



**Matunda Fruits Bus Services Limited v I & M Bank Ltd (Commercial Civil Suit E955 of 2021)  
[2022] KEHC 17022 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E955 OF 2021  
DO CHEPKWONY, J  
NOVEMBER 24, 2022**

**BETWEEN**

**MATUNDA FRUITS BUS SERVICES LIMITED ..... APPLICANT**

**AND**

**I & M BANK LTD ..... RESPONDENT**

**RULING**

1. Before this court for determination is a notice of motion application dated December 10, 2021 which seeks for orders that;
  - a. Spent;
  - b. Spent;
  - c. This honourable court issues a temporary injunction stopping the defendant/respondent by themselves or their agents, employees or anyone at their behest from threatening, intimidating and/or harassing the Plaintiff/Applicant by purporting to recover, attach or detain motor vehicles belonging to the Plaintiff/Applicant without following the lawful procedures pending full hearing and determination of the main suit;
  - d. There be temporary orders of injunction to restrain the defendant/respondent, its servants and/or agents from realizing the collaterals in land parcel number Kitale Municipality Block 4/125 or any pledge through Demand Bill of Exchange held as lien pending the determination of this Application and thereafter the main suit;
  - e. An order for taking of accounts, directing the defendant to supply the plaintiff and this court with the full statement of accounts detailing all dealings and interest charged on the plaintiff's loan account;



- f. Any other order that this honourable court may deem fit in the interest of justice;
  - g. Costs of this application be provided for.
2. The application is premised on the grounds on its face and in the supporting affidavit of Daniel Ng'ang'a Mwangi sworn on the even date. The applicant's case is that through a director's resolution dated October 2, 2016, it resolved to borrow capital from the respondent, I & M Bank, for financing the purchase of 5 Units of F310 Scania Buses and 1 Units of F360 Scania bus. That the said 6 units of buses were to cost a total of Kshs 97,835,010.00.
  3. The plaintiff paid a total of Kshs 21,081,188.00 and the balance of Kshs 73,853,952.00 was to be paid by the respondent. Thereafter, the plaintiff and defendant executed a credit facility agreement dated March 21, 2017
  4. The Plaintiff avers that it had been repaying the loan Facility religiously but the figures do not seem to reduce. This caused the Plaintiff to request Taxplan Consulting Ltd to conduct a loan reconciliation and prepare a report to that effect. The report was made ready sometimes in December and is dated December 2, 2021 and it shows that there are significant discrepancies between the loan amount advanced and the amount being demanded by the defendant. The plaintiff goes on to state that the bank statements and records revealed that the defendant had approved an overdraft of Kshs 5,000,000.00, the said amount was never credited to the Plaintiff's account.
  5. It is also averred that the defendant has been calling the plaintiff's directors regularly and threatening to collapse their business unless the amount disputed is paid. In the end, the defendant has engaged the plaintiff in an unlawful venture of intimidating and harassing it with recovery and attachments of the vehicles.
  6. The plaintiff further avers that a formal demand letter has been sent threatening to recover alleged arrears on or about the December 15, 2021 and it would be in the interest of justice that the orders sought herein be granted as prayed.
  7. The Application is opposed vide the Replying Affidavit of Andrew Muchina sworn on April 27, 2022. His case is that pursuant to a letter of offer dated March 24, 2017, the bank extended a credit facility to the plaintiff. That the plaintiff executed the letter of offer and duly accepted all the terms and conditions contained therein. the parties also executed a hire purchase agreement dated April 20, 2017 and agreed to be bound by the terms set out therein.
  8. Subsequently, by a letter of offer dated April 12, 2017, parties agreed to amend the repayment Clauses. As security for the facility, parties executed a Corporate Guarantee and Indemnity by Dan Davies Petroleum Limited, joint and several personal guarantees and indemnities by Daniel Ng'ang'a Mwangi and Peninah Wanja Ng'ang'a, first legal charge over all that property known as Title No Kitale Municipality Block 4/425, Deed of Assignment of Rental Income in respect of all that property known as Title No Kitale Municipality Block 4/425 and a letter of undertaking to create a further legal Charge of an amount of Kshs 65,000,000.00 over the property in favour of the bank.
  9. However, it is averred that the plaintiff defaulted in repayment obligations, neglected and or refused to pay the instalments as and when they fell due as agreed. And following the breach by the plaintiff in its repayment obligations, the bank issued a demand notice dated December 1, 2021 calling up the entire debt in line with the terms of the loan agreement. That vide a letter dated March 30, 2020, the Plaintiff admitted its indebtedness to the bank and its inability to settle the debt then sought a 12-month extension to settle the same.



10. The defendant avers that all payments received from the plaintiff in repayment of the loan were credited in the plaintiff's loan account but the plaintiff has not adduced evidence of payments made but not captured.
11. According to the defendant, following the plaintiff's breach in its repayment obligations, the entire debt became repayable immediately pursuant to clause 16(a), (b) and (i) of the Letter of offer. All the securities held by the bank in respect of the facility became immediately enforceable and the bank was duly entitled to call up the entire debt.
12. Thus the plaintiff's prayers for injunctive orders is premature and it is not entitled to the prayers sought in the application for among other reasons that, the bank has only issued a demand notice calling up the entire debt and has not advertised the properties for sale or issued any statutory notices commencing the realization of the securities. If anything, the bank is duly entitled to call up the entire debt following default by the plaintiff to honor its loan repayment obligations by failing to pay the instalments as and when they become due. Further, the bank is entitled to commence realization of the securities in line with the terms of the letter of offer as the Plaintiff has refused to oblige to the demand notice issued to it.
13. Further, it is the defendant's contention that the plaintiff was truly and justly indebted to the bank for the sum of Kshs 44,462,969.73 as at March 24, 2022 which sum continues to accrue interest at the bank's commercial rates in line with the terms of the contract until payment in full. In any suit, parties to a contract are bound by the terms of the contract and a court of law cannot re-write the terms therein. In this case, the plaintiff executed the letter of offer and the security documents and agreed to be bound by the terms set out therein. In the defendant's view, a dispute as to interest or amount outstanding does not warrant the grant of injunctive orders now being sought. That the bank is lawfully entitled to proceed with realization of the securities to recover the outstanding debt since once a property is offered as security, it becomes a commodity for sale in the event of default. It is the defendant's case that the plaintiff does not stand to suffer irreparable harm as any loss, if proved, can be compensated by way of damages and prays that the application be dismissed with costs.
14. In rejoinder, the plaintiff/applicant filed a further affidavit sworn by Daniel Ng'ang'a on July 11, 2022 in which the grounds on face of the application and in the supporting affidavit are annexed.
15. On February 21, 2022, the parties were directed to canvass the application by way of written submissions. The plaintiff/applicant's submissions are dated July 11, 2022 while the respondent's are dated parties canvassed the application by way of written submissions which I have read and considered.

### **Analysis and determination**

16. I have read the pleadings and submissions filed by each party in respect of the application and considered the case and statute law in regard to the same. The issues for determination are:
17. jlkj
  - a. Whether the plaintiff/applicant has made out a case to warrant grant of injunction
  - b. Who bears the costs of the application.
18. Having considered the pleadings and each party's case as summarized above, I am guided by the law on granting of interlocutory injunction as is set out under Order 40 Rules (1) and (2) of the [Civil Procedure Rules 2010](#) which provides:-

(1)"Where in any suit it is proved by affidavit or otherwise—



- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

Injunction to restrain breach of contract or other injury.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

19. The conditions for the granting of an injunction were also set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 and which are reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No 77 of 2012 (2014) eKLR, where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

20. What a prima facie case is, was as well defined in the case of *Mrao Limited v First American Bank Limited & 2 Others*, [2003] KLR 125 to mean:-

“... a case in which on the material presented to the court a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....

But as I earlier endeavored to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”



21. Applying the above principles to the present case, it is not denied that the applicant defaulted towards the loan repayment but contests that there is discrepancy in the loan amount in question and the monies so far paid. The plaintiff's concern is that some of the payments it has made might not have been credited in the loan account thus showing a wrong balance. I find this to be a pertinent issue which the court needs to determine. This is because should the defendant proceed with realizing of the securities on the outstanding loan amount with certainty, the plaintiff would be prejudiced and lose not only the securities but also the amounts already paid. For this reason, I am satisfied that the applicant has established a prima facie case and it is upon the parties to adduce evidence showing whether the amount outstanding is the figure given by the defendant or otherwise.
22. On whether the applicant is likely to suffer irreparable loss, I am guided by the Court of Appeal's observation in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR (supra), where 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 such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
23. In the present case, it is a common ground that the securities involved include properties in form of land that were used as collateral in the facilities in question and which the Respondent has vide a formal demand letter threatened to realize. In my considered opinion, each case is to be considered on its own merit. And while considering the circumstances of this case, although the defendant is within its rights to realize the securities, the plaintiff is likely to suffer substantial loss that may not be compensated by an award of damages should the defendant be allowed to proceed, on an uncertain outstanding loan balance as it is unclear whether some payments made by the plaintiff were factored in.
24. Lastly, I am satisfied that the balance of convenience tilts in favour of the plaintiff who has demonstrated that it has repaid a substantial part of the loan and is entitled to an update on whether the repayments made were factored in by the bank.
25. Based on the foregoing, I am satisfied that the applicant has made a case for an injunction. The application therefore succeeds in the following terms:-
  - a. That a temporary injunction be and is hereby issued stopping the defendant/respondent by themselves or their agents, employees or anyone at their behest from threatening, intimidating and/or harassing the plaintiff/applicant by purporting to recover, attach or detain motor vehicles belonging to the plaintiff/applicant without following the lawful procedures pending full hearing and determination of the main suit;
  - b. That temporary orders of injunction be and are hereby issued restraining the defendant/respondent, its servants and/or agents from realizing the collaterals in land parcel number Kitale Municipality Block 4/125 or any pledge through demand bill of exchange held as lien pending the determination of this application and thereafter the main suit;



- c. An order be and is hereby issued, for taking of accounts, directing the defendant to supply the plaintiff and this court with the full statement of accounts detailing all dealings and interest charged on the plaintiff's loan account within 45 days from the date hereof;
- d. Costs in the cause of the main suit.

It is so ordered.

**RULING DELIVERED VIRTUALLY VIA MICROSOFT TEAMS, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Sigona counsel for Applicant

No appearance for and by Defendant/Respondent

Court Assistant - Sakina

