



REPUBLIC OF KENYA



**Cimex Concrete Company Limited v Business Partners International (K) Ltd & another  
(Civil Case 20 of 2022) [2023] KEHC 27437 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE 20 OF 2022  
DO CHEPKWONY, J  
NOVEMBER 30, 2023**

**BETWEEN**

**CIMEX CONCRETE COMPANY LIMITED ..... APPLICANT**

**AND**

**BUSINESS PARTNERS INTERNATIONAL (K) LTD ..... 1<sup>ST</sup> RESPONDENT**

**KENYA SHIELD AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling in respect of a Notice of Motion application dated 2<sup>nd</sup> September, 2022 filed pursuant to Sections 1A, 1B and 3A, all of the [Civil Procedure Rules](#) and Order 40 Rule 1 (a) of the [Civil Procedure Rules](#) 2010. It seeks the following orders:
  - a. Spent;
  - b. Spent;
  - c. That the Honourable Court be pleased to grant a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents restraining them from selling by way of public auction Land Reference Number 8361/8 (I.R Number 81154) Maporomoko Estate West of Thika-Kiambu County and Motor Vehicle Number KHMA 187R, stone crusher fabricated fuel tank, furniture and fittings, machinery and equipment situated on Land Reference Number Mwea/Wacharo/1623 pending the hearing and determination of the main suit.
  - d. That the costs of this application be provided for.



2. The Application is based on the grounds set out on its face and the Supporting Affidavit sworn by Ann Njeri Kamau on 2<sup>nd</sup> September, 2022. It has been opposed through the Replying Affidavit of Michael Muthengi the Country Manager of the Respondent, sworn on 7<sup>th</sup> December, 2022.
3. The Applicant has stated that it entered into a loan agreement with the Respondent for Kshs 39,500,000/= and thereafter for an amount of Kshs. 2,084,000/= which was secured by Land Reference Number 8361/8 I.R Number 81154 Maporomoko Estate West of Thika-Kiambu County which was used a security for the loan. She argues that the movable properties in the subject property being Motor Vehicle Registration Number KHMA 187R, stone crusher machine, weighbridge, control room machinery and equipment, power generator and fabricated fuel tank were not part of the security for the loan.
4. The Applicant holds that she was served with Notification of sale of the subject property on 15<sup>th</sup> February, 2022 and others respectively dated 24<sup>th</sup> May, 2022, 2<sup>nd</sup> June, 2022, 8<sup>th</sup> July, 2022 and 22<sup>nd</sup> July, 2022 for the outstanding amount. According to the Applicant the amount of Kshs 41,996,715.92 is inordinately high as she had been making the payments regularly and she sought explanation from the Respondent over the same which refused to respond.
5. The Applicant also holds that the Respondent breached the terms of the loan by failing to provide a proper statement of accounts of the loan and by issuing the Notification of sale of the subject property and the movable properties which is an infringement of the Applicant's right of redemption. She contends that if the subject property is sold, she stands to suffer loss and damage which cannot be compensated by way of damages.
6. The application has been opposed through the Replying Affidavit of Michael Muthengi, the County Manager of the Respondent sworn on 7<sup>th</sup> December, 2022, wherein he has stated that the Application is ill-conceived and undeserving of the equitable orders sought therein as they are unpalatable and tainted by misrepresentation and falsehoods. In regard of the movable properties, the Respondent states that the application is *res judicata* and *subjudice* since the Applicant had filed another application dated 10<sup>th</sup> August, 2022 where Javison Construction Limited was seeking injunctive orders over Land Reference No. Mwea/Wachoro/1623 and the court gave conditional orders for the sum of Kshs. 500,000/= to be deposited within seven days of the order which the Applicant failed to honour and instead filed the present application.
7. The Respondent argues that since the issue of movable properties had already been dealt with, the Applicant cannot relitigate the same issues by changing the parties in the suit. It thus, can neither evade the doctrine of *res judicata* nor sit on appeal of its own decision, as it would amount to having a second bite on the cherry.
8. The Respondent confirms granting credit facility for which the Applicant was to provide securities as per Clause 8.1 of the Hire Purchase Agreement being a third party charge and registration of the fixed and floating assets debentures over new equipment to be financed in the amount of Kshs.30,500,000.00 and via a debenture dated 19<sup>th</sup> September, 2019, the Plaintiff charged by way of security in respect of all assets of the Company. The Respondent stated that the Applicant provided a schedule of the charged assets which are in Mwea/Wachoro/1623 and which were proclaimed and were to be auctioned on 17<sup>th</sup> June, 2022.
9. The Respondent argues that the Applicant's allegations that the movable assets at Mwea/Wachoro/1623 were not offered as part of security is a falsehood and should not be entertained by the



court as the Applicant is a perpetual defaulter. The Respondent holds that the movable assets which were the subject of the case in Embu Civil Case No. E002 OF 2022, Javison Construction Limited, the Plaintiff therein made a proposal to settle the debt owing which the Plaintiff defaulted and the Defendant, (the Respondent) herein warned the Plaintiff that it would proceed and sell the same to recover the amount owed.

10. The Respondent contends that it is not in dispute that the Applicant owes it and therefore the Application is full of falsehoods. Also, the Respondent avers that the Applicant does not have any capacity to claim the subject property since she does not have legal interest or capacity to file the suit as she is neither the chargor nor the registered proprietor of the property
11. According to the Respondent, it exercised its lawful rights under Section 90 of the *Land Act* by issuing the requisite notices which the Applicant has not disputed and therefore the right to sell has crystallised in law. The Respondent holds that the Applicant has not fulfilled the conditions required for injunctive orders to issue as set out in the case of *Giella -vs- Cassman Brown*[1978] EA 358.
12. It is the Respondent's position that it is a reputable company which is capable of paying damages in case there is an injustice on the part of the Respondent in selling the property. The Respondent has urged the court to dismiss the application herein with costs.
13. On 17<sup>th</sup> April, 2023, the court directed the parties to file written submissions in respect of the application which are dated 30<sup>th</sup> January, 2023 and 24<sup>th</sup> July, 2023 respectively.

#### **Analysis and Determination.**

14. The court has read the Application, the Replying Affidavit, the Applicant's Submissions dated 30<sup>th</sup> January, 2023 and the 1<sup>st</sup> Respondent's Submissions dated 24<sup>th</sup> July, 2023 and considered the arguments raised by the parties in support of their respective positions and the authorities cited therein.
15. From the pleadings, the court finds the following issues arise for determination:-
  - a. Whether the Applicant has the locus standi in the matter.
  - b. Whether there the claim over the movable properties is res judicata.
  - c. Whether the Applicant deserves the injunctive orders sought.
16. On the issue of whether the Applicant has the locus standi in the matter, it is the Respondent's argument that the Applicant does not have the capacity to bring the suit since it is neither a registered proprietor of the subject property nor a chargor herein.
17. Upon reading through the court record, it is evident that the Applicant herein, Cimex Concrete Company Limited, was the Borrower of the loan which was secured by the charge instrument of the subject property owned by Ann Njeri Kamau as the proprietor of the subject property and a

#### **Director of the Company.**

18. In essence, the party with a proprietary interest in the property being Anne Njeri Kamau is the only party who can seek injunctive orders as it is the



party which stands to lose the interest in the land if it is sold. In this case the Applicant was only a Borrower and a guarantor of the credit facility but the chargor being Anne Njeri Kamau is the only one with the capacity to sue.

19. The court abides with the Court of Appeal decision which explained a similar scenario in the case of *Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* [2006] eKLR, by holding that-

“... the suit property does not belong to the Applicant. The owner of the property M/S Komorock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the Bank. So even if the suit property is sold the applicant will not lose any proprietary right to the property...”

20. The Applicant being the borrower of the credit facility has not shown that it has a *prima facie* case whose right is threatened to the extent that it is entitled to an injunction. However, Anne Njeri Kamau as one of the Directors of the Applicant

Company, is a separate and distinct person from the Applicant Company. In this case the Applicant Company cannot agitate matters concerning the suit property as it does not have any proprietary interest in that property.

21. It is therefore clear that in the absence of the chargor, as a party to the suit, the

Applicant Company cannot succeed in challenging the Respondent’s exercise of its statutory power of sale, and thus does not have a *prima facie* case with a probability of success as it will not lose any proprietary right if the suit property is sold.

22. Having found that the Applicant Company neither has legal interest in the property nor the capacity to sue, the court finds that the Applicant has not established *prima facie* to warrant the orders sought, it will be an exercise in futility to address the issue of resjudicata. On this, the court has relied on the Court of Appeal decision in the case of *Nguruman Limited -vs- Jane Bonde Nielsen and 2 Others* (*Supra*), which stated that,

“If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration...”

23. In the end, the court finds that the application lacks merit and the same is dismissed with costs to the Respondent. Consequently, the interim injunctive orders in place beand are hereby discharged forthwith.

It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:-

M/S Wamuyu counsel for Defendants

Court Assistant - Martin

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