



**Infinite Quest Marketing Ltd v Eco Bank Kenya Ltd; Choudhy  
(Interested Party) (Commercial Civil Case E948 of 2021)  
[2022] KEHC 17021 (KLR) (Commercial and Tax) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E948 OF 2021  
DO CHEPKWONY, J  
DECEMBER 22, 2022**

**BETWEEN**

**INFINITE QUEST MARKETING LTD ..... PLAINTIFF**

**AND**

**ECO BANK KENYA LTD ..... DEFENDANT**

**AND**

**JANE NJERI CHOUDHY ..... INTERESTED PARTY**

**RULING**

1. This ruling determines two applications. The first application is a Notice of Motion dated December 8, 2021 filed by Infinite Quest Marketing Ltd in Civil Case No E948 of 2021 and seeks for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. Pending the hearing and determination of the main suit, an injunction do issue restraining the Defendant, either by itself, employees, servants and/or agents, appointed or authorized by it from selling or advertising for sale by way of private treaty or public auction the property comprised in Title No Nairobi/ Block 92/33- House No 33 Along Baringo Drive, Lakeview Estate, Nairobi or interfering in any way whatsoever with the Plaintiff/Applicant's proprietary interests thereof;



- d. The Defendant be directed to render and deliver to the Plaintiff true and correct accounts and the entire statements of accounts of the Plaintiff's account operated by them in respect of the loan account;
  - e. Spent;
  - f. Such other or further orders as this court may deem fit to grant;
  - g. Costs of this application be provided for.
2. The Second application dated June 27, 2022 was filed by the Interested Party, Jane Njeri Choudhy in Civil Suit No E240 of 2022 against both the Plaintiff and Defendant herein as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents respectively. The Plaintiff's advocate on record has also been sued in that suit as the 3<sup>rd</sup> Defendant/Respondent. The application seeks a myriad of reliefs including the following orders: -
- a. Spent;
  - b. Spent;
  - c. Spent;
  - d. Spent;
  - e. Spent;
  - f. That the Honourable Court be pleased to grant an order extending the completion period of the sale agreement dated February 17, 2021 for 90 days.
  - g. That this Honourable Court be pleased to grant an order compelling the 2<sup>nd</sup> Defendant/Respondent to disclose the balance of the loan amount as at June 27, 2022 to the Plaintiff/Applicant.
  - h. That this Honourable Court be pleased to grant an order that the Plaintiff/Applicant be allowed to pay the disclosed additional accrued interests to enable completion of the sale transaction.
  - i. That this Honourable Court be pleased to direct the 2<sup>nd</sup> Respondent to release the original Title documents and discharge upon the Plaintiff/Applicant fulfilling her obligations.
  - j. That this Honourable Court be pleased to grant an order of specific performance to compel the 1<sup>st</sup> Defendant/Respondent to perform its obligation as set out in the agreement dated February 17, 2021 and to specifically transfer or cause to be transferred the suit property in favour of the Plaintiff/Applicant within the completion period as may be extended by this Honourable Court upon the Plaintiff/Applicant fulfilling her obligations.
  - k. That in default of prayer (j) above, the Deputy Registrar of the High Court be permitted/Authorized to sign the transfer forms for or on behalf of the 1<sup>st</sup> Defendant/Respondent to transfer the suit property in favour of the Plaintiff/Applicant.
  - l. That the costs of this application be provided for.

### **Background**

3. To appreciate the nature of the dispute between the parties herein, it is important to lay down the background and genesis of the dispute as follows. The relationship between the parties began vide



a letter of offer dated June 10, 2015 wherein the Defendant bank agreed to advance Infinite Quest Marketing Limited (for purposes of discussion herein to be referred as “the Plaintiff/Applicant”) an asset finance facility of Kshs 45,000,000/=, in addition to an existing loan facility of Kshs 9,636,364.83. To secure the facilities, a charge was created over the Plaintiff/Applicant’s property Known as Title Number Nairobi/Block 92/93, first legal charge for Kshs 12,000,000/= over the Applicant’s Three-bedroom Apartment No C9 Block C on L R Number 1/308 and a personal guarantee and indemnity for Kshs 54,636,364/= by the Plaintiff/Applicant’s Director, Fredrick Busolo Simiyu.

4. However, despite the terms of the charge instruments and the letter of offer, the Plaintiff/Applicant defaulted in repaying the facilities despite several demands, requests, and reminders by the bank. The bank was then constrained to realize the charged properties and issued the statutory notices as is required by the applicable laws. The process was however stalled by Plaintiff/Applicant after filing Civil Suit No 408 of 2018 seeking to restrain the bank from selling the properties by public auction. In any event, the suit was compromised vide a consent dated February 19, 2019 wherein the Applicant agreed with the bank to repay the outstanding loan arrears within thirty (30) days and in default the bank to exercise the power of sale over the Three-bedroom Apartment on LR No 1/308. The Plaintiff/Applicant reneged on its promise and consequently, on July 23, 2020 sold the Three-bedroom apartment on LR No 1/308 for Kshs 15,000,000/=.
5. Property Title No Nairobi/Block 92/93 was also scheduled to be sold by auction on February 18, 2021 to realize the loan arrears but before then, on February 17, 2021, the Plaintiff/Applicant through its advocates asked the bank to suspend the public auction since they had gotten a buyer, the Interested Party herein who was willing to purchase the property at Kshs 75,000,000/= through a private treaty. The terms of the sale as contained in the Sale Agreement dated February 16, 2021 were that the Interested Party would make a 20% deposit in the sum of Kshs 15,000,000/= and the balance of Kshs 60,000/= would be financed by Absa Bank Kenya Ltd.
6. Consequently, the intended auction was suspended on condition that the Interested Party would deposit Kshs 15,000,000/= in escrow account held in the names of the Plaintiff/Applicant and the Bank (transaction account) and thereafter the bank would release the title upon receiving undertaking by Absa Bank for Kshs 60,000/=. That although the Interested Party deposited the sum of Kshs 15,000,000/= as agreed, Absa Bank communicated that it was prepared to advance the Interested Party a loan of Kshs 39,000/= and could not undertake for Kshs 60,000/=. Nonetheless, the Interested Party raised the Kshs 21,000,000/= difference and deposited the same with the Plaintiff/Applicant’s advocates on May 17, 2021.
7. On September 7, 2021, the Interested Party instructed Applicants advocates to deposit the said sum of Kshs 21,000,000/= in the transaction account held in the name of the bank and the Applicant but the request was never acted upon. Consequently, the bank rescinded the agreement to sell the property by private treaty and demanded the outstanding debt of Kshs 54,471,816.65 as of November 10, 2021 failing to which it would exercise its power of sale.

### **The Plaintiff/Applicant’s case**

8. In seeking the orders of injunction against the Defendant bank, the Applicant alleges that the bank illegally sold its apartment on LR No 1/308 for undervalued price of Kshs 15,000,000/= notwithstanding the said property was not offered as security for the loan. Further that the bank never accounted for the amounts realized from the auction sale and the outstanding loan balance is uncertain.
9. According to the Plaintiff, although the bank allowed the suit property to be sold by public auction, it continued to apply and charge unnecessary interest to its prejudice. In addition, the Plaintiff avers the



sale of the property has been delayed by the Interested Party and her bankers so that and should the property be sold by public auction as is intended, a fair market price is unlikely to be obtained hence occasioning it irreparable loss.

10. The Plaintiff adds that apartment on LR No 1/308 was security to earlier loan of Kshs 12,000,000/= which had been fully repaid and there was no justification for its sale by public auction. That the proceeds thereof were even applied to the wrong loan account and no proper records were availed to the Plaintiff/Applicant.
11. In response to the Interested Party's submissions, the Applicant vide a Replying Affidavit sworn by its Managing Director, Fredrick Busolo Simiyu is agreeable to the completion date being extended as sought notwithstanding that the court cannot rewrite contract of parties. It is also agreeable that the Interested Party be allowed to settle the outstanding arrears to enable completion of the agreement. He added that the bank disclosed the outstanding amount as Kshs 63,081,709.06 as at July 5, 2022 and should the Interested Party pay the same, then the obligation with respect to the loan shall be discharged and the present suits rendered unnecessary.
12. The deponed concedes that the Interested Party indeed deposited the sum of Kshs 21,000,000 with the Applicant's advocate but avers that the Interested Party could not unilaterally decide on when and whom such money would be paid to without the Plaintiff/Applicant's approval. Indeed, according to the Applicant, the Interested Party has caused unnecessary delay in completing the sale agreement by failing to secure and/or avail the balance of Kshs 39,000,000/=.

#### **The Defendant Bank's Case.**

13. In response to the Plaintiff/Applicant's case, the bank averred that the properties were voluntarily offered as security to the facilities and the sale of apartment on LR No 1/308 was by virtue of consent to the effect recorded in Nairobi HCCC No 408 of 2018 on February 19, 2019, that the Plaintiff/Applicant should clear the outstanding arrears together with interests within thirty (30) days in default, the bank would exercise the Statutory Power of Sale. Thus, the Three-bedroom Apartment sitting on L R 1/308 was sold upon default vide Public Auction held on July 23, 2020.
14. That after the sale of the Three-bedroom Apartment No.C9 Block C at Kshs.15,000,000/= the outstanding amount on the loan facility stood at Kshs.48,489,996.15 as at December 9, 2020. Further, that despite numerous indulgence and restructuring of the loan, the Plaintiff made no effort to repay the loan prompting the 1<sup>st</sup> Defendant to initiate the process of realizing the 2<sup>nd</sup> charged property being Title Number Nairobi/Block 92/93 (the subject property in this suit) to recover the outstanding balances. Consequently, the Respondent instructed Auctioneers to sell the property and a Public Auction was scheduled for February 18, 2021.
15. However, on February 17, 2021, the Plaintiff through its advocates requested for the postponement of the auction on the ground that they had gotten a buyer who is the Interested Party herein and was willing to purchase the property at Kshs 75,000,000/= which was adequately enough to settle the amounts outstanding. A Sale Agreement presented to the bank showed that the terms of the sale were that the Interested Party would deposit 40% of the purchase price which is Kshs 15,000,000/= and the balance of Kshs 60,00,000/= would be financed by Absa Bank Kenya Ltd. The Bank then accepted the conditions for sale but directed that the deposit be made in a joint Escrow Account between itself and the Plaintiff.
16. Sometimes in May, 2021, Absa Bank communicated that it was prepared to finance the Interested Party to the tune of kshs.39,999,000/= and not the entire Kshs.60,000,000/=. The Interested Party then undertook to raise the balance of Kshs.21,000,000/= and the Plaintiff caused the Interested Party



to deposit the Kshs.21,000,000/= with its advocates. But despite clear instructions by the Interested Party, the Plaintiff refused to release the said Kshs.21,000,000/= to the bank. Consequently, vide letters dated November 10, 2021, the bank suspended the intended sale of the property and demanded the outstanding debt which then stood at Kshs.54,471,816.65. Both the Plaintiff and the Interested Party failed to remedy the default and the bank urges the court not to grant the injunction sought since the balance of convenience tilts in its favour.

17. As regards the Interested Party's claim, the bank acknowledged having received the deposit of Kshs.15,000,000/= and alleges that it is willing to refund the same if directed to do so. Further, that although the Interested Party seeks the court to rewrite the contract, it is amenable to allowing the sale transaction being completed provided that the proceeds are directed to settling the outstanding loan amounts.

### **Interested Party's Case**

18. For the Interested Party, she avers that she dutifully performed her part of bargain in the Sale Agreement dated February 17, 2021 for the subject property but the Plaintiff conversely caused the delay. She reiterates that the agreed sale price was Kshs.75,000,000/= and she paid the agreed deposit of Kshs.15,000,000/= and further Kshs.21,000,000/= after Absa bank agreed to finance only Kshs.39,000,000/=. She has added that the Plaintiff breached the terms of sale by declining to remit the Kshs.21,000,000/= which she deposited with it and it will serve justice if the Plaintiff is compelled to remit the said Kshs.21,000,000/= it holds on its behalf as part of the purchase price. Finally, she avers that she is willing to complete the Sale Agreement and procure the balance of Kshs.39,000,000/= and has urged the court to direct as such.
19. Directions were issued that the Plaintiff's application and Interested Party's application be canvassed jointly by way of written submissions. The record reflects that all the parties complied and I have read their submissions. Since they reflect the summary outlined above, I do not wish to repeat the same here.

### **Analysis and Determination**

20. Having considered the two applications, the affidavits sworn in support and rebuttal of the same, the submissions tendered on behalf of the parties as well as the authorities relied on, I am of the opinion that the issues arising for determination are as follows: -
  - a. Whether the Plaintiff has established a case for temporary injunction as sought.
  - b. Whether the Interested Party's Notice of Motion dated June 27, 2022 is merited.

#### **a. Whether the Plaintiff has established a case for grant of temporary injunction**

21. The law on granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the [\*Civil Procedure Rules, 2010\*](#) which provides that:-

“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; or [Rev 2012] Civil Procedure Cap 21 [Subsidiary] C17 – 165;
- (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."

22. It serves repetition to reiterate that the power exercised by the courts in an application seeking interlocutory injunctive orders is discretionary. The discretion is guided by the principles established in the *locus classicus* case of *Giella –vs- Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows on the conditions that a party must satisfy for the court to grant an interlocutory injunction:

"First, 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 irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

23. I have considered the material placed before the court in a bid to establish whether the Plaintiff has met the threshold established *Giella –vs- Cisman Brown (supra)*. As to whether the first limb on *prima facie* case has been shown, I note that the Plaintiff has based its claim on ramifications visited on it by Covid-19 Pandemic, the allegations that the Defendant has not rendered proper accounts on the outstanding loan amount and the delay caused by the Interested Party together with its financiers in completing the sale of the subject property by private treaty. However, the Plaintiff does not deny being in default or taking any steps to service the outstanding loan amount but merely alleges that should the Defendants be allowed to proceed with the sale by auction, it stands to suffer substantial loss as the property is likely to be sold at gross under value to settle uncertain loan amounts.

24. In my humble opinion, a *prima facie* case is considered as a case which on first examination, without investigating the alleged defences apparently shows that the Applicant's rights are at verge of being infringed if the Defendant/ Respondent's acts are not stopped. A useful guidance is also to be found in the case of *Kitur vs Standard Chartered Bank & 2 Others* (2002) 1KLR, where the court opined as follows: -

"It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."

25. While I agree and associate with the sentiments in the above authority, I wish to add that Courts do not generally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. Thus, the argument that the outstanding loan amount is uncertain cannot not aid the Plaintiff's case for injunction. It is understood that at all material times, that the property the Plaintiff offered as security may be realized in the event of default. And in this case, the Plaintiff does not dispute having defaulted in servicing the outstanding loan amount which continues to attract interest on a daily basis. That having been said, I



find that the Plaintiff has not established a *prima facie* case with probability of success to warrant the grant of injunction as sought.

26. On the second limb, which is on the issue of damages being an adequate remedy, in the case of *Nguruman Ltd vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal reiterated the principles to be considered with respect to interlocutory injunctions. The court observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella Case*, they could neither be questioned nor be elaborated in detailed research. Since those principles are already settled by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a *prima facie* level
- b) demonstrate irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

27. The Superior Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable in law cannot be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The court emphasized that the standard of proof is that on *prima facie* standard. (Emphasis added)
28. Consequently, in the present case, I do find that the Plaintiff/applicant has not only failed to show *prima facie* case, but has also not proved that it will suffer damages which cannot be compensated by way of damages if an order of injunction is not issued. In the premises, I find that the application dated 8<sup>th</sup> December, 2021 lacks merit and is therefore dismissed with costs to the Respondent Bank.

#### **b. Whether the Interested Party’s Notice of Motion dated June 27, 2022 is merited**

29. Substantially in her application, the Interested Party seeks indulgence by extending the completion period for the sale agreement dated February 17, 2021 for 90 days and an order for specific performance to issue directing the Plaintiff to perform its obligations under the sale.
30. The grounds adduced in support of that application are not disputed and it is indeed agreeable by the parties *inter se* that vide a Sale Agreement dated February 17, 2021, the Defendant bank was agreeable to the Plaintiff selling the subject property to the Interested Party at a consideration of Kshs 75,000,000/= . Ten percent (10%) of the purchase price would be deposited in a joint account held by the bank and the Plaintiff while the balance of Kshs 60,000,000/= would be financed by Absa Bank. However, things turned around when Absa Bank communicated that it was only willing to finance Kshs 39,000,000/= as opposed to the Kshs 60,000,000/= contemplated. Nonetheless, the Interested Party sourced the difference of Kshs 21,000,000/= and deposited the same with the Plaintiffs, which claim has not been denied by the Plaintiff and or its advocate. The Plaintiff does also not deny that it received the Interested Party’s request to release the sum of Kshs.21,000,000/= to the Defendant bank to complete the sale transaction but avers that the Interested Party could not on its own motion decide on when and whom the Kshs 21,000,000/= ought to be transferred.



31. In addition, although the parties are in consensus that a court cannot rewrite a contract of parties by extending the period of performance, it is a common ground that the parties are agreeable to have extension of the period of performance of the sale agreement provided that the Interested Party pursues Absa bank to facilitate the remaining Kshs 39,000,000/=. In that state of affairs, I find the Interested Party's claim more persuasive, and justice would better serve in favour of all the three parties herein by allowing completion of the Sale Agreement.
32. This court has the inherent jurisdiction to prevent an injustice from happening and a duty to intervene and stop or put an end to it. In my view, the Interested Party having performed a substantial part of the sale agreement it would suffer injustice if the property were to be sold without consideration of the preemptive it has gained by virtue of the sale agreement. However, the court has to take into account the competing interests of the parties including the bank's right to realize the outstanding loan amount which stands at Kshs 63,081,709.06 as at July 5, 2022.
33. It is for the foregoing discussion that I grant the following orders: -
- a. That the completion period of the sale agreement dated February 17, 2021 be and is hereby extended for a further sixty (60) days.
  - b. That an order be and is hereby issued compelling the Plaintiff (Infinite Quest Marketing Limited) and or its advocate (Chepkwony Paul Elkington) to transfer Kshs 21,000,000/= held on behalf of the Interested Party on account of sale of the suit property to Escrow Account No 6580010707 within fourteen (14) days from the date hereof.
  - c. That the Interested Party is directed to facilitate the payment of the remaining Kshs 39,000,000/- to be deposited in the Escrow Account No.6580010707 within thirty (30) days from the date hereof.
  - d. Thereafter, the Defendant bank shall apply the proceeds of the sale to the loan account and forthwith render a Statement of Accounts to the Plaintiff.
  - e. That if orders (a), (b) and (c) above are not complied with, the bank shall be at liberty to exercise its power of sale.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF DECEMBER, 2022.**

**D O CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr Kamwaro counsel for 1<sup>st</sup> and 3<sup>rd</sup> Defendants in E948/2021 holding brief for**

**Mr Elkington for Plaintiff/Applicant**

**M/s Kale holding brief for Mr Mugisha for 1<sup>st</sup> Defendant/Respondent in E948/2021 and 2<sup>nd</sup> Respondent in E240 of 2022.**

**Mr Kimiti holding brief for Mrs Karega for Interested Party in E948 of 2021 holding brief for Mr K for Applicant in E240 of 2022**

**Court Assistant - Sakina**

