



**Mburu v ABSA Bank Kenya Plc (Commercial Case E370 of 2023)
[2023] KEHC 22546 (KLR) (Commercial and Tax) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E370 OF 2023
DAS MAJANJA, J
SEPTEMBER 26, 2023**

BETWEEN

KENNETH NDUNG’U MBURU PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. By a Letter of Offer dated 05.11.2008, the respondent (“the Bank”) agreed to advance the plaintiff a loan facility of Kshs. 2,550,000.00 that was secured and perfected by a charge (“the Charge”) registered over the plaintiff’s residential property No. L.R 209/11088/69 (“the suit property”). On 18.04.2023, the Bank issued the plaintiff with a statutory notice demanding Kshs. 1,388,436.55 which it stated was the outstanding amount in respect of the loan. The plaintiff paid the full amount demanded on 11.05.2023 whereupon he requested the Bank issue the discharge of charge and release of the original certificate of title for the suit property to him. As no response was forthcoming, the plaintiff filed suit together with the Notice of Motion dated 17.08.2023 invoking, inter alia, Order 40 Rule 1 of the Civil Procedure Rules seeking an interlocutory injunction barring the Bank from selling the suit property in exercise of its statutory power of sale.
2. The application is supported by the plaintiff’s affidavits sworn on 17.08.2023 and 30.08.2023 and opposed by the Bank through the affidavits sworn by its Legal Officer, Samuel Njuguna on 28.08.2023 and 04.09.2023. In addition to brief oral submissions, the parties have also filed written submissions in support of their respective positions.
3. The plaintiff’s case is that he has fully settled his liability as demanded by the Bank under the Charge. He is apprehensive that the Bank may surreptitiously and maliciously, or even inadvertently sell the suit property despite the fact that he has fully settled his liability.



4. The Bank opposes the application on the ground that in as much as the plaintiff complied with the statutory notice and paid the demanded outstanding sum, he is yet to settle the debt collection charges as per the fee note the Bank sent to the plaintiff on 30.05.2023. It avers that under the Charge instrument, the plaintiff, as chargor, is obliged to pay on demand all expenses incurred or suffered by the Bank in the enforcement of the Charge. The Bank contends it has not discharged the Certificate of Title for the suit property as the plaintiff has not settled its advocate's fees.
5. The Bank urges that the application is premature and without merit as the suit property is not yet advertised for sale by auction and that the security realization process is only at its initial stages and the subsequent statutory notices may be issued in due course.

Analysis and Determination

6. The court is being called upon to determine whether the plaintiff has made out a case for an injunction to stop the Bank from advertising and selling the suit property. In order to succeed in the application, the plaintiff must demonstrate that he 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 his favour (*Giella v Cassman Brown* [1973] EA 358). Additionally, these three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially as was held 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.
7. In order to establish a prima facie case, the plaintiff must show that, "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" as was held by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR.
8. In order to discharge this burden, the plaintiff must establish that the Bank does not have any legal or equitable right to hold the title to the suit property and has an obligation to discharge any encumbrances on the title. Resolution of this issue turns on Clause 5(a) of the Charge which provides as follows:
 5. The Chargor covenants with the Bank to pay and discharge on demand and on a full indemnity basis and this Charge shall constitute security for:
 - a. all costs, charges and expenses incurred or suffered by the Bank in the preparation, completion, stamping, registration, enforcement, protection or improvement of this Charge and any supplemental or collateral mortgages, charges, assignments, guarantees and other securities or in obtaining or attempting to obtain payment or discharge of the obligations and liabilities secured by this Charge.
9. The plaintiff does not deny the import of the aforementioned section but in his further deposition, he states that the amount demanded by the Bank is unreasonable, capricious and whimsical and designed to keep him in permanent distress so that the Bank can eventually sell the charged property. Since the plaintiff does not deny that the Bank is entitled to be paid on a full indemnity basis for any expenses or charges it incurs in relation to the Charge including its enforcement, it follows that the plaintiff will still be indebted to the Bank for these costs if it is proved that the same have been incurred by the Bank in enforcing the Charge. A chargee is entitled to recover not only the entire mortgage debt but



all charges, interests, costs and incidentals arising therefrom, from the chargor (see *Housing Finance Company of Kenya Limited v Ann Njoki Kuria ML* HCCC No. 187 of 2002 [2008] eKLR).

10. However, these costs and charges cannot be interpreted to mean monies spent lavishly, exorbitantly or recklessly merely because the chargor has been bound to pay and must pay in all events and because the contract is not available for rewriting by the court (See *Ibrahim Hassan Abubakar v First Community Bank Ltd* MSA HCCC No.23 of 2014(O.S) [2017] eKLR). This of course, is a question for trial and the court cannot issue an injunction merely because the quantum of the amount claimed is disputed (see *Mrao Ltd v First American Bank of Kenya Limited and 2 others* (Supra)).
11. Since the plaintiff has not paid the costs demanded for enforcing the Charge, he could not expect the Bank to execute any discharge of charge or release the title documents because he still indebted. As stated, the question whether the amount sought is reasonable will be determined at the trial and if the plaintiff proves his case on that point, he would be entitled to a refund and/or damages as the case might be.
12. I find and hold that the plaintiff has not made out a prima facie case as it remains indebted to the Bank for the incidental costs relating to the enforcement of the Charge. His grievance against the Bank can be ameliorated by an award of damages hence his quest for an injunction comes to a grinding halt in line with the dicta in *Nguruman Limited*(supra).

Disposition

13. The plaintiff's application dated 17.08.2023 lacks merit and is dismissed with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mburu instructed by K. N. Mburu and Associates Advocates for the plaintiff.

Mr Kimiti instructed by Karanja Njenga and Company Advocates for the Defendant.

