



REPUBLIC OF KENYA



Muthamia & another v I &M Bank Limited & another (Civil Case E006 of 2022) [2022] KEHC 11483 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E006 OF 2022
TW CHERERE, J
MAY 31, 2022**

BETWEEN

MOSES THANE MUTHAMIA 1ST APPLICANT

MOSES MAIGALU THAIMUT 2ND APPLICANT

AND

I &M BANK LIMITED 1ST RESPONDENT

**BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERS
SERVICES 2ND RESPONDENT**

RULING

Background

1. Land Parcel No. Ntima/Igoki/4305 is registered in the name of Moses Thane Muthamia and Moses Maigalu Thaimut (Applicants). By a letter dated 18.09.2019, a request for a credit facility of Kshs. 15,000,000/- by Applicants trading as Mosomarts Ventures was granted by I &M Bank Limited (Bank) with all the conditions agreed thereto and was secured by a charge over LR. Ntima/Igoki/4305 (suit property) which was executed by both Applicants and the Bank on 01st November, 2019.
2. Applicants aver that on March 14, 2022, a purported Notification of Sale was brought to them by a friend in respect of a public auction of the suit property scheduled for 18th March, 2022.
3. Subsequently, Applicants filed two applications. The first Notice of Motion dated and filed on 17th March 2022 (first application) is brought pursuant to Section 1A, 1B, 3A & 63 of the *Civil Procedure Act* (Cap 21), Order 40 rule 1, 2 and 3 of the *Civil Procedure Rules* seeking the following orders;
 - 1) Spent
 - 2) Spent



- 3) That pending the hearing and determination of the main suit herein, the Honorable Court be pleased to issue an order of temporary injunction against the Defendants/Respondents whether by themselves, their agents, employees or servants from selling, dealing, interfering, alienating or disposing of land parcel known as LR. No. Ntima/Igoki/4305.
 - 4) That cost of this application be provided for.
4. The application is based on the grounds of its face and on the two supporting affidavit sworn by each of the Applicants on March 17, 2022. Applicants aver that they neither served with the 90-day mandatory statutory notice, the redemption notices nor has the property been advertised for auction. The contend that the auction scheduled for March 18, 2022 is illegal and that the suit would be rendered nugatory and their property will be alienated if orders sought are not granted.
 5. The second Notice of Motion dated and filed on 13th April, 2022 (second application) is brought pursuant to Section 1A, 1B & 3A of the Civil Procedure Act (Cap 21), Order 40 rule 1 of the Civil Procedure Rules 2010, Section 68 of the Land Registration Act and Article 159 of the Constitution seeking the following orders;
 - 1) Spent.
 - 2) Spent
 - 3) That this Honorable court be pleased to issue an order of inhibition to inhibit any dealings with land parcel no LR No. Ntima/Igoki/4305 pending the hearing and determination of this suit.
 - 4) That this order be served upon the Land Registrar Meru for compliance.
 - 5) Cost of the application be borne by the Respondents.
 6. The application is based on the grounds of its face and It is based on the grounds of the face of it and on the supporting affidavit of the 1st Applicant sworn on April 13, 2022. He avers that on March 18, 2022, the 1st Respondent's branch manager was served with an order of temporary injunction but he indicated that the sale of the suit property by public auction had already taken place. On the basis that the suit property has not been transferred, Applicant seek an order of inhibition to prevent its alienation.
 7. The 1st Respondent opposed the applications by way of a replying affidavit sworn on April 25, 2022 by George Ratemo Mecheo, the assistant manager credit department. He avers that the redemption notice and notification of sale were served on one Mr. Karithi who was residing in the main house of the suit property and who claimed to be the beneficial owner of the charged property. He additionally avers that the injunction order was served after the auction had taken place but they suspended the process of transfer to the purchaser till further court orders. To his further replying affidavit dated April 25, 2022, the deponent annexed the redemption notice, notification of sale, newspaper advertisement, auction report and a memorandum of sale.

Plaintiffs'/Applicants' submissions

8. The Applicants by their submissions dated May 28, 2022 contend that the Respondents have not discharged the duty to prove that statutory notices were served upon the applicants. They submit that the person allegedly served was a stranger to the charge and that all the subsequent processes conducted by the Respondents were illegitimate. The argue that Respondents have not supplied them with any documentation demonstrating that the suit property was valued and further that the purported sale is



illegal as their equity of redemption had not arisen. Reliance was placed on *Moses Kibiego Yator v Eco Bank Kenya Limited* [2014] eKLR, *Michael Gitere & Another V Kenya Commercial Bank Limited* [2018] eKLR, *Sharok Kher Mohamed Ali & Another V Southern Credit Banking Corporation* [2018] eKLR, *Paul Gitonga Wanjau V Gathuthi Tea factory Company Ltd & 2 others* [2016] eKLR, *Koileken Ole Kipolonka Orumos V Mellech Engineering & Construction Limited & 2 others* [2018]eKLR.

Respondents' submissions

9. The Respondents by their submissions dated 24th May 2022 contend that the statutory notices were issued and served upon the Applicants in strict compliance with the law. They argue that the 2nd Respondent has stated how personal service was effected upon the Applicants in addition to postal service and by advertisement in the local daily newspaper. It is the Respondents' case that their statutory power of sale had crystallized and become exercisable and that since Applicants have not denied their indebtedness to the 1st Respondent, the applications ought not to be allowed. The Respondents additionally argue that the Applicants equity of redemption was extinguished when the property was sold in a public auction and payment made by the purchasers. Finally, Respondents submit that the Applicants can be compensated in damages and hence the balance of convenience tilts in the Respondents' favor. The Respondents relied on *Sammy Japheth Kavuku V Equity Bank Limited & Another* [2014]eKLR, *Kyangavo V Kenya Commercial Bank Ltd & Another*[2004]eKLR, *Barmal Kanji Shah & Another V Shah Depar Devji* [1965] E.A 91, *Hosea Mundui Kiplangat V Kenya Commercial Bank* [2012]eKLR, *Peter Kamau Munene V Kenya Commercial Bank Limited* [2015]eKLR.

Analysis and Determination

10. I have considered the two notices of motion in the light of the affidavits on record and on submissions by the parties.
11. The principles governing the grant or denial of the injunctive orders were laid down in the celebrated case of *Giella vs. Cassman Brown* (1973) E.A 358 and the court held as follows;
- “An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above two requirements, then it will decide the application on the balance of convenience.”
12. The principles on which courts will grant an injunction were restated by the Court of Appeal in *Nguruman Limited V. Jan Bonde Nielsen & 2 Others*, CA NO. 77 OF 2012, together with the mode of their application as follows:
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- (a) establish his case only at a *prima facie* level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.



13. From the foregoing, it is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86).
14. The Court of Appeal in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others* [2003] eKLR interpreted the condition as to *prima facie* case as follows:

“A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter.”
15. Both parties agree that Applicants were advanced a loan facility by the 1st Respondent which was secured by a charge over suit property. Applicants do not dispute that they fell in arrears.
16. The gravamen of Applicants’ case revolves around whether the Bank properly exercised its power to realize the security in the suit property. To get an answer to that question, I will have to consider the provisions of Section 90 of the *Land Act* which provides for the remedies of a chargee as follows:
 - (1) 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 in 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.
 - (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
 - (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
 - (a) sue the chargor for any money due and owing under the charge; (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;



- (d) enter into possession of the charged land; or
 - (e) sell the charged land;
17. Section 96 of the *Land Act* on the other hand provides for the Chargee's power of sale as follows:
- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.
 - (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
18. It is to be remembered that under section 90 and 96 aforesaid, the operation of the Statutory Notices is triggered by service of the same upon the chargor. (See *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR).
19. The Applicants' contention that they were not served with the statutory power of sale has been conceded by the Respondents who admit that the same was served on one Mr. Jadiel Karithi. The Respondents additionally concede that it was the same Mr. Jadiel Karithi that was served with the 45 days' redemption notice.
20. There is no evidence that any attempt was made to serve the Applicants personally or by other legal means before service was effected on the said Mr. Jadiel Karithi. And be as it may, there is no evidence that the said Mr. Karithi delivered the notices to the Applicants.
21. From the foregoing therefore, I do not find it difficult to agree with the Applicants that the 1st Respondent's statutory power of sale did not crystallize and any subsequent service of the 45 days' redemption notice and notification of sale on the said Mr. Jadiel Karithi are merely acts pursuant to a pretended power of sale and are such, a nullity in law.
22. Concerning the sale, I find that having ruled that the 1st Respondent's statutory power of sale did not crystallize, it follows that the purported sale of the suit property, by auction, is a nullity and does not have the force of law.
23. Accordingly, I find that Applicants have meet the test laid out in the celebrated case of *Giella vs Cassman Brown* case (*supra*) in that they have demonstrated a prima facie case with a probability of success. The mere fact that the 1st Respondent has the ability to compensate the Applicants in damages does not afford the 1st Respondent the opportunity to disregard express provisions of the law to the disadvantage of the Applicants.
24. In the end, I have come to the conclusion that the Plaintiffs/Applicants have demonstrated an arguable case on which this court would be rightly entitled to exercise its discretion in their favor.
25. Consequently, the Notices of Motion dated and filed on 17th March 2022 and 13th April, 2022 respectively are hereby allowed in the following terms:
- 1) A temporary injunction be and is hereby issued against the Defendants/Respondents whether by themselves, their agents, employees or servants from selling, dealing, interfering, alienating or disposing of land parcel known as LR. No. Ntima/Igoki/4305.



- 2) An order of inhibition be and is hereby issued inhibiting any dealings with land parcel no LR No. Ntima/Igoki/4305 pending the hearing and determination of this suit.
- 3) This order shall be served upon the Land Registrar Meru for compliance.
- 4) Costs shall be in the cause.

DELIVERED IN MERU THIS 31ST DAY OF MAY, 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

For Plaintiffs/Applicants - Mr. Atheru for Thurania Atheru & Co. Advocates

For Defendants/Respondents - Mr. Mahinda for Gathara Mahinda & Co Advocates

