



**Forest Lodge Ltd v Credit Bank Ltd (Commercial Civil Suit E676 of 2021)
[2022] KEHC 14545 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E676 OF 2021**

A MABEYA, J

OCTOBER 28, 2022

BETWEEN

FOREST LODGE LTD PLAINTIFF

AND

CREDIT BANK LTD DEFENDANT

RULING

1. This is a ruling on an application by the plaintiff dated July 9, 2021. It was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, section 90 of the *Land Act* 2012, order 40 rules 1 and 2, and order 51 rule 1 of the *Civil Procedure Rules 2010*.
2. The application sought a temporary injunction to restrain the defendant from interfering with the suit properties being Title No Kiirua/Naari/4940 and Title No Kiirua/Naari-Maitei/375 pending the determination of the suit.
3. The grounds thereof were set out on the face of Motion and in the supporting affidavit of Leon M Ndubai sworn on July 9, 2021 . The plaintiff contended that the defendant advanced it a loan facility of Kshs 200 million for the construction and furnishing of Forest Lodge in Meru on the two suit properties.
4. The loan was payable in 96 months inclusive of a 12 months moratorium period. The plaintiff was to make monthly payments of Kshs 3,641,265/= inclusive of interest till payment in full.
5. In 2020, the plaintiff requested for a 12 months moratorium due to the Covid 19 Pandemic but the defendant declined and issued a restructuring letter dated December 2, 2021. In it, it sought to restructure the loan to Kshs 41,278,521.00/=, an amount less than the loan amount of Kshs 200 million agreed upon.



6. It was the plaintiff's case that the restructuring was in breach of the initial loan offer dated October 31, 2018 and an attempt to coerce the plaintiff into signing a new contract and abandon the initial agreement.
7. The plaintiff contended that the defendant had through its agent Westminster Commercial Auctioneers issued a notice of sale by public auction to recover an outstanding debt of Kshs 43,646,678.60/= on July 14, 2021. A newspaper advert was placed on July 1 advertising the public auction. The plaintiff also contended that the defendant had failed to issue it with statements of accounts in respect to its loan account.
8. It was also the plaintiff's case that the defendant had failed to issue it with prerequisite notices under section 90 of the Land Act. It had also failed to serve the statutory notice of sale on the lessees on the suit property, failed to seek alternative remedies such as appointment of a receiver over the charged property, and also failed to conduct a forced sale valuation on the suit properties. The plaintiff thus averred that should the orders not be issued, it would suffer loss and damage due to the intended illegal sale.
9. The defendant opposed the application *vide* the replying affidavit of Wainaina Francis Ngaruiya sworn on July 14, 2021. The credit facility of Kshs 200 million payable in 96 months inclusive of a 12 months moratorium period was admitted. However, it was averred that for the moratorium period, the plaintiff was only to pay interest but only paid for 5 months.
10. That the defendant had by then advanced Kshs 36,284,103/= on diverse dates in 2019. That the plaintiff had already fallen into breach before the Covid 19 Pandemic.
11. That various communication about the arrears were sent to the plaintiff with no response until on September 7, 2020 when the plaintiff requested for a further 12 months moratorium. That the request was granted with a proposed 6 months moratorium period and proposed restructure. That the plaintiff declined to execute the supplementary letter of offer dated December 2, 2020.
12. That on March 4, 2020, the defendant demanded for payment of Kshs 37,494,028.31. The same was not responded to whereby the defendant issued statutory notices under section 90 of the Land Act on June 10, 2020.
13. That on January 5, 2021, the defendant issued the 40 day notice to sell as per section 96 of the Land Act and caused a valuation on the suit properties. A valuation report dated March 23, 2021 was issued. The defendant further averred that the notification of sale and the 45 days Redemption dated May 3, 2021 were also issued pursuant to rule 15 of the Auctioneers Rules 1997. All notices were not responded to by the plaintiff.
14. The defendant then advertised the properties for sale on July 5, 2021 on Nation Newspaper for public auction on July 22, 2021. The outstanding amount was Kshs 46,020,027.51 which continues to accrue interest and penalty for non-payment.
15. The application was canvassed by way of submissions. The plaintiff filed its written submissions dated February 4, 2022, while the defendant's were dated March 4, 2022. This court has considered those submissions as well as the pleadings and the affidavits on record.
16. The conditions for consideration in granting an injunction were in *Giella v Cassman Brown & Company Limited (1973) E A 358*. An applicant must establish a *prima facie* case with a probability of success. He must show that unless the order is granted he will otherwise suffer irreparable loss and damage and if the court is in doubt, it will determine the matter on a balance of probability.



17. The plaintiff's case is based on the assertion that it was not served with mandatory notices under section 90, that the defendant did not conduct a valuation on the suit properties, thus it will suffer loss and damage if the intended sell by public auction proceeds.
18. This court has seen the evidence provided by the defendant. There is sufficient evidence to show that KShs 30,284,103/= was disbursed to the plaintiff in 2019. There was communication to the plaintiff on the arrears on interest payments and such communication was made before the on-set of Covid-19 Pandemic.
19. There is also evidence that it was the plaintiff who requested for a further moratorium of 12 months vide a letter dated September 7, 2020. In this regard, the assertion that it was the defendant who attempted to coerce the plaintiff into another agreement fails. There is also evidence of the plaintiff's request being granted, but the plaintiff did not execute the supplementary letter offer which extended the moratorium by 6 months.
20. There is overwhelming evidence to support the defendant's position that it complied with the issuance of all the relevant notices and demands. These were produced as WFN 9-15. Specifically, exhibit WFN 12 was a copy of a valuation report dated March 23, 2021. The same indicated the forced value of the properties. A copy of the statement of loan account dated July 13, 2021 was also produced.
21. In view of the foregoing, the plaintiff's allegation that it was not served with the requisite notices fails. The allegation that the suit properties were not valued also fails. There is proof that the defendant complied with all statutory requirements and there is ample evidence that the defendant constantly communicated to the plaintiff about the arrears through emails. All these however, were un-responded to.
22. From the foregoing, it is this court's finding that the plaintiff has not established a *prima facie* case against the defendant. The plaintiff has not demonstrated in what way the intended sale is illegal, more so in light of the overwhelming evidence of statutory compliance on the defendant's part.
23. Having failed the first test, there arise no need to consider the other two limbs of *Giella v Cassman Brown*. In any event, the court is not satisfied that the plaintiff would suffer irreparable harm which cannot be adequately compensated by way of damages. The plaintiff did not deny taking a loan with the defendant and did not deny that it had fallen into arrears. It instead pleaded that the defendant has other alternative remedies under the charge.
24. Unfortunately, the plaintiff cannot arm-twist the defendant into exercising either of its rights under the charge. Furthermore, the parties were occasioned several opportunities to settle the matter out of court but failed. Further still, the legal exercise of the defendant's statutory power of sale cannot solely be the ground relied upon to establish irreparable harm. It is thus unlikely that the plaintiff would have passed the second test.
25. The upshot is that the application is unmeritorious and is dismissed with costs to the defendant.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

A MABEYA, FCIArb

JUDGE

