



**Mugi v SBM Bank (K) Limited & 2 others (Civil Suit 027 of 2021)
[2022] KEHC 14525 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 027 OF 2021
A MABEYA, J
OCTOBER 28, 2022**

BETWEEN

IMMACULATE NJERI MUGI PLAINTIFF

AND

SBM BANK (K) LIMITED 1ST DEFENDANT

MAKAAZI MANAGEMENT COMPANY LIMITED 2ND DEFENDANT

STEPHEN KINUTHIA MBURU 3RD DEFENDANT

RULING

1. This is a ruling on the plaintiff's notice of motion dated September 29, 2021. It was brought pursuant to sections 40, 3, 3A of the *Civil Procedure Act* and rules 1, 2 and 4 of the *Civil Procedure Rules*.
2. The plaintiff sought to restrain the 1st defendant from interfering with the property known as L R 3734/134 (IR 112140) House No 2 Tulip Villas Convent Road ("suit property") either by way of sale or otherwise pending the determination of the suit.
3. The plaintiff also sought to compel the defendants to provide her with all documents relating to the loan account including reconciled accounts.
4. The application was supported by the affidavit sworn by the plaintiff on even date.
5. The grounds for the application were that in 2017, the 1st defendant advanced a loan of Kshs 50,000,000/- to the 2nd defendant. The 2nd defendant approached her and her husband, the 3rd defendant, to stand as its guarantors. Accordingly, a charge was registered over the suit property which is jointly owned by her and the 3rd defendant.



6. That the 1st defendant unlawfully advertised the suit property for sale by public auction in exercise of its statutory power of sale without notice to her as a guarantor. It failed to give her notice of the alleged default by the principal debtor.
7. She further alleged that the statutory notice or the redemption notice were not brought to her attention in violation of her rights as a guarantor. That the suit property is her matrimonial home and she stood to suffer irreparable loss as she will be rendered homeless if the prayers sought are not granted.
8. In opposition, the legal officer of the 1st defendant swore a replying affidavit on October 26, 2021. He averred that the plaintiff was offered a term loan facility of Ksh 50,000,000/- dated November 10, 2017. Under the facility, the plaintiff accepted to be the guarantor of the 2nd defendant and executed a guarantee dated December 15, 2017.
9. Consequent thereto, a charge dated December 15, 2017 was created over the suit property. That the plaintiff and 3rd defendant are husband and wife.
10. The 2nd defendant failed to meet the agreed payments towards servicing the loan in or about June 2020 leading to the recalling of the facility immediately. *Vide* a letter dated June 8, 2020, the bank notified the plaintiff that the 2nd defendant's loan had been recalled. That the outstanding loan amount was Ksh 36,132,042/- and was to be paid within 90 days.
11. That another letter dated January 6, 2021 was sent to the plaintiff informing her that the loan was still in arrears despite the statutory notice sent on June 8, 2020. That the plaintiff was also informed of the bank's intention to sell the charged property after 40 days if the loan amount remained in arrears.
12. In the premises, the bank contended that it had fulfilled all its statutory obligations in exercise of its power of sale and prayed to have the application struck out and dismissed.
13. This is an interim injunction application. 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.
14. In terms of [Giella v Cassman Brown](#) [1973] EA 358, the principles to be considered before granting an interim injunction are: (i) the applicant must establish 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.
15. On the first limb, the court set out what constitutes prima facie case in the case of [Mrao Ltd V First American Bank of Kenya Ltd & 2 others](#) Civil Appeal No 39 of 2002. It was held to be a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.
16. The plaintiff submitted that her rights as a guarantor had been infringed by the 1st defendant as she has never been notified of any default. That the letter of default and statutory notice was never served upon her.
17. The 1st defendant is adamant that the statutory notices were served as evidenced in the annexures in its replying affidavit.
18. Section 90 of the [Land Act](#) requires the chargee to give a notice in writing to a chargor in default to pay the money owing or to observe the agreement as the case may be. The notice ought to inform the



recipient of the extent of the default by the chargor and the time under which such default ought to be rectified, which is not less than 3 months.

19. Paragraph 21(d) of the letter of offer produced as 'DM-1' in the 1st defendant's replying affidavit stated that, a notice under the letter of offer would be made by post to the addresses of the borrower/guarantor provided. Further, that any notice shall be deemed served, three business days after posting, provided that proof is given that the notice was properly addressed and adequately stamped and put in the post.
20. In the letter dated June 8, 2020, produced as 'DM-6' by the defendant, the bank informed the plaintiff, the 2nd and 3rd defendants of the loan arrears as of June 8, 2020. *Vide* a letter dated January 6, 2021, the bank issued a 40day statutory notice to sell the suit property to all of the parties herein.
21. The notices were properly addressed as provided for under paragraph 21(d) of the letter of offer but there is no proof that the letters were stamped and posted.
22. I therefore agree with the plaintiff that there is no proof of postage of the aforementioned letters. The court cannot ascertain that the plaintiff received the notices as aforementioned.
23. Further, the plaintiff has shown that her marriage with the 3rd defendant broke down therefore it is possible that she was kept in the dark on the financial distress that the 2nd defendant was in by her husband. This is evidenced by the annexure "INM3" in the supporting affidavit of the plaintiff.
24. In this regard, there is no evidence to show that the plaintiff received the statutory notices as required. Accordingly, I find that a *prima facie* case has been established by the plaintiff.
25. The second limb on irreparable loss, the plaintiff averred that the suit property is her matrimonial home where she resides with her children. That she stands to suffer irreparable loss if the same is auctioned as she would be rendered homeless.
26. The 1st defendant pleaded that the property is a quantifiable asset and that it is able and willing to compensate the plaintiff if the court requires it to do so.
27. In *Fatma Hassan Hadi v Diamond Trust Bank (K) Ltd* [2019] Eklr, the court held: -

“On irreparable loss, it is clear that if the property is sold, then it will be lost, and the plaintiff stands to lose her matrimonial home. There certainly is danger of the plaintiff suffering irreparable loss. Even if I was to consider the balance of convenience, it tilts toward preserving the property until this case is heard and determined.”
28. Further, in *Bhalvinder Pal Singh S/O Surji Singh & another v Equity Bank* [2015] eKLR, it was held: -

“And what about adequacy of damages as a remedy to the plaintiffs? One would argue that the defendant is capable of paying damages. But it is not an unassailable position of law that where the respondent or defendant can pay damages, then the plaintiff or applicant is not entitled to injunctive relief.

Steve Ouma In “a Commentary on the Civil Procedure Act Cap 21” 2nd Edition at Page 440 states as follows:

“It is not settled, however, that where damages may be an appropriate remedy, an interlocutory injunction should never issue.’



In simple terms, the remedy of damages is not everything. It is necessary to give serious thought to the applicant's case. In the case at hand, the plaintiff's advance a serious argument that they don't owe. They also point out the defendant's serious omission to give requisite notices concerning variation of interests and charging of default penalties. You cannot violate another person's right because you are able to pay damages."

29. It is not in dispute that the 1st defendant issued a loan facility of Kshs 50,000,000/- to the 2nd defendant who has been unable to service the loan. It is also not in dispute that the plaintiff and the 3rd defendant are guarantors of the said loan and have issued their home as collateral.
30. The plaintiff pleaded that the suit property is her matrimonial home, an assertion that has not been denied.
31. Having found that a *prima facie* case exists, there certainly would be irreparable loss if the plaintiff loses her matrimonial home where she resides with her children, before the suit is determined.
32. There is no doubt that the 1st defendant bank would be able to compensate the plaintiff if the court were to decide, upon conclusion of this case, that the sale of the suit property was unlawful.
33. The court is of the opinion that a matrimonial home holds special importance and that the plaintiff would suffer irreparable loss if it is sold prior to a final determination of this suit.
34. On the third limb of balance of convenience, it is well established that this is only considered when the court is in doubt concerning the other two conditions. Having established a *prima facie* case and irreparable loss, therefore there is no need to delve into where the balance of convenience lies. In any event, it lies in preserving the subject matter of the suit.
35. Accordingly, the application is meritorious and is allowed as prayed. The costs are awarded to the plaintiff.
36. It is so ordered.

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

A. MABEYA, FCI Arb

JUDGE

