



REPUBLIC OF KENYA



Omega Risk Management Limited v NCBA Bank Kenya PLC Ltd (Civil Suit E024 of 2021) [2022] KEHC 13084 (KLR) (Civ) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 13084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT E024 OF 2021
A MABEYA, J
AUGUST 31, 2022**

BETWEEN

OMEGA RISK MANAGEMENT LIMITED APPLICANT

AND

NCBA BANK KENYA PLC LTD RESPONDENT

RULING

1. The plaintiff moved this court *vide* a motion on notice dated August 12, 2021. The same was brought under Order 40 rule 1 and Order 57 rule 1 of the [Civil Procedure Rules](#); sections 103(3), (4) and 104(1) and (2) of the [Land Act 2012](#).
2. The plaintiff sought an injunction to restrain the defendant from entering, selling, advertising, transferring and/or interfering with the property known as Office Suite No 7C erected upon LR No 1/716 Commodore Office Suites (“the suit property”).
3. The plaintiff further sought an order to extend the period for its compliance with the notice dated July 16, 2021 and to allow it to pay reduced installments of Ksh 100,000/- per month pending the hearing of the suit.
4. The grounds for the application are that; the defendant issued the plaintiff with a statutory notice of 45 days through Purple Royal Auctioneers. The defendant claims Ksh 9,261, 068.50 in arrears and Kshs 19,308, 656.51 as outstanding loan balance. That the same is an exaggerated figure as the balance inclusive of interest is not more than Kshs 10,000,000/-.
5. The plaintiff pleaded that it is unable to pay the loan installments of Kshs 271,757/- owing to the hard economic times faced by its business and it therefore prayed to be allowed to service the loan through monthly installments of Kshs 100,000/-.



6. The defendant opposed the application *vide* a replying affidavit sworn on November 3, 2021 by Jackson Nyaga, its legal counsel. He asserted that the application is misconceived, bad in law, full of misrepresentation and heavily laden with material non-disclosure of facts.
7. That *vide* a letter of offer dated December 5, 2019, the defendant agreed to advance to the plaintiff various loan facilities in the nature of mortgage loan and an invoice discounting of Kshs 12,148,095.18 and Kshs 6,000,000.00, respectively.
8. That the aforementioned facilities were advanced to the plaintiff on the strength of the security of a further charge over the suit property and a personal guarantee and Indemnity for Kshs 19,284,734/- each in the name of Karanja K Njama and Franklin Mugendi. That the plaintiff read and understood the letter of offer and the terms therein and thereafter signified its acceptance.
9. That the plaintiff has been in flagrant breach of the loan agreement by failing to regularize the loan account which prompted the defendant to issue the requisite 90 days statutory notice on February 1, 2021. The same required the plaintiff to regularize the loan account as it was then in arrears to the tune of Kshs 7,972,421.68 with the total outstanding balance standing at Kshs 18,702,390.62.
10. Despite the 90 day statutory notice, the plaintiff failed to pay off the loan arrears which prompted the defendant to issue the requisite 40 day statutory demand dated May 24, 2021. The same required the plaintiff to regularize the loan account whose arrears stood at Kshs 8,598,119.73 with the total outstanding balance standing at Kshs 18,897,438.24
11. Pursuant thereto, the defendant instructed Purple Royal Auctioneers *vide* a letter of July 13, 2021 to issue a 45 day redemption notice and a 14 day notification for sale. In the premises, the application is solely meant to deny the defendant its right to realize the security.
12. The issue for determination is whether the plaintiff has met the test for the grant of injunctive relief.
13. The principles for consideration in granting an interim injunction were established in *Giella v Cassman Brown [1973] EA*. These are: firstly, 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, he 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.
14. On *prima facie* case, the record shows that the plaintiff obtained a loan facility pursuant to the letter of offer dated December 5, 2021. The same was secured by a further charge over the suit property for Kshs 19,200,000/-.
15. There is no dispute that the plaintiff is in arrears and therefore in breach of its obligations under the facilities. It only pleaded that in or about August 2019, one of its major clients, Tuskys Supermarket, delayed in payment on monthly invoices raised by it. That in the circumstances, it was unable to meet most of its financial obligations, particularly servicing the loan facility with the defendant. Further, that the Covid 19 pandemic threw the plaintiff into deep financial distress.
16. The plaintiff also sought a moratorium from the defendant on the monthly repayment installment and proposed to pay the loan in installments Kshs 100,000/- as opposed to the Kshs 271,751/- agreed under the facility. A proposal that was rejected by the defendant.
17. While the plaintiff disputes the outstanding loan balance, it is not in dispute that the plaintiff has failed to service the loan leading the defendant to pursue its statutory power of sale.



18. A *prima facie* case was defined in the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*[2003] eKLR, as follows:-

“... 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 to call for an explanation or rebuttal from the latter”.

19. In *Capital Realty Limited v Housing Finance & another* [2020] eKLR, Odunga J held: -

“In this case, the plaintiffs’ case is not that there is no amount due. In fact, the plaintiff’s problems seem to be, according to them, partly due to constrained cash flows. In my view the defendants can only be restrained if the Plaintiffs pay the amount claimed into court or claims that having repaid the sum that was lawfully due from them, the claim now being made by the defendants is, on the terms of the mortgage, excessive. That is not the case before me. Accordingly, the issue of exorbitant levies does not constitute a *prima facie* case for the purposes of restraining the defendants from exercising the statutory power of sale.”

20. I concur with the foregoing. The plaintiff willingly entered into a binding loan agreement with the plaintiff. It failed to comply with the terms therein in terms of repayment of the arrears. A dispute as to account is no basis for an injunction. That cannot constitute a *prima facie* case.

21. Accordingly, no *prima facie* case has been established by the plaintiff.

22. In this regard, as the first limb to grant an interim injunction has failed there is no need to consider the remaining two limbs.

23. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, Ca No 77 of 2012, the Court of Appeal stated: -

“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).”

24. In this regard, the prayer for an interim injunction pending determination of this suit fails. The court cannot interfere with the defendant’s right to exercise its statutory power of sale.

25. As for the prayers for extension of time for compliance and reduction of monthly instalments to Kshs 100,000/-, that would be to re-write the parties’ contract. That is not the duty of the court. The same is declined.

26. In the premises, the application dated August 12, 2021 is without merit and is hereby dismissed with costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 31 day of August, 2022.

A. MABEYA, FCI Arb

JUDGE

