



REPUBLIC OF KENYA



Osodo & another v Housing Finance Company of Kenya Ltd & another (Civil Case E418 of 2020) [2022] KEHC 11863 (KLR) (Commercial & Admiralty) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E418 OF 2020**

A MABEYA, J

MAY 26, 2022

BETWEEN

HANNINGTON ONYANGO OSODO 1ST PLAINTIFF

BETH WANGARI 2ND PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LTD 1ST DEFENDANT

SAMUEL GATHOGO T/A VALLEY AUCTIONEERS 2ND DEFENDANT

RULING

1. Before court is a notice of motion dated November 3, 2021. It was brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#) and order 40, rules 4(4), 7 and order 51 rule 1 [Civil Procedure Rules](#).
2. In the Motion, the applicant sought for the discharge of the injunction orders issued on June 30, 2021. The application was supported by the affidavit of Christine Wahome sworn on November 3, 2021. The grounds were that; that the respondents had on June 30, 2021 obtained injunctive orders stopping the 1st applicant from completing the transfer/registration of the suit property which had been sold in exercise of the applicant's statutory power of sale.
3. That in granting the orders, the court also ordered the respondents to continue servicing their loan with the applicant. In defiance thereof, the respondent had failed to service the loan and continued to default the requisite monthly installments of Kshs 417,740/= as per the letter of offer. That the respondents had not made any payment since the order was made.
4. The applicant contended that due to the aforesaid default, the loan balance had continued to increase due to interest which is unjust. That the applicant was unable to exploit the commercial utility of the suit property and it was in the interest of justice that the injunction be discharged.



5. The respondents opposed the application vide grounds of opposition and the replying affidavit of Hannington Onyango Osodo sworn on November 10, 2021. The grounds were that there were active and pending proceedings before the Court of Appeal in Civil Appeal No E507 of 2021 Nairobi Housing Finance Company of Kenya Limited & another v Hannington Osodo & Beth Wangari Ososo wherein the applicants were seeking similar orders from the COA as the ones sought herein. That the matter was therefore in breach of section 6 of the *Civil Procedure Act* which prohibits a court from proceeding with a matter directly and substantially in issue before another court. In support of that contention, the respondents produced annexures ‘HOO 3a, b and c’ which was a copy of the notice of appeal, memorandum of appeal and the record of appeal.
6. They contended that the application was meant to delay the trial of the suit and to maliciously force the illegal acquisition of their property to the 1st respondent’s staff. That the orders had directed that the parties do engage in the reconciliation of the loan account as one of the issues in contention was that the loan funds had been misappropriated by 3rd parties hence not all the funds were channeled to the construction of the subject property.
7. The respondents contended that they had made two deposits of Kshs 200,000/= and Kshs 100,000/=, albeit late, and produced copies of deposit slips in support thereof. That the applicants had not made any efforts to reconcile the accounts as ordered. That the impugned orders were made in order to conserve the suit property before the issues in dispute are determined at the trial.
8. The court has considered the depositions of the parties and the entire record. The application is for the discharge of injunctive orders. It is now settled that such orders are discretionary, however, such discretion is to be exercised judiciously and not capriciously.
9. In *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, it was held that: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”
10. In *Benl Development Limited v First Community Bank Limited* [2021] eKLR, it was held: -

“Interim injunctions do not suspend obligations of the parties to their contracts. They are rather meant to afford the parties an opportunity of being heard on their grievances. When a borrower rushes to court and obtains an interim order of injunction, be it *ex parte* or *inter partes*, he is not absolved from his obligations under the contract with the lender. He is obligated to continue servicing the facilities in the normal manner pending the resolution of the dispute.

An interim order of injunction is never a carte blanche licence for the borrower to suspend his obligations under the contract and sit back pretty leaving the lender writhing in pain. The funds disbursed under the contracts of lending belong to depositors out there. They require their monies to be returned to the bank for use as and when it is required.

In this regard, an interim injunction that is followed by non-servicing of the loan by a borrower is subject to discharge forthwith without any much consideration. The court retains the discretion to vary or discharge such an interim injunction for good cause. That



is why even an injunction made after an inter-partes hearing has a lifespan of only 1 year under order 40.”

11. In the present case, the applicants contended that the respondents had not paid a penny since the orders were issued. However, the respondents produced two deposit slips identified as ‘HOO 1a and ab’ showing some deposit. Though this was not the full amount, the applicant failed to disclose that some payment had been made and instead insisted that not a penny had been paid.
12. Further, the applicants failed to demonstrate that the respondents failed to continue servicing the loan and it continued to attract interest. It was upon the applicants to produce evidence such as the respondent’s statement of account as evidence that the loan was not being serviced. It is trite law that he who alleges must prove. Without such evidence, the Court is unable to ascertain that the loan was not being serviced by only relying on correspondence which is unsupported by the statement of the loan account.
13. The respondents also raised the issue that the applicants had made similar prayers in Civil Appeal No E507 of 2021 Nairobi Housing Finance Company of Kenya Limited & Another vs Hannington Osodo & Beth Wangari Ososo. The Court has seen the documents produced as ‘HOO 3a, b and c’. They are a copy of the notice of appeal, memorandum of appeal and the record of appeal. These are proceedings pending before the Court of Appeal.
14. Section 6 of *Civil Procedure Act* is clear about the doctrine of *sub judice*. It bars a court from entertaining a matter where a similar matter is pending in another court of competent jurisdiction.
15. The applicant’s appealed against the orders of June 30, 2021 and amongst the prayers in the memorandum of appeal is that:

“The appeal be allowed with costs and the ruling and order dated August 19, 2021 appealed from be set aside and an order be made dismissing the respondent’s application dated October 16, 2020.
16. It is clear that the orders sought in this application are similar to those sought in the appeal. Both reliefs in both matters are provided for under order 40 of the *Civil Procedure Rules*.
17. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, it was held that for the doctrine of *sub judice* to apply: -
 - a. There must exist two or more suits filed consecutively.
 - b. The matter in issue in the suits or proceedings must be directly and substantially the same.
 - c. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.
 - d. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The court continued;

“Both suits challenge the same decision. The prayers sought in both suits are the same. Since both the suits cite similar issues, the decision of the first suit should be binding on those issues and it need not be tried again. If the plea in the first suit succeeds, then it will render the second case *res judicata*.”



18. This court finds that the application is *sub judice* and cannot stand.

19. For the foregoing reasons, the application dated November 3, 2021 is found to be without merit and hereby is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022.

A MABEYA, FCIArb

JUDGE

