



REPUBLIC OF KENYA



KENYA LAW
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**Kaigai v Equity Bank (Kenya) Limited (Civil Suit E031 of 2022)
[2022] KEHC 14522 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E031 OF 2022
A MABEYA, J
OCTOBER 28, 2022**

BETWEEN

EUNICE WANJIKU KAIGAI PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

RULING

1. Before Court is the plaintiff's Notice of Motion dated 3/2/2022. The same is brought under Article 40 of *The Constitution* of Kenya; Section 3A and 63(e) of the *Civil Procedure Act*; Section 97, 103(1) and 104 of the *Land Act* and Order 51, Rule 1 of the *Civil Procedure Rules*.
2. The plaintiff seeks a temporary injunction to restrain the defendant from exercising its statutory power of sale under the *Land Act* over the properties identified as LR No 2259/566(I.R. 97550) and LR No 9183/4 (LR No 135832) (hereinafter "the suit properties") or any other way interfering with the plaintiff's quiet possession of the same.
3. The grounds for the application are that the plaintiff is the registered owner of the suit properties. That the defendant granted the plaintiff a loan facility of Kshs.118,000,000/- with the suit properties offered as security thereto. The defendant scheduled an auction of the suit properties for 15/2/2022. That the auction would be contrary to *the Constitution* and the provisions of the *Land Act* on the chargee's duty of care as the defendant advertised the charged property for sale at a price lower than the best price obtainable at the time of sale.
4. That the defendant has unreasonably declined to consider viable proposals from the plaintiff to discharge her obligations to it.



5. The defendant opposed the application *vide* grounds of opposition dated 8/2/2022 and a replying affidavit sworn on 9/2/2022.
6. In the grounds of opposition, the defendant contended that the entire suit does not disclose any cause of action as against it to warrant grant of any interlocutory reliefs. That there are in existence valid legal charges duly executed by the plaintiff in favour of the defendant and as such, there is no cause of action disclosed by the plaintiff's suit against the defendant.
7. That the plaintiff has readily admitted owing a sum in excess of Kshs.136,000,000/- which continues to grow because of interest and that there is every likelihood that it may surpass the value of the charged properties. As such no useful purpose would be served by a grant of the injunction orders sought. That no *prima facie* case or any case at all with a probability of success has been established. That damages awardable would be an adequate remedy.
8. It was further contended that the requisite Statutory Notices by the defendant have been served and received by the plaintiff. In the premises, the intended sale is regular and in accordance with the law. That the alleged dispute on the advertised price of the charged Properties is not a ground for the grant of the orders sought.
9. That statutory notices had been served but not responded to. Acumen Valuers had valued the properties and the forced sale value was determined at Kshs.105,000,000/- and Kshs.67,500,000/-, respectively. That the debt stood at Kshs.140,689,048/94 as of 8/2/2022.
10. The issue for determination is whether the plaintiff has met the threshold for the grant of an interlocutory injunction.
11. Section 63 of the *Civil Procedure Act* provides that the court may, to prevent the ends of justice from being defeated, grant a temporary injunction and make such other interlocutory orders as may appear to the court to be just and convenient.
12. This is an interlocutory injunction. The applicable principles were settled in the case of *Giella v Cassman Brown* [1973] EA 358. These are; (i) the applicant must prove a *prima facie* case with a probability of success (ii) the applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted (iii) If the court is in doubt, it will determine the matter on a balance of convenience.
13. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002, *prima facie* case was defined 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 been infringed by the opposite party to call for an explanation or rebuttal from the latter.
14. The plaintiff submitted that under the *Land Act*, the defendant has the obligation to obtain the best obtainable price at the time of sale. The plaintiff claimed that the value of LR No 9183/4 in the notification of sale dated December 14, 2021 was the same as the value of the property when it was charged in 2019. That the defendant only carried out forced sale valuations after issuing the notification of sale.
15. The plaintiff argued that the valuations in the notification of sale were plucked from the air without any proper valuation as required by law and the values quoted in the notification of sale are not the true market prices of the two parcels of land.



16. It was the plaintiff's case that no valuation was ever conducted by the defendant and if they issued instructions in this regard, it was only for the purposes of ticking boxes and showing a technical compliance with section 97(2) of the Land Act.
17. On the other hand, the defendant bank is adamant that the plaintiff has not established a prima facie case with a probability of success as. She has admitted to being indebted to the defendant, she voluntarily used her properties as security for the loan facilities and was duly served with all requisite statutory notices prior to the advertisement and the defendant duly conducted a valuation on the charged properties prior to instructing its auctioneers to advertise the property for sale by public auction.
18. Section 97 of the Land Act provides that a chargee who exercises a power to sell the charged land owes a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale. That the chargee shall, before exercising the right of sale, ensure that a valuation is undertaken by a valuer.
19. Subsection 3 thereof states that the price at which the charged land is sold should not be 25% or below the market value at which comparable interests in land of the same character and quality are being sold in the open market. There shall be a rebuttable presumption that the chargee is in breach of the duty to obtain the best price reasonably obtainable.
20. It is not disputed that the plaintiff is indebted to the defendant due to default in payment of a loan. A credit facility of Ksh.118,000,000/- was advanced to her trading as Safari Line Africa.
21. The defendant consequently wishes to exercise its statutory power of sale over the charged suit properties. A notification of sale dated December 14, 2021 issued by the defendant's auctioneers indicated that one of the suit properties LR No 9183/4 was valued at Ksh.75,000,000/- while the other LR No 2259/566 was valued at Ksh.125,000,000/-.
22. However, vide a valuation report by Accumen Valuers dated December 14, 2021, the property LR No 9183 Karen Estate had a market value of Ksh.90,000,000/= and a valuation report dated December 15, 2021 by the same valuers stated that LR No 2259/566 had a market value of Ksh.140,000,000/=.
23. The above observations indicate that the defendant had two varying valuations for the suit property. The value quoted in their notification for sale dated December 14, 2022 was lower than the subsequent valuation reports issued on December 14, 2021 and December 15, 2021, respectively. There was no explanation for the variation.
24. To further muddy the waters on the true value of the suit properties, the plaintiff carried out its own valuation of the suit properties in which the market values of the properties were Ksh.175,000,000 for LR No 2259/566 and Ksh.92,000,000 for LR No 9183.
25. The Court further notes that the valuation of LR No 9183 in the notification of sale dated December 14, 2022 is the same as it was in the valuation report dated 4/7/2019. There has been no appreciation in its value nor an explanation for the stagnated value.
26. I am of the opinion that the discrepancies in the valuations on the charged property by the defendant is questionable and potentially violates the chargee's responsibility to obtain the best price of charged property before exercising its statutory power of sales stipulated under section 97 of the Land Act.
27. A prima facie case as described in Mrao (*supra*) has been established.
28. The second limb for consideration is whether the applicant has illustrated that she will suffer irreparable loss and damage if the injunction is not granted.



29. The plaintiff submitted that the property that the defendant sought to sell has some sentimental value to her which money cannot compensate. That on LR No 9183/4, there is a house that the applicant and her deceased husband had used as their matrimonial home, where her deceased husband passed on in 2019. That this kind of attachment cannot be compensated by way of damages.
30. Conversely, the defendant submitted that the plaintiff has neither demonstrated any irreparable loss nor proved that the defendant is not capable of compensating her should the Court make an order for compensation of damages.
31. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR it was held: -
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be an adequate remedy.”
32. The Court adopts the foregoing holding. The plaintiff submitted that she would suffer irreparable loss if the sale goes ahead as one of the properties has some sentimental value to her which money cannot compensate.
33. I do not find this to be a substantial reason to prove irreparable loss. Further, the plaintiff has not demonstrated the gravity of that loss and how it could not be compensated by an award of damages.
34. Once the plaintiff willingly offered her suit property as collateral, it became a commodity capable of sale upon default. An irreparable loss is one whose amount cannot be adequately measured with reasonable accuracy or the injury is of such a nature that monetary compensation will not be an adequate remedy.
35. I therefore find that the plaintiff has not demonstrated how she would suffer substantial loss.
36. Although the plaintiff has established a prima facie case, she has failed to demonstrate that she will suffer irreparable loss and damage.
37. The third limb is to determine where the balance of convenience lies. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR it was held: -
- “The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience



which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

38. Applying the above principle to the present case, the defendant is likely to continue suffering financial loss as the outstanding loan will continue to attract interest which may surpass the value of the charged properties. On the other hand, the plaintiff has readily admitted being in debt and the damages she would suffer (if any) could be quantified and compensated by the defendant.
39. The balance of convenience tilts in favour of not granting the injunction sought. However, if the defendant proceeds with the sale without a proper valuation, it will have itself to blame for the consequent loss and damages against it. The valuations it has are improper for any exercise of the statutory power of sale.
40. All in all, I find the application to be without merit and dismiss the same with costs.

It is so ordered.

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

A. MABEYA, FCIArb

JUDGE

