



REPUBLIC OF KENYA



**Mbobu & another v Hypac Investments Ltd (Commercial Suit E144 of 2023)  
[2023] KEHC 26175 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E144 OF 2023  
FG MUGAMBI, J  
NOVEMBER 24, 2023**

**BETWEEN**

**MATHEW KYALO MBOBU ..... 1<sup>ST</sup> APPLICANT**

**RIVIERA ESTATES LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HYPAC INVESTMENTS LTD ..... RESPONDENT**

**RULING**

**Brief Facts**

1. Before the court is the application dated 3<sup>rd</sup> April 2023. It is brought under section 1A, 1B, 3A and 63 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 40 rules 1, 2 and 4 as well as Order 51 rule 1 of the *Civil Procedure Rules*. The application seeks the following prayers:
  - i. Spent
  - ii. Spent
  - iii. Pending hearing and determination of the main suit, this Honourable Court be pleased to issue an interim order of injunction directed at the respondent, its agents, servants, employees or any person acting under its instructions:
    - a. Restraining them from selling, disposing of, alienating, transferring, subdividing, charging or in any manner whatsoever interfering with the land parcel known as Title Number I.R. 83020 Land Reference Number 15065/64 (original number 15065/47/1);



- b. Restraining them from trespassing onto, evicting, preventing entry onto or in any manner whatsoever interfering with the applicants' quiet possession of the land parcel known as Title Number LR 83020 Land Reference Number 15065/64 (original number 15065/47/1):
    - c. Costs of the application be provided for.
  2. The application was premised on the grounds on the face of it and the supporting affidavit sworn by MATHEW KYALO MBOBU, the 1<sup>st</sup> applicant, on 3<sup>rd</sup> April 2023.
  3. The 1<sup>st</sup> applicant avers that the 2<sup>nd</sup> applicant was the previous registered owner of the land parcel known as Title Number IR 83020 Land Reference Number 15065/64 (original number 15065/47/1) (hereafter the suit property). The suit property is occupied by the 1<sup>st</sup> applicant, who is the 2<sup>nd</sup> applicant's director, and his family with the permission of the 2<sup>nd</sup> applicant.
  4. The 1<sup>st</sup> applicant approached the respondent for a loan wherein the respondent issued a letter of offer dated 27<sup>th</sup> January 2021, for a loan of Kshs. 11,000,000 payable over a maximum period of 6 months. The security for the loan was the transfer of the suit property to the respondent. This was effected on the understanding that the respondent would transfer the suit property back to the 2<sup>nd</sup> applicant upon full satisfaction of the loan. It was a term of the loan that interest would be charged at the rate of 15% per month on a flat rate with a late repayment penalty at a rate of 5% per week on the installment arrears over and above the interest rate.
  5. The 1<sup>st</sup> applicant avers that he made repayments in the sum of Kshs. 24,600,000/=. The respondent had issued the 1<sup>st</sup> applicant with a demand for Kshs. 69,495,599/= which the 1<sup>st</sup> applicant takes issue with and claims that the same is based on an inaccurate loan statement which improperly computes interest together with the unconscionable late payment charges and does not take the 1<sup>st</sup> applicant's repayments into account.
  6. The application was opposed by the respondent vide a replying affidavit sworn by Alex Mutuku Mbelenzi, the sole director of the respondent company. The respondent confirms that the letter of offer for the loan was voluntarily executed between the parties as was the transfer of lease dated 28<sup>th</sup> January 2021 over the suit property in favour of the respondent and in compliance with the terms of the letter of offer. According to the respondent, the applicant's failed to repay the loan by 27<sup>th</sup> July 2021 as agreed and the penalty interest rates set in, which escalated all the way up to Kshs. 54,000,000/=.
  7. The parties on 17<sup>th</sup> December 2021 agreed on repayment terms whereby the respondent waived the amount of Kshs. 24,000,000/= on condition that the applicants paid the sum of Kshs. 21,000,000/= immediately and a further Kshs. 9,000,000/= on or before October 2022. The applicants failed to honour the commitments made, with the result that the prevailing terms on the 5% per week late payment penalty reverted back. As at 24<sup>th</sup> March 2023 the amount due from the applicants to the respondents was Kshs. 69,495,599.47

## Analysis

8. I have carefully considered the pleadings, evidence and the rival submissions filed by the parties. The issue for determination is whether or not the applicants have met the threshold for granting of an interlocutory injunction.
9. The conditions for granting interlocutory injunctions are set out in Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules](#) 2010. These conditions have been interpreted and given effect through numerous



judicial pronouncements. Amongst the most celebrated of these is the case of *Giella V Cassman Brown & Co Ltd*, (1973) E.A 385. The Court at page 360 (Spry J) held that:

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

10. In determining what amounts to a prima facie case, the Court of Appeal in the case of *Mrao Limited V First American Bank of Kenya and 2 Others*, (2003) KLR 125, stated:

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. Have the applicants therefore demonstrated that they have a prima facie case with a probability of success? From a cursory look at the record, the main bone of contention is the interest and penalty charges that were applied on the loan facility. The applicants term the same as excessive. The 1<sup>st</sup> applicant submits that despite paying the loan to the tune of over Kshs. 26,000,000/=, the respondent alleges that a balance of Kshs. 9,000,000/= was outstanding, which amount has grown to over Kshs. 69,000,000/= within a short span. The 1<sup>st</sup> applicant therefore avers that he has repaid the loan with interest and costs.
12. On his part the respondent insists that the agreement was freely entered into by the parties and that the 1<sup>st</sup> applicant should therefore pay up the amounts that he signed up against. As to whether the respondent is entitled to the monies claimed, is a question for further interrogation at a substantive hearing. I am satisfied that the applicant has established that he has a prima facie case worthy of rebuttal.
13. The second consideration for grant of an injunction is whether the applicant has shown that he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
14. The 1<sup>st</sup> applicant describes the substratum of the suit as a rare, unique and sentimental family residence. He also states that if the injunctive orders are not granted the suit property is bound to dissipate and further that he is apprehensive that the respondent which is a sole proprietorship may not be in a position to pay any damages should the same be ordered by this Court.
15. I am inclined to concur with the Court in the *Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others*, [2016] eKLR. The Court cited with approval from the Halsbury’s Laws of England,



in a view that was also captured by Warsame, JA in *Joseph Siro Mosioma V Housing Finance Company of Kenya & 3 Others*, [2008] eKLR. This was to the effect that:

“Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law...a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

16. While the applicant has not exactly explained how the dissipation of the suit property is likely to occur, considering the totality of the facts herein, I find that the inconvenience caused to the applicants would be greater than that which would be caused to the respondent. This is so if an injunction is not granted and the respondent is allowed to dispose of the suit property, and the suit is ultimately decided in favor of the applicants.

### **Determination**

17. For all the foregoing reasons, the application dated is allowed. Consequently, I make the following orders:
- i. Pending the hearing and determination of the main suit, an interim order of injunction be and is hereby issued, directed at the respondent, its agents, servants, employees or any person acting under its instructions:
    - a. Restraining them from selling, disposing of, alienating, transferring, subdividing, charging or in any manner whatsoever interfering with the land parcel known as Title Number I.R 83020 Land Reference Number 15065/64 (original number 15065/47/1);
    - b. Restraining them from trespassing onto, evicting, preventing entry onto or in any manner whatsoever interfering with the applicants' quiet possession of the land parcel known as Title Number LR 83020 Land Reference Number 15065/64 (original number 15065/47/1):
  - ii. The costs of the application shall follow the outcome of the suit.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2023.**

**F. MUGAMBI**

**JUDGE**

