



**Iringo & another v Equity Bank (Kenya) Limited (Civil Case E205 of 2020)
[2022] KEHC 13261 (KLR) (Commercial and Tax) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE E205 OF 2020
DAS MAJANJA, J
SEPTEMBER 30, 2022**

BETWEEN

JOHN MWENDA IRINGO 1ST PLAINTIFF

PROSPERITY MILLERS LIMITED 2ND PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

RULING

Introduction and background

1. The plaintiffs are customers of the defendant (“the bank”). The 2nd plaintiff (“the company”) applied for a business loan and overdraft facility amounting to Kshs 30,000,000.00. The facilities were secured by several securities. A personal guarantee by the 1st plaintiff supported by a deed of variation on the existing charge of Kshs 66,550,000.00 over LR No 13080/9 in favour of the bank to cover facilities for the company and Jofrim E A Limited (“Jofrim”). A personal guarantee by the 1st plaintiff supported by a deed of variation on the existing charge of Kshs 5,500,000.00 over LR No Karingani/Ndagani/9217 and 9161 in favour of the bank to cover facilities for the company and Jofrim. A corporate guarantee for Kshs 30,000,000.00 by Jofrim in favour of the bank. A fixed and floating debenture over of the company’s assets for Kshs 30,000,000.00 in favour of the bank and the director’s personal guarantees in favour of the bank.
2. The plaintiffs aver that LR 13080/9 (IR 211058), Karingani/Ndagani/9217 and 9161 (“the suit properties”) were also primary securities for loan facilities amounting to over Kshs 150,000,000.00 advanced by the bank to Jofrim.



3. In the plaint dated June 7, 2022, the company states that it installed a milling plant in Mavoko within Athi River and commenced operation. However, its business was hampered by COVID 19 restrictions, drought, regulatory and logistical constraints in the maize supply chain. In the circumstances, from September 23, 2021, the plaintiffs sought to reschedule the facilities but the bank failed to respond to their requests. Instead, the bank served the 1st plaintiff with a 45-day redemption notice demanding Kshs 22,657,158.76 due and owing as at March 21, 2022.
4. The plaintiffs' complaint is that the bank failed to serve the plaintiff with a statutory notice under section 90 of the Lands Act, 2012 and that it has failed to obtain a current valuation of the suit properties contrary to section 97(2) of the Lands Act, 2012. The plaintiffs aver that despite meeting with the bank and the fact that the suit properties are also securities for advances to Jofrim which are well in excess of the of Kshs 120,000,000.00, the 1st plaintiff will be prejudiced as he is a guarantor to the company and Jofrim and will suffer irreparable loss and damage.
5. The plaintiffs contend that the intended sale of the suit properties is ill-conceived and in bad faith as their value was in excess of Kshs 100,000,000.00 and the outstanding loan is only Kshs 22,000,000.00. Further, the plaintiffs aver that the bank intends to sell the suit properties at a throw away price. The plaintiffs therefore seek to restrain the bank from exercising its statutory power of sale.
6. In view of the scheduled sale, the plaintiffs filed a notice of motion dated June 7, 2022 made, *inter alia*, under order 40 rule 1, 2 and 4 of the Civil Procedure Rules seeking to restrain the bank from selling the suit properties pending the hearing and determination of the suit. It is supported by the 1st plaintiff's affidavit sworn on the same date. The bank opposes the application through the replying and further affidavit sworn by Mr Michael Gachau, its officer, on June 30, 2022 and July 21, 2022 respectively. The parties filed written submissions in support of their respective positions.

Analysis and Determination

7. The main issue for determination is whether the court should grant an injunction restraining the bank from exercising its statutory power of sale. It is common ground and the parties have cited authorities to confirm that the parameters for the grant of such an order are grounded on the principles established in Giella v Cassman Brown [1973] EA 358. In order to succeed, an applicant must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour.
8. 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 the three conditions to be fulfilled before an interim injunction is granted as set out in Giella v Cassman Brown (supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.
9. In Mrao Ltd v First American Bank of Kenya Limited and 2 others MSA CA Civil Appeal No 39 of 2002 [2003] eKLR, the Court of Appeal 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." Since the plaintiffs seek to restrain the bank from exercising its statutory power of sale, they must show that the bank is violating their right in the suit property. Further, the *prima facie* case is grounded on the facts which the plaintiffs set out to prove in the plaint.



10. According to the plaint and deposition, the fact that the bank advanced money to the company on the strength of securities over the suit properties is not disputed. Nor is the fact that securities are valid. The plaintiffs expressly admit that they are indebted hence the question whether the bank is entitled to exercise its power of sale does not arise. What is in issue is the process of exercise of sale by bank. In its plaint, application and deposition, the plaintiffs raise three issues. First, whether the bank should sell the suit properties in light of the fact that were used to secure advances to Jofrim, a related company. Second, whether the bank issued and served statutory notices. Third, whether the suit properties have been valued.
11. On the first issue, the plaintiffs argued that the securities over the suit properties are also primary securities for Jofrim hence its debt and that of the company are consolidated and actionable together thus calling in one part of the loan jeopardizes the other part as sale of shared security opens both parties to potential loss and damage. In this instance, if the securities are sold, then Jofrim's position is imperiled.
12. The bank argues that the mere fact that the securities in question have been used to secure another larger facility for the related company is not sufficient ground for this court to restrain the bank from exercising its statutory power of sale.
13. I hold that although the facilities for both companies are secured by the same securities, the plaintiffs have not pointed to any provision in the law or the agreements between the parties that prevents the bank from exercising its power of sale. Further, the bank did not forbear to exercise its legal remedies by acceding to the variation of charges to secure the company's facilities. I also dismiss this complaint on the ground that Jofrim is not a party to this suit and has not complained about the bank's action in respect of the company.
14. Since the plaintiffs are indebted to the bank, the next question for resolution is whether the bank has satisfied the procedure necessary for it to exercise its statutory power of sale. In this respect, the burden is on the bank to show that it has issued and served all the statutory notices. In *Nyagilo Ochieng & another v Fanuel Ochieng & 2 others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden to show that the statutory notice has been served does not in any way rest on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.
15. In an effort to discharge its burden, the bank exhibited a demand notice made under section 90 of the *Land Act*, 2012 dated July 29, 2021 addressed to the directors, Prosperity Millers Limited by the bank. Although the notice is endorsed that it was sent by registered post, the bank did not provide a certificate of posting or any other evidence of service upon the chargor. The bank also provided a statutory notice to sell issued under section 96(2) of the *Land Act*, 2012 dated January 20, 2022 addressed to the 1st plaintiff. The notice is also endorsed that it was sent by registered post although the bank did not provide a certificate of posting to support its case. Since the bank has not proved service of both notices, which are a condition precedent to the exercise of the statutory power of sale, I find that the plaintiffs have established a *prima facie* case with a probability of success on the ground that they were not served with statutory notices. Although there is proof that the subsequent notices were served, the fact that the initial 90-day notice was not served invalidates the entire process.
16. For completeness, I shall deal with the issue of valuation of the suit properties. Under section 97 of the *Land Act*, 2012 the bank, as chargee, has a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The section provides that the chargee has a duty to obtain the best price reasonably obtainable at the time of sale and that before exercising the right of sale, ensure that a forced



sale valuation is undertaken by a valuer. Under rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale.

17. The bank has produced three valuation reports prepared by Gimco Limited for the suit properties. The report dated March 29, 2022 for Karingani/Ndagani/9161 gives the market value at Kshs 4,800,000.00 and the force sale value as Kshs 3,600,000.00. The valuation report for Karingani/Ndagani/9127 is dated March 29, 2022 gives the market value as Kshs 4,800,000.00 and the forced sale value as Kshs 3,600,000.00. The valuation report for LR No 13080 (IR 211058) is dated April 7, 2022 and gives the market value as Kshs 91,000,000.00 and the forced sale value as Kshs 68,250,000.00. The valuation reports are prepared within the time frame provided by the law hence I find that the bank has complied with section 97 of the Land Act, 2012.
18. Since the plaintiffs are indebted to the bank, the company's covenant to repay the loan facilities remains despite the finding that the plaintiff have established a *prima facie* case with a probability of success on the issue of service of the 90-day statutory notice under section 90(1) of the Land Act. In the circumstances, the issue of an injunction pending the hearing and determination of the suit would not be in the interests of justice as the debt would continue to escalate and eat in the value of the securities. I am therefore inclined to grant an injunction on terms as was approved by the Court of Appeal in National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No 26 of 2009 [2009] eKLR where it observed as follows:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

19. I shall therefore grant an injunction but only limited to the period necessary for the bank to comply with the law by issuing and sending to the plaintiffs statutory notices under section 90(1) of the Land Act, 2012 and then proceed with all the other steps.

Disposition

20. I allow the notice of motion dated June 7, 2022 on the following terms:
- a. The defendant be and is hereby restrained from exercising its statutory power of sale in respect of the properties known as LR 13080/9 (IR 211058), Karingani/Ndagani/9217 and 9161 unless it issues fresh statutory notices under section 90 of the Land Act, 2012.
 - b. The defendants shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS DAY 30TH OF SEPTEMBER 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M Onyango

Mr Guantai instructed by Muriungi and Company Advocates for the Plaintiffs.



Mr Mbaji instructed by Igeria and Ngugi Advocates for the Defendant.

