



Eldoret Hotel Limited v Ecobank Kenya Limited & another (Civil Suit 33 of 2020) [2022] KEHC 10966 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 33 OF 2020
EKO OGOLA, J
JULY 28, 2022**

BETWEEN

ELDORET HOTEL LIMITED APPLICANT

AND

ECOBANK KENYA LIMITED 1ST DEFENDANT

IGARA CONTRACTORS LIMITED 2ND DEFENDANT

RULING

1. By way of Notice of motion dated 18th August 2014, the applicant seeks the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. Pending the determination of the suit, the 1st defendant be restrained by means of temporary injunction from proceeding by way of public auction to sell the plaintiff's property comprised in title no. Eldoret/municipality Block 3/58
 5. The court be pleased to order that the charge by the 1st defendant over Eldoret/municipality Block 3/58 be reopened and its terms scrutinised and revised so as to ascertain its extent, validity, redemption and realization.
 6. This Court be pleased to order that accounts between parties be taken over the loan account and ascertain what balance there is and who should satisfy the same and by what time.
 7. Costs



2. The application is premised on the grounds set out therein and the deposition in the affidavit in support of the application.
3. A brief summary of the facts leading up to the application is that the plaintiff guaranteed the 2nd defendant the sum of kshs. 15,500,000/- which was secured by a charge over the plaintiff's land known as L.R Eldoret Municipality Block 3/58. Upon default in loan repayment, the 1st defendant proceeded to advertise the plaintiff's property for an auction that was due on 28th August 2014. The Applicant, being aggrieved by this action filed the present suit and application. The matter originated in the Environment and Land Court but was then transferred to the High court vide a ruling delivered on 7th May 2020 by Hon. S. M Kibunja.

Parties filed submissions to the application.

Applicant's Case

4. The plaintiff submitted that the application is premised on Order 40 of the Civil Procedure Rules. Citing *Giella vs Cassman Brown & Co Limited* (1973) EA 358 the applicant submitted that the three conditions to be satisfied before granting an injunction are;
 1. Whether there is a prima facie case with high chances of success.
 2. Whether the applicant stands to suffer irreparable harm that cannot be compensated by way of damages.
 3. Which side does the balance of convenience lie.
5. Citing *Mrao Limited vs First American Bank of Kenya and 2 Others* (2003) eKLR the plaintiff submitted that he is the registered owner of L.R Eldoret Municipality Block3/58 and he agreed to create a charge over the said land to secure the sum of kshs. 15,500,000/-. Contrary to what was agreed the 1st defendant allowed the 2nd defendant to divert kshs. 6,021,830/- to other accounts unknown to the plaintiff thus rendering the secured account under serviced and exposed the property charged by the plaintiff to the risk of being realized by sale in a public auction.
6. The applicant's case is that despite the fact that the plaintiff and 2nd defendant made payments to the 1st defendant, the 1st defendant without issuing a statutory notice proceeded to advertise the property for sale by way of public auction, at a gross under value and that the forced sale price will not cater for the amount claimed and will only benefit the defendant bank and the auctioneers. The applicant will suffer irreparable injury if the orders sought are not granted. It was further submitted that the defendant failed to follow the procedure for exercising statutory power of sale as provided in the [Land Act](#). Citing *Kenya Commercial Bank Limited vs Pamela Akinyi Ochieng*, Civil Appeal no. 114 of 1991 and *Koileken Ole Kipolonka Orumos vs Mellech Engineering & Construction Limited & 2 others* (2018) eKLR, the applicant submitted that the defendant ought to have ensured that a forced sale valuation was undertaken by a valuer before exercising the right of sale.
7. The applicant contended that the charge was illegal as the defendants had colluded to divert funds meant to liquidate the debt so as to embarrass and expose the plaintiff's land to public auction and loss.



The applicant prayed that the application be found to be merited.

1st Respondent's Case

8. The 1st Respondent, citing the case of *Moses Ndegwa Gitonga v Halifax Financial Services Ltd & another* (2018) eKLR submitted that it granted the 2nd defendant a financing facility of kshs. 15,500,000/- together with interest and other bank charges. The facility was secured by a first legal charge for the said amount secured by the plaintiff's land known as L.R Eldoret Municipality Block 3/58 which was registered in its name. The plaintiff and the 2nd defendant were aware as per the letter of offer that the banking facility was to be repaid by the 2nd defendant within 6 months or upon demand.
9. From the affidavit evidence the 2nd defendant defaulted in repaying the facility as was required under the contract and by 31st July 2014 was in default to the tune of kshs. 11,906,839.47. The 2nd defendant is still indebted to the 1st defendant and there have been no efforts made to reduce the debt.
10. It was the 1st Respondent's case that if the applicant was to convince the court of its sincerity in the wake of raising the issue of accounts, the Applicant should have at least cleared the balance of the original amount, then raise an issue with the accounts, a matter that should be the preserve of the main suit. The Respondent cited *Moses Ndegwa Gitonga vs Halifax Financial Services Ltd & Another*(supra) in support of this submission. It asked the court to be persuaded by the above decision to the extent that dispute as to accounts cannot be a basis for restraining a chargee from exercising its statutory power.
11. It is the respondents' case that the plaintiff will not suffer irreparable harm. Citing the cases of *Premier Flour Mills & 2 Others vs Standard Chartered Bank Kenya Ltd* (2019) eKLR and *Maithya vs Housing Finance Co. of Kenya & Another* (2003) 1 EA 133 at 139 among other relevant authorities, the respondent submitted that the plaintiff by offering its property as loan security should have contemplated the loss of property by sale in case of default in paying the loan. On the same authority the 1st Respondent stated the balance of convenience tilts in its favour; that the 2nd Respondent still owes the 1st Respondent a sum of kshs. 11,906,839.47/- which has remained outstanding since 31st July 2014. The said loans continue to accrue interest and it is clear that the defendant is likely to be given the short end of the stick if the injunction is granted.
12. On whether the statutory power of sale had accrued, the 1st Respondent submitted that it caused to be served upon the plaintiff a statutory notice in terms of the provisions of section 90 of the *Land Act*. The letter is dated 10th June 2013 and the service was effected through registered post using the plaintiff's postal address. It was the 1st Respondent's contention that it complied with the provisions of the *Land Act*.
13. The 1st Respondent cited the case of *MWK vs PKM Interested Party Equity Bank (Kenya) Limited* (2019) eKLR and submitted that the applicant has not given any evidence to warrant reopening of the charge by the court; that there is no evidence to prove that the charge was irregular, null or void. The same is a matter that should be determined at trial and not be a basis of granting an injunction. The 1st Respondent avers that the Applicant is seeking equitable orders and the same ought not to be granted; that the Applicant has not complied with the maxim of he who seeks equity must do equity as they have failed to remit the outstanding balance. Further, the applicant hands are not clean as it has not made any efforts to settle the arrears. The Respondent prayed that the application be dismissed with costs.

Issues for Determination

14. Upon perusing the submissions and the pleadings in this matter, the following issues which arise for determination shall be determined together as they are all related.



1. Whether the temporary injunction should be granted
2. Whether the 1st respondent's statutory power of sale was exercised according to the law
3. Whether the accounts between the parties should be reconciled.

Whether the Temporary Injunction should be Granted

15. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -

Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."
16. The conditions for consideration in granting an injunction were settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the conditions a party must satisfy for the court to grant an interlocutory injunction as follows: -

"Firstly, 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."

17. The test for granting of an interlocutory injunction was also considered in the *American Cyanamid Co. vs Ethicon Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -
- i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.

Whether there exists a prima facie case

18. In *Mrao Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 the court pronounced itself on a prima facie case as follows;

A Prima facie case in a civil application includes but not confined to a genuine and 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 later.



19. The applicant's contention is that there exists a prima facie case based on the claim that the 1st Respondent diverted some of the funds it was to advance as part of the facility to other entities. The applicant also disputes the exercise of the statutory power of sale by the 1st Respondent and went to the extent of seeking a reconciliation of accounts to clear up part of the dispute.
20. The sub stratum of the suit herein rests on proving that the statutory power of sale was not exercised in accordance with the law. Therefore, in order to determine the existence of a prima facie case the court will explore whether there is any truth to this statement.
21. The statutory power of sale under the Land Act is exercised when the chargor fails to adhere to the terms of the charge and defaults on payment. The Land Act 2012 lays down the requirements for a valid statutory notice and the procedure for exercising the statutory power of sale. In line with the procedure for exercising the statutory power of sale, the court is faced with the following issues to determine; Whether the Defendant served the Plaintiffs with a Statutory Notice pursuant to section 90(2) of the Land Act; Whether the Defendant served the Plaintiffs with a Notification of sale; Whether the Defendant served the Plaintiffs with a Notice to Sell pursuant to section 96(2) of the Land Act; and Whether the Defendant carried out a valuation of the charged property. Whether the 1st defendant served the Plaintiff with the statutory notice pursuant to section 90 of the Land Act.
22. Section 90(1) of the Land Act provides that: -

“if the chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

According to 90 (2) of the said Act, the notice to be served shall adequately advise the chargor of:

- a. The nature and extent of the default by the chargor;
- b. If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed.
- c. (Not relevant to these circumstances)
- d. The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

Section 90 (3), provides that if the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:

- a. sue the chargor for any money due under the charge,
- b. appoint a receiver of the income of the charged land,
- c. lease the charged land, or if the charge is of a lease, sublease the land,
- d. enter into possession of the charged land; or



- e. Sell the charged land
23. It is not in dispute that the applicant secured a loan facility from the 1st Respondent for KShs. 15,500,000/-. The terms of the offer letter dated 30th March 2011 was that the 1st Respondent was at liberty to demand repayment of the loan facility and further, that the sum was due in lump sum, within 6 months.
24. The Applicant's default was brought to the attention of the 2nd Defendant vide a letter dated 24th April 2013. I have perused the statutory notice dated 10th June 2013 and marked as JK5 in the replying affidavit dated 15th September 2014. In this respect the 1st Defendant/Respondent complied with section 90 of the Land Act.

Whether the 1st defendant served the Plaintiff with a notice to sell pursuant to section 96 of the Land Act

25. Section 96(1) of the Land Act provides that: -

“...where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.”

Section 96(2) of the Land Act provides as follows: -

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

26. The Applicant averred that the 1st Defendant did not serve a Notice to sell as mandatorily required under section 96(2) of the Land Act. This failure alone is enough to support a grant of an injunction. Generally, failure to comply with statutory provisions gives rise to prima facie case with serious chances of success. I have perused the replying affidavit by the 1st respondent and there is no evidence that there was a notice to sell issued as per the provisions of section 96(2) of the Land Act.
27. I therefore need not delve any further into the procedure governing the statutory power of sale as it is clear the 1st Respondent did not comply at this juncture. The applicant therefore has a prima facie case. I shall however render my brief view on the other requirements for granting of interlocutory injunctions.

Whether damages will be an adequate remedy

28. The value of the land is determinable vide a valuation. It is trite that once property is used as security for a charge or any facility it becomes a commodity. I find that the applicant has not shown that damages will not be an adequate remedy.

Balance of convenience

29. The applicant was granted the loan facility in the year 2011 and 11 years later the same is yet to be repaid. I am in agreement with the 1st respondent that it is in danger of getting the short end of the stick as the interest may cause the loan amount to outstrip the value of the land resulting in a loss.
30. Given that the Applicant has a prima facie case by virtue of the failure of the 1st respondent to exercise statutory sale in accordance with the law, the temporary injunction is granted.



31. However, I decline to grant prayers 5 and 6. These prayers can be canvassed during trial. The 1st Respondent is hereby restrained by means of a temporary injunction from proceeding by way of public auction to sell the plaintiff's property comprised in title no. Eldoret/municipality Block 3/58. However, to avoid a situation where the applicant gets an injunction and goes to slumber, it is hereby ordered that the injunctive orders herein issued shall remain in force for a period not exceeding nine (9) months from the date of this ruling. The applicant must ready this suit for hearing and determination within the said period. Costs shall be in the main suit.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF JULY 2022

E. K. OGOLA

JUDGE

