



**Matu v Family Bank Limited & another (Civil Case E877 of 2021)
[2022] KEHC 272 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E877 OF 2021
WA OKWANY, J
MARCH 31, 2022**

BETWEEN

FRANCIS MARANGA MATU APPLICANT

AND

FAMILY BANK LIMITED 1ST RESPONDENT

ANTIQUA AUCTIONS AGENCIES 2ND RESPONDENT

RULING

1. This ruling is in respect to the application dated 25th October 2021 wherein the applicant seeks the following orders: -
 1. Spent.
 2. Spent
 3. That an interlocutory injunction be granted restraining the 1st and 2nd defendant/respondents either by themselves, their servants, workers, agents, and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling or disposing of the Land Parcel number L.R No 12495/156(I.R No. 150385) Hillcrest Area-Karen C Estate pending the hearing and determination of the main suit.
 4. That costs of this application be provide for.
2. The application is supported by the applicant's affidavit of and is based on the grounds that: -
 - a. That on or around June 2020 the plaintiff acted as a guarantor for Lawrence Kanja who bought off a loan owed to the 1st defendant and accordingly charged his property L.R. No 12495/156 (I.R No 150385) Hillcrest Area Karen C Estate in this respect



- b. That the plaintiff consequently believed that the loan was being regularly serviced as was agreed upon between the principal debtor, Mr. Kanja and the 1st defendant.
 - c. That on 22/10/2021, the plaintiff while going about his business received a phone call from one of his business partners Mr. Maranga who notified him that he had seen an advertisement on the Daily Nation Newspaper of 12/12/2021 where his property land parcel Number L.R. No 12495/156(I.R No 150385) Hillcrest Area Karen C Estate had been placed for sale through auction on 28/10/2021 at 11.00 am by the 2nd defendant under instructions of the 1st defendant allegedly in its offices at Blessed House 2nd floor door no 4 Ngara Post Office Nairobi and that he had purported to tell him immediately but that this escaped his mind.
 - d. That the plaintiff/applicant is apprehensive that he will suffer irreparable loss should the impugned auction be allowed to proceed.
 - e. That the plaintiff/applicant's suit stand high chances of success and as such it would be trite that the orders sought be granted so as to not aggravate the loss
 - f. That no prejudice shall be suffered by the defendant/respondents if the orders sought herein are granted on a temporary basis.
 - g. The plaintiff/applicant stands to suffer great loss if the orders sought herein are not granted.
3. The 1st respondent opposed the application through the replying affidavit of its Legal Officer Ms. Sylvia Wambani who states that the applicant had previously filed other suits being; CMCC No 5310 of 2017 Francis Maranga Matu & Fortis Kenya Limited Vs Family Bank Limited & Antique Auctions Agencies and HCCANo E015 of 2020 *Francis Maranga Matu & Fortis Kenya Limited vs Family Bank Limited & Antique Auctions Agencies* seeking the same prayers but that the suits were dismissed for want of prosecution.
 4. The respondent's deponent further states that the plaintiff offered his land title as security for a loan advanced to Fortis Kenya Limited which loan fell in default and as a result, the defendant moved to issue the requisite statutory notices before exercising its statutory power of sale. It was the 1st respondent's case that the total loan amount due as at 29th October 2021 was Kshs 14,851,614.43 and that the arrears stood at 4,920,395.
 5. The application was canvassed by way of written submissions which I have considered.
 6. The applicant submitted that that failure to issue the requisite statutory notices amounted to a fundamental breach of duty by the 1st and 2nd respondents. It was further submitted that the applicant stands to suffer irreparable harm in the event the property is sold at an auction as the market value of the property is Kshs 30,00,000 an amount more than double the loan balance.
 7. The 1st respondent submitted that the plaintiff was duly served with the requisite statutory notices in strict compliance with the provisions of the *Land Act* and the charge document. It was further submitted that matrimonial property is not precluded from sale in the event of default in loan repayments. It was the respondent's case that spousal consent was obtained by the execution of the affidavit of spousal consent sworn by Christine Wairimu Matu.
 8. I have carefully considered the pleadings and the arguments made by the parties herein. I find that the main issue for determination is whether the plaintiff has made out a case for the granting of orders of injunction.



9. The applicant seeks an injunction to prevent the respondent from exercising its statutory power of sale in relation to the property L.R. No 12495/156(I.R NO 150385) Hillcrest Area Karen C Estate. The principles governing the granting of temporary orders of injunction were settled in the case of *Giella vs Cassman Brown and Company Limited* (1973) E.A 385 where Spry J. held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, 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 *Mrao Limited vs First American Bank of Kenya and 2 Others* (2003) KLR 125, the Court of Appeal in determined what amounts to a prima facie case and held that: -

“A prima facie case in a Civil Case includes 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. Applying the above principles to the present case, I note that the gist of the application is the applicant’s claim that he was not served with the requisite statutory notices prior to the exercise of the statutory power of sale. He faulted the defendant for depriving him of the opportunity to redeem his property thus exposing him to imminent danger of losing the same.

12. The defendants on the other hand stated that they duly served the statutory notices in compliance with the law and the terms of their contract. They submitted that they effected service on the plaintiff by hand delivery and through registered post. They drew the court’s attention to the annexures marked SW-8, SW-9 and SW-10 as proof of such service.

13. I have perused the defendants’ said annexures and I note that they are two postal service receipts dated 24th August 2021 addressed to the plaintiff and the certificate of service dated 2nd September 2021 executed by Alice Wambui Abdu.

14. Section 90 of the *Land Act* mandates the chargee to give notice to the chargor of the details of the default. It stipulates that: -

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

15. Having regard to the uncontested exhibits produced by the 1st defendants, I find that the 1st defendant effected proper service of the statutory notices on the plaintiff as required by the law. I further find that upon proving service of the notices, the evidentiary burden shifted on the plaintiff to demonstrate that there was no such service. I am guided by the decision in *Kamunyori & Co. Advocates vs Cannon*



Assurance (K) Limited [2006] eKLR where the court placed the evidentiary burden on the chargor to show that he did not receive the notices due to some omission by the 1st defendant.

16. On the issue of whether the plaintiff will suffer irreparable harm, I note that the plaintiff did not dispute that he offered the suit property as a security for the loan facility. The loan agreement was very clear that in the event of a default, the property would be sold.

17. In the case of *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR the Court considered the Halsbury's laws of England on what irreparable loss is and stated that: -

“first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

18. Further, in *Andrew Mwanjobi vs Equity Building Society & 7 Others* [2006] eKLR, it was held that: -

“Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon.

Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.

In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.

Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss.”

19. Guided by the above-cited cases I find that the plaintiff did not demonstrate that he will suffer irreparable harm in the event the suit property is sold as he was all along aware of the consequences of a default in the loan repayments.

20. My further finding is that the balance of convenience tilts in favour of the 1st defendant since the plaintiff has not made any attempts to settle the outstanding loan even during the subsistence of this case.

21. In sum, I find that the instant application does not meet the threshold set for the granting of the equitable remedy of injunction. The order that commends itself to me is the order to dismiss it with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022.



W. A. OKWANY

JUDGE

In the presence of: -

Mr. Onsare for 1st Defendant.

Mr. Hamba for Plaintiff/Applicant

Court Assistant – Abdi

