



REPUBLIC OF KENYA



KENYA LAW
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**Koech v National Bank of Kenya Limited & another (Civil Case
E004 of 2021) [2022] KEHC 13259 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE E004 OF 2021
AN ONGERI, J
SEPTEMBER 23, 2022**

BETWEEN

REUBEN KIPKIRUI KOECH APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

**LYDIAH N WAWERU T/A PURPLE ROYAL AUCTIONEERS 2ND
RESPONDENT**

RULING

1. The Application coming for consideration in this ruling is dated December 14, 2021 seeking the following orders:-
 - (i) Spent
 - (ii) That pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of Temporary Injunction restraining the 1st and 2nd defendants/ respondents by themselves, their agents, servants, employees and their authorized persons from attaching, advertising for sale, selling, auctioning, alienating disposing or in any other way detrimental to the plaintiff's interest, dealing with properties, to wit L.R. No Kericho/chepsir S.S./147, L.r. No 209/10775, Block B 31, Flat No.97 Southends Flats and L.r. No Kericho/kipchimchim/4352.
 - (iii) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st and 2nd defendants/respondents by themselves, the agents, servants, employees and their authorized persons from attaching, advertising for sale, selling auctioning, alienating disposing or in any other way detrimental to the plaintiff's interest dealing properties, to wit L.R. No Kericho/chepsir S.S./147,



L.R. No 209/10775, Block B 31, Flat No.97 Southends Flats and L.R. No Kericho/kipchimchim/4352.

- (iv) That pending the hearing and determination of this suit, reconciliation balance be based on the interest rate of 4.5% per annum and the plaintiff be allowed to continue paying the loan accordingly.
 - (v) That pending the hearing and determination of this suit, an order do issue directing the 1st Respondent to remove the plaintiff/applicant's name from the negative listing in the Credit Reference Bureau.
 - (vi) That the Honourable Court issues such further orders as will serve the interests of justice in the circumstances of this case.
 - (vii) That costs of this Application be provided for.
2. The Application is supported by the affidavit of the Applicant dated December 14, 2021.
 3. The applicant avers that he was an employee of the 1st Respondent, whilst working for the 1st respondent, they advanced loans to him at a rate of 4.5% p.a and the repayment was based on deduction from his salary.
 4. The applicant avers that he was the proprietor of the suit properties herein which he had offered as security for his loans.
 5. The applicant avers that despite termination of his employment, he continued to pay his loans diligently but upon exhausting his resources, he requested the 1st respondent to restructure the loan facilities, the 1st respondent subsequently approved this request.
 6. Following constraints occasioned to him by the loss of employment and the lack of alternative income generating activities in the wake of the COVID-19 pandemic, he was unable to make further payments.
 7. The applicant requested the 1st respondent to grant him a moratorium as per the Central Bank circular dated 27/3/2020 directing commercial banks to grant moratorium on loan repayments in order to cushion their customers from the adverse effects of the corona pandemic. The 1st respondent did not respond to the request for moratorium.
 8. The applicant avers that he had commenced the process of sub division of the suit properties in order to offset the loan when the 1st respondent served him a statutory notice of sale via email and subsequently served him with a notice of redemption and notification of sale.
 9. The applicant avers that the 1st respondent's decision to list him with the Credit Reference Bureau based on erroneous default arising from the unlawful and illegal conversion of interest rates affected him adversely and as such he could not mitigate his losses, he is unable to apply for alternative employment with the Public Service Board as he cannot get clearance from the bureau and he is unable to negotiate with another financial institution with a view of getting loans or opting out of the loan arrangement with the 1st Respondent by way of buy off.
 10. The 1st respondent opposed the Application and filed a replying affidavit dated 29/1/2022.
 11. The 1st respondent avers that the applicant was a beneficiary of various loan facilities, whose terms and conditions are contained in several letters of offer.



12. The applicant offered the suit properties herein as securities towards repayment of the loan amount and subsequently charges were registered against the suit properties' titles and the 1st respondent's interests as a chargee noted therein.
13. The 1st respondent avers that at the time of advancement of the loan facilities, the applicant was an employee of the 1st respondent and as such benefited from staff preferential rates under its staff loan policy.
14. Following the voluntary resignation of the applicant, the staff preferential rates ceased to apply and he was legally and contractually liable to commercial interest rates, this position was communicated to the applicant vide letter dated 17/5/2020.
15. The 1st respondent avers that soon after the applicant's employment ended, the applicant's loan account fell into arrears and as a result the outstanding sum accrued default interest in addition to the principal interest provided for in the letters of offer.
16. The 1st respondent avers that the loan facilities were consolidated and restructured under terms agreed upon by both parties, however, the applicant failed to remit the monthly installments as agreed upon by both parties and the loan account slipped further into arrears.
17. The applicant neglected and/or reneged to service the loan facility and the 1st respondent opted to exercise its statutory power of sale that had crystallized.
18. The 1st respondent issued the applicant with a ninety (90) day statutory notice dated 9/3/2021 and a forty (40) day redemption notice dated 5/7/2021.
19. The 1st respondent undertook valuation of the suit properties and instructed the 2nd respondents to sell the suit properties. The 2nd respondent subsequently issued the applicant with notices and advertised the intended sale with the local dailies.
20. The parties filed written submissions which I have considered.
21. The applicant submitted that the application herein met the legal principles set out for granting an interlocutory injunction.
22. The applicant submitted that he had a prima facie case, he contended that he had furnished sufficient evidence that demonstrated the infringement of a right, namely, that the actions of the respondents were calculated to clog and/or fetter the applicant's equity of redemption and as a result the Applicant stood to suffer irreparable loss and harm.
23. The applicant contended that the provisions of section 90 of the Land Act requiring that notice be served upon the chargor were unequivocal and preemptory.
24. The applicant reiterated that these provisions were put in place to protect chargors from an unscrupulous process of sale in exercise of the statutory power of sale.
25. The applicant contended that he was not served with the statutory notices as required by law, as the 1st respondent had sent the statutory notices to the wrong postal address.
26. The applicant contended that the balance of convenience tilted towards preservation of suit properties pending the determination of the suit, against the manifest injustice that would arise from sale in exercise of the statutory power of sale under circumstances that do not comply with the guiding legal regime.



27. The applicant reiterated that the instant application had met all conditions for the grant of interlocutory relief.
28. The respondent opposed the application, the respondent reiterated that the suit herein did not raise any prima facie case with a probability of success and neither did it meet the threshold for grant of the reliefs sought.
29. The respondent contended that the applicant had admitted to having taken a loan facility which he defaulted in servicing. The Respondent was therefore not in breach of any of its statutory and contractual duties as to be deterred from exercising the statutory power of sale, and that if the application were to be allowed, it would suffer irreparably as the loan amount and accrued interest may outstrip the value of the suit properties.
30. The respondent whilst acknowledging the inadvertent error in the postal address they used to issue the statutory notices, contended that this could not be the basis for the grant of a blanket injunction as the said error could be remedied through re-issuance of the ninety 90 day statutory notice.
31. The respondent reiterated that the balance of convenience was in their favour as the applicant breached his contractual duties by failing to honour his repayment obligations and as a result of the continuous default, the loan amount and accrued interest would outgrow the value of the suit properties thus subjecting the respondent to financial loss.
32. The issues for determination are as follows:-
- (i) Whether the applicant is entitled to an injunction.
 - (ii) Who pays the cost of the Application?
33. On the issue as to whether the applicant is entitled to an injunction, I find that the principles for grant of injunctions were laid down in the Court of Appeal case of *Giella v Cassman Brown Co Ltd* [1973] E A 358 where Hon Spry J stated as follows: -
- “The conditions for the grant of interlocutory injunction are now, I think well settled. 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 an irreparable injury, which cannot be adequately be compensated by an award in damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”
34. In the current case, I find that the applicant has defaulted in repayment of the loan granted to him. I find that he has not established that he has a prima facie case with probability of success.
35. I also find that the Applicant has not shown that he will suffer irreparable damage that cannot be compensated by an award of damages.
36. In my view, the balance of convenience in this case tilts in favour of the Respondent.
37. I dismiss the Application dated 14/12/2021 with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF SEPTEMBER, 2022

A. N. ONGERI

JUDGE

