



Innercity Properties Limited & another v Housing Finance & another (Civil Suit E289 of 2019) [2022] KEHC 156 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)

Neutral citation: [2022] KEHC 156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E289 OF 2019
A MABEYA, J
FEBRUARY 25, 2022**

BETWEEN

**INNERCITY PROPERTIES LIMITED 1ST PLAINTIFF
WILSON KIRUNGIE GACHANJA 2ND PLAINTIFF**

AND

**HOUSING FINANCE 1ST DEFENDANT
LEGACY AUCTIONEERING SERVICES 2ND DEFENDANT**

RULING

1. Before Court are three applications all filed by the plaintiffs. The first one is dated 25/11/2020, the second is dated 22/1/2021 and the third is dated 25/5/2021. All three applications have been filed by the plaintiffs.
2. The Court proposes to first determine the two. The first application sought an order to restraining the defendants from selling by way of public auction or otherwise whatsoever the suit premises pending the hearing and determination of the suit.
3. It also sought an order for accounts to be taken in compliance with the Banking Laws including the in-duplum rule to determine the amounts owed to the 1st defendant in respect of the loans secured respectively by Property A and Property B on L.R. No. 21984/74 Fairacres, Karen, Nairobi (“the suit premises”). Further that an order be issued directing that the amount deemed to be due be paid within a period of 12 months or such other period as this court may deem reasonable.
4. That application was supported by the affidavit sworn by the 2nd plaintiff.



5. The second application dated 22/1/2021 sought to set aside the consent order entered into by the parties on 17/9/2019. The grounds for the application were set out in the affidavit sworn by the 2nd plaintiff. It was contended that the parties entered into a consent whereby the plaintiffs agreed to pay the 1st defendant the sum of Kshs. 52,020,889.79 being the arrears claimed by the 1st defendant and also to pay the auctioneers charges within 30 days.
6. The 2nd plaintiff contended that the basis of the consent was that the 1st defendant had allowed the 1st plaintiff to sub-divide the suit premises and sell a portion thereof measuring one acre in order to settle the claimed arrears on the loan(s); that the 1st defendant proceeded to cause the suit premises to be surveyed and the sale of 2 plots therein was secured for a total consideration of Kshs. 50,000,000; that the proposed purchaser had already paid to the 1st defendant the sum of Ksh. 5,000,000 being the 10% deposit of the purchase price.
7. To the plaintiffs' surprise, the 1st defendant reversed its decision and declined to consent to the sale despite receiving the aforesaid deposit. That the 1st defendant insisted that the plaintiffs had breached the consent order despite the 1st defendant frustrating the sale of the plots being the sole source of the funds required to comply with the consent order.
8. As such the plaintiffs prayed to have the consent order set aside since the 1st defendant's position was that it was the plaintiffs who breached it which was likely to prejudice the plaintiffs case.
9. Both applications were opposed by the defendants through their replying affidavit sworn on 5/2/2021.
10. It was averred that the two applications were based on material misrepresentation and non-disclosure; that the plaintiffs were serial defaulters and had deliberately refused to repay the loan and were using the Court to frustrate the bank from selling the charged properties to recover its money.
11. That the principal amount advanced vide an Offer Letter dated 24/7/2012 was Kshs. 98,000,000/-. That the allegation that the 1st defendant should have opened two accounts was misleading as the offer letter was clear that it was one facility secured by charges over the two suit properties A and B.
12. It was contended that due to the plaintiffs' default in payment of the loan, the facility which stood at Kshs. 126,617,189/- was restructured whereby it was agreed that the outstanding amount would be repaid in monthly instalments of Kshs. 2,372,808/-. That the plaintiffs deliberately failed to disclose the said restructure, had they done so they would not have alleged breach of the in duplum rule.
13. That despite the restructure, the plaintiffs continued to default, leading the 1st defendant to issue them with statutory notices and the suit property was advertised for sale. The plaintiffs' request for subdivision could not be accepted by the bank as the plaintiff only wanted to pay arrears from the said subdivision and not the entire loan which would deprive the bank of its security and leave the unpaid loan balance unsecured.
14. It was the defendants' contention that the prayer to set aside the consent order was in bad faith as the plaintiffs were duly represented by an advocate and voluntarily negotiated its terms. That there was no evidence of the alleged undue influence and that the plaintiffs had not disclosed any of the well-established grounds for setting aside a consent.
15. Finally, it was averred that the plaintiffs were not in a financial position to settle the outstanding loan as they were heavily indebted on other facilities. That in the premises, the only way for the bank to recover the outstanding loan would be by selling the charged properties.
16. The 2nd plaintiff lodged a lengthy further affidavit sworn on 17/2/2021 in rebuttal to the defendant's replying affidavit. The plaintiffs denied that the 1st plaintiff was a serial defaulter. That it had paid



Kshs. 82,000,000 towards repayment of the loan and that the prayers in the application were directed at the settlement of the loan accounts once proper accounts were rendered in accordance with the loan instruments and the Banking Act.

17. The Court has considered the parties' contestations and submissions. The second application seeks the setting aside of the consent dated 17/9/2019. The terms of the consent were that, the auction scheduled for 17/9/2019 was suspended on the condition that the plaintiffs were to pay a sum of Kshs. 52,020,889.79 within 30 days from the date of the consent. The said sum constituted the arrears due as at that date.
18. Further, the plaintiffs were to pay the auctioneer's costs within 30 days from the date of the consent and furnish the 1st defendant with an acceptable payment proposal for the loan balance within 30 days from the date of the consent.
19. The plaintiffs contended that they had been misled into entering into the consent. That the basis of the consent was that the 1st defendant had allowed the 1st plaintiff to sub-divide the suit premises and sell a portion thereof in order to settle the claimed arrears. That the 1st defendant allowed a survey of the suit premises to be undertaken and the sale of 2 plots therein for a total consideration of Kshs. 50,000,000/-. As at the time of filing the application, purchaser had already paid to the 1st defendant a sum of Ksh. 5,000,000/-, being the 10% deposit.
20. The plaintiff claimed that the 1st defendant changed its mind and refused to consent to the sale of the land thereby frustrating the performance of the consent by the plaintiffs.
21. On the other hand, the 1st defendant argued that the plaintiffs were represented by an advocate who negotiated the terms of the consent. There was no proof that the plaintiffs were misled.
22. The court finds that the terms of the consent were straight forward; the plaintiffs were to comply with its terms or else the 1st defendant would be at liberty to exercise its statutory power of sale. There was nothing on record to show that the plaintiffs complied with the terms of the consent nor that they were misled into accepting its terms. The subdivision and sale of the suit property was not included in the terms of the consent order.
23. In this regard, that application does not disclose any ground upon which the consent can be set aside. A consent order is akin to a contract and can only be set aside for reasons by which a contract can be terminated. The Court cannot rewrite a contract between parties. See *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & another [2001] eKLR*.
24. As regards the first application, the plaintiffs sought an interim injunction to halt the 1st defendant's exercise of its statutory power of sale. The grounds were that the Court has to determine whether the loan facilities secured by the 1st Charge and the 2nd Charge ought to be treated as distinct and separate loans. Whether the amounts claimed by the 1st defendant exceed the maximum amount payable under the provisions of the Banking (Amendment) Act and that the amount properly due to the 1st defendant in respect of the loan account had not been properly determined.
25. The application being one for an injunction, the applicable principles are well known as set out in the case of *Giella vs. Cassman Brown [1973] EA*. These are that the applicant must establish a prima facie case with a probability of success. That an injunction would not normally be granted unless the applicant will suffer loss that cannot be compensated by an award of damages and that if the court is in doubt, it will determine the same on a balance of convenience.



26. In *Thomas Ratemo Oira V Equity Bank Limited [2012] eKLR*, the court quoted with approval the case of HCCC No.602 of 2000 *Woodcraft Industries Ltd & 3 others v East African Building Society* wherein it was held: -

“To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless”.

27. Further in the case of *Innercity Properties Limited v Housing Finance & another; Josephine Mukubi & another (Interested Parties) [2020] eKLR*, it was held: -

“As regards the issue of the rate of interest applicable and the allegation that the claim for Kshs. 106,000,000/- violates the in duplum rule under the *Banking Act*, I am not convinced that the same would entitle the plaintiff to an injunction. The plaintiff has already admitted its indebtedness. It has not made any payment for some time and a successful claim on that basis would only reduce the amount due to the Bank. It is trite law that a chargee will not be restrained from exercising the power of sale merely because the amount in issue under the charge is disputed.”

28. The Court fully concurs with the foregoing sentiments. The fact that the amount under the facility and the interest charged is disputed, that alone is not sufficient to restrain the 1st defendant from exercising its statutory power of sale. That application also fails.

29. The third application was dated 25/5/2021. It sought an order of stay and/or temporary injunction to restrain the sale of the suit premises arising from the auction held on 20/4/2021.

30. The record shows that the successful buyer during the auction, Rentco Africa Limited, sought the refund of the money paid as deposit for the purchase of the suit premises. The 1st defendant agreed to refund the same to the purchaser. The application is therefore, for all intents and purposes, spent and the Court need not determine it.

31. The upshot is that the applications dated 25/11/2020 and 22/2/2021 are dismissed with costs to the defendants. The application dated 25/5/2021 is marked as spent with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE

