



**Elite Intelligent Traffic Systems Ltd v Housing Finance Company Limited (Commercial Suit E713 of 2021) [2022] KEHC 13087 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 13087 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E713 OF 2021  
A MABEYA, J  
AUGUST 31, 2022**

**BETWEEN**

**ELITE INTELLIGENT TRAFFIC SYSTEMS LTD ..... PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. The court has been moved by the plaintiff vide a Motion on Notice dated July 28, 2021. The same was made pursuant to order 40 rule 1 of the *Civil Procedure Rules 2010* and section 1A, 3A and 63(e) of the *Civil Procedure Act*.
2. In the application, the plaintiff sought a temporary injunction to restrain the defendant from advertising for sale, disposing off, alienating, transferring or interfering in any other manner whatsoever with property known as LR no 209/1051/1 (“the suit property”) pending the hearing and determination of the suit.
3. The application was predicated upon the grounds that the plaintiff and defendant entered into loan agreement for a facility worth kshs 364 million of which kshs 95 million was for takeover from Kenya Commercial Bank (KCB) and the balance was for the construction of apartments on the suit property.
4. On November 28, 2013, the plaintiff created a supplementary charge in favour of the defendant over a property known as L R no 1160/339 (Karen property) as security for the loan of kshs 364 million in terms of the loan agreement.
5. It was the plaintiff’s case that the defendant paid to KCB the sum of kshs 95 million but failed to disburse funds to it when needed for the construction of the apartments on the suit property which caused massive losses. That when the defendant continued to dishonour its obligations, the plaintiff



- lodged a case against the defendant, that is Civil Suit Number 83/2016, where it sought, *inter alia*, an injunction to restrain the defendant from selling the suit property and a discharge of the supplementary charge over the Karen property.
6. That however, the defendant realised its mistakes and opted to reach a settlement with the plaintiff whereby the defendant was willing to waive excess interest and both parties settled for a final settlement of kshs 71,800,000/- as the full debt. That despite the settlement agreement, the defendant acted unilaterally and reverted back to previous loan agreements in breach of the settlement.
  7. The plaintiff averred that the defendant listed it with the Credit Reference Bureau for default whereas there was no time limit set for the payment of Kshs 50,000,000/- as per the settlement agreement. That therefore, the defendant has given wrong information about the plaintiff to other banks and which listing killed all chances of the plaintiff getting any other financier since the failure of Spire Bank.
  8. That the defendant has since received a demand letter from the defendant's lawyers on August, 10, 2020 stating that the defendant was unilaterally rescinding the settlement agreement and reinstating the loan facility despite the fact that the loan claimed was never advanced and further threatening to dispose of the suit property. That as at the time of filing this suit, the defendant was claiming a staggering sum of kshs 174,125,294.95. That unless the court intervenes, the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
  9. In opposition, the defendant lodged a replying affidavit sworn on August 5, 2021 by its legal manager. Its case was that; the subject application and suit do not raise any issues warranting a trial as it was only intended to delay the realisation of the bank securities. That the plaintiff accepted a loan facility amounting to Kshs.364,000,000/- with properties known as L R no 209/1052/1 and L R no 1160/330 being offered as security.
  10. That the parties had agreed that the plaintiff would repay the loan facility without default or else the charged properties would be sold to clear and/or reduce the debt. Nevertheless, the plaintiff defaulted. Demands by the defendant for regularization of the accounts were unsuccessful.
  11. The defendant therefore contended that since the plaintiff had changed the scope of the development project and was sourcing for new equity partners and/or to borrow from other lending entities, it was unable to progress the plaintiff's application for development financing.
  12. That the parties entered into a settlement agreement which was dependent on the plaintiff fulfilling its obligations failure to which the agreement would be rendered otiose. The plaintiff failed to adhere to the settlement agreement despite indulgence by the defendant. In the premises, the defendant had no option but to recover its outlay by exercising its statutory power of sale.
  13. In a supplementary affidavit, the plaintiff contended that the plaintiff had already paid a total sum of kshs 4,196,055/- as interest on the initial partial disbursement to KCB and denied any default. That repayments were purely based on the sale of the proposed apartments thereby including a pre-condition of 30% of pre-sales as set out and which were dutifully fulfilled. That HCC 83/2016 was filed due to the defendant's failure to fulfil its obligations and its expectation for the plaintiff to settle the full amount while it was an express agreement that the bank would finance the project that would eventually service the loan.
  14. The plaintiff denied ever receiving any statutory notices and contended that the intended auction would be unlawful as the parties are bound by the settlement agreement and the defendant cannot walk away from it unilaterally.



15. The court has considered the record in its entirety. This is an injunction application. The principles applicable are those set out in *Giella v Cassman Brown (1973) EA 358*. These are: that the applicant must establish a *prima facie* case with a probability of success, secondly, the applicant must show that if the orders sought are not granted it will suffer loss that is incapable of being compensated by an award of damages, thirdly, if in doubt, the court will determine the matter on a balance of convenience.
16. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] Eklr, the Court of Appeal defined *prima facie* to be 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 that calls for an explanation or rebuttal from the latter.
17. The plaintiff submitted that there is a binding settlement agreement between the parties and the defendant's attempt to rescind the same and reinstating the loan facility is unfair and prejudicial as the plaintiff has performed its obligations therein. That the failure by the defendant to comply with the settlement agreement and the relevant statutory provisions gives rise to a *prima facie* case with chances of success.
18. The defendant submitted that the plaintiff was in breach of the loan repayment modalities since 2013. It was in breach of the settlement agreement as it failed to pay the agreed amount of kshs 50,000,000/- which constituted a repudiation of future undertaking upon which the defendant could end the settlement agreement.
19. The record shows that on October 10, 2013, the parties entered into a loan agreement for a facility of kshs 364,000,000/- secured by L R no 209/1052/1 and L R no 1160/330, respectively.
20. Subsequently, the plaintiff fell into arrears on the so far disbursed amount which led to a settlement agreement. Under that agreement, the plaintiff was to pay a total sum of kshs 71,800,000/-. Since the plaintiff had already paid a sum of kshs 16,800,000/- to the defendant, the outstanding balance was kshs 55,000,000/-. Spire Bank Limited was to issue a financier's undertaking to the defendant for kshs 50,000,000/- for which the defendant discharge L R no 209/1052/1. The plaintiff was to pay the defendant the balance of kshs 5,000,000/- by December 31, 2017. Time was of the essence.
21. Despite as aforesaid, the plaintiff paid the kshs 5,000,000/- after December 31, 2017 while the professional undertaking by Spire Bank Ltd never materialized. Time extension for payment of loan arrears were granted by the defendant but the plaintiff failed to repay the loan.
22. In this regard, the settlement agreement was breached by the plaintiff. This gave the defendant the right to revert to the initial loan agreement and to seek to exercise its statutory power of sale.
23. The foregoing being the case, I find that it has not been demonstrated that there are any rights of the plaintiff that have been infringed by the defendant that would require rebuttal. In the premises, the court finds that no *prima facie* case has been established.
24. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held: -
 

“If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).”
25. In this regard having found that the first limb to grant an interim injunction has failed there is no need to consider the remaining two limbs.



26. As such the application stands dismissed with costs to the defendant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF AUGUST, 2022.**

**A MABEYA, FCIArb**

**JUDGE**

