



**Pegasus Kenya Limited v African Banking Corporation Limited & another (Civil Case E195 of 2021) [2021] KEHC 411 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E195 OF 2021  
WA OKWANY, J  
DECEMBER 16, 2021**

**BETWEEN**

**PEGASUS KENYA LIMITED ..... APPLICANT**

**AND**

**AFRICAN BANKING CORPORATION LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**IMPACT INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 15<sup>th</sup> April 2021 wherein the applicant seeks the following orders: -
  1. Spent
  2. Spent
  3. That this honourable court be pleased to issue a temporary order against the Respondents jointly and severally restraining them from selling, transferring, disposing and/or dealing with Applicant's property known as L.R. 209/10669/5 South B pending the hearing and determination of this suit.
  4. That this court be pleased to grant any other suitable order that it deems fit and just in the circumstances.
  5. That costs of this application be provided for.



2. The application is supported by the affidavit of Adan Haji Isaak and is based on the following grounds: -
  - a. The Applicant is an innocent purchaser for value of all that property described as L.R. 209/10669/5 together with development thereon.
  - b. The 1<sup>st</sup> Defendant/Respondent has never issued a statutory 90 days to the Applicant.
  - c. The 1<sup>st</sup> Respondent has equally never sent a 45 redemption notice to the applicant.
  - d. The Respondents have colluded to dispose of the Applicant's parcel without involving him or his consent.
  - e. The Applicant entered into a private treaty with the 2<sup>nd</sup> Respondent with the consent from the 1<sup>st</sup> Respondent.
  - f. The Applicant has paid a sum of Kshs. 23,000,000/- towards servicing of the said loan and he stands to suffer great loss and damage if the Respondents are not restrained from disposing of the Applicant's parcel.
  - g. The 1<sup>st</sup> Respondent has not acquired superior rights over those that were acquired by the Applicant over the suit parcel.
  - h. The Applicant has spent heavily towards rehabilitating the suit premises as it was not hospitable at the time of purchase. This fact had not been communicated to the applicant before purchase.
  - i. No loss or damage will be occasioned to the Respondents should the court grant the orders sought.
3. The respondents opposed the application through the replying affidavit of the 1<sup>st</sup> respondent's Legal Manager Ms. Faith Nteere who states that the bank did not enter into any agreement with the plaintiff with respect to the sale of the LR. No 209/1066915 South B and does not therefore owe any contractual obligation to the plaintiff. She further states that the bank is the only financier with a registered interest over the suit property as a chargee and that it issued the requisite statutory notices to the 2<sup>nd</sup> defendant following its default in servicing the loan.
4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of injunction.
5. Order 40 Rule 1 of the Civil Procedure Rules provides for the circumstances under which orders of temporary injunction can be granted by the Court. The principles governing the granting of orders of injunction were stated in *Giella vs Cassman Brown* [1973] E.A 358 as follows: -

“The settled principles therein are firstly that the applicant must show a prima facie case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot adequately be compensated by damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience”.



6. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 the court described prima facie to mean: -

“So what is a prima facie case.... In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter.”

7. In the instant case, the applicant sates that he is a bona fide purchaser of the suit property for that the 1<sup>st</sup> respondent did not send him the statutory notices despite the fact that it gave consent to the 2<sup>nd</sup> respondent to sell the said property to the applicant through a private treaty. The applicant further contended that it had already paid the sum of Kshs. 23,000,000/ towards servicing of the 2<sup>nd</sup> respondent’s loan and it stands to suffer loss and damage if the 1<sup>st</sup> Respondent is not restrained from disposing of the suit property.

8. The 1<sup>st</sup> respondent on the other hand conceded that it gave consent to the 2<sup>nd</sup> respondent to sell the suit property to the applicant but argued that it was not a party to the said transaction and does not therefore owe any contractual obligation to the plaintiff.

9. On whether the applicant established a prima fie case, I note that the parties did not dispute the existence of the loan agreement and the default on the part of the 2<sup>nd</sup> defendant. It was also not disputed that the bank holds a legal charge over the suit property which it is entitles to sell in order to recover its debt in the event of default in the loan repayments.

10. It is noteworthy that while it is true that the applicant has a beneficial interest in the suit property, the banks interest as a chargee supersedes or overrides the applicant’s interest. The court did not however lose sight of the fact that the bank gave consent to the 2<sup>nd</sup> respondent to sell the suit property to the applicant who in turn paid the sum of Kshs 23,00,000 to the 1<sup>st</sup> respondent/bank towards the settlement of the loan. I therefore find that the applicant was, in the circumstances of this case, entitled to be issued with the statutory notices and has therefore demonstrated it has a prima facie case against the respondents.

11. Turning to the issue of whether the applicant will suffer irreparable harm, I note that the amount in question is stated to be Kshs. 23,000,000 which by all standards, is a substantial sum that the applicant stands to lose in the event the order stopping the intended sale of the suit property is not issued. In the case of case of *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR the Court considered the Halsbury’s laws of England definition of what amounts to irreparable loss is and stated that: -

“first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

12. Guided by the above decision, I find that the applicant has demonstrated that it stands to suffer irreparably should the suit land be sold as the 2<sup>nd</sup> respondent has already shown that it is not able to service the loan it owes to the bank thus resulting in the bank’s exercise of its statutory power of sale. I further find that the balance of convenience tilts in favour to granting the order of injunction more



so in the face of the admission, by the bank, that it consented to the sale of the suit property to the applicant.

13. I therefore find merit in the instant application which I hereby allow with orders that costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 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. Riechi for Nyaberi for Plaintiff/Applicant.

Mr. Mugisha for Respondent.

Court Assistant: Margaret

