



REPUBLIC OF KENYA



**Khan & another v Habib Bank AG Zurich & another (Civil Case 069 of 2021)  
[2022] KEHC 130 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 069 OF 2021  
DAS MAJANJA, J  
FEBRUARY 23, 2022**

**BETWEEN**

**MOHAMMED A. KHAN ..... 1<sup>ST</sup> PLAINTIFF  
SONABER SHABEEN KHAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HABIB BANK AG ZURICH ..... 1<sup>ST</sup> DEFENDANT  
MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs are the registered proprietors of a parcel of land; LR No. 5/103 (IR 3557) situated along Kabasarian Road, Lavington, Nairobi (“the suit property”). They took out a loan facility of KES 110,000,000.00 from the 1<sup>st</sup> Defendant (“the Bank”) as evidenced by a Letter of Offer dated 30<sup>th</sup> September 2016. The facility was valid for 6 months and was to be repaid in lumpsum by 31<sup>st</sup> March 2017 with interest at 14% p.a. The facility was secured by a Charge dated 10<sup>th</sup> October 2016 over the suit property.
2. In due course, the Bank accepted the Plaintiffs’ request to restructure the facility by the Supplemental Letter of Offer dated 14<sup>th</sup> October 2017 under which the sum of KES 107,950,000.00 then outstanding would be repaid over a period of 5 years by 60 monthly installments comprising the principal and interest of KES. 2,559,508.00 commencing 16<sup>th</sup> October 2017.
3. The dispute between the parties concerns the Bank’s exercise of its statutory power of sale. From the Plaint dated 12<sup>th</sup> November 2021, the Plaintiffs do not deny that they have defaulted in servicing the facility. They challenge the manner in which the Bank has acted in exercising its power of sale.



4. By the Notice of Motion dated 12<sup>th</sup> November 2021, the Plaintiffs seek to restrain the Bank from exercising its statutory power of sale. The application is supported by the 1<sup>st</sup> Plaintiff's supporting and further affidavit sworn on 12<sup>th</sup> November 2021 and 18<sup>th</sup> December 2021. It is opposed by the Defendants through the Grounds of Opposition dated 25<sup>th</sup> November 2021 and the replying affidavit of the Bank's Legal Manager, Brian Otieno, sworn on 25<sup>th</sup> November 2021. The parties filed written submissions in support of their respective positions.
5. As the application before the court is one for an interlocutory injunction, the parties agree that the principles guiding the exercise of this court's discretion are those settled in *Giella v Cassman Brown [1973] EA 348*. The applicants have to satisfy three requirements; establish that they have a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in his favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (Supra)* and further clarified that they are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
6. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* explained what amounts to a prima facie case. It stated that 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 to call for an explanation or rebuttal from the latter."
7. As I stated earlier, the Plaintiffs do not deny that they are indebted to the Bank. In order to establish a prima facie case, they contest the amount claimed by the Bank on the ground that it is exorbitant and comprises inflated interest and penalties which the Bank has refused to reconcile despite various requests. They also contest service and validity of the statutory notices required to be issued by the Bank under the *Land Act* before the exercise of the its statutory power of sale.
8. In the further affidavit, the 1<sup>st</sup> Plaintiff depones that even after filing this suit, he was engaged in communication with the Bank as late as 13<sup>th</sup> December 2021, in which he proposed a payment plan where he would pay KES. 30 million on or before 23<sup>rd</sup> December 2021, KES. 10 million by 31<sup>st</sup> January 2022, KES. 10 million by 28<sup>th</sup> February 2022 and the entire balance by 23<sup>rd</sup> March 2021. The proposal disclosed by the court is an unequivocal admission of the indebtedness. This court though, cannot compel the Bank to accept the proposal and the court cannot enforce the proposal unless it constitutes and agreement between the parties. In addition to the admitted proposal, the Bank, in its replying affidavit produced correspondence where the Plaintiffs put forward various proposals to settle the debt including by selling other properties but all of them came to naught.
9. Turning to the issue of unlawful charges and unconscionable interest, the Plaintiffs contend in the Plaint that the Bank failed to keep a proper account of the loan and has produced accounts that are, "false, hazy and concocted". In response, the Bank has produced a Statement of Account evidencing the monies owed under loan account No. 09-01-01-10\*-546-28\*\*\* showing that the amount due as at 26<sup>th</sup> October 2021 is KES. 130,870,470.17. Under section 176 of the *Evidence Act* (Chapter 80 of



the Laws of Kenya) the Bank enjoys a presumption of regularity of the entries in its books of account. It states as follows:

176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

10. In this case, the Plaintiffs have not shown that the entries or part thereof do not reflect that true state of their account. They have not shown which entry is erroneous or provided any evidence to contradict the statements. It is not enough to allege by a broad brush that the accounts are not clear or are hazy or that interest charged is unconscionable with full particulars that would enable the Bank respond and the court discern or adjudicate whether the Plaintiffs' allegations have merit. In any case, looking at the totality of the correspondence between the parties over the years, the issue of interest is being raised late in the day and only to support its case for an injunction.
11. From the totality of the material placed before the court, I find and hold that the Plaintiffs are indebted to the Bank and as a result the Bank is entitled to exercise its statutory power of sale. Further, if there is any dispute as to the charges or interest, this would only affect the level of indebtedness. In line with decisions of our Superior Courts, the court will not ordinarily issue an injunction to restrain a chargee from exercising its statutory power of sale for reason only that the debt is disputed (see for example *Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR*).
12. The second issue raised by the Plaintiffs concerns the service of the statutory notices. Since the Plaintiffs have denied that they received statutory notices, the burden rests on the Defendants to show that they have complied with the law. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260*, the Court of Appeal held that the burden to show that the statutory notice has been served does not in any way rest on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.
13. Together with its replying affidavit, the Bank has produced the 90-day statutory notice dated 6<sup>th</sup> March 2019 demanding payment of KES. 6,399,040.49 from the Plaintiffs failure to which it would proceed to exercise its statutory power of sale. It has attached a Certificate of Posting showing that it was sent to the 1<sup>st</sup> Plaintiff's address shown in the Letters of Offer. As receipt of this notice is not controverted, I find and hold that the Bank's statutory power of sale under section 90 of the *Land Act* has crystallized.
14. The Bank also issued and served the 40-day notice to sell the Suit Property under section 96(2) of the *Land Act*. The notice dated 5<sup>th</sup> July 2021 was sent by registered post to the Plaintiff's address and evidenced by a certificate of posting which was annexed to the affidavit. It was also acknowledged on its face by the 1<sup>st</sup> Plaintiff on 8<sup>th</sup> July 2021. The Bank then instructed the Auctioneer to issue the 45-day Notification of Sale in accordance with the Auctioneers Rules. The Auctioneer duly issued a Notification of Sale dated 19<sup>th</sup> October 2021 granting the Plaintiff 45 days to redeem the Suit Property before the public auction scheduled for 29<sup>th</sup> January 2022. Service of the 45-day notice was evidenced by a Certificate of Service sworn by the Auctioneers. It was sent by registered post as evidenced by the Certificate of Posting and is acknowledged on its face by the 1<sup>st</sup> Plaintiff on 1<sup>st</sup> November 2021.
15. I find that the Bank has affirmatively shown that it served all the notices required under the *Land Act* and the Auctioneers Rules as a prelude for exercise of its statutory power of sale. There is thus no basis to grant the injunction pending determination of the suit.
16. I have come to the conclusion that the Plaintiffs have not established a prima facie case with a probability success. They are truly indebted to the Bank. In *Nguruman Limited v Jane Bonde Nielsen*



and 2 Others (Supra), the court stated that if the applicant does not establish a prima facie case with a probability of success, the issue whether the damages are sufficient to compensate the Plaintiff in the event the suit succeeds does not arise.

17. I therefore dismiss the Notice of Motion dated 12<sup>th</sup> November 2021 with costs to the defendants. The interim orders in force are now discharged.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRAURY 2022.**

**D. S. MAJANJA**

**JUDGE**

**Mr Mwangi instructed by Mwangi, Mwangi and Associates Advocates for the Plaintiffs.**

**Mr Kalua instructed by Macharia-Mwangi and Njeru Advocates for the Defendants.**

