



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
COMMERCIAL AND TAX DIVISION  
HCCC NO. E043 OF 2020

ABCOM INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

Alias ANNE WANGECHI NGUMBA.....2<sup>ND</sup> PLAINTIFF/ APPLICANT

-VERSUS-

SBM BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS .....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. This ruling is in respect to the application dated 17<sup>th</sup> February 2020 wherein the plaintiff/applicant seeks orders of injunction to restrain the respondent from attaching, transferring, alienating, advertising, selling or in any other manner interfering with L.R. NO. 1870/IV/175 (I.R. 54664) (hereinafter “**the Suit Property**”) pending the hearing of the suit.

2. The applicant also seeks the following orders: -

**1. That this Honourable court be pleased to issue an order restraining the 1<sup>st</sup> respondent from listing the applicant with the Credit Reference Bureau pending the hearing and determination of this suit.**

**2. That pending the hearing and determination of this application, this Honourable court do issue an order compelling the 1<sup>st</sup> respondent to furnish the applicant with:**

**i. Copies of the charge documents of the facility issued to the 1<sup>st</sup> applicant.**

**3. That this Honourable court be pleased to issue an order compelling the respondents to furnish the applicants with copies of the forced sale valuation report for the above mentioned property L.R. No. 1870/IV/175(I.R.54664) earmarked for sale.**

3. The application is supported by the affidavit of the applicant’s director **Mr. Kirit Kanabar** and is premised on the grounds that: -

**1. That the object of this application will be defeated and the same rendered nugatory if it is not heard urgently. This is in view of the fact that the 2<sup>nd</sup> defendant/respondent under the instructions of the 1<sup>st</sup> defendant/respondent had advertised and plans to sell the plaintiff’s property charged in favour of the 1<sup>st</sup> defendant.**

**2. That the 1<sup>st</sup> defendant/respondent herein entered into an agreement with the plaintiff/applicant whereby the former was to advance the latter a loan facility.**

**3. That the said loan facility was securitized by a charge over the property known as L.R. No. 1870/IV/175 (I.R.54664) (hereinafter the suit property) registered in the name of the plaintiff/applicant.**

**4. That the plaintiff was surprised to see the property advertised for sale by auction as the 1<sup>st</sup> defendant/respondent NEVER issued the chargor with statutory notices in accordance with Section 90 of the Land Act 2012 which ostensibly would indicate**

how much is owed and how much the chargor and/or borrower would need to pay to rectify the default.

5. That the 1<sup>st</sup> defendant/respondent has also not issued the chargor with a notification of sale as required under Section 96 of the aforesaid Act.

6. That no forced sale valuation report has been carried out to indicate the reserve price, the amount that the 1<sup>st</sup> defendant/respondent would recover from the intended sale and how much money would be payable to the chargor after the 1<sup>st</sup> defendant/respondent recovers whatever amount is owed to it.

7. That the advertisement has been made despite of the fact that the plaintiff has painstakingly made payments towards settlement of the facility.

8. That despite the glaring irregularities, the 1<sup>st</sup> defendant/respondent has instructed the 2<sup>nd</sup> defendant/respondent to advertise the property for sale on the 19<sup>th</sup> day of February 2020.

9. That the actions of the 1<sup>st</sup> defendant/respondent are clearly informed by malice and are crafted to defeat the plaintiff's right of redemption.

10. That there is imminent fear that unless this honourable court urgently intervenes and halts the action, the defendants/respondents will eventually and unfairly dispose of the suit property in question to third parties thus keeping it out of the reach of the plaintiff consequently occasioning it irreparable loss, the irregularities indicated herein notwithstanding.

4. The 1<sup>st</sup> respondent opposed the application through the replying affidavit of its Assistant Manager, Debt Recovery **Becline Ochiel** who avers that the 1<sup>st</sup> defendant advanced a loan facility of Kshs 300,000,000 to the applicant at the said applicants request which loan was secured by a legal charge over the suit property.

5. She further states that the applicant defaulted in the loan repayments thus precipitating the 1<sup>st</sup> respondent's action by realize its security by exercising its statutory power of sale. She states that the 1<sup>st</sup> respondent issued the plaintiff with all the requisite statutory notices besides carrying out a valuation of the suit property.

6. She further states that the applicant is truly indebted to the 1<sup>st</sup> respondent and that the instant application for injunctive orders has been brought in bad faith. She maintains that the actual loan amount agreed upon was Kshs 300,000,000 and not Kshs 375,000,000 and that the application does not meet the threshold for granting orders of injunction.

7. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the granting of interim orders of injunction.

8. The law governing the granting of interlocutory injunction 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;**

**(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 orders."**

9. The conditions for consideration in granting an injunction were settled in the case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

**"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."**

10. The principles in *Giella v Cassman Brown* (supra) were captured in *Paul Girona Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR as follows:

**"i) Is there a serious issue to be tried?**

**ii) Will the applicant suffer irreparable harm if the injunction is not granted?**

**iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")**

11. The test for granting of an interlocutory injunction was considered in the American *Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where the following elements were noted to be of great importance namely:

**i. There must be a serious/fair issue to be tried,**

**ii. Damages are not an adequate remedy,**

**iii. The balance of convenience lies in favour of granting or refusing the application.**

12. A simple reading of **Order 40 Rule 1 of the Civil Procedure Rules** shows that before granting an order of temporary injunction the applicant must prove that the property in dispute in the suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. The court is in such a situation enjoined to grant a temporary injunction to restrain such acts.

13. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1<sup>st</sup> defendant does not deny that it has instructed the 2<sup>nd</sup> defendant to auction the suit property but contends that it has a legal right to exercise a statutory power of sale. The plaintiff, on the other hand, challenges such a right while contending that it was not issued with the statutory notices among other grounds.

14. Having regard to the evidence presented through the parties' respective affidavits this court will now venture into considering if the instant application meets the threshold set for the granting of orders of interlocutory injunction.

**Prima Facie Case with a probability of success.**

15. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 the Court of Appeal defined a prima facie case as follows:

**"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".**

16. In *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

**"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."**

17. In the present case, it was not disputed that the applicant entered into an agreement with the 1<sup>st</sup> defendant for a Term Loan Facility of Kshs 300,000,000 as shown in the Letter of Offer dated 19<sup>th</sup> May 2014. The applicant however blames the defendant for stalling its construction project on account of the 1<sup>st</sup> defendant's alleged failure to disburse an additional Kshs 75,000,000 needed to complete the construction.

18. The applicant also blames the 1<sup>st</sup> defendant for clandestinely debiting the balance into the loan account to make it appear as if the entire loan had been disbursed such that instead of charging simple interest on the amount disbursed, interest was calculated as if the entire loan had been disbursed.

19. Having regard to the settled principles of granting orders of injunction and the facts surrounding this case, this court notes that the applicant has been cagey in disclosing if it had paid back the loan advanced to it by the 1<sup>st</sup> defendant. I also note that besides blaming the 1<sup>st</sup> respondent for the alleged failure of its construction project and for failure to issue it with statutory notices, the applicant has not demonstrated that it has paid the loan advanced to it by the 1<sup>st</sup> defendant. In its submissions, the applicant concedes that it diligently paid interest on the loan facility until sometime in 2016 when it defaulted due to alleged frustrations caused by the bank in failing to disburse the alleged additional Kshs 75,000,000.

20. I have perused the letter of offer signed by the parties that was attached to the respondent's Replying Affidavit as annexure marked **"SBM-1"** and I note that debt sum was for a maximum of Kshs 300,000,000 and not Kshs 375,000,000 as has been alleged by the applicant.

21. It is not disputed that the applicant is still indebted to the 1<sup>st</sup> respondent in which case, the applicant cannot be said to have come to the court of equity with clean hands. I am therefore not satisfied that the applicant has made out a prima facie case for the granting of orders of injunction.

22. Having found that the condition on prima facie case has not been satisfied, I do not find it necessary to consider the two remaining conditions for granting orders of injunction in view of the fact that all the three conditions for granting interlocutory injunction have to be established sequentially. This means that failure to prove one condition spells a death knell on the entire application. I am guided by the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA NO. 77 OF 2012, where the principles of injunction, together with the mode of their application was discussed 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, 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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. 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.” (Emphasis added).

23. My findings on the subject of the conditions for granting of orders of injunction notwithstanding, I am still minded to consider the issue of the alleged charging of illegal interest rates that was raised by the applicant. My finding is that the interest rate applicable in a loan agreement is governed by the terms of the said agreement and cannot be a basis for the granting of orders of injunction. I am guided by the decision in *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 (CCK) wherein it was held that: -

**“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest...in any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction. “**

24. On the issue of the alleged failure to serve the applicant with the requisite statutory notices, I note that the 1<sup>st</sup> respondent demonstrated through annexures “SBM-5”, “SBM-6”, “SBM-7” and “SBM-8” that it sent the said notices to the applicant. Courts have taken the position that lack of or improper service with statutory notices cannot stop a chargee from exercising its statutory power of sale. I am guided by the decision of the Court of Appeal in the case of *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held as follows:

**“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not *exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.*”**

25. Turning to the issue of valuation report, the applicant contended that no valuation had been carried out on the suit property as required by the law. Section 97 of the Land Act stipulates as follows: -

#### **Duty of chargee exercising power of sale**

- (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.**
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—**
  - (a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**
  - (b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).**
- (4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.**
- (5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any**

guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

**(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.**

**(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.**

26. The importance of compliance of the above provision has been the subject of many court decisions. In the case of **John Mwenja Ngumba & Another v National Industrial Credit (NIC) Limited & Another** [2014] eKLR it was held that the issue of whether or not the property was sold at the proper price can be determined at full trial.

27. In the instant case, I note that contrary to the applicant's assertions, the 1<sup>st</sup> respondent exhibited annexure marked "SBM-9" to demonstrate that it carried out a valuation of the suit property which valuation revealed that the value of the suit property is not capable of meeting the current outstanding arrears.

28. Courts have also held that undervaluation *per se* cannot form a ground for the issuance of orders of injunction since breach, by the chargee in selling the property at an undervalue can be remedied through a claim for damages. (See **Jashvantsing L. Solanki v Diamond Trust Bank Ltd.** [2014] eKLR).

29. For the reasons that I have outlined in this ruling, I find that the justice of this case does not favour the granting of the orders of temporary injunction and I therefore dismiss the instant application with costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kazungu for the 1<sup>st</sup> defendant.

Mr. Wamukoya for Okatch for plaintiff/applicant

Court Assistant: Sylvia.