



**Kigen v Absa Bank Kenya PLC (Formerly Barclays Bank of Kenya Ltd) & another
(Environment & Land Case E18 of 2023) [2023] KEELC 17528 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E18 OF 2023
FM NJOROGE, J
MAY 18, 2023**

BETWEEN

BRIAN KIPYEGON KIGEN PLAINTIFF

AND

**ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK OF KENYA
LTD) 1ST DEFENDANT**

LEGACY AUCTIONEERING SERVICES 2ND DEFENDANT

RULING

1. The plaintiff brought an application dated 13/3/2023 seeking at prayer 3 an injunction to restrain the defendants or their agents from sale, transfer, leasing auctioning, pledging, offering as security or any other change of ownership of title No. Nakuru Municipality Block 15/108-Section 58 Area in Nakuru County (hereinafter the suit premises).
2. The grounds at the foot of the application upon which the application is brought are that the plaintiff is the registered owner of the suit premises; that the respondents have interfered with the suit property by trespassing thereon and taking photographs with the intention of disposing it by way of auction. The application is supported by an affidavit of the applicant sworn on 13/3/2023 which reiterates the grounds analyzed above and adds the following details: that on 19/6/2019 the applicant entered into a home loan agreement with the 1st respondent for purchase of the suit premises on the basis of a creditor appraisal premised on his then income but on 21/3/2020 when the Covid-19 pandemic broke out, the applicant was suspended from employment and failed to meet his monthly repayment obligations and the loan fell into arrears; however on 1/8/2020 he was reinstated back into employment on a lesser salary under a revised employment contract and on 19/10/2020 he sought in writing for a restructuring of the loan repayment terms for reason of change of income which proposal the 1st respondent declined and persists in declining to date. The applicant states that he has managed to meet his monthly instalments but with much strain. On 19/2/2023 the 2nd respondent issued the applicant



the notification of sale of the suit premises and there is real apprehension on the part of the applicant that the suit property will be disposed of.

3. The 1st respondent filed a replying affidavit on 28/3/2023 in which it admitted that it entered into a charge agreement with the applicant over the suit property for USD 192, 000/= and that the charge document contained an express term that the suit property would secure such sums as would be owed on the current account or other accounts to the bank and in default the bank would exercise its rights under the Land Act; that the applicant had been making irregular loan repayments towards settlement until February 2022 and subsequently gave false commitment until 22/2/2023 when he made a payment of USD 18,000 just three weeks before the auction; that as at March 2023 the applicant was in arrears to the aggregate tune of USD 218,060.81 which amount continued to accrue interest; that the charge gave the 1st respondent a right to sale of the suit property on default and a 90 days' statutory notice was issued and served upon the applicant via email on 23/8/2022 and receipt thereof acknowledged by him; that on 24/11/2022 the requisite 40 days' notification of sale was issued and served upon the applicant on the same day and acknowledged by him; that as there was no response on 17/1/2023 the respondent served a 45 days' redemption notice to the applicant which the applicant acknowledged but did not substantively respond to and that only when the advertisement in a local daily on 6/3/2023 was put up did the applicant approach court seeking injunctive reliefs. The respondent denied knowledge on change in income on the part of the applicant but admitted receiving a restructuring proposal which it found "unacceptable." The respondent denies that it declined to accommodate the applicant on a loan restructuring plan. The applicant stated that its rights and remedies under the charge had crystalized and that the land, once charged, had become a commodity for sale in default of payment of the outstanding loan and that since the applicant has admitted in being indebted to the bank and an injunction cannot issue, more so because the applicant has not demonstrated that he has an arguable case. The 1st respondent accused the applicant for failing to come up with a concrete proposal of redeeming the suit property and of failing to demonstrate that he would suffer irreparable injury not compensable by way of monetary damages.

Submissions of the parties

4. The applicant filed submissions on 11/4/2023 and the respondent on 20/4/2023. I have considered those submissions in this ruling.

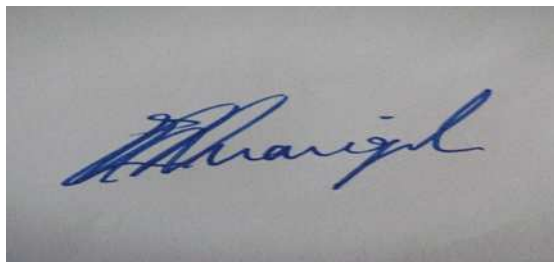
Determination

5. The issues arising for determination in the instant application are whether the applicant has established that he has a prima facie case and whether he would suffer loss that can not be compensated by way of damages if the orders sought do not issue.
6. On the first issue I note that it is common ground that the land belongs to the applicant and that there was a charge agreement and that the suit property secured payment of the loan and other monies owed to the respondent bank by the applicant on the loan account.
7. The applicant's main grievance is that he was unable to service the loan and that he fell into arrears due to his suspension from employment and, upon reinstatement, a subsequent drop in his income from USD 63,600 to USD 57,600 due to the covid 19 pandemic which facts the 1st respondent pleads ignorance of. His further grievance is that the 1st respondent has declined the applicant's proposals for a restructuring of the loan repayment terms due to the change in income. The applicant acknowledges that he was served with the notification of sale of the suit property on 19/1/2023.



8. No impropriety is alluded to in respect of service or content or form of the notification of sale. No dispute is raised by the applicant over the amounts claimed from him by the 1st respondent. It would appear that the main grievance of the applicant is that the 1st respondent's rejection of its loan restructuring proposals are likely to lead to loss of the suit property perchance it is disposed of in realization of security by the 1st respondent. Such loss is likely, but the applicant has also failed to persuade this court that it would be of such nature that it can not be compensated for by way of damages; further, this court must respect the agreement between the parties and there being no wrongdoing alleged on the part of the respondent save the rejection of proposals, I find that the applicant has not established any prima facie case. Consequently, the motion dated 13/3/2023 is lacking in merits and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF MAY, 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

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