



**Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited (Civil Case E133 of 2022) [2022] KEHC 10668 (KLR) (Commercial and Tax) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10668 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E133 OF 2022  
DAS MAJANJA, J  
JUNE 20, 2022**

**BETWEEN**

**ELITE INTELLIGENT TRANSPORT SYSTEMS LIMITED ..... PLAINTIFF**

**AND**

**GULF AFRICA BANK LIMITED ..... DEFENDANT**

**RULING**

**Introduction and Background**

1. What is before the court for determination is the plaintiff's notice of motion dated April 13, 2022 made, inter alia, Order 40 rules 1, 2, 3 and 4 of the *Civil Procedure Rules* principally seeking to restrain the Defendant ("the Bank") from proclaiming, attaching, selling, advertising for sale, offering, disposing or in any other way dealing or interfering with the property known as Land Reference Number 1160/339 (Original Number 1160/178/3) Kwarara Road, Karen Estate, Nairobi City County ("the suit property") pending hearing and determination of this suit.
2. The application is supported by the affidavits of Patrick Kibaiya, the plaintiff's director, sworn on April 13, 2022 and May 10, 2022 respectively. It is opposed by the Bank through the replying affidavit of Lawi Sato, an Advocate and its Legal Officer, sworn on April 28, 2022.
3. The facts giving rise to this application are largely common ground and can be gleaned from the plaintiff's *Plaint* and the parties' depositions. In any event, the same facts were captured by the court in Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & another*.
4. On May 22, 2017, the plaintiff was awarded a contract by the Kenya Rural Roads Authority ("KeRRA") for upgrading to bitumen standards and maintenance of the Mikindiri-Kunati-Kitithine road in Meru County ("the Project") for a period of 24 months. In order to finance working capital,



purchase motor vehicles and equipment for the Project, the plaintiff applied for and was granted facilities to the tune of KES. 250,000,000.00 by the Bank secured by, inter alia, a legal charge for KES. 133,000,000.00 over the suit property. Over time, the Plaintiff was unable to service the facilities as agreed leading to default prompting the Bank to invoke its statutory power of sale in respect of the suit property.

5. To forestall the sale of the suit property, the plaintiff filed a suit; Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & another*. In a ruling of the court dated 20<sup>th</sup> November 2020, the court dismissed the plaintiff's application for injunction noting that the Bank's statutory power of sale had accrued once the Plaintiff admitted indebtedness and the statutory notices issued had been served.
6. The previous suit was compromised by a Consent dated June 3, 2021 ("the Consent"). Under the consent, it was agreed that as at May 18, 2021, the plaintiff owed the Bank KES. 278,976,666.41 including Legal costs in the balance of an all-inclusive sum of KES 2,500,000.00 and auctioneers' fees amounting to KES. 3,410,359.68 which continued to accrue profit at the rate of 13% per annum until payment in full. The parties agreed that the plaintiff was at liberty to complete the sale of the suit property on or before October 1, 2021 provided that it procures and executes an agreement of sale acceptable to the Bank by August 1, 2021 and that if the plaintiff failed to meet any obligations in the Consent and/or otherwise fail to sell the suit property, the Bank would be at liberty to sell the same to recover the debt. With this recap, I now turn to the plaintiff's application.

### **The Application**

7. The plaintiff's case is that the suit property is the directors' matrimonial home that is why it was given an opportunity to redeem it. It states that the Bank issued its undertaking to the Plaintiff that once it undertakes all the requisite steps in subdividing and selling the suit property, it will offer the required support to ensure that the process is successful.
8. Based on this representation, the Plaintiff states that it proceeded to incur the cost of a surveyor, mapped the suit property for subdivision into 5 plots, undertook the process of change of user including the cost of advertising and finally obtained the requisite approval from Nairobi Metropolitan Services on 2<sup>nd</sup> November 2021 for Change of User from a single dwelling unit to a multiple dwelling unit. It also incurred marketing and legal costs and procured 4 prospective purchasers who executed sale agreements with it to purchase each plot at KES. 25,000,000.00.
9. The plaintiff depones that as the suit property is charged to the Bank, the prospective purchasers needed assurance that the Bank supported the transaction and would not change its mind due to the differences with the plaintiff once they had paid the deposit. In a bid to reassure the purchasers, the plaintiff requested the Bank to execute a statutory Form LRA 34 titled, 'consent by the encumbrancer to transfer', which would then be registered against the title to the suit property as well as statutory Form LRA 32 being consent to chargee to partition the suit property.
10. The plaintiff states that despite the Bank executing the statutory forms to transfer and partition the suit property, it frustrated the process by failing to release the original title to either its advocates or the Plaintiff's advocates for purposes of registering the consents to transfer or subdivide against the title to the suit property thereby causing the prospective buyers to doubt the transactions.
11. The plaintiff believes that the Bank was aware that if the consents were not registered against the original title, the subdivision and sale would be frustrated. The plaintiffs complain that in a bid to steal the match on it while it was busy pursuing the registration of the consent, the Bank advertised the suit property for sale by public auction.



12. The plaintiff states that the Bank is precluded by the doctrine of estoppel from undertaking the sale of the suit property when it represented to the plaintiff's directors that they would have a fair chance to redeem their matrimonial home. It urges that the court has the jurisdiction to issue equitable reliefs where it is apparent that the Bank is aggressively and viciously circumventing its representations and the Plaintiff's legitimate expectation by oppressively shifting goal posts, thwarting and frustrating the very opportunity they had presented and represented to the plaintiff.

### **The Bank's Reply**

13. The Bank opposes the application on several grounds. It accuses the plaintiff of failing to disclose the existence of the previous suit; Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & Another*. It urges that it has always acted within the terms of the Consent filed therein and thus this suit and application are an abuse of the court process.
14. The Bank reiterates that the court already determined that it is entitled to exercise its statutory power of sale in the previous suit. That the aforesaid notwithstanding, the Bank avers that the Plaintiff is guilty of material non-disclosure as indeed, the Bank, has made various efforts to obtain the Plaintiff's cooperation and regularization of the Loan Account to no avail.
15. The Bank states that as per the Consent, the sale of the suit property was to be concluded by 1<sup>st</sup> October 2021 and an acceptable sale agreement was to be executed by 1<sup>st</sup> August 2021 but that the Plaintiff did not meet this condition. The Bank denies any undertaking alluded to by the Plaintiff. It states that the Plaintiff failed to disclose to the Court that payment of a 10% deposit was a pre-condition of the proposed sale to buyers and whereas the Plaintiff indicated that there were prospective buyers, it never procured the payment of the deposit despite numerous reminders and accommodations from the Bank. It states that through its email of 10<sup>th</sup> February 2022, the Bank informed the Plaintiff that it shall proceed with the sale as per the terms of the Consent if the deposits are not paid.
16. The Bank reiterates that the Plaintiff gave numerous representations on the payment of deposits and completion of the sale that never materialized. That the Consent form alluded to by the Plaintiff was executed on request from the Plaintiff to re-assure the buyers of the Bank's consent and that the Plaintiff further requested a letter from the Bank giving consent for the sale to enable the proposed buyers to remit the deposit. The Bank states that while it swiftly forwarded the letter to the Plaintiff, no deposit was forthcoming and that in a letter dated 28<sup>th</sup> February 2022, the Bank exhibited its good faith and noted that it had consented to the sale of the suit property and noted that time was of the essence and it expected to receive deposits not later than 3<sup>rd</sup> March 2022. The Bank adds that in the said letter, it informed the Plaintiff that the Bank retained its right to sell the suit property in accordance with the Consent despite according the Plaintiff accommodation.
17. The Bank avers that the Plaintiff failed to disclose that on 14<sup>th</sup> January 2022, a discussion was held between the Bank and the Plaintiff's Advocates wherein it was agreed that the Form LRA 34 was inapplicable as the partial discharges would be registered with the sub-leases. That the said advocate was to consult with the Plaintiff and the Plaintiff confirmed this position in an email of 18<sup>th</sup> January 2022.
18. The Bank states that it never refused to release the original title. That in its email of 7<sup>th</sup> February 2022, the Plaintiff acknowledged that the Bank had agreed to release the title upon a suitable and acceptable undertaking from the buyers' lawyers. The Bank maintains that it was all along amenable to receiving proposals from the Plaintiff but the Plaintiff did not take advantage of this. The Bank states that at all material times the Plaintiff duly acknowledged its indebtedness to the Bank.
19. The Bank urges the court to dismiss the application to enable it exercise its statutory power of sale.



## Analysis and Determination

20. Before determining the substance of the application, let me briefly comment on the Plaintiff's failure to disclose the previous suit; Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & Another* and the Consent that compromised the said suit. While I agree with the Plaintiff that this suit introduces a new set of facts and thus a new and different cause of action, a party is enjoined to make a full rank and disclosure and leave the court to decide on its materiality and relevance. It was held in *Brink's-Mat Ltd v Elcombe and others* [1988] 3 All ER 188 that, "The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers".
21. Had the Bank not disclosed the fact of the Consent, the court would not have known that there was a Consent settling Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & Another* or known about the contents of that Consent. The Consent is material to this determination and the Plaintiff was aware hence it had a duty to present it.
22. Further, under order 4 rule 1(1)(f) of the *Civil Procedure Rules*, the Plaintiff is required to disclose that there has been a previous suit relating to the same subject matter between the same parties. It states that the Plaintiff must contain, "(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint." The Plaintiff has itself conceded that the previous suit Nairobi HCCC No. E240 of 2020, *Elite Intelligent Transport Systems Limited v Gulf African Bank Limited & Another* related to the same subject matter between the same parties and it is clear that it has failed to comply with mandatory provisions of the law by failing to disclose that there was a previous suit. In as much as this is not fatal, it amounts to non-disclosure of material facts which may lead the court to refuse an injunction (see *Equity Bank Limited v Neptune Credit Management Limited* NRB CA Civil Appeal No.62 of 2012[2016] eKLR).
23. Turning to the substance of the application, I do not think there is any dispute about the principles needed to be fulfilled to allow the same. The conditions for the grant of an injunction were settled in *Giella v Cassman Brown* [1973] EA 385 where the court held that in order to succeed in obtaining an interlocutory injunction, the Plaintiff must demonstrate that it has a prima facie case with a probability of success, that they will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated those conditions and added that they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that a prima facie case is, "a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter." It also observed in the *Nguruman* Case (Supra) that when considering whether the applicant has established a prima facie case, the court need not hold a mini trial, but it must be satisfied that on the face of the evidence, the applicant has a right which has been or is threatened with violation.
24. The resolution of this application turns to whether the terms of the Consent have been adhered to. As stated before, the Plaintiff was at liberty to complete the sale of the suit property on or before the 1<sup>st</sup> October 2021 provided that it procured and executed an agreement of sale acceptable to the Bank by



- 1<sup>st</sup> August 2021 and that if the Plaintiff failed to meet any obligation in the Consent, and/or otherwise fails to sell the suit property, then the Bank was at liberty to sell the same to recover the debt.
25. It is clear that there has been no sale of the suit property let alone a sale before 1<sup>st</sup> October 2021 as stipulated by the Consent. The sale agreements annexed by the Plaintiff are undated and do not indicate whether they were executed and accepted by the Bank by 1<sup>st</sup> August 2021. In any case, the correspondence by the parties indicate that the said agreements were never executed as stipulated by the Consent, meaning the Plaintiff was in breach of its obligations in the Consent.
26. Whereas the Plaintiff blames the Bank for the breach, a reading of their correspondences paint a different picture. In one correspondence dated 8<sup>th</sup> November 2021, it can be seen that the Plaintiff's advocate was forwarding the draft sale agreement to one of the prospective purchasers, Emily Njoroge on that date which was past the date anticipated by the Consent. In an email dated 19<sup>th</sup> January 2022, the Plaintiff, through its director and deponent herein confirms that the first three buyers would start paying the deposit before end of January 2022 and that they had agreed with the Bank that the Plaintiff would issue an undertaking rather than go through the process of registering the consent on the title. In another email from the Plaintiff's deponent of 14<sup>th</sup> February 2022, he informs the Bank that the purchasers had executed the sale agreements and that they were to start making payment of the deposit in the course of that week and that he sought the indulgence of the Bank until 28<sup>th</sup> February 2022 for that to be done.
27. In a letter from the Bank dated 28<sup>th</sup> February 2022, the Bank confirmed that it had consented to the sale of the suit property and that it would issue partial discharges of charge to each purchaser who had paid the requisite deposit and submitted a suitable undertaking for payment of the balance of the purchase price. The Bank further stated that time is of the essence and it expected deposits to be received not later than 3<sup>rd</sup> March 2022. It further disclaimed that this was not to be construed as a waiver of the Bank's rights and that if the terms therein were breached, the Bank reserved the right to proceed with security realization without any further reference to the Plaintiff.
28. The aforementioned exchanges between the Plaintiff and the Bank confirm the Bank's position that the Plaintiff sought its indulgence and the Bank acceded to the requests but the Plaintiff never made good on its promises. There is also nothing that indicates that the Bank was a stumbling block to the sale of the suit property. If anything, the Bank continued accommodating the Plaintiff despite its breach of the Consent. I find and hold that once the Plaintiff breached the Consent, the Bank was at liberty to proceed with the exercise of its statutory power of sale as there was no forbearance on its part.
29. In conclusion and on the basis of the evidence on record, I conclude that the Bank did not make any misrepresentations to the Plaintiff or fetter its right to redeem the suit property. In view of the Plaintiff's breach of the Consent, I find and hold that the Plaintiff has failed to prove a prima facie case with a probability of success and its quest for an injunction fails.

### **Conclusion and Disposition**

30. The Plaintiff's application dated 13<sup>th</sup> April 2022 lacks merit and it is dismissed with costs. The interim orders in force are discharged forthwith.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.



Mr Nyanhoga instructed by Muraguri, Muigai and Waweru Advocates for the Plaintiff.

Mr Ogunde instructed by Walker Kontos Advocates for the Defendants.

