



Ali & another v Gulf African Bank Limited (Commercial Miscellaneous Application E816 of 2023) [2023] KEHC 22847 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E816 OF 2023**

**DAS MAJANJA, J
SEPTEMBER 29, 2023**

BETWEEN

ABDI MOHAMED ALI 1ST PLAINTIFF

MEGA WHOLESALERS LIMITED 2ND PLAINTIFF

AND

GULF AFRICAN BANK LIMITED DEFENDANT

RULING

Introduction and Background

1. Through various facility letters issued in 2018 and 2020, the Defendant (“the Bank”) agreed to advance the 2nd Plaintiff (“the Company”) loan facilities secured by, inter alia, guarantees of the 1st Plaintiff and a legal charge over the 1st Plaintiff’s property No LR 36/III/208, Eastleigh (“the suit property”). Over time, the Company defaulted in fulfilling its repayment obligations prompting the Bank to issue them with a 90-day statutory demand notice dated November 24, 2022 and a further 40-day notification of sale dated February 28, 2023 when the Plaintiffs could not rectify their default. The Bank set its sights on selling the suit property by conducting a valuation and instructing an auctioneer to sell it by public auction.
2. To forestall the sale, the Plaintiffs approached the Bank and proposed a restructure of the facilities through its letters of April 3, 2023 and June 22, 2023. By its letter dated July 24, 2023, the Bank offered to restructure the facilities by granting the Plaintiffs a one-month moratorium on principal and profit on the outstanding amount which as at July 5, 2023 stood at Kshs 69,681,489.00 and USD 856,389.00. On August 14, 2023, the Bank sought an update from the Plaintiffs on the whether the conditions for the restructure had been met. In their response, the Plaintiffs, through their letter of September 15, 2023, sought a further restructure but which the Bank declined through its letter dated September 20,



2023. The Bank intimated that it would proceed with the auction scheduled for October 3, 2023 if it did not receive a suitable proposal before then or if the Plaintiffs did not settle the current arrears of USD 802,300 and Kshs 71,749,843 as at September 18, 2023.

3. The Bank's response prompted the Plaintiffs to file this suit which is accompanied by the Notice of Motion dated September 18, 2023 made, inter alia, under Order 40 Rule 2 of the Civil Procedure Rules where they seek an injunction to restrain the Bank from selling the suit property. The application is supported by the 1st Plaintiff's supporting affidavit sworn on September 18, 2023. It is opposed by the Bank through the replying affidavit of its Legal Officer, Lawi Sato, sworn on September 22, 2023. The parties' counsel also made brief oral submissions in support of their respective positions.
4. The Plaintiffs' case is that the Bank's statutory power of sale has not arisen as the Bank has not issued it with mandatory statutory notices as required by law, making the intended auction illegal. Moreover, that the suit property is valued at way more than the debt and would be sold at a throw away price when the Bank had already accepted the Plaintiffs' payment plan. At the hearing counsel for the Plaintiffs pointed out that since there was restructure of the facilities, the Bank was obliged to issue a fresh statutory notices.
5. The Bank opposes the application on the ground that the Plaintiffs have not met the conditions for granting an injunction. It states that the Company has admitted its indebtedness and has obtained from it concessions and indulgences which it has failed to honour.
6. The Bank avers that the Plaintiffs were duly served with all the requisite statutory notices. That thereafter they engaged the Bank to forbear any further action but they failed to comply with the stipulated conditions when the Bank temporarily suspended the earlier auction for 30 days. That even on the eve of filing this suit and application, the Plaintiffs engaged the Bank with a view to obtaining further indulgence. The Bank urges that the Plaintiffs' application is a delaying tactic employed to stall the exercise of its statutory power of sale.

Analysis and Determination

7. The Plaintiffs call upon this court to determine whether they have made out a case for an injunction to restrain the Bank exercising its statutory power of sale. In order to succeed, the Plaintiffs must demonstrate that they have 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. These conditions settled, in *Giella v Cassman Brown* [1973] EA 358, were further amplified by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR where it held that these three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
8. As to 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 explained that, "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."
9. As I have outlined elsewhere, the gist of the Plaintiffs' case as per its Plaint is that the Bank has failed to honour the terms of the agreement with the Company pursuant to the banker-customer relationship, that it has failed to issue the requisite notices to any of the Plaintiffs, that it has failed to conduct a proper valuation of the suit property and that it has failed to accord the Plaintiffs fair administrative action.



10. On the first issue, the Plaintiffs have not given any details as to how the Bank has violated their banker-customer relationship. If anything, the record indicates that it is the Plaintiffs who have not honoured their commitments as evidenced and admitted by the Plaintiffs in their letter September 15, 2023.
11. On the ground that the Bank has not issued the Plaintiffs with the requisite statutory notices, the Plaintiffs do not dispute that they received the initial statutory notices from the Bank. However, counsel for the Plaintiffs submitted that once the Bank agreed to restructure the facilities, then it was now obligated to issue fresh notices and that the initial notices were voided. Counsel relied on the court's decision in *Bevaj Furniture Limited v Gulf African Bank Limited* (KEHC 9942 (KLR) where Okwany J, held that even though a chargee had issued initial statutory notices, the restructuring of the facilities introduced new terms between the parties and the chargee is therefore required to inform the chargor of the default and the intention to sell the charged property. In this regard, the chargee is required to comply with the provisions of section 90 of the *Land Act* on the issuance of statutory notices before exercising its power of sale.
12. While the aforesaid position appears to be attractive, the law as to whether the Chargee is obliged to issue a fresh statutory notice in circumstances where the process of sale is interrupted by other arrangements has been settled. Apaloo JA, speaking for the Court of Appeal in *George Gikubu Mbutia v Jimba Credit and Another*; Civil Appeal No 111 of 1986 held as follows:

"It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notices to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale, as a matter of favour or indulgence to a defaulting mortgagor."
13. In this case, the Bank has previously suspended the auction of the suit property to accommodate the Plaintiffs. It would be unreasonable to expect the Bank to issue fresh notices every time the Plaintiffs are accommodated. The terms of the restructure were to apply for a period of one month where the Bank suspended the payment of the due and outstanding principal and profit amount. During this time, the Plaintiffs had an opportunity to repay the debt and redeem the security as per the initial statutory notices issued on November 24, 2022 and February 28, 2023. This was not done and the Bank has rightfully sought to realize its security through the sale. I therefore hold that the Bank was not under any legal or statutory obligation to issue fresh notices once it restructured the facility and suspended the sale to accommodate the Plaintiffs (see also *Joseph Kiarie Mbugua and Another v Garam Investment Limited and Another* ML HCCC No 444 of 2005 [2006] eKLR and *Fortune Credit Limited v Sidian Bank Limited & another* ML HCCC No E541 of 2020 [2021] eKLR).
14. On the ground that the Bank has failed to conduct a proper valuation for the suit property, the Bank has rebutted the same by annexing a valuation report dated March 31, 2023. The Plaintiffs do not point out what is improper about this valuation report. Even the Plaintiffs were to ultimately prove that the suit property is under-valued, this would not be a sufficient reason to warrant the grant of an interlocutory injunction as damages would be an adequate remedy.
15. The last ground laid out by the Plaintiffs is that the Bank has failed to accord them fair administrative action. While this ground fails for lack of sufficient detail and proof, I have grave doubt that issues of public law under the rubric of fair administrative action would apply as the relationship between the Plaintiffs and the Bank is contractual in nature.
16. In conclusion, the Plaintiffs admit that they are truly indebted to the Bank, they have failed to repay the debt and thus the Bank is entitled to exercise its statutory power of sale by issuing the requisite



statutory notices to the Plaintiffs. The notices are not contested and the Bank is not obliged to issue fresh notices. It is for these reasons that I find that the Plaintiffs have not made out a prima facie case

Disposition

17. The Plaintiff's application dated September 18, 2023 lacks merit. It is dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Mr Gathu with him Mr Mwango instructed by Bradrick and Associates Law Advocates for the Plaintiff.

Mr Ogunde instructed by Walker Kontos Advocates for the Defendant.

