



**Erdeman Properties Limited v KCB Bank Limited (Civil Suit E209 of 2022)
[2023] KEHC 26586 (KLR) (Commercial and Tax) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E209 OF 2022
DO CHEPKWONY, J
DECEMBER 15, 2023**

BETWEEN

ERDEMAN PROPERTIES LIMITED PLAINTIFF

AND

KCB BANK LIMITED DEFENDANT

RULING

1. The subject of this ruling is the plaintiff/applicant's notice of motion application dated June 6, 2022 which seeks the following orders:-
 - (a) Spent;
 - (b) Spent;
 - (c) That pending the hearing and determination of this suit, there be an order of temporary injunction restraining the defendant/ respondent, its agents, employees, servants or any other person or entity claiming through it from alienating, selling by public auction or in any way disposing off or evicting the innocent purchasers for value or in any way interfering with the quite possession of all that property known as 100 apartment units being A203, A243, A252, A253, A254, A351, A352, A354, E451, E452, E453, E454, E502, E504, E551, E552, E553, E554, J452, J453, J454, J551, J552, J554, N102, N151, N154, N404, N452, N453, N542, M544, N552, N553, N554, J211, J701, B342, B353, B354, B454, C451, C452, C453, D243, D301, D351, D352, D354, F351, F352, F353, F354, F444, F451, F452, F453, G333, G342, G352, G353, G452, G453, H254, H342, H351, H352, H354, K332, K351, K352, K353, K354, K442, K451, K452, L304, L342, L351, L353, L354, L441, L444, L451, L452, M234, M243, M251, M253, M254, M301, M351, M352, 1657, 1657, 1744, & L344 on LR No 27317/2 in Athi River registered in the name of the plaintiff and charged with the defendant



but disposed off to innocent third-party purchasers for value through various unregistered lease agreements with the plaintiff and who innocent third-party purchasers for value are now already in occupation of the respective unit.

- (d) Spent;
 - (e) That pending the hearing and determination of this suit, there be an order of temporary injunction restraining the defendant /respondent, its agents, employees, servants or any other person or entity claiming through it from alienating, selling by public auction or in any way disposing off or in any way interfering with the quiet possession of all that property known as Title No IR 202852 LR 209/22016 (Original Number 209/20567/2) registered in the name of the Plaintiff and charged with the Defendant but partially disposed off to innocent third party purchasers for value off plan through various unregistered lease agreements with the Plaintiff.
 - (f) Any other or further relief which this honourable court deems fit and just to grant.
 - (g) The costs of this application be provided for.
2. The grounds adduced forming the synopsis in support of the application both on its face and in the affidavits of Zeyun Yang, the plaintiff's managing director is that the plaintiff is a real estate developer and has constructed about 2190 units on LR No 27317/2 financing the construction with an overdraft facility of Kes 1.3 billion advanced by the defendant/respondent. That facility was enhanced with another term loan of Kes 540 million making the total loan from the defendant to be Kes 1.24 Billion.
 3. The security offered was a legal charge over the plaintiffs properties namely Title No IR 202852 LR 209/22016 (Original number 209/20567/2) and the project developments on those properties, deed of assignment of project receivables of sale and lease of the units constructed under the projects on the two suit properties.
 4. The plaintiff avers that it consistently committed in repayment of the facility until sometimes in 2020 when its operations were shaken by ramifications of Covid -19 including low sales of the units constructed. Nonetheless, the facilities were mutually reviewed and restructured with further new securities including a further legal charge of Kes 425,750,000/= on over hundred (100) unsold units on LR No 27317/2.
 5. It is the plaintiff's case that it mistakenly sold the one hundred (100) units on LR No 27317/2 and informed the defendant of the mistake *vide* a letter dated December 5, 2019. Indeed, all hell broke loose and the defendant resorted to demanding payment of the entire outstanding loan amount coupled with threats and ultimatum to list the plaintiff with Credit Reference Bureau which it eventually did. The defendant further issued statutory notices under section 90 of the Land Act, and a 40 days statutory demand notice under section 96 of the Land Act intended to sell the suit property and the said 100 apartment units so as to recover a total debt of Kes 2,001,845,844.56 notwithstanding that the plaintiff had already repaid a total of Kes 645,550,282.01.
 6. The plaintiff has added that the defendant has so far crippled it financially by failing to advance it further facilities to carry on the developments while well aware that it had listed the plaintiff with Credit Reference Bureau (CRB). Finally, the plaintiff has averred that the charge over the mentioned 100 units anticipated the lease income therefrom be paid into the designated joint account but not the sale proceeds but so far, that there is no evidence indicating deviation from that arrangement.
 7. It is the plaintiff's contention that since the plaintiff on a genuine mistake sold the 100 units, signed sale agreements and granted the innocent purchasers quiet possession who now await the titles, for lack of evidence to the contrary, the court is then asked to protect the investments of the innocent purchasers



for value. According to the plaintiff, the defendant will not suffer any prejudice if the orders sought are allowed because the plaintiff has offered an alternative security upon realizing the mistake in selling the 100 units and it would be more fair to vitiate the contract charging the 100 units for the benefit of the innocent purchasers for value.

8. The respondent opposed the application *vide* the Replying affidavit of its Head Credit support Unit, Oscar Obuna sworn on 21st July, 2022 and his further affidavit sworn on July 22, 2022. His case is that the plaintiff had admitted having received the loan facilities and the outstanding balance as at June 11, 2022 was Kes 2,020,899,625.21. That the plaintiff executed the charge documents securing these facilities including the charge over the 100 units on LR No 27317/2. A common term in the charge documents was that the Plaintiff would channel the proceeds realized in selling and or renting the units and other secured projects into a designated escrow account. The plaintiff was also enjoined to seek the defendant's consent while borrowing from other lender on account of the charged facilities and completely barred from allowing the sale or purporting to transfer title of the charged property.
9. However, the plaintiff chose to breach the express terms of the charge documents more specifically by redirecting the proceeds of the sale and lease income to accounts other than the designated escrow account. The plaintiff further allowed the sale of the charged units in breach of clauses 6 (1) and 11 of the Charge wherein it had covenanted to ensure that no person registers proprietary rights over the charged units. Thus, since the defendant did not authorize the sale of the units, in view of the encumbrance created on the titles, the third-party purchasers do not qualify as innocent purchasers for value.
10. The deponent has added that since the plaintiff had all the reasons to know that it could not pass other interest other than leasehold rights, the alleged purchasers cannot qualify as innocent purchasers for value within the provision of section 87 and 88(1) of the [Land Act](#) since the title passed would be defective.
11. Lastly, the defendant/respondent added that the plaintiff/applicant has continuously defaulted in repayment of the agreed instalments notwithstanding that the defendant/respondent has on various requests restructured the facilities to accommodate the plaintiff/applicant. Therefore, its power of sale has arisen upon default and having issued the pertinent statutory notices, that right should not be defeated in the guise of the present application.
12. The application was canvassed by way of written submission and as the record reflects, both parties complied in filing their respective submissions with the plaintiff/applicant filing submissions dated September 19, 2022 whilst the respondent's submissions are dated November 24, 2022. I have read through the said submissions and clearly, they reiterate the grounds summarized above that I do not wish to reproduce the same here.

Analysis and Determination

13. Having considered the application, the affidavits sworn in support and
14. In rebuttal of the same, the submissions made by parties as well as the authorities relied on, the main consideration in this case is whether the plaintiff/applicant has established a case for grant of temporary injunction.
15. The principles guiding an application for an injunction were outlined in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction: -
 - (a) First the applicant must show a *prima facie* case with a probability of success.



- (b) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
- (c) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
16. The above principles are reiterated under order 40(1)(a) and (b) of the [Civil Procedure Rules, 2010](#) which provides as follows: -
- “Where in any suit it is proved by affidavit or otherwise: -
- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev 2012] [Civil Procedure](#) cap 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”
17. The above test will be applied to facts and material that has been placed before the court, and more specifically with a view is establishing whether the plaintiff’s case meets the threshold under the *Giella v Cassman Brown* case namely; whether a *prima facie* case with a probability of success has been shown, whether the plaintiff might otherwise suffer irreparable harm which cannot be adequately compensated by an award of damages and lastly, whether the plaintiff has proven that the balance of convenience will tilt in its favour or whether the lower risk of injustice would be served in granting the injunctive relief sought.
18. On the first issue of whether the plaintiff has established a *prima facie* case, the guide is the case of [Mrao v First American Bank of Kenya Ltd & 2 others](#) [2003] KLR 125 which defined a *prima facie* case as follows;
- “..in civil cases, it 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 as to call for an explanation or rebuttal from the latter.”
19. Therefore, based on the material that has been presented to this court, the underscoring question is whether the plaintiff has established existence of rights which have apparently been infringed by the defendant bank so as to call for an explanation or rebuttal. The plaintiff’s major contention is that the defendant has issued statutory notices to sell the one hundred (100) units offered as security for the loan facilities it advanced the plaintiff notwithstanding that those units have already been sold to innocent purchasers for value and that it is more likely than not that the purchasers’ rights will be defeated if the intended sale is allowed. It is explained that although the 100 units were initially offered as security, the plaintiff had sold them on a mistake by its marketing department but upon realizing the mistake, it offered alternative security which the defendant has failed to acknowledge and or accept.



20. The defendant on the other hand has argued that the plaintiff breached the charge document by allowing the sale of the 100 units while knowing it was precluded from doing so without the Defendant's consent. Further to that, any proceeds thereof ought to have been deposited in a mutually agreed escrow account, but the Plaintiff failed to. Thus, according to the Defendant, the alleged sale was unlawful and did not pass any title to the third-party purchasers so as to qualify them as innocent purchasers for value.
21. The defendant has further submitted that it has the right to exercise the power of sale in event of default in repayment as was agreed upon by the parties at the time of creating the charge. That its rights as guaranteed under the charge document cannot be overridden by the alleged rights of innocent purchasers who so far are unknown and do not have any title to the subject property.
22. In my view, from the onset, it is common ground that the defendant advanced the plaintiff loan facilities and the subject suit properties were offered as security thereto. As regards the 100 units, it is not disputed that they were offered as security and the charge document precluded any sale without consent of the defendant. It follows that the sale of the 100 units without consent was an outright breach of the charge document which cannot be mitigated by an explanation that the sale was an honest mistake. Objectively, the breach and the alleged mistake would have been cushioned by the plaintiff offering to remit the proceeds from the sale of the units or any part thereof to the defendant or the agreed escrow account.
23. In any event, it is a renown principle in law that one cannot sue on behalf of someone else unless it is shown that the person is somehow incapacitated or has issued a power of attorney to that effect. Thus although the plaintiff alleges that about 281 persons who are innocent purchasers for value are likely to be prejudiced and their title to the 100 units defeated if the injunction sought is not granted, it is this court's opinion that it is upon the alleged purchasers to pursue and establish that they are entitled to protection under the bona fide doctrine notwithstanding the breach by the plaintiff in offering the units for sale. Therefore, the plaintiff cannot afford to prosecute third parties' rights and rely on the same in attempt to establish a prima facie case for temporary injunction. Instead, the plaintiff ought to have shown its own rights which are likely to be infringed if the defendant bank is allowed to proceed with realizing the securities. In this court's my view, the plaintiff has not met the threshold of a prima facie case as the court is also alive to the argument by the plaintiff that it has offered alternative securities which the defendant has turned down. However, that does not asset the plaintiff's position since it is not within the business of the court to rewrite agreements as between parties hence this court cannot compel the defendant to accept the alternative securities. In view of the foregoing discussion, the court is not persuaded that the plaintiff has satisfied the first limb required to warrant the grant of temporary injunction.
24. It is also worth-noting that the plaintiff has also not denied that it has defaulted in the repayment of facilities offered to it by the defendant bank. Thus, this court's opinion, where a chargor lets loose its property to a chargee as security for a loan facility on the basis that it be sold in the event of default, the damages are foreseeable and consented to by the chargor. Since the plaintiff has defaulted in the repayment of the loan arrears thus prompting the defendant to exercise its power of sale, the claim that the plaintiff is likely to suffer loss or injury incapable of compensation by an award of damages is misplaced and has no merit.
25. In the upshot, it is the court's conclusion that the plaintiff's application dated June 6, 2022 has failed to meet the threshold for grant of temporary injunction as sought. The application is therefore without merit and the court proceeds to dismiss it with costs to the defendant/respondent.

It is so ordered.



RULING DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF DECEMBER , 2023.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

ALFRED MABEYA

JUDGE

