if an order of interlocutory injunction is not issued. I am therefore satisfied that the plaintiff has established a *prima facie* case to warrant a grant of the orders of injunction.

9. The second element in *Giella* is “whether the plaintiff will suffer irreparable harm if the orders sought herein are not granted”. In *Halsbury's Laws of England*, third edition, volume 21, paragraph 739, page 352 irreparable injury or harm has been described as follows:-

“It is the very first principle of injunction law that *prima facie* the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”.



10. Courts of law have been reluctant to grant an injunction if the loss likely to be suffered is one where damages will be adequate to alleviate the loss. As held in the case *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR, the court stated the following:-

“Is the applicant’s probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages.”

Suffice it to say that each case must be treated on its own merits and on the facts available to the court for determination. The facts of this case are unique. The 1st defendant bank deployed the 2nd defendant to go and look for business for the bank. The banks’s business is the one of lending money and not real estate. The 2nd defendant approached the plaintiff, who it is alleged was facing extreme difficulties in finding feeds for his livestock and offered a way out. From the WhatsApp correspondences attached to the application, the 2nd defendant appear to have played a very great role in persuading the plaintiff to guarantee the loans already advanced to the 3rd defendant. It is not clear is at all if these two parties ever met. Land is an emotive issue in Kenya. No one parcel of land is similar to another. The facts herein point to a scheme to defraud the plaintiff, orchestrated by the 1st defendant in collusion with the 2nd and 3rd defendants. I am therefore persuaded that this is case where damages are unlikely to be adequate compensation for the plaintiff should he succeed in the end. I find and hold that this element for a grant of injunction has been established.”

11. The third element that the court must satisfy is on whose side the balance of convenience lies. The 1st defendant holds a legal charge over the suit property and also over the assets of the borrower who also provided corporate and personal guarantees as well. Should the plaintiff lose this case, the 1st defendant will have an opportunity to realise the charged property and go after the 3rd defendant for the loan balances thereto. I am therefore persuaded that the balance of convenience tilts in favour of the plaintiff.
12. In conclusion therefore, I find and hold that the plaintiff/applicant has established a case for a grant of the order of injunction. The application is allowed as prayed. Costs of this application to be borne by the defendants in favour of the plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Ms. Kayugira for the Plaintiff together with Ms. Kioge.**
- 2. Pravin Odiyo for the 1st Defendant.**
- 3. Mr. Nyaga holding brief for Kurauka for the 2nd Defendant.**
- 4. Sylvia- Court Assistant**

