



**Karoki & another (Suing as the Legal Representative of Nixon Karoki Meru) v NCBA Bank Kenya PLC (Civil Case E008 of 2022) [2023] KEHC 25942 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE E008 OF 2022  
PM MULWA, J  
NOVEMBER 29, 2023**

**BETWEEN**

**VERONICA MUTHONI KAROKI AND PETER MERU KAROKI (SUING AS  
THE LEGAL REPRESENTATIVE OF NIXON KAROKI MERU) ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... DEFENDANT**

**RULING**

1. The court has been called to determine three applications dated 23rd April 2022, 28<sup>th</sup> April 2022 and 11<sup>th</sup> May 2022 by the Plaintiff/applicant. The gist of the application is that the plaintiff/ applicant filed the first application dated 23<sup>rd</sup> April seeking injunctive orders against the defendant from advertising for sale, selling, auctioning, alienating, transferring, disposing, charging or further charging, evicting, disposing of the property known Ruiru West Block 1(Githunguri)/ 1378. When the matter was placed before the court on 27<sup>th</sup> April, the court declined to grant the injunctive orders which prompted the applicant to file the second application dated 28<sup>th</sup> April 2022 seeking an order for status quo of the property known as Ruiru West Block 1(Githunguri)/ 1378. On 4<sup>th</sup> May 2022, the court at the instant application noticed the intended public sale was to take place on 5<sup>th</sup> May 2022 and allowed the injunctive orders on condition that the Plaintiff/applicant deposited a sum of Kshs. 3,000,000/= as security within 30 days as well as pay the auctioneer fees.
2. The applicant aggrieved by the conditional orders set by the court the applicant/plaintiff filed the third application seeking review of the orders of 4<sup>th</sup> May 2022 seeking to remove the condition for depositing Kshs. 3,000,000/= and the payment of the auctioneer's fees.
3. The three applications were supported by the annexed affidavits of Veronicah Muthoni Karoki sworn on diverse dates; in a nutshell, she avers the intended sale is illegal and a nullity as no statutory notices were served on the deceased. The suit property is the home to the children and mother of the deceased and they stand to suffer irreparable loss if the bank is allowed to continue with the sale. The business



is unable to pay the sum imposed by the court as a conditional stay as the business currently makes a total of Kshs. 50,000/= per month. She urged the court to review the orders of 4<sup>th</sup> May 2022.

4. In response to the three applications, Jackson Njaga the legal counsel for the defendant filed the Replying affidavit sworn on 29<sup>th</sup> June 2022. He avers on 20<sup>th</sup> June 2018, the Director of Eagles Fresh Food Hotel Limited applied for a credit facility of Kshs 16,000,000/= which was approved by the bank, Nixon Karoki Meru and Veronica Muthoni were the guarantors of the loan facility. The Charge was secure over the property known as Ruiru West Block1 (Githunguri)/1378. The loan was to be repaid with interest in seventy-two monthly instalments of Kshs. 325,423/=.
5. The failures of the borrower and the guarantor to regularize the loan led the defendant to invoke and exercise its right to sell the charged property under Section 90 of the *Land Act*. He avers the borrows declined/ignored and refused to honour the 90 days' statutory period, and Josrick Merchant auctioneers were appointed and issued a 45-day redemption notice to the Plaintiff. On 11<sup>th</sup> April 2022, the property was advertised for sale through public auction to take place on 5<sup>th</sup> May 2022. The plaintiff has always been aware of the outstanding loan facility which they defaulted to repay, and therefore the current application seeking injunctions is an afterthought aimed at denying the Defendant an opportunity to recover and enjoyment of the proceeds of the loan engagement.
6. He denied that the loan was fully secured and avers that the estate of the late Nixon Karoki Meru is not entitled to redemption of the loan as clause 1(c) of the Guarantee of indemnity stated the guarantee of indemnity shall remain in force as a continuing security notwithstanding death or any disability. He states the statutory notices were duly served through the provided postal address.
7. In a rejoinder Veronica Muthoni Karoki filed a supplementary Affidavit sworn on 19<sup>th</sup> July 2022 in which he deponed that Nixon Karoki Meru passed on 29<sup>th</sup> July 2020 and the information was disclosed to the Bank, that postal address 27573-00506 belonged to his employer PCEA headquarters, the proper address for the company was 1902-00232 Ruiru which the defendant acknowledges and was aware and used to send all correspondences to the Plaintiff. She avers by the time notices were sent out the Plaintiff was long dead. She believes the mortgage was fully insured though the bank failed to commit to showing the documents. The bank has also failed to respond to her request to restructure the loan.
8. By the directions of this court, the three applications were heard together by way of written submissions. Each party complied by filing written submissions.

#### **Applicant's/Plaintiff's submission**

9. Learned counsel for the Plaintiff/Applicant raised two issues for determination. On the first issue, he submits that it is in the interest of justice that the court issues an injunctive order restraining the defendant from selling, auctioning, transferring, disposing, charging, evicting or interfering with the applicant's right to the suit property known as Ruiru West Block1 (Githunguri)1378. Counsel avers the applicant has met the conditions set for granting an injunctive order as stipulated in *Giella vs Cassman Brown & co. Ltd (1973)eKLR* as well as provided under Order 40 Rule 1 of the Civil Procedure Rules.
10. According to counsel, the suit property Ruiru West Block1 (Githunguri) 1378 is in danger of being wasted, through a public sale. Counsel argues the statutory notices were never served on the applicants. She avers the Plaintiff Nixon Karoki Meru died on 29<sup>th</sup> July 2020 and the notices were sent out through postal address 27573-00506 in place of the postal address 1902-00232 which was being used by the Defendants. Counsel could not understand how a dead person was served. Cited the case in *Phylis Jerotich Kimutai & Anor vs Kenindia Assurance Co. Ltd (2012) eKLR* where it cited with



approval *Ragui vs Barclays Bank of Kenya Ltd (2002) KLR 647* where the court held: "a statutory notice addressed to a deceased person is invalid and has no effect and that it should have been served on the administrators."

11. Counsel argues the matter came to the knowledge of the Applicants when the auctioneers visited the premises. The bank's rights to sell had not crystallized and are a complete nullity and ought to be stopped by the court. Counsel avers the loan was insured and thus the bank ought to move the insurance but instead wishes to have a double benefit by claiming from the applicants/plaintiffs.
12. Counsel challenges the valuation report and maintains that no inspection was ever done on the property.
13. Counsel argues the applicants will suffer a substantial loss that cannot be adequately compensated through an award of damages. It is argued that the suit property is the matrimonial property where the applicant lives with her children, and the property being sold illegally will occasion loss and damage.
14. Counsel avers the balance of convenience tilts in the applicant's favour as they stand to suffer greater harm if the application is dismissed; while the defendant will not suffer loss if the injunction is granted.
15. On the second issue, counsel urged the court to review the orders of 4th May 2022, as the condition set for depositing Kshs. 3,000,000/= is way above the reach of the Applicants as the business only fetches 50,000/= ordering the applicant to pay the auctioneer's fees is not only punitive but unjust. Under the court to exercise its power and review the orders as stated in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1. The application is made primarily on the basis that the applicants are unable to raise the amount of Kshs. 3,000,000/= as well as pay the auctioneer's fees, which is a sufficient reason for bringing the current application for review of the orders.
16. Counsel urged the court to allow the applications as prayed.

#### **Defendant's/Respondent's submissions**

17. Counsel for the Respondent raised to issue for determination. The first issue is whether a temporary injunction should be issued. He submits that the applicant has failed to meet the threshold as enshrined in *Giella vs Cassman Brown & co. Ltd (1973) eKLR*. According to counsel, he avers the applicant has failed to demonstrate a prima facie case in that the postal address availed in the charging document is not their proper postal address. Counsel submits the statutory notices dated 26th August 2021 were sent out to the applicant on 31st August 2021 through the shared postal address and a certificate of postage has been duly produced in court.
18. Counsel submits the 1st Plaintiff a director of the borrower was notified of the default and has been aware of the default which she failed to regularize. Cited the case of *Emrre Global Investor Ltd vs Housing Finance Company of Kenya Ltd & 2 others (2014) eKLR* where the court held; "A borrower is at all material times presumed to be aware of its default so long as it does not affect payments and need not be notified of such a fact. The purpose of a notice is merely to give a reasonable opportunity to a borrower to regularize its financial position before the lender can commence recovery proceedings of the monies due and owing to it,"
19. The failure of the Applicant to remedy their default prompted the Defendant/respondent on 3rd December 2021 to issue a 40-day notice of the intention to sell under section 96(2) (3) of the *Land Act*. Subsequently, the respondent issued the Applicant with 45 45-day Redemption Notice on 16th February 2022, which was served to the applicant in person.
20. Counsel argues the Respondent followed due procedure and due care was accorded to the applicant.



21. Counsel avers the applicant has failed to demonstrate the irreparable injury to be suffered if the injunction is not granted. Counsel argues applicant freely charged the property and was aware that in case of default, the same would be sold. In instances where the applicant is to suffer loss, the same can be paid through damages calculated at the market value of the property.
22. Counsel avers the balance of convenience tilts in favour of the bank. By restraining the bank from continuing with the sale the court will be re-writing the contract for the parties. Counsel avers the applicant is not deserving of the injunctive orders.
23. The second issue is whether the applicant has made a case for review of the orders issued on 4th May 2022. Counsel argues the applicant has failed to demonstrate the threshold for review of orders as stipulated under Order 45 Rule 1 of the civil procedure Rules. The Applicant has failed to demonstrate there is the discovery of new and or important facts, which after exercise of due diligence were not within her knowledge or could not be procured before the orders were made, or an account of some mistake or error apparent on the face of the record or any sufficient reasons.
24. Counsel argues the applicants have not argued any ground to warrant the review orders sought and are deserving of the orders. Counsel urged the court to dismiss the applications with costs to the Defendant/Respondent.

### **Analysis and determination**

25. I have considered the applications, the affidavits both in support of the applications and in opposition thereto, the submissions filed and the authorities the issues for determination by the court are:
  - i. Whether the applicants have met the threshold for the grant of injunctive orders?
  - ii. Whether the applicants have established grounds for review of the orders of 4th May 2022 issued by this court?
  - iii. What are the appropriate remedies?
26. The issue of injunctive orders is well settled in *Giella v Cassman Brown & Co. (1973) EA*. To succeed, the applicant must establish a prima facie case with a probability of success, that irreparable loss which cannot be adequately compensated by an award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.
27. In *Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001*: the court held:

“The remedy of injunction is one of the greatest equitable relief. It will be issued in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of Judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”



28. It is not in dispute that the suit property was charged to the defendant by the deceased Nixon Korir Meru together with the 1st Applicant for the sum of Kshs 16,000,000/=. Nixon Korir died in July 2020 and the loan fell into arrears necessitating the Defendant to issue statutory notices to the Plaintiff (deceased). The Applicants avers that the statutory notices were never issued and if issued it was done to the deceased and the sale is illegal and null. The applicant also avers that the suit property is matrimonial property and the applicant stands to suffer irreparable loss if injunctive orders are not issued as she and her children live.
29. I have perused the pleadings and I note the statutory notices were served on the deceased. Despite the chargee having the express power of sale in instances where the charger defaults in payments, It is trite that service cannot be effected on a dead person, the statutory notices ought to have been served through the administrators of the estate. The applicants also aver that there was no valuation conducted on the suit premises and disputed the valuation report as provided.
30. In the circumstances this court finds the applicants have established a prima facie case.
31. The next issue is whether the applicants have established they will suffer irreparable loss and damages, which would not be adequately compensated by way of damages. The applicant avers that the suit property is matrimonial property which she lives in with her family she is apprehensive if the same is sold, her family will be rendered homeless and rendering the family homeless cannot be compensated by an award of damages. I agree with the applicants that indeed rendering the family homeless yet the statutory notices were never properly served will amount to loss and damages.
32. I have found that the applicants have established a prima facie case and that they are likely to suffer damages which would not be compensated by an award of damages, in the circumstances therefore I find and hold that the balance of convenience tilts in favour of the applicants.
33. In the premises I grant an order of injunctions restraining the Defendant, its agents, servants, and or assigns or any of them from advertising for sale, disposing of selling or otherwise interfering with the property known as Ruiru West Block 1(Githunguri)/ 1378, pending the hearing and determination of this suit, in the meantime the applicants ought to comply with the conditions entered into the contract between themselves and the defendants.
34. On the second issue, this court is guided by Order 45 Rule 1 of the Civil Procedure Rules, which provides as follows:

“Application for review of decree or order.

- (1) Any person considering himself aggrieved
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



35. In addition to the above Section 80 of the Civil Procedure Act provides for review to an aggrieved party. It states as follows:

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

36. From the above provisions the court is conferred with jurisdiction to hear and determine an application for review of the orders or decree if sufficient reasons have been adduced.

37. An applicant seeking review orders must demonstrate to the court any of the following in an application for review.

- a. There has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at that time;
- b. There is some mistake or error apparent on the face of the record; or
- c. any other sufficient reason; and
- d. That the application has been brought without unreasonable delay.

38. The applicant avers the application is made on the ground of sufficient reasons. The applicant asserts that it is not able to raise the amount of Kshs. 3,000,000/- together with the auctioneer's fees despite numerous efforts as the business is only making Kshs. 50,000 that is being as school fees and maintaining the family.

39. The Defendant strongly opposes the application because the applicants have failed to demonstrate to meet the conditions set out for review orders.

40. I have perused the record and the issue is the applicant filed an application dated 23rd April 2022, seeking injunctive orders against the bank from selling, transferring or dealing with the Ruiru West Block1 (Githunguri)1378, the court declined to grant the orders and the Applicant filed the second application dated 28th April 2022 seeking status quo to be maintained it is based on this application that the court issued an injunctive order against the Defendant on condition that the applicant pays the auctioneers fees and deposits Kshs. 3,000,000 as security in due performance of the decree.

41. I am of the considered opinion that the condition imposed by the court was to caution the defendant as the bank has no money of its own as it uses public funds to trade. As stated in John Nduati Kariuki T/ A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96 the Court of Appeal held as follows:

“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged”.



42. I am thus not persuaded that the applicants have established sufficient reasons for this court to review the court orders of 5th May 2022. The upshot is that the application for review orders dated 4th May 2022 fails.

43. The court makes the following orders:

- i. The applications dated 23rd April 2022 and 28th April 2022 are merited.
- ii. An order of injunctions restraining the Defendant, its agents, servants, and or assigns or any of them from advertising for sale, disposing of selling or otherwise interfering with the property known Ruiru West Block 1(Githunguri)/ 1378, pending the hearing and determination of this suit.
- iii. The applicants ought to comply with the conditions entered into the contract between themselves and the defendants.
- iv. The application dated 4th May 2022 is dismissed.
- v. The costs of the application to be in the cause.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023.**

**P. MULWA**

**JUDGE**

In the presence of:

Ms. Nkatha h/b for Mr. Kirima – for Plaintiffs/Applicants

Mr. Chaka h/b for Mr. Ayisi - for Respondent

