



**Osotua Villas Limited v HFC Limited (Civil Case E010 of 2021)  
[2022] KEHC 10976 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL CASE E010 OF 2021  
GWN MACHARIA, J  
MAY 26, 2022**

**BETWEEN**

**OSOTUA VILLAS LIMITED ..... APPLICANT**

**AND**

**HFC LIMITED ..... RESPONDENT**

**RULING**

1. Before court is the plaintiff's notice of motion dated December 22, 2022 brought under sections 1A, 1B, 3A and 63(b) and (e) of the Civil Procedure Act, order 40 rule 1, 2 and 4 of the Civil Procedure Rules, 2010, section 90 of the Land Act, article 40 and 50(1) of the Constitution and all enabling provisions of the law. The application sought 10 orders but four are already spent. The remaining are:
  1. That pending hearing and determination of the Suit, the honorable court be and is hereby pleased to issue an interim order of stay restraining the respondent Bank whether by itself, directors, employees, servants, agents and/or otherwise anyone claiming under its authority from enforcing or giving effect to adverse notices issued against the applicant dated October 18, 2021 and October 19, 2021 in respect of the loan agreement dated 1May 1, 2021.
  2. That pending Hearing and determination of the Suit the honorable court be and is hereby pleased to grant a temporary injunction restraining Respondent Bank whether by itself, directors, employees, servants, agents and/or otherwise anyone claiming under its authority from advertising for sale, selling, disposing of, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise interfering with the applicant's quiet possession and ownership of all that parcel of land known as Land Reference Number 9134/2 (Original No. 40418).



3. That the honorable court be and is hereby pleased to issue an order of mandatory injunction directing the respondent bank to lift the freeze effected over the applicant's escrow account and allow the applicant to operate the account in accordance with the signing mandate.
  4. That the honorable court be and is hereby pleased to issue an order compelling the respondent to withdraw and/or otherwise suspend any adverse notices or information sent by the respondent to any licensed credit reference bureau in regard to the subject loan facility.
  5. That the costs of the application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of the plaintiff's director, John Kariuki. He averred that on or about September 26, 2012, the plaintiff applied for a loan facility of Kshs. 380,000,000/= from the Defendant Bank to finance the construction of pristine 46 holiday homes, studio apartments, a health club, restaurant and spa on the Plaintiff's property known as LR No 9134/2 (Original No. 40418) (hereafter "the Suit Property"). The loan was secured by a charge over the suit property and was to be disbursed to the Plaintiff in phases upon the issuance of interim certificates requesting payment to the contractors of the project. The Defendant promptly made payments in respect to the first 19 interim certificates. However, the disbursements in respect of the 20<sup>th</sup> and 21<sup>st</sup> interim certificates were unfairly delayed and this adversely affected the progress of the construction and the servicing the loan.
3. As a result, the Plaintiff requested the Defendant to restructure the loan facility which led to a Restructure Agreement dated 6<sup>th</sup> November, 2017 between the parties. Under Clause 5.12 of the Restructured Agreement, the Defendant agreed to defer the repayment of the loan and the servicing of interest, for a period of six (6) months from the date of execution of the Agreement and completion of perfection of additional securities. Further, under Clause 6.1 of the Agreement, the Defendant was obligated to disburse to the contractors a further sum of Kshs. 47,729,096.80 to enable completion of the project on condition that the Plaintiff provides additional securities. Additionally, The Plaintiff was required to ensure that Purchasers of the housing units deposit the balance of the purchase price in an escrow account.
4. That the Defendant failed to meet its end of the bargain as it failed to disburse to the main contractors the further amount required to complete the project therefore further delaying the completion of the project and causing most buyers to be skeptical about paying for the units. That in blatant disregard of the agreed moratorium period, the Defendant issued the Plaintiff with a 90 days' Statutory Notice and a 40 days' notice pursuant to the Land Act on September 18, 2018 and December 31, 2018 respectively. Further, the Defendant submitted the names of the Plaintiff's directors and Guarantors to the Credit Reference Bureau for failing to service the loan. Consequently, the Plaintiff filed Naivasha HCCC No. 2 of 2019 to stop the intended sale which suit was compromised by a consent dated August 5, 2019 through which the parties agreed to comply with the restructure agreement and the matter was marked as closed.
5. Additionally and as regards the subject of this application, it was averred that on May 11, 2021, the plaintiff and the defendant entered into another loan agreement for the advancement of banking facilities to the Plaintiff in the aggregate sum of Kshs. 923,102,877.06. The Defendant agreed to defer the repayment of the loan and interest for a period of twelve (12) months and thereafter the loan would be repaid in 4 quarterly payments. That however, in breach of the said Agreement, the Defendant unlawfully and prematurely issued the Plaintiff with the impugned notices on account of an outstanding loan of Kshs. 933,679,379.40 during the moratorium which is set to lapse on 12<sup>th</sup> May, 2022.



6. That the Bank issued the plaintiff with a 90 days' Statutory Notice dated October 19, 2021 as well as a Pre-listing Notification dated 18<sup>th</sup> October, 2021 threatening to submit the Plaintiff's name to the Credit Reference Bureau (CRB) for supposed failure to service the loan. Further, that the Bank has frozen the Plaintiff's escrow account, thus paralyzing the project and defeating the very purpose for which the facility was advanced. It was further his averment that the Defendant's threatened unlawful action will irreparably injure the reputation of the Plaintiff's business and expose it to possible cancellations of bookings and sales during the holiday high season. That this will deprive the Plaintiff of the ability to optimize returns on their investment and ultimate ability to repay the loan. Lastly, he contends that the Defendant does not stand to suffer any prejudice if the orders sought are granted as it remains fully secured by the legal charges and guarantees over the suit property.

### **Defendant/Respondent's Case**

7. In opposition, the defendant filed grounds of opposition dated December 22, 2021 and a Replying Affidavit sworn on 21<sup>st</sup> January, 2022 by its Legal Manager Christine Wahome. The Defendant contended that the Plaintiff's application is based on material misrepresentation and non-disclosure. The Defendant denied frustrating the completion of the Plaintiff's construction project as alleged. As regards the first loan, it averred that after making numerous disbursements in accordance with the terms of the Letter of Offer, the plaintiff breached various terms thereunder.
8. Further, it was contended by the defendant that the plaintiff substantially failed to comply with the pertinent terms and conditions of the restructure agreement dated 6<sup>th</sup> November, 2017 and this prompted the Defendant to exercise its rights under Clause 8 of the Agreement. It was also the Defendant's contention that Naivasha HCCC No. 2 of 2019 was settled on very different terms being: that the existing facility (loan 1) which stood at Kshs. 636,000,000.00 would remain as per the existing terms and conditions; that the additional facility of Kshs. 100,000,000.00 (loan 2) would be repaid within 18 months; and that interest would be paid on monthly basis on the disbursed amount.
9. As regards the agreement which is the subject of this application, it was contended that vide a Letter of Offer dated 18<sup>th</sup> May, 2021, the Defendant yet again agreed to advance to the Plaintiff a new facility of Kshs. 75,000,000.00 for operationalization of the project. That the said offer letter provided, inter alia, that:
  - i. Loan 1 which stood at Kshs. 735,430,812.38 would remain as per the existing terms and conditions.
  - ii. Loan 2 which stood at Kshs. 112,672,064.68 would become consolidated with the new loan of Kshs. 75,000,000.00 (loan 3) at drawdown of loan 3 and would be repaid within 24 months.
  - iii. There would be a 12-month repayment moratorium on principal and interest and thereafter the loan will be repaid in 4 quarterly payments.
  - iv. All sale proceeds would be channeled directly to escrow, an account to be held at HFC Limited.
  - v. It would be an event of default if any other indebtedness of the applicant is not paid when due.
  - vi. In an event of default, the Bank may declare the loan due and payable immediately together with all interest accrued thereon.
  - vii. The offer letter would supersede the previous offer letters dated 29<sup>th</sup> March 2021, 27<sup>th</sup> April 2021 and 11<sup>th</sup> May 2021.



10. That after execution however, the Plaintiff breached several terms of the contract by, inter alia, diverting funds generated from the project instead of channeling the same to the escrow account and failing to continue servicing the previous facility (loan 1) as per the existing terms and conditions. Consequently, the Defendant exercised its rights by issuing the Plaintiff with the 90 days' statutory notice dated October 19, 2021 and a pre-listing notification dated October 18, 2021. Further, the Defendant avers that the allegation that it has frozen the escrow account is baseless since the Plaintiff is well aware of the purpose for which it was created. Lastly, the defendant contends that this suit is an abuse of the process of this court and an attempt by the plaintiff to avoid its contractual obligations.
11. In rebuttal, the plaintiff's director averred that the defendant curiously elected to veer into issues which do not form the cause of action in the matter herein with the intention of mixing up the issues before this court. He averred that the letter dated September 16, 2021, relied on by the defendant as proof of diversion of funds, refer to the restructure agreement dated November 6, 2017 which is not the subject of this suit. He also noted that as at January 7, 2022, the defendant had withdrawn Kshs. 11,103,065.36 from the escrow account.

### **Submissions**

12. The application was canvassed by way of written submissions.

### **Plaintiff's submissions**

13. The plaintiff formulated only one issue for determination namely whether it made out a case for the grant of the injunctive relief sought. Relying on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA. 358, the Plaintiff submitted that it has satisfied all the requirements for the grant of the order. The Plaintiff contended that it has established a prima facie case as it has demonstrated that the Defendant breached the Agreement of May 11, 2021 by issuing it with the 90 days' statutory notice dated October 19, 2021 and the pre listing notification dated October 18, 2021 during the moratorium period.
14. On irreparable harm, the Plaintiff submitted that the suit property is of great sentimental value to it and urged the court to consider its uniqueness. It was contended that being a multi-million project located in the heart of Naivasha, damages would not be an adequate remedy especially considering the illegality inherent in the Defendant's breach of the terms of the moratorium. The Plaintiff relied on the case of *James Titus Kisia v Guaranty Trust Bank (Kenya) Limited* [2018] eKLR where the court held that damages is not an automatic remedy when deciding whether or not to grant an injunction as damages cannot be a substitute for loss occasioned by a clear breach of the law.
15. On the third limb, the plaintiff submitted that considering all the circumstances of the case, the balance of convenience lies in favour of granting the injunction sought. It was contended that the plaintiff will suffer more prejudice if the suit property is sold than the defendant would if the injunctive orders are granted. It reiterated that in any event, the defendant still holds a charge over the suit property and whatever prejudice it may suffer can be easily remedied in costs.

### **Defendant's submissions**

16. On the other hand, the defendant submitted that the only issue for determination is whether all the three loan facilities are subject to the 12 months repayment moratorium on principal and interest. On this, it contended that loan 1, which the plaintiff stopped repaying upon being granted loan 3, is governed by the terms and conditions of the Offer Letter dated September 26, 2012 and the restructure agreement dated November 6, 2017. Further, it contended that the plaintiff does not deny that it breached the terms of the two agreements when it stopped repaying loan 1 and as such, the issuance of



the 90 days' statutory notice was well founded. The defendant reiterated that this application and the entire suit are just but attempts by the Plaintiff to avoid its contractual obligations.

17. The defendant relied on the following cases: *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR where the Court of Appeal stated that parties are bound by the terms of their contract and a court of law cannot re-write the same; *Jopa Villas LLC v Private Investment Corp & 2 others* [2009] eKLR where the court stated that courts should not aid parties in running away from their lawful contractual obligations; and *Woodcraft Industries Ltd & 3 others v East African Building Society* HCCC No. 602 of 2000 where Ringera J. stated that giving an injunction to restrain a party from exercising a statutory power of sale which has crystallized amounts to rendering securities useless.
18. In her view, the foregoing demonstrates that the plaintiff has not established a prima facie case with probability of success. The defendant cited the case of *Kenya Commercial Finance Co. Ltd v. Afraba Education Society* [2001] Vol. 1 EA 86 for the court's position that, if prima facie case is not established, then irreparable injury and balance of convenience need no consideration. Further, the Defendant submitted that the Plaintiff has failed to prove that the balance of convenience tilts in its favour since it is undisputed that the outstanding loan is enormous. Reliance was placed on *Daniel Ndege Ndirangu v Barclays Bank of Kenya Limited & another* Nakuru High Court Civil Suit no 8 of 2012 'B' where the court found that the balance of convenience lay with the Respondent bank therein as it must account to its shareholders and investors.

### Analysis and Determination

19. I have carefully considered the application and the responses thereto. I have also considered the parties' respective submissions and authorities cited. The only issue for determination at this point is whether the court should grant the injunctive orders sought.
20. The principles governing the grant of temporary injunctions were laid down in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, where the court stated as follows:-

“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.”
21. In *Nguruman Limited v Jane Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal stated the three conditions 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 can proceed to consider the other two conditions.
22. As to what constitutes a prima facie case, the Court of Appeal explained in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR 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.”



23. In *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* [1990] eKLR, the court held:
- “To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”
24. Further, it is noteworthy that when considering whether or not a prima facie case has been established, the court will not venture into closely examining the merits of a case. (See: *Nguruman Limited v Jan Bonde Nielsen & 2 others* [supra])
25. In the instant case, there is no doubt that there is a danger of suit property being alienated as the defendant has already set in motion the process of exercising its statutory power of sale over the property. The said power emanates from the legal charge and supplemental charges created over the suit property in favour of the defendant as security for loans advanced to the plaintiff. For that reason, the question as to whether the plaintiff has established a prima facie case with a probability of success, turns on whether the plaintiff has prima facie demonstrated that the defendant breached the moratorium.
26. It is not in dispute that the plaintiff entered into an agreement with Defendant sometime in May 2021 for a third loan facility of Kshs. 75,000,000.00. The plaintiff’s position is that the Defendant consolidated the third facility with the first and second loans and granted it a 12-months moratorium on repayment of both principal and interest on the entire loan which then constituted an aggregate sum of Kshs. 923,102,877.06. The Plaintiff now contends that the Defendant reneged on its promise by issuing it with the 90 days’ Statutory Notice dated 19<sup>th</sup> October, 2021 and the Pre-listing Notification dated 18<sup>th</sup> October, 2021 during the moratorium period.
27. To begin with, I note that the plaintiff and the defendant have referred to two different letters of offer as the basis of the 12 months moratorium which was allegedly breached. The plaintiff annexed an offer letter dated May 11, 2021 whilst the Defendant refers to an offer letter dated May 18, 2021. I have carefully studied these two offer letters and I note that their terms and conditions are similar in almost every aspect except for some of the special conditions. Of particular importance is special condition (z) (xx) at page 10 of the offer letter of May 18, 2021 which provides that:
- “This offer supersedes our previous letter dated March 29, 2021, Ref: EK/CW/CL3125/246326, April 27, 2021 and 11<sup>th</sup> May 2021.”
28. The plaintiff did not make any comment regarding the Defendant’s reference to the offer letter of May 18, 2021 hence it can only be deduced that it was well aware that the offer letter of May 11, 2021 was supplanted by the one of May 18, 2021 and is therefore bound by its terms and conditions. Foremost, it is noteworthy that the offer letter dated 18<sup>th</sup> May, 2021 was titled “Additional Facility to Osotua Villas Limited for the Sum of Kes. 75,000,000.00.” meaning that the terms were for the said facility.
2. Secondly, the particulars of the facility, at Page 1 of the offer<sup>9</sup> letter, clearly shows that the loan tenure (means ‘repayment period’) of loan 1 which stood at Kshs. 735,430,812.38 was as per the existing terms and conditions.
30. On the other hand loan 2 which stood at Kshs. 112,672,064.68 was to be consolidated with the new top up of Kshs. 75,000,000.00 (loan 3) which was the subject of the letter, at drawdown of the said loan 3, and would be repaid within 24 months.



31. The particulars further show that the plaintiff was granted a 12-month grace period on repayment of both principal and interest on the loan subject of the letter which period ended on 18<sup>th</sup> May, 2022 and thereafter the loan will be repaid in 4 quarterly payments.
32. The Plaintiff has not provided any proof that it continued to service loan 1 as per the existing terms and conditions as clearly indicated in the offer letter dated 18<sup>th</sup> May, 2021 which it executed. To that end, it is evident that the Plaintiff has not come to court with clean hands as is required of an applicant seeking equitable relief. I am therefore not satisfied that the Plaintiff has established, on prima facie basis, that the Defendant failed to honour the moratorium period.
33. Secondly, special condition (u) of the offer letter provided that all sale proceeds from Osotua Villas would be channeled directly to an account to be held at HFC Limited. The account referred to is an Escrow account at the bank and it was a term of the offer letter that the bank would hold a lien over the account as security for the loan and the account would be used for monitoring financial performance of the project and receipt of all sales proceeds which were to be used for interest servicing (See special condition W (x)). With these terms and conditions in mind, the Plaintiff cannot be heard to be claiming that the bank unfairly froze the Escrow account since it is well aware of its purpose and the terms of its use.
34. The upshot is that the plaintiff has not satisfied this court that it has a prima facie case with probability of success. Having found so, I do not deem it necessary to consider the two remaining conditions for the granting of injunction. This is in view of the fact that all the three conditions have to be established sequentially and failure to prove one condition spells doom on the entire application.

#### **Disposition**

35. The upshot is that the notice of motion dated December 22, 2021 has no merit and is hereby dismissed with costs to the defendant.

**DATED AND DELIVERED AT NAIVASHA THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Ms. Rono h/b for Ms. Mwangi for the Plaintiff/Applicant- absent.
2. Mr.Kimani. for the Defendant/Respondent.

