Kamanja v Equity Bank Limited & another (Civil Suit E016 of 2021) [2022] KEHC 10813 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL SUIT E016 OF 2021

SN MUTUKU, J

MAY 24, 2022

BETWEEN

ROBERT MAINA KAMANJA .... APPLICANT

AND

EQUITY BANK LIMITED .... 1ST RESPONDENT

KEYSIAN AUCTIONEERS .... 2ND RESPONDENT

RULING

Application

1. This Ruling relates to the Notice of Motion Application (the Application) dated 16th July, 2021 brought by Robert Maina Kamanja (the Applicant) against Equity Bank Ltd and Keysian Auctioneers, 1st and 2nd Respondent respectively. The Application is anchored on Order 51 Rule 1, Order 40 Rule 1 and 2 of the *Civil Procedure Rules*, 2010, and Sections 3 and 3A of the *Civil procedure Act* Cap 21. The Application seeks the following orders:

    1. That this application be certified urgent and service be dispensed with at first instance.
    2. That an order of temporary injunction does issue restraining the defendants whether by itself, its agents and/or assigns or any of them from advertising for sale, disposing off, selling or otherwise interfering with the Plaintiff's ownership and/or possession of Ngong/Ngong/91927 pending hearing and determination of this application inter-parties.
    3. That an order of temporary injunction does issue restraining the defendants, whether by itself, its agents and/or assigns or any of them from advertising for sale, disposing off, selling or otherwise interfering with the Plaintiff's ownership and/or possession of Ngong/Ngong/91927 pending hearing and determination.
    4. That cost of this application be provided for.

The Applicant's case

2. The application is supported by grounds found in the Affidavit sworn by the Applicant on 16th July, 2021. He deposed that he is the registered proprietor of the parcels of land known as Ngong/Ngong/91927, Ngong/Ngong/91928 and Ngong/Ngong/91929 situated at Kerarapon area of Ngong town; that he charged Ngong/Ngong/91927 in favour of the 1st Respondent to secure a loan of Kshs. 12, 500,000/; that the 1st Respondent purported to issue a Notice via a letter dated 7th June, through his agents, the 2nd Respondent for an intended auction demanding payment of Kshs.16, 569,523.42 being the supposed outstanding balance as at 21st May, 2021.

3. He deposed that he had created a charge over the property formerly known as Ngong/Ngong/13665 but with consent of the 1st Respondent this parcel of land was subdivided into three portions: Ngong/Ngong/91927, Ngong/Ngong 91928 and Ngong/Ngong 91929; that a fresh charge over Ngong/Ngong/91927 was registered as a substitute charge in place of Ngong/Ngong/13665, and Ngong/Ngong/91928 was sold to offset part of the outstanding loan while Ngong/Ngong/91929 was released to him.

4. He deposed that he entered into a sale agreement on 7th December, 2012 in respect to Ngong/Ngong/91928 for an amount of Kshs. 5,200,000/- out of which Kshs. 2,500,000/- was deposited in his account while Kshs. 1, 700,000/- was held by the 1st Respondent's advocate and therefore the amount being demanded by the 1st Respondent should take into account this amount.

5. He further deposed that the sale of Ngong/Ngong/91928 fell through and has a pending dispute in ELC Appeal No. 23 of 2019 – Florence Akoth Oduk -vs- Robert Maina Kamanja; that for this reason he has been unable to sell the property to other buyers. He claims that he had been making regular payments until February 2020 when Covid 19 hit the country and greatly affected him; that he lives on the charged property with his family and selling the same will render him homeless. It is the case for the Applicant that the 1st Respondent did not give him the 90 days statutory notice before the notice of intended sale by public auction and that if the injunction is not granted, he stands to suffer irreparable loss and damage.

The Respondent's case

6. The Application is opposed. In the Replying Affidavit dated 22nd September, 2021 and sworn by Roy Akubu, Senior Manager, Legal Services of the 1st Respondent, with authority from both respondents, stated that the Applicant applied to the 1st Respondent for a loan facility in the sum of kshs. 11,000,000/-; that through a letter of offer dated 12th April, 2012 the loan facility was accepted; that it was agreed that the Applicant would pay principal and interest in 180 months instalments of Kshs. 105,122/-; that the loan would attract an interest of 8% per annum; that in the event the Applicant left the employment of the bank the interest would be charged at the prevailing commercial rate without prior notice to the plaintiff.

7. He stated that it is correct that the Applicant initially created a charge in favour of the bank over LR. No Ngong/Ngong/1366 and that this property was subdivided into three portions as deposed by the Applicant; that a charge was created over property Ngong/Ngong/91927 (the suit property) to secure facility in the sum of Kshs. 12,500,000/; that the Applicant failed to clear his arrears and the bank on 27th June, 2019 served with a demand notice for payment of 1,091,004.49 which was to be settled within 3 months; that upon the lapse of the 3 months the 1st Respondent issued the Applicant with a statutory notice of sale after failure to pay Kshs. 14,253,157/- at the material time. Consequently the

1st Respondent instructed the 2nd Respondent herein to sell the property by public auction and that from account statements as of 28th August, 2021 the Applicant owed the bank Kshs. 17,046,551.59.

8. Further, it is the Respondent's case that the 1st Respondent's right to sell the suit property stems from the statute as well as the charge executed by the parties upon default; that in compliance with Section 97 (2) of the *Land Act*, the 1st Respondent instructed Acumen Valuers Ltd to conduct valuation on the suit property. That after valuation was conducted, the market value of the suit property was placed at Kshs 22,500,000/ and Forced Sale value was placed at Kshs 16,875,000/.

9. It is the Respondents' case that the Applicant has admitted to owing the bank monies and therefore has failed to establish a prima facie case; that the Applicant does not stand to suffer any irreparable damage if the orders sought are not granted, as any injury herein can adequately be compensated by way of damages. It is their case that the requisite notices were served on the Applicant before the 1st Respondent exercised its statutory power of sale

10. The Applicant filed a Supplementary affidavit dated 12th November, 2021 in which he reiterated that he did not receive the statutory notices from the 1st Respondent because his mail box was closed on 1st June, 2018 due to non-payment of renewal fees; that the 1st Respondent had alternative ways to contact him which they failed to do and that issuance of the requisite statutory notices is a mandatory requirement before a bank can exercise its statutory power of sale.

Applicant's submissions

11. This matter was canvassed by way of written submissions. The Applicant filed his submissions dated 12th November, 2021. He highlighted one issue for determination: whether the requirements for granting of a temporary injunction have been met. In addressing that issue, he submitted that the principles of injunction are enunciated in the renowned case of *Giella -vs- Casman Brown* (1973) EA 358 and reiterated in the case of *Nguruman Limited – vs- Jan Bonde Nielsen & 2 others* [2014] eKLR. His argument is that he has satisfied the three requirements set out in the above-mentioned cases.

12. On the issue of *prima facie* case, he argued that failure by the 1st Respondent to effect service of the statutory notices in compliance with the provisions of section 90(1) and 90(2) (b) of the *Land Act* is a denial of his right to extinguish the charge and retain ownership of the suit property by paying the debt; that closure of his mail box since the year 2018 meant that he didn't receive any notices sent through that channel. It is his argument that the 1st Respondent had every means of contacting him through alternative ways as they were in constant communication with him and that he even visited their offices frequently.

13. On whether he will suffer irreparable injury if the temporary injunction is not granted, he argued that the suit property is his family home and if sold his family is likely to be rendered homeless. He relied on the case of *Pius Kipchirchir Kogo-vs- Frank Kimeli Tenai* [2018] eKLR which defined irreparable injury and argued further that the loss of a family home amounts to irreparable injury which cannot be adequately compensated by an award of damages. He also relied on the case of *Vivo Energy Kenya Ltd -vs- Maloba Petrol Station and 3 others* [2015] eKLR to stress the same point.

14. On balance of convenience, it was his argument that his and his family's suffering would be greater than that of the 1st Respondent if temporary injunction is not granted and that if the suit property is sold the inconvenience caused would be greater for him as the same is his family home. He relied on the case of Pius Kipchirchir Kogo-vs- Frank Kimeli Tenai [2018] eKLR [Supra].

15. It was his submissions that no prejudice shall be suffered by the 1st Respondent as it is in the interests of justice that an order of temporary injunction be in place pending the hearing and determination of the main suit.

The Respondents' submissions

16. The Respondents filed their submissions dated 29th October, 2021. They identified one issue for determination: whether this Honourable court should grant a temporary injunction in favour of the Applicant. In addressing this issue, the Respondents also relied on the cases of Giella -vs- Casman Brown (1973) EA 358, Nguruman Limited – vs- Jan Bonde Nielsen & 2 others [2014] eKLR, as well as *Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society* [2001] Vol 1 EA 86.

17. On the issue of the establishment of a prima facie case, they argued that the Applicant defaulted on his repayment obligations a fact which is not in dispute; that the Applicant disputes that the amount owed is not accurate as there is an alleged 1,700,000/- held by the 1st Respondent's advocate in respect of sale of Ngong/Ngong/91928 that has not been taken into account but he has not supported this allegation with any evidence. It was their argument that a dispute as to amount cannot be a ground to restrain a chargee from exercising its statutory power of sale and cited the case of Habib Bank Ltd -vs- Pop-in [1989] LLR 291 CAK to support that point. They argued that the Applicant has not attached evidence to support his allegation that there is an existing dispute between him and Florence Akoth Oduk in ELC appeal No. 23 of 2019 – *Florence Akoth Oduk -vs- Robert Maina Kamanja*.

18. It was their submissions that the Statutory Notice of Sale was served on or about 26th October, 2019, while the Notification of sale and Redemption Notice was served on or about 8th June, 2021 and therefore there is a period of more than 7 months between the service of the Statutory Notice and service of the Notification of Sale. On this issue of issuance of notices, the Respondents relied on the case of Milimani motors (K) Ltd -vs- Kenya Commercial Bank Ltd (2014) eKLR and argued that the Applicant has not demonstrated a prima facie case with likelihood of success.

19. On the issue of irreparable injury, they argued that the Applicant was aware that if he defaulted on his payment obligations the 1st Respondent would exercise its statutory power of sale. They also argued that the property was given as security and therefore it became a commodity for sale upon default. To stress on this pointm the Respondents relied on the case of Michael Gitere & another -vs- Kenya Commercial Bank Limited [2018] eKLR and further argued that any loss to be suffered by the Applicant is quantifiable in damages which damages the 1st Respondent, being a financial institution, is capable of paying and therefore the Applicant is not likely to suffer irreparable harm.

20. It is the Respondents' submission that the argument that the charged property is a matrimonial home alone will not suffice as a ground for granting an injunction as long as the chargee has fully adhered to the law; that the spouse consented to the suit property being charged and that in compliance with section 96(3) of the Act, the 1st Respondent has served the Plaintiff's spouse with the requisite notices to sell the suit property.

21. On the principle of the balance of convenience, the 1st Respondent argued that the balance of convenience tilts in its favour in exercising its statutory power of sale of the subject property following breach of charge by the Applicant; that the outstanding loan amounts continue to accrue and if injunction is granted pending hearing and determination of the suit which time is not certain it is possible that the amount outstanding would overly outstrip the value of the suit property. The Respondents urged the court to dismiss the application with costs.

Analysis and Determination

22. In determining this matter, I have read the Application and the grounds in support of the same, the rival submissions on the issues raised and the authorities relied on by both parties. It is my view that the main issue for determination in this matter is whether the Applicant has satisfied this court that a temporary injunction should be granted to him. The starting point is to determine whether the Applicant has met the threshold for granting temporary injunctions. The principles for granting temporary injunctions are settled. To get the answer as to whether the Applicant has satisfied the requirements for granting the orders he is seeking, I turn to the case of Giella v. Cassman Brown and Company Limited (1973) E.A. In this case, the court stated 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."

23. In the matter before me, has the Applicant established a *prima facie* case with a probability of success? Has he shown that unless an interlocutory injunction is issued he will suffer irreparable injury which would not adequately be compensated by an award of damages? Where does the balance of convenience lie?

24. In the case of *Mrao Limited v First American Bank of Kenya and 2 Others* (2003) KLR 125, the Court of Appeal defined what amounts to *a prima facie* case as follows:

25. A prima facie case in a Civil Case include 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."

26. On whether the Applicant deserves the orders he is seeking, I have noted that there is no dispute that there exists a charge over Ngong/Ngong/91927 over a loan facility in the sum of Kshs. 12,500,000/ and that the Applicant has fallen in arrears, which fact is admitted. He however disputes that he was served with requisite notices by the Respondents as well as the amount involved.

27. I have considered the Applicant's arguments that he has established a prima facie case. He disputes the amount that is owed claiming that an amount of Kshs.1,700,000/-, being part of the proceeds from the sale of Ngong/Ngong/91928, is held by the 1st Respondent's advocates and that this amount ought to be taken into account. The Applicant also alleges that the sale of Ngong/Ngong/91928 fell through, a matter which is in dispute in ELC appeal No. 23 of 2019 – Florence Akoth Oduk -vs- Robert Maina Kamanja. That as a result he has been unable to sell the said parcel to other prospective buyers which would enable him further clear the arrears. He further claims that he was not receiving any of the notices sent through his postal address P.O Box 70912-00400 Nairobi because the mail box had been closed for non-payment of renewal fees and that his family lives on the charged property and therefore, he stands to suffer irreparable injury that cannot be compensated by a monetary award. He also claims that the balance of convenience tilts in his favour since he stands to suffer greater inconvenience than the Respondents if the orders of injunction he is seeking are not granted.

28. I have weighed these arguments against those by the Respondents that the Applicant has not established a prima facie case given that he is in arrears which he has admitted; that the Applicant does not deny that the address used to sent the notices to him is the same address he has used in all his documents including the charge; that he has not provided evidence that the 1st Respondent's advocates are holding Kshs 1,700.000 from the sale of Ngong/Ngong/91928 or that there is a dispute in court between him ad the buy of that property.

29. It is clear to me that the Applicant has fallen in arrears over the loan facility with the 1st Respondent. My careful consideration of the submissions by the Applicant show that he does not deny that the 1st Respondent served him with the requisite notices. His main contention is that he did not receive the notices because his postal mail box had been closed for non-payment of fees. This issue was not raised when the Notice of Motion under consideration herein and the supporting affidavit were drawn on 16th July 2021. In the Supporting Affidavit, the Applicant asserts that he had not been served with the statutory notices. But in his Supplementary Affidavit sworn on 12th November 2021 he changed tune and stated that he did not receive the statutory notices because his postal mail box was closed at the time. The letter from the POSTA Kenya, which he has attached to his Supplementary Affidavit, is dated 18th June 2021. It is not explained why, if it was in existence from that date, it was not attached to the Supporting Affidavit sworn on the 16th July 2021. I cannot stop wondering why would the Applicant fail to pay for his postal mail box from 1st June 2018 when he knew that it is the address he had used for crucial transactions like this charge? It is my view on this matter that there are unanswered questions in regard to this issue of closure of postal mail box that weaken the case for the Applicant. Be that as it may, it is upon the Applicant to satisfy the court that he deserves the orders he is seeking. In the language of Nguruman Limited v. Ian Bonde Nielsen & 2 others, which adopted the definition of prima facie case from Mrao case, it was stated that "the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

30. As argued by the Respondents, the Applicant charged the property in issue herein. He knows the consequences of such an action. The property so charged becomes a commodity for sale in case of default in repayments. He has defaulted and that default has attracted the action of the 1st Respondent to exercise its statutory power of sale that flows automatically upon default of repayments by the mortgagor. The fact that the property is claimed to be the matrimonial home, though no evidence was provided to that effect, can only become relevant if the spousal consent had not been obtained prior to the creation of the mortgage. Can a bank properly exercising its statutory power of sale where all legal requirements have been observed be said to invade the rights of the mortgagor? I would think not.

31. It is clear to me that the Applicant only claims non receipt of the notices. The 1st Respondent has argued that it properly served the notices using the correct postal address provided by the Applicant. Should the bank be held to account if this postal address, which address is the correct address, was closed for non-payment of fees? I do not think so. It was upon the Applicant to ensure that his postal address remained active to enable him receive mail, more so given that he had used this address for crucial transactions like this mortgage.

32. I have considered the Applicant's claim that the amount being claimed by the 1st Respondent as owing is at variance with the actual amount due to Kshs 1,700,000 he claims is being held by the 1st Respondent's advocates. The circumstances in which a mortgagee or chargee may be restrained from

exercising his statutory power of sale are set out in Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725, cited by the Court of Appeal in Mrao case above. It states that: -

> 725. When mortgagees may be restrained from exercising power of sales—
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> "The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

33. I am satisfied that the Applicant's claim that the amount is incorrect would not affect the 1st Respondent from exercising its statutory power of sale.

34. Turning on the issue of irreparable harm the Applicant argued that the suit property was his family home and that the sale would render him homeless; that the loss of a matrimonial home cannot be adequately compensated by an award of damages. This argument was opposed by the Respondents who argue that the Applicant was aware of the consequences that if he defaulted the 1st Respondent would exercise its statutory power of sale and that the suit property was provided as security and therefore becomes a commodity for sale. This was the position taken by the court in Michael Gitere & another -vs- Kenya Commercial Bank Limited [2018] eKLR[supra] cited by the Respondents in their submissions. Both the Applicant and his spouse, upon her consent, knew of the consequences of default in repayments and the risks involved.

35. It was argued by the Respondents that injury suffered by the Applicant, if any, can be compensated by a monetary award given that the 1st Respondent is a financial institution. After considering this matter, I take the view that the injury that may be suffered by the Applicant, if any, is capable of being adequately compensated by monetary award. To my mind, Section 99(4) of the *Land Act* provides a remedy where a party may suffer damages as a result of the exercise of the power of sale. This section states as follows:

> 99. (4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

36. The same position was held by the court in *Palmy Company Limited v Consolidated Bank of Kenya* [2014] eKLR and *Daniel Ndege Ndirangu v Barclays Bank of Kenya Limited & Another*, Nakru High Court Civil Suit No. 8 of 2012 'B', among other cases with similar view.

37. On the issue of balance of convenience, it is my view, having considered rival arguments of both parties, that the balance of convenience tilts in favour of the 1st Respondent for it is likely to suffer prejudice if the amount owing reach a point where the offered securities cannot cover (see *Milimani Motors (K) Ltd v. Kenya Commercial Bank Ltd* [2014] eKLR).

38. In conclusion and my careful consideration of this matter, it is my view that the Applicant has failed to satisfy this court that he deserves the restraining orders he is seeking. He has failed to establish a prima facie case or to show that he will suffer irreparable injury that cannot be compensated by monetary award. On those two principles alone, this application fails. But even if this court were to be in doubt and resort to the third principle of balance of convenience, it is my view that the balance of convenience tilts in favour of the 1st Respondent. Consequently, the Notice of Motion Application dated 16th July 2021 stands dismissed with costs to the 1st Respondent.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH MAY, 2022.

S. N. MUTUKU

JUDGE