



**Kardesh Limited v SBM Bank Limited & another (Civil Suit  
05 of 2020) [2022] KEHC 3260 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3260 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL SUIT 05 OF 2020  
CM KARIUKI, J  
MAY 26, 2022**

**BETWEEN**

**KARDESH LIMITED ..... APPLICANT**

**AND**

**SBM BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**LEAKEY'S AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated September 9, 2020, the Applicant sought an interim injunction pending hearing of suit to stop disposal of suit property namely Nyandarua/Nandarasi/152 same being anchored on provisions of Order 40 of Civil Procedure Rules 2010 and based on grounds on the application:
  - i. By a letter dated 7<sup>th</sup> October ('the recall notice') addressed to the Plaintiff/Applicant, the 1<sup>st</sup> Defendant/Respondent recalled the entire debt and demanded immediate payment of an alleged Kshs.38,328,417.30/- as at October 7, 2019 plus accrued interest (the Facility) citing the Applicant's alleged failure to adhere to the agreed arrangement regarding repayment of the facilities and subsequent arrears. The 1<sup>st</sup> Respondent further threatened to, among others, commence the process of enforcing its rights under the charge.
  - ii. As far back as August 2019, the Applicant had already made arrangements with another financial institution, Messrs Anarossi Capital Partners ('the financier'), which he agreed to take over the full the facility in consideration of a legal charge being created in the latter's favour upon Title Number Nyandarua/Nandarasi/152 presently charged in favour of the 1<sup>st</sup> Respondent (the charged property). The 1<sup>st</sup> Respondent has been duly informed of the new financing arrangement by the Applicant and on numerous occasions requested to promptly to facilitate the same to enable payment of all amounts due by the Applicant.



- iii. The 1<sup>st</sup> Respondent has however continually frustrated and/or impeded the proposed provision of alternative financing to the Applicant and takeover of the Facility by the financier and has filed, refused and/or neglected to facilitate the same through delays and failures in availing suitable terms of professional undertaking to the financier and issued unreasonable pre-conditions for the approval of the intended take over including demanding redemption of other separate loan accounts held by the Applicant's director and company (which are not due).
  - iv. Clauses 2 and 3 notwithstanding the 1<sup>st</sup> Respondent by a statutory notice issued on February 12, 2020 indicated its express intention to sell the charged property in realization of the security conferred to it to recover all amounts owed by the Applicant on account of principal, costs and interest upon the expiry of ninety days from the date of service. The pre-sale notice period has since lapsed thus clearing the way for the intended sale of the charged property.
  - v. By a notice dated June 15, 2020, the 1<sup>st</sup> Respondent as charge demanded payment by the Applicant of the sum of Kshs.40,092,403.25/- being the sum allegedly due as at 15<sup>th</sup> June, 2020, which amount was to be repaid within forty (40) days and in default the 1<sup>st</sup> Respondent threatened to proceed to sell all the charged property by public auction or private treaty. The said notice period has already lapsed.
  - vi. The Applicant is aware that the 1<sup>st</sup> Respondent has already initiated the realization process and is intended to sell the charged property at a grossly under-stated value of Kshs.33,000,000/- (per valuation report dated August 2020). The 1<sup>st</sup> Respondent is concluding arrangements for sale of the charged property and has instructed the 2<sup>nd</sup> Respondent to undertake the sale. The latter have duly issued the forty-five (45) days' redemption notice and notification of sale to the Applicant to recover the alleged sum of Kshs.39,843,672.60/- as at 21<sup>st</sup> August, 2020. The Applicant is therefore apprehensive that the Respondents will at any time proceed to advertise or offer for sale and sell the charged property by private treaty or in the alternative public auction, which sale is illegal and premature as the 1<sup>st</sup> Respondent's statutory power of sale has not arisen, and will occasion the Applicant irrevocable prejudices, gave loss and irreparable damage.
  - vii. That the Applicant has ably demonstrated its willingness and ability to immediately liquidate in full the amount due under the facility through the proposed takeover by the financier.
2. The Respondent No. 1 opposes application via a replying affidavit sworn by Kelvin Kimani on October 21, 2020, and a further affidavit sworn on 22<sup>nd</sup> October, 2020.
  3. Parties were directed to canvass application via submissions but only Respondents filed the same.

**1<sup>st</sup> Respondent's Submissions:**

4. It is undisputed that the Plaintiff/Applicant secured a loan of Kshs.40,000,000/- from the Defendant/Respondent vide a letter of offer dated August 23, 2013.
5. It is uncontroverted that the said loan was disbursed on the strength of a legal charge over the Plaintiff/Applicant's property Land Reference Number Nyandarua /Nandarasi /152.
6. Section 96 of the Land Act No. 6 of 2012 entitles a charge to exercise the right to sell any charged property once the chargor is 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) of the Land Act No. 6 of 2012.



7. Relevant statutory notices and notices to sell the suit property from both the charge being the bank and the auctioneers being the 2<sup>nd</sup> Defendant/Respondent were properly and legally served upon the Plaintiff/Applicant as required by law.
8. The Bank observed all the statutory requirements in exercising its statutory power of sale under the relevant laws. Therefore, an injunction to stop the bank from exercising this power of sale once it has rightfully accrued would result in an injustice which the court ought not to sanction.
9. It is also worth noting that the Plaintiff/Applicant has not denied that it is and continues to be in default of the loan repayment to the bank and has on several occasions made proposals to settle the amounts due but has demonstrated bad faith by never fulfilling the said proposals.
10. The Plaintiff/Applicant even attempted to arrive at an amicable repayment method whereby the Plaintiff/Applicant made arrangements with Messrs Anarossi Capital Partners (the financier) to take over the facility. The bank was not opposed to the proposal, however, the bank does not accept undertakings from non-bank entities and this position was communicated to the Plaintiff/Applicant.
11. At no point did the bank incorporate other facilities into the subject facility. The statement of account produced in the bank's replying affidavit are evidence probative of the foregoing and the said allegations are unfounded.
12. It is a well settled principle in law that an injunction ought not to be granted against a charge merely on grounds that there is a dispute as to the amounts due in *Bharmal Kanji Shah & Another v Shah Debar Devji* [1965] EA. 91, which was stated with authority in the case of *Samuel Kamau Kairu & Another v National Bank Limited & Another* [2017] eKLR, *Labelle International Limited & Another v Fidelity Commercial Bank & Another*, Civil Case No. 786 of 2012, Kajiado ELC No. 560 of 2017 *New Age Developers & Construction Co. Ltd v Jamii Bora Bank Ltd*, *Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd* [2005] eKLR, *Palmy Company Ltd v Consolidated Bank of Kenya Ltd* [2014] eKLR (as adopted in *Olkasasi Limited v Equity Bank Limited* [2015] eKLR), other cited authorities are *Olkasasi Limited v Equity Bank Limited* (*supra*), *Equip Agencies Limited v I&M Investment Bank Limited & 2 Others* [2019] eKLR, *Andrew M. Wanjobi v Equity Building Society & 7 others* [2006] eKLR and *Thomas Nyakamba Okong'o v Co-operative Bank of Kenya Limited* [2012] eKLR.
13. After going through the pleadings, affidavits, and 1<sup>st</sup> respondent submissions, I find the issues are, where the grounds for grant of interim injunctions are established to warrant issuance of the orders sought and the costs.
14. It is not disputed that 1<sup>st</sup> Respondent (Bank) advanced the Applicant a loan facility for the sum of Kshs.40,000,000/- vide a letter dated August 23, 2013 and in return same was secured by LR No Nyandarua/Nandarasi/152 in the name of Kardesh Ltd.
15. It was a term of the letter of offer that the facility would be repaid over a period of 120 months comprising of principal and interest, by debit of the Applicant's account held with the Bank, with the first installment failing due 30 days after disbursement of the loan facility.
16. Subsequently Applicant fell into arrears and thus failed to service the loan account prompting the Bank to issue numerous demands to the Applicant. This was via letters and email correspondence requesting the Plaintiff/Applicant to regularize their loan account.
17. Also including the demand letter dated October 7, 2019 whereby the Bank recalled the entire debt which was to the tune of Kshs.38,328,417.30/- together with interest accruing as at October 7, 2019.



The letter further stated that failure to pay the aforementioned amount within 90 days would result in the Bank pursuing the remedies available to it.

18. Despite the numerous demands and the Applicant being in arrears for over the statutorily provided period of one month, on February 21, 2020 the Bank proceeded to issue the first statutory notice under Section 90(2) (3) (e) of the *Land Act*, informing the Applicant of the nature and extent of default and to its rights as the chargor on how to rectify the default.
19. Further, vide an email dated March 4, 2020, the Bank recalled the entire debt and demanded repayment in full together with all interest which continued to accrue thereon until payment in full.
20. According to the aforementioned email, the Applicant was issued with 7 days from that date to pay the entire amount owed to the Bank by Kardesh Limited which was the sum of Kshs.135,868,512.39/- as at March 4, 2020 failure to which the Bank was to proceed with recovery actions.
21. The aforesaid statutory notice issued above elicited no response and expired without rectification by the Applicant, necessitating the bank's move to exercise its power of sale over the charged property, to which end the bank issued a statutory notice to sell under Section 96(2) (3) of the *Land Act* dated June 15, 2020.
22. Applicant admits being indebted to the bank and even attempted to arrive at an amicable repayment method whereby the Applicant made arrangements with Messrs Anarossi Capital Partners (the financier) to take over the facility. The bank was not opposed to the proposal; however, the bank does not accept undertakings from non-bank entities and this position was communicated to the Applicant.
23. Thereafter, the Applicant has been said to always made un fulfilled promises with regard to making payment to clear the outstanding arrears of the loan facility thus continuing to frustrate the Bank.
24. Despite agreeing on a payment plan, the Applicant failed to adhere to the terms of the agreement thereby necessitating further various demands from the Bank.
25. In an effort to exercise its right of sale, the Bank instructed Leakey's Auctioneers, the 2nd Respondent herein, to issue the Applicant with the 45 days redemption notice as well as the notification of sale of property both dated September 7, 2020 which notices the Applicant received as admitted in paragraphs 16 of its supporting affidavit.
26. The Respondent acting on the instructions of the Bank consequently proceeded to advertise the suit property for sale by public auction and the same was scheduled to take place on November 20, 2020.
27. The Applicant thereafter filed the instant suit seeking injunctive orders.
28. The applicant complaints are that the bank recalled the entire debt and demanded immediate payment of an alleged Kshs.38,328,417.30/- as at October 7, 2019 plus accrued interest (the Facility) citing the Applicant's alleged failure to adhere to the agreed arrangement regarding repayment of the facilities and subsequent arrears. The 1st Respondent further threatened to, among others, commence the process of enforcing its rights under the charge.
29. Applicant says he made arrangements with another financial institution, Messrs Anarossi Capital Partners ('the financier'), which he agreed to take over in full the facility in consideration of a legal charge being created in the latter's favour upon Title Number Nyandarua/Nandarasi/152 presently charged in favour of the 1st Respondent (the charged property).



30. The 1st Respondent was duly informed of the new financing arrangement by the Applicant and on numerous occasions requested to promptly to facilitate the same to enable payment of all amounts due by the Applicant.
31. The 1st Respondent impeded the proposed provision of alternative financing to the Applicant and takeover of the Facility by the financier and has filed, refused and/or neglected to facilitate the same through delays and failures in availing suitable terms of professional undertaking to the financier and issued unreasonable pre-conditions for the approval of the intended take over including demanding redemption of other separate loan accounts held by the Applicant's director and company (which are not due).
32. Clauses 2 and 3 notwithstanding the 1st Respondent by a statutory notice issued on February 12, 2020 indicated its express intention to sell the charged property in realization of the security conferred to it to recover all amounts owed by the Applicant on account of principal, costs and interest upon the expiry of ninety days from the date of service. The pre-sale notice period has since lapsed thus clearing the way for the intended sale of the charged property.
33. By a notice dated June 15, 2020, the 1st Respondent as per the charge demanded payment by the Applicant of the sum of Kshs.40,092,403.25/- being the sum allegedly due as at June 15, 2020, which amount was to be repaid within forty (40) days and in default the 1st Respondent threatened to proceed to sell all the charged property by public auction or private treaty. The said notice period has already lapsed.
34. The Applicant is aware that the 1st Respondent has already initiated the realization process and is intended to sell the charged property at a grossly under-stated value of Kshs.33,000,000/- (per valuation report dated August 2020). The 1st Respondent is concluding arrangements for sale of the charged property and has instructed the 2nd Respondent to undertake the sale.
35. The latter have duly issued the forty-five (45) days' redemption notice and notification of sale to the Applicant to recover the alleged sum of Kshs.39,843,672.60/- as at August 21, 2020. The Applicant is therefore apprehensive that the Respondents will at any time proceed to advertise or offer for sale and sell the charged property by private treaty or in the alternative public auction, which sale he alleges is illegal and premature as the 1st Respondent's statutory power of sale has not arisen, and will occasion the Applicant irreparable prejudices, gave loss and irreparable damage.
36. That the Applicant averred that it has ably demonstrated its willingness and ability to immediately liquidate in full the amount due under the facility through the proposed takeover by the financier.
37. It is undisputed that the Applicant secured a loan of Kshs.40,000,000,- from the bank vide a letter of offer dated 23rd August, 2013 and was disbursed on the strength of a legal charge over the Plaintiff/Applicant's property Land Reference Number Nyandarua/Nandarasi/152.
38. Section 96 of the *Land Act* No. 6 of 2012 entitles a charge to exercise the right to sell any charged property once the chargor is 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) of the *Land Act* No. 6 of 2012.
39. Relevant statutory notices and notices to sell the suit property from both the charge being the bank and the auctioneers being the 2nd Respondent were served upon the Applicant as required by law and are all exhibited. The Bank observed all the statutory requirements in exercising its statutory power of sale under the relevant laws.
40. Therefore, the question is whether an injunction to stop the bank from exercising this power of sale once it has rightfully accrued would result in an injustice?



41. It is also worth noting that the Applicant has not denied that it is and continues to be in default of the loan repayment to the bank and has on several occasions made proposals to settle the amounts due but has demonstrated bad faith by never fulfilling the said proposals.
42. The Applicant even attempted to arrive at an amicable repayment method whereby the Applicant made arrangements with Messrs Anarossi Capital Partners (the financier) to take over the facility. The bank was not opposed to the proposal, however, the bank declined not accept undertakings from non-bank entities and this position was communicated to the Applicant.
43. It is trite law that, an injunction ought not to be granted against a charge merely on grounds that there is a dispute as to the amounts due. In case of *Bharmal Kanji Shah & Another v Shah Depar Devji* [1965] EA. 91, whcited in of *Samuel Kamau Kairu & Another v National Bank Limited & Another* [2017] eKLR the court held that:

“... the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage.....”

44. See also the case of *Labelle International Limited & Another v Fidelity Commercial Bank & Another*, Civil Case No. 786 of 2012 cited with approval in Kajiado ELC No. 560 of 2017 *New Age Developers & Construction Co. Ltd v Jamii Bora Bank Ltd* where the court expressed itself in the following terms:

“...when part of amount claimed or proved to be due, a chargee cannot be restrained by an injunction....”

“...it is hence the court’s finding that in the instant case the Defendant cannot be restrained from realizing the security since the Plaintiff already admitted its indebtedness to the bank.”

45. The court also finds guidance in the case of *Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd* [2005] eKLR where court declined to grant injunctive orders despite the Applicant producing a report from the Interest Rates Advisory Centre. The court held that:

“The dispute is essentially on the quantum of the arrears and of the loan at the time the statutory notice was issued. The Applicant recognized in the plaint that the dispute was of ‘Mathematical nature’. Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the Respondent from exercising its statutory power of sale.

In the case of of *Palmy Company Ltd v Consolidated Bank of Kenya Ltd* [2014] eKLR (as adopted in *Olkasasi Limited v Equity Bank Limited* [2015] eKLR) the court stated:

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under Section 97(1) of the *Land Act* lies on the Applicant. The court needs cogent evidence and material in order to say that prima facie, there has been an under valuation of the suit property which is an infringement of Section 97(2) of the *Land Act* by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.



46. Further in the case of *Olkasasi Limited v Equity Bank Limited* (*supra*) the Court stated as follows:

“The report must be dislodged on real items, terms and legal parameters which are acceptable in the practice and profession of Valuers. There is no evidence of that caliber here and, therefore, the arguments by the Applicant that the Respondent failed to discharge the duty of care under Section 97 do not hold sway, I dismiss it.”

47. There is argument advanced by the Applicant that the two valuation reports have different values and the reason for this has been explained. In *Equip Agencies Limited v I&M Investment Bank Limited & 2 Others* [2019] eKLR court opined that:

“As valuation undertaken by the bank was less than 12 months prior to the impugned sale by public auction, then the valuation has to be taken to be a recent valuation. In the absence of evidence that the valuation is a gross and fraudulent undervaluation, the bank will be taken to have complied with the provisions of Section 97(2) of the Act.”

48. Finally am guided by cases of *Andrew M. Wanjohi v Equity Building Society & 7 Another* [2006] eKLR and *Thomas Nyakamba Okong'o v Co-operative Bank of Kenya Limited* [2012] eKLR, where the court held that:

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

In view of all what the court has stated above and the guidance of the cited authorities, I find that the application has no merit and make orders that.

(i) The application has no merit and thus dismissed with costs to the 1<sup>st</sup> Respondent (Bank).

**DATED AND SIGNED AT NYAHURURU THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**CHARLES KARIUKI**

**JUDGE**

