



REPUBLIC OF KENYA



KENYA LAW
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**Shah & another v Diamond Trust Bank Kenya Ltd; Tusker
Mattresses Ltd (Interested Party) (Civil Suit E387 of 2022)
[2023] KEHC 22882 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E387 OF 2022
FG MUGAMBI, J
SEPTEMBER 29, 2023**

BETWEEN

HARSHA ATULKUMAR MAGANLAL SHAH 1ST PLAINTIFF

NEEL ATUL SHAH 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD RESPONDENT

AND

TUSKER MATTRESSES LTD INTERESTED PARTY

RULING

Brief Facts

1. This ruling determines the application dated October 3, 2022. It is brought under order 40(2), (1), (2), rule 3(1), (2), (3) of the [CPR](#) cap 21, section 3A of the [CPA](#) Cap 21, article 40 of the [Constitution of Kenya, 2010](#), section 44A of the [Banking Act](#) cap 288, section 85(2) 89 and 90(1) of the [Land Act](#) No 6 of 2012, and seeks injunctive orders.
2. The application is premised on the grounds stated on the face of it and the Supporting Affidavit sworn by Harsha Atulkumar Maganlal Shah on behalf of both applicants and dated October 3, 2022. The applicants' case is further buttressed by the Submissions dated March 22, 2023.
3. The Application was opposed by a Replying Affidavit dated November 19, 2022 sworn by Faith Ndonga, a manager in the respondent's Debt Recovery Unit and further substantiated by Written Submissions dated May 5, 2023.



4. At the heart of the dispute between the parties is a loan facility extended by the respondent to the interested party and secured by legal charges over the suit property known as house number 9 Magnolia Hills developed upon land known as LR No 29xx/20xx (original number 29xx/122/2) (the suit property), belonging to the applicants. The respondent claims from the applicants the amount of Kshs 2,562,461,949.35 due from the interested party as at May 9, 2022. The applicants argue that the intended sale by the respondent's is illegal and that due process had not been followed including issuing all the requisite notices.

Analysis

5. I have carefully considered the pleadings, evidence and submissions raised by rival parties in support of their cases. The main issue is whether the applicant has met the threshold for granting an injunction to restrain the respondent from selling the suit property, pending the hearing and determination of the suit herein.
6. Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules 2010](#) sets out the threshold upon which such an application may be granted. The conditions are now well crystalized and supported by judicial pronouncements including the celebrated case of *Giella v Cassman Brown & Co Ltd*, (1973) EA 385. For the avoidance of doubt, the criteria requires that:
 - i. An applicant must demonstrate that he has a *prima facie* case with a probability of success.
 - ii. An applicant must demonstrate that should the orders not be granted, he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
 - iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
7. On the first of the three conditions, the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#), [2003] KLR 125 defined a *prima facie* case as one in which a Court would conclude, from the face of the evidence tabled by an applicant, that there exists a right which has apparently been infringed sufficient to call for an explanation or rebuttal. The evidence must therefore point to the probability of success of the applicant's case upon trial.
8. In determining whether a *prima facie* case has been demonstrated, I am cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in [Nguruman Ltd v Jan Bonde Nielsen & 2 others](#), [2014] eKLR warned that a Court is not to carry out a mini trial and is not required to examine the merits of a case. Rather, this Court is only required to consider whether, on the face of it, there does appear to be a right that has been threatened with violation.
9. In the dispute before the Court, the applicants' ownership of the suit property as well as the fact that the respondent had advanced credit facilities to the interested party on account of securities including the applicants' suit property are not disputed.
10. The bone of contention between the parties is the extent of the applicants' liability. The applicants argue that they are not indebted to the respondent since the facility that the suit property guaranteed had been fully paid up and that the suit property did not guarantee further facilities. They submitted that the respondent had extended their security to cover the facilities to which they were not party to and without appending their signatures in acknowledgment of the terms and conditions thereof.
11. The respondent's position is that the charge over the property was intended to secure the initial amount of Kshs 260,000,000/= granted under the first Letter of Offer and all amounts in facilities thereafter granted.



12. To answer these questions would require an interpretation of the terms of the contract that governed the relationship between the parties herein. This includes the letter of offer and the charge documents, which as I earlier stated, this Court cannot interrogate at this interlocutory stage. On account of this, it is my finding that the applicants have established that they have a *prima facie* case as it is one that raises triable issues for rebuttal by the respondents.
13. The second consideration for grant of an injunction is whether the applicants have shown that they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others*, [2016] eKLR referred to the *Halsbury's laws of England* on what irreparable loss is and stated that:
- “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.”
14. Counsel for the respondent argues that the value of the suit property is easily ascertainable and therefore that the applicants can be sufficiently compensated in damages, if the need arises. On this point, I concur with the finding of the Court, M.A. Warsame in *Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others*, [2008] eKLR to the extent that:
- “Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”
15. Having found that the applicants have established a *prima facie* case with triable issues, I am of the view that they would suffer irreparable loss if an injunction is refused, for purposes of preserving the suit property until the issues between the parties are determined. Lastly on the balance of convenience, I think the same tilts in favour of the applicants.

Determination and Orders

16. In conclusion, and for the reasons that I have stated, the application dated October 3, 2022 is granted as prayed, to the extent that:
- i. An order of injunction be and is hereby granted restraining the defendant by itself agents and/or servants howsoever from interfering with, selling, disposing of by public auction or otherwise and /or transferring or causing to be transferred any interest in the property, House No 9, Magnolia hills, situated on LR No 29xx/2011 (Original Number 29xx/122/2) on the basis of the impugned statutory notices dated the 9th of May 2022 and 19th of August 2022 respectively pending the hearing and determination of this suit.
 - ii. Costs shall await the outcome of the main suit.
 - iii. I further direct that parties fix the matter for pre-trials at the earliest available date for purposes of having the matter ready for hearing.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023



F. MUGAMBI
JUDGE

