Ngari & another v Family Bank Limited & 2 others (Commercial Case E893 of 2021) [2022] KEHC 16512 (KLR) (Commercial and Tax) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E893 OF 2021

A MABEYA, J

DECEMBER 16, 2022

BETWEEN

DAVID KARIUKI NGARI ..... 1ST PLAINTIFF

HANNA WACHU KARIUKI ..... 2ND PLAINTIFF

AND

FAMILY BANK LIMITED ..... 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2ND DEFENDANT

CHOSEN BUILDERS INVESTMENT LIMITED ..... 3RD DEFENDANT

RULING

1. The application before court is dated October 29, 2021. It was brought under order 40 rule 1,2 and 4, order 51 rule 1 of the *Civil Procedure Rules*, sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* (chapter 21 of the laws of Kenya) sections 84, 90, 96, 97, 105 and 106 of the *Land Act*.

2. The application seeks injunctive orders to restrain the 1st and 2nd defendant from advertising for sale or disposing the plaintiffs' property known as LR numbers 12241/37(IR No 56698) and 12241/38(IR No 56699) Nairobi and Land Reference Number 13537/86(IR No 185762) Juja, Kiambu ("the suit properties")

3. The application is premised on the grounds on the face of it and the supporting affidavit of David Kariuki NgarI sworn on October 29, 2021. The applicants' case is that the plaintiffs had offered the suit property as collateral to guarantee the 3rd defendant for a facility and the 1st defendant issued a redemption notice with respect to the 3rd defendants indebtedness. That the 1st defendant did not recover the outstanding amount from the 3rd defendant who was the principal debtor. In that regard, the suit property being matrimonial property stands the risk of being auctioned.

4. That the security documents offered alternatives for ensuring full payment however the 1st defendant was bent on selling the suit property. That the 1st defendant failed to issue statutory notices and failed to undertake valuation before the auction and that the amount demanded was exaggerated.

5. The application was opposed through a replying affidavit dated November 25, 2021sworn by Sylvia Wambani, the legal officer with the 1st defendant. She stated that the 1st respondent had notified the plaintiffs of the outstanding and their rights *vide* a letter dated May 17, 2019.Further notices dated August 19, 2019 and July 22, 2021 were served by post. She contended that the 1st respondent instructed valuers to value the suit properties but the plaintiffs denied them access.

6. It was her contention that the allegation that the escrow account had money was untrue and contended that the facility had always been in arrears. She further contended that the outstanding balance was high because of the interest charged upon default in payment.

7. The application was canvassed by written submissions which I have considered.

8. The applicant submitted that no statutory notices were issued thereby making the realization of security unlawful. That upon restructuring of the facility, the notices dated March 19, 2021 and July 22, 2021 expired and thus the 1st defendant could not rely on them. That no proper valuation was conducted and that payment of the facility was to be effected through the escrow account and the 1st defendant had failed to show the court that the account did not have sufficient funds. That the 1st defendant ought to have considered all other modes of recovery before resorting the disposal of the suit properties.

9. On behalf of the defendants, it was submitted that statutory notices were served contrary to the assertions by the plaintiffs. The case of *Jampen Enterpriese Ltd v NIC Bank Kenya PLC & anor* [2019] eKLR, was relied on the proposition that he who alleges must prove. That it was the plaintiffs who had prevented the valuation of the suit properties. The case of *Levi House Construction and Engineering Ltd v ABC Bank Ltd & another* [2021] eKLR, was cited in support of the proposition that a joint valuation be ordered. That the loan arrears stood at Kshs 402,842,154/78 as at December 31, 2021.

10. I have considered the pleadings, the submissions and the authorities relied on. The main issue for determination is whether the applicants have made out a case for the injunctive orders sought.

11. The three conditions for the grant of a temporary injunction as set out in *Giella v Cassman Brown & Co Ltd* (1973) EA 385, are well known. The applicant must establish a *prima facie* case, he must demonstrate that he will suffer irreparable loss if the order is not granted and if the court is in doubt, it will determine the matter on a balance of convenience.

12. The applicants seek to restrain the defendants from transferring the suit property pending the hearing and determination of the suit. The applicant faulted the 1st defendant in the manner in which it sought to recover funds for payment of the facility stating that the statutory notices were not served upon them, valuation was not carried out and that the applicant had not exhausted all recovery methods before realizing the security.

13. In response, it was the respondents case that the facility remained unpaid and that the applicants were served with all the necessary statutory notices. The respondents further contended that the plaintiffs were the directors of the 3rd respondent and well aware of the arrears.

14. In this present case, it is not disputed that the 1st respondent advanced the facility to the 3rd respondent and a charge was registered against the suit property in its favour. On record are notices dated March 19, 2021, July 22, 2021 and a redemption notice dated September 28, 2021. All these were sent through

the registered postal addresses of the applicants. There was no evidence that the same were returned unclaimed. In this regard, I hold that the applicants were well served as required by law.

15. It was contended that since there had been a restructuring of the facility, the notices had expired and that there was need to re-issue fresh ones. There was no authority that was cited for that proposition neither do I know of any. Notices are only meant to put the charger on notice that there has been default and the charge intends to realize its security if default persists. I reject that contention.

16. On valuation, the 1st defendant contended and it was not denied, that it was the plaintiff who had made it difficult to value the properties. A chargee has a duty of ensuring that a forced valuation is taken before exercising the power of sale. Section 97(2) of the *Land Act* provides: -

> 97.
>
> (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
>
> (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

17. In *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, it was held that the purpose of the valuation under section 97(2) of the *Land Act* was two-fold; to obtain the best price reasonably obtainable at the time of sale, thus protecting the right of the chargor to property, and secondly, to prevent unscrupulous chargees from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.

18. In view of the foregoing, valuation is a mandatory requirement in order to ascertain the value of the property before disposing of it. The duty of the bank to undertake the valuation is imposed by statute. In this case the 1st respondent does not deny that that no valuation was conducted but it blames the plaintiff for having prevented the valuers from accessing the properties.

19. That may be so. But since valuation before sale is so crucial so as not to defraud the charger, the same is not an option. The 1st defendant should have applied to court for entry.

20. On the second limb of irreparable injury, in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held that: -

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

21. That the Court of Appeal further held that:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be 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."

22. In the present case, the applicants have not demonstrated that it would suffer irreparable harm that is not capable of being compensated by an award of damages. The applicants offered the properties as security with the knowledge that in the event of default, the security would be realized by the 1st defendant to recover its outlay.

23. In this regard, I find that the applicants have not demonstrated the irreparable harm they will suffer should the orders not be granted. On the contrary, the 1st respondent has more to lose should the orders be granted. The balance of convenience tilts in favour of denying the orders sought.

24. Accordingly, the application is without merit and is dismissed on the following terms: -

    a. Fresh and joint valuations be carried out on the suit properties within 30 days of the date of this ruling before the 1st respondent can proceed with the intended sale.

    b. Since the parties may dilly dally in agreeing on the joint valuer, I direct that each party shall forward 3 names of his/her/its preferred valuer to the Deputy Registrar of this court within 14 days who shall in her own discretion choose one of them to carry out the valuation of the suit properties. The expenses of the joint valuer shall be in terms of the security documents between the parties.

    c. Costs to the 1st defendant in any event.

25 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

A MABEYA, FCIArb

JUDGE