



Watene & another v Kenya Women Microfinance Bank & 3 others (Civil Case E862 of 2021) [2022] KEHC 11956 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E862 OF 2021**

WA OKWANY, J

JULY 28, 2022

BETWEEN

KENNETH KIRIKA WATENE 1ST PLAINTIFF

NANCY MUTHONI NJOROGE 2ND PLAINTIFF

AND

KENYA WOMEN MICROFINANCE BANK 1ST DEFENDANT

ZENITH PHARMACEUTICAL LIMITED 2ND DEFENDANT

GREGORY KIVUVA MUINDE 3RD DEFENDANT

WATTS AUCTIONS 4TH DEFENDANT

RULING

1. This ruling determines the application dated October 13, 2021 where the applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That an order of temporary injunction do issue from this Honourable Court restraining the Respondents herein from jointly and/or severally by themselves, their servants, agents, employees and/or any other person acting on their behalf from further advertising for sale, selling by way of auction or otherwise, trespassing, alienating, transferring and/or evicting the Applicants from all that property known as LR No 5955/20 situate in Karen, Nairobi pending the hearing and determination of the main Suit.



4. That an order do issue from this Honourable Court for a current valuation to be conducted over all that property known as LR No 5955/20 by an independent valuer.
 5. That an order of mandatory injunction do issue from this Honourable Court against the 1st Respondent to furnish and bring before this Court Certified Bank Accounts statements in respect of the subject credit facility extended to the 2nd and 3rd Respondents for which that property known as LR No 5955/20 is charged.
 6. That anchored on prayer (5) above, an independent auditor be appointed to audit the said accounts and issue to this Court a Report on the accuracy and appropriateness of those accounts as produced by the 1st Respondent.
 7. That the costs of this application be borne by the Respondents.
2. The application is supported by the 1st plaintiff's and is based on the following grounds:-
1. The 1st Applicant is the registered owner of the Suit Property herein known as LR No 5955/20 situate along Ushirika Road, Karen, Nairobi.
 2. The Applicants are a married couple who have been living on the Suit Property for the last Thirty (30) years.
 3. The Applicants have received a Notification of Sale from the 4th Respondent acting on the 1st Respondent's instructions to sell the Applicants Matrimonial Property by way of public auction on the 22nd of October, 2021 for a loan facility that was disbursed to the 2nd Respondent.
 4. As at the time of creating a charge over the Applicants' suit property, the 1st Applicant and 3rd Respondent had entered into an agreement where the 1st Applicant's property would act as security for the loan facility to be advanced anchored upon the 2nd Respondent's books of account. The 3rd Respondent was to transmit half the loan facility amount to the 1st Applicant's nominated account.
 5. To date, the 3rd Respondent has not transmitted the amount of money he was obligated to transmit to the 1st Applicant. This matter has since been reported to the police and is pending investigations.
 6. On account of the foregoing, the 1st Applicant herein through various letters in his capacity as the Chargor, sought information from the 1st Respondent specifically, on the loan status, disbursement dates and statement of accounts of the loan facility, but this information was never given on grounds of confidentiality.
 7. Most egregiously though, is that despite the foregoing, the 1st Applicant herein has learnt that the 1st respondent continued to advance the 2nd Respondent further credit facilities against his title, without his consent and/or knowledge.
 8. As regards the foregoing, among the justiciable issues for determination in the Plaint herein will be whether the Chargor and Borrower have distinct rights and whether a financial institution can claim confidentiality against a Chargor to a loan facility advanced to a Borrower upon the Chargor's security as was the case herein.
 9. The Applicant herein thus aver that they were not only kept in the dark with regard to disbursement of funds and further advances for the benefit of the 2nd and 3rd Respondents



but were also never informed of the default Status of the facility and/or the statutory notices in accordance with the provisions of Section 90 (2) of the Land Act.

10. In addition to the foregoing, the 4th Respondent herein has purported to advertise the subject property for sale by way of public auction in reliance of a valuation report that was done in the year 2014 (7 years ago) in violation of the express provisions of Section 97 (3) of the Land Act.
 11. The foregoing is despite the fact that the author of the valuation report dated 5th September, 2014, Shelter (M) Valuers Limited (upon which the loan facility was granted) who had valued the Suit Property at Kshs. had on the 27th of June, 2017 valued the same property at Kshs. 110,000,000.
 12. In seeking to sell the Suit Property (1.8 acres in Karen) at a forced sale value of Kshs. 60,000,000.00, the Respondents will in effect be selling the Applicants Suit Property LR No 5955/20 at below 75% of its current market price depriving the Applicants of their Matrimonial Property.
 13. This Honourable Court is empowered by Section 97(3) of the Land Act to arrest and annul this eminent scheme by the Respondents to arbitrary deprive the Applicants of their Matrimonial Property I-R NO 5955/20 by public auction.
 14. It is trite law and as well as diversely pronounced by our Courts that valuation under Section 97 of the Land Act serves as an important legal calling since it informs the reserve price of the property and examines the market price reasonably obtainable at the time of sale. It is not merely for purposes of carrying out a public auction or solely for recovering debts, it also reinforces the rights of a charger to have reasonable value for the charged property. [Palmy Company Limited versus Consolidated Bank of Kenya Limited, Milimani HCCC 527/2013 (2014) and Nicholas Ruthiru Gatoto versus Ndarugu Merchants & 2 others, Milimani HCCC 4275/94 (2014) eKLR.
 15. Unless this Court grants the temporary injunction orders sought herein, the 4th Respondent will proceed to auction that Matrimonial Property known as LR No 5955/20 thereby causing the Applicants irreparable loss.
 16. Further to the foregoing, if the orders herein sought are not granted, the suit herein will be rendered nugatory.
 17. It is proper and just that the orders sought herein are issued to prevent an occasion of injustice to the Applicants.
3. The 1st respondent opposed the application through the replying affidavit of its Legal counsel Mr. Benard Kiprotich who states that the 1st applicant obtained a loan facility of Kshs 20,000,000 from the 1st respondent. He further states that a charge was registered in favour of the 1st respondent against property known as LR NO 5955/20 where the 1st applicant acted as a guarantor to the facility advanced to the 2nd respondent.
 4. He avers that the 2nd respondent defaulted in the loan repayments and that both the applicant and the 2nd respondent were served with statutory notices but failed to settle the loan arrears. He states that the applicant made several proposals to sell the property by private treaty which proposals did not yield any fruits. He contends that the 1st respondent was not privy to the application dated September 17, 2014 involving the 1st applicant, on one hand, and the 2nd and 3rd respondents on the other hand. He further states that the only disbursement made to the 2nd respondent was on October 8, 2014 with



respect to the suit property as collateral. He contends that no single payment was received by the 1st respondent in relation to the outstanding loan in the years 2017 and 2018 and that the applicant was aware of the statutory notices and notifications.

5. I have carefully considered the application, the respondent's response, the rival arguments made by the parties together with the authorities that they cited. The main issue for determination is to establish whether the application meets the requirements for granting of the equitable remedy of injunction.
6. The conditions for the grant of a temporary injunction were well set out in the case of *Giella v Cassman Brown & Co Ltd*(1973) EA 385, at page 360 where Spry J held that:-

“The conditions for the grant of an interlocutory injunction are ...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.”

7. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, Bosire, JA defined a *prima facie* case as follows:-

“...So what is a prima facie case? I would say that in civil cases it 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 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

8. The applicants seek injunctive orders to restrain the 1st and 2nd defendants from advertising, for sale by way of auction, the property known as LR No 5955/20 situate in Karen Nairobi. The application was based on the fact that the 1st Applicant and the 3rd respondent entered into an agreement where the applicants' property was offered as security for a loan advanced to the 2nd respondent. The terms of the agreement were that the 3rd respondent would transfer half of the loan amount to the 1st applicant. The 1st applicant's case is that the 3rd respondent did not transmit the amount as agreed and the efforts, by the applicant, to enquire about the status of the loan from the 1st respondent did not bear any fruit.
9. The 1st respondent maintained that it was not privy to the agreement between the applicant and the 2nd and 3rd respondent. It added that there was only one disbursement made to the 2nd respondent with respect to the suit property.
10. In *Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No 69 of 1991 the Court of Appeal stated as follows:-

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On



an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

11. Further, in *Ochola Kamili Holding Limited v Guardian Bank Limited* (2018) eKLR while commenting on the behavior of a plaintiff after an obtaining an order of injunction, the court stated that:-

"The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party. Or to deny justified repayment of outstanding loan. That once such a post-injunction behaviors is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice"

12. From the foregoing cases, it is evident that an injunction is an equitable remedy that can only be granted where the applicant demonstrates that he has a right whether legal or equitable that requires protection and that his conduct meets the approval of equity.
13. It was not disputed that the 1st respondent advanced the loan facility to the 2nd respondent and that a charge was registered in favour of the 1st respondent against the suit property registered in the name of the 1st applicant. I have perused the documents that the parties relied upon and I note that 1st applicant and the 2nd and 3rd entered into a loan agreement dated September 17, 2014. Under the said agreement, the loan amount of 20 million was to be shared equally between the 1st applicant and the 2nd and 3rd respondents who did not honour their part of the bargain as the Kshs 10,000,000 was not remitted to the applicant.
14. I note that the applicant has attached letters sent to the bank prior to the statutory notice asking for the status of the account. I also note that the 1st respondent did not avail any information in respect to the notice it sent to the applicant. I am convinced that, by his conduct, the 1st applicant demonstrated that he intended to make good of the loan facility.



15. The applicant also faulted the 1st respondent for alleged continued loan advancement to the 2nd respondent against his title without his knowledge/consent. The applicant attached a loan statement which shows that there was a principal increase of Kshs 864,882 on the loan on December 3, 2015. The court will however, not delve into the merits of the case and the documents presented by the parties as to do so at this interlocutory stage may prejudice the determination of the main suit.
16. I note that that the applicant did not benefit from the amounts disbursed to the 2nd respondent. The 2nd and 3rd defendants have not tendered evidence to controvert to the applicant's assertions.
17. On the issue of valuation, the applicant contended that the 1st respondent purported to advertise the subject property for sale by public auction using an old valuation that was conducted in 2014. The applicant contended that he will be deprived of his matrimonial home if the suit property is sold at a forced sale value of Kshs 60,000,000. The respondent observed that the issue of valuation should not stop the 1st respondent from exercising its statutory power of sale.
18. In the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, it was held that the purpose of the valuation under section 97(2) of the *Land Act* is twofold:-
 - a) to obtain the best price reasonably obtainable at the time of sale, thus protecting the right of the chargor to property. Doubtless, best or reasonable price which is comparable to interests in land of the same character and quality is part of the right to property itself; and
 - b) to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.

The duty under section 97(2) of the *Land Act*, is therefore, a serious legal requirement which will entitle the chargor to apply to court under section 97(3) of the *Land Act* to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void. That is the onerous nature and duty.
19. The principle emanating from the above case that the 1st respondent is under the obligation to obtain a reasonable value for the suit property. The 1st respondent ensured that a forced evaluation was undertaken as well as the open market value of the suit properties. I note that the first valuation was conducted in 2014 when the suit property was valued at 80 million whereas the second valuation which was conducted by the 1st respondent on June 28, 2021 shows that the suit property was assessed at a market value of Kshs 80,000,000 and a forced sale value of Kshs 60,000,000. The court takes judicial notice of the fact that the property ought to have appreciated in 6 years given that its location. In this regard, I find that will be necessary to conduct a fresh valuation.
20. On irreparable harm the applicants submitted that they are senior citizens who have been in possession of the subject property for the last forty years. I find that the applicant have demonstrated that they will be greatly prejudiced if the injunctive orders sought are not granted.
21. In the circumstances of this case, I find that the balance of convenience tilts in favour of the applicants who stand to suffer the greater harm of losing an asset they have held for many years.
22. In the upshot, I find that the application meets the requirements for grant of equitable remedy of injunction and I therefore allow it in the following terms:-
 - a. A temporary injunction is hereby granted restraining the Respondents herein from jointly and/or severally by themselves, their servants, agents, employees and/or any other person acting on their behalf from further advertising for sale, selling by way of auction or otherwise, trespassing, alienating, transferring and/or evicting the Applicants from all that property



known as LR No 5955/20 situate in Karen, Nairobi pending the hearing and determination of the main Suit.

b. A fresh valuation to be conducted over all that property known as LR No 5955/20 by an independent valuer preferred by both the applicant and the respondent.

c. The costs of the application shall abide the outcome of the main case.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Umazi for Walukwe for Plaintiff/Applicant.

Imbugwa for Cheronono for 2nd and 3rd respondent.

Court Assistant- Sylvia

