



**Faraj (As the Legal Representative of Estate of Salim Juma
Hakeem Kitendo (Deceased)) v Absa Bank Kenya PLC (Civil Suit
E070 of 2023) [2023] KEHC 27579 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E070 OF 2023
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

**FATUMA ABUD FARAJ PLAINTIFF
AS THE LEGAL REPRESENTATIVE OF ESTATE OF SALIM JUMA HAKEEM
KITENDO (DECEASED)**

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 28th August, 2023 which sought for the following orders: -
 - a. That pending the hearing and determination of this application, an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its employees, successors, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Apartment No. A5 erected on title No. 209/20045 – Mwewe Apartments, Nairobi County and L.R. No. Mainland North/Section I/8436 Nyali Enclave Estate off Beach Road Nyali Area, Mombasa County;
 - b. That pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its employees, successors, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Apartment No. A5 erected on title No. 209/20045



– Mwewe Apartments, Nairobi County and L.R. No. Mainland North/Section I/8436 Nyali Enclave Estate off Beach Road Nyali Area, Mombasa County;

- c. That in the alternative to prayer 2 above, the time for compliance and/or rectifying any default to redeem Apartment No. A5 erected on Title No. No. 209/20045 – Mwewe Apartments, Nairobi County and L.R. No. Mainland North/Section I/8436 Nyali Enclave Estate off Beach Road Nyali Area, Mombasa County be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under section 104 (2) as read with section 90 of the *Land Act*, 2012;
 - d. That in the alternative to prayer 2 and 3 above, the Defendant/Respondent’s statutory powers of sale be suspended and/or postponed for a period of twenty-four (24) months or for such other period as the court may determine to enable the Plaintiffs/Applicants redeem Apartment No. A5 erected on Title No. No. 209/20045 – Mwewe Apartments, Nairobi County and L.R. No. Mainland North/Section I/8436 Nyali Enclave Estate off Beach Road Nyali Area, Mombasa County.
 - e. That the costs of this application be borne by the Defendant/Respondent.
2. The application was strenuously opposed. The Respondent filed a detailed replying affidavit dated 19th September, 2023. It was sworn by the Respondent’s corporate recoveries manager. Among the issues raised in the affidavit was the Applicant having been jointly appointed as a legal representative of the deceased estate, she lacked locus standi to bring the suit on her own.
 3. Directions were taken that the application be canvassed by way of written submissions wherein all parties complied by filing submissions and citing authorities in support of their respective rival positions. I am grateful to Counsel on their compliance as the submissions filed will aid the court in arriving at a just decision either way.

Analysis and Determination

4. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination
 - a. Whether the Applicant has made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
5. Turning to the substance of the application, the facts are not greatly in dispute. The deceased obtained two (2) facilities from the Respondent. One was a business mortgage loan for Kshs. 8,400,000/= and a term loan for Kshs. 18,900,000/=. The properties subject of the application were used as securities for the loan. It is equally not in dispute that the business mortgage loan had a life insurance and the same was cleared upon the deceased’s death. However, what appears to be a dispute is on the term loan. On one hand, the Applicant contends that it was also insured while on the other hand, the Respondent denies such assertions.
6. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in *East African Industries*



vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal restated the law as follows:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted...” (Emphasis added)

7. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*). However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
8. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
9. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims



of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.¹

10. So has the Applicant established prima facie case? In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: - “...In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter...”
11. In her application, the Applicant averred that the amount sought by the Respondent was not owing by the fact that it was insured and any sums were owing, then the amount sought for was exaggerated. She contended that despite her numerous visits to the Respondent, a loan statement had not been supplied. It was submitted that if any amount was outstanding, the same should be without accrued interest since the non-payment was due to the death of the deceased.
12. I note that the two properties formed part of the deceased estate and which were subject of Mombasa High Court Succession Cause No. 200 of 2015. The judgement in the succession cause was delivered on 25th March, 2022. In the said judgement, the court directed that the properties be distributed in accordance to Islamic Sharia law. In the judgement which was exhibited in the Applicant’s affidavit, order (5) provided as follows: -

“The fate of the three children sired by the 1st Petitioner and the Interested Party whose paternity is in dispute shall be subjected to a DNA test after extracting samples from their bodies and compared with those extracted from the bodies of at least two of the objector’s children whose paternity is not in dispute.”
13. There was a further order that the parties to agree on which of the two children of the Objector will donate DNA samples for examination before a mutually agreed laboratory. The matter was to be mentioned on 3rd May, 2022 to confirm compliance of order (8) of the judgment. Though the succession cause did not concern the Respondent, it is not in dispute that one of the properties was earning rental income but the court had directed that the monies received be deposited in court. It was not available for use to offset any outstanding loan. The purpose of an order of injunction is to preserve the substratum of the suit. The party who stands to be prejudiced if the order sought is not granted is the Plaintiff. To this end, I am satisfied that a prima facie case has been established.
14. As held in *Nguruman* (supra), having found that a prima facie case has been established, I am duty bound to consider the second facet, that is, irreparable injury. The Court of Appeal in the above case expressed itself thus: -

“...The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.” (Emphasis added)
15. The Applicant submitted among other grounds that the suit properties go to the core of the succession tussle and that any sale of the same could expose all beneficiaries to a loss that could not adequately be compensated by damages. Distribution of the estate is pending and thus if sale is allowed, some of

¹ See *JM v SMK & 4 Others* [2022] eKLR



the beneficiaries will be disinherited. In the Respondent's submissions, it was contended that damages would be an adequate remedy. Section 99 (4) of the *Land Act* among other authorities was cited in support. Though I agree that the suit premises value be determined, the loss that would ensue in the event sale is allowed to go ahead cannot be quantified. It is equally not in dispute that distribution is pending. In *Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR, Warsame, J (as he then was) held as follows: -

“...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted 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...”

16. I thus note that though the Respondent's states that damages can be computed, the ensuing loss in the event the suit properties are sold cannot be ascertained and as such, I am satisfied that irreparable injury would occur if the order sought is not granted.

17. On the third limb, that is, balance of convenience, I note that the subject properties are subject of distribution and as such, it is only until distribution that the same can be available for realization. Otherwise, some of the beneficiaries will have nothing to inherit. In *Chebii Kipkoech vs. Barnabas Tuitoek Bargarioria & Another* [2019] eKLR, balance of convenience was defined as follows: -

“...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed...”

18. Putting all the facts into perspective, I note that if the Respondent is allowed to proceed with realization of the subject properties, the Applicant and in extension the estate would lose that which she holds dear. On the contrary, the Respondent still has the right to go ahead and realize the securities in the event the suit is dismissed. All that is happening is simply a pause on the Respondent's pursuit. I cannot say the same of the Applicant and thus I am persuaded to maintain the status obtaining pending the hearing of the suit.

19. The Respondent equally raised an issue of locus standi of the Applicant. This is a jurisdictional issue and thus goes to the core of the matter. I note that in her supplementary affidavit, it was pointed out that the joint administrator, one Rose Faith Mwawasi had shown unwillingness to file the suit. Therefore, her unwillingness ought not to preclude the Applicant from lodging the present suit and application. The joint administrator's unwillingness is confirmed by the Respondent through an affidavit sworn by said Rose on 31st January, 2019. So, was her failure to cooperate to preclude the Applicant from instituting the present matter? I have no doubt in my mind that her failure to cooperate would render the present matter non-suited. I therefore dismiss the Respondent's objection on the Applicant's capacity to institute the present case.

20. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that costs shall await the outcome of the suit.



21. In order to safeguard the Respondent's interests, I order that the matter be fast tracked. Notice is hereby issued to all parties that once the matter is fixed for hearing; no adjournments shall be allowed.
22. Based on the above discourse, I make the following orders: -
 - a. The application dated 28th August, 2023 is merited and the same is allowed in terms of prayer (2) thereof, that is, there be a temporary order of injunction pending the hearing and determination of the main suit.
 - b. Costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

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F. WANGARI

JUDGE

In the presence of;

Mr. Yunis Advocate for the Plaintiff/Applicant

Mr. Kongere Advocate for the Defendant/Respondent

Mr. Barille, Court Assistant

