Obama Enterprises Limited & 2 others v Kenya Women Microfinance Bank Limited (Civil Case E315 of 2021) [2021] KEHC 351 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E315 OF 2021

EC MWITA, J

DECEMBER 16, 2021

BETWEEN

OBAMA ENTERPRISES LIMITED ..... 1ST APPLICANT

SAMMY MUITA MUREITHI ..... 2ND APPLICANT

CAROLINE MAUREEN THUIYA ..... 3RD APPLICANT

AND

KENYA WOMEN MICROFINANCE BANK LIMITED ..... RESPONDENT

RULING

1. The plaintiffs/applicants (applicants) have filed a notice of motion dated 15th March 2021, seeking a temporary injunction restraining the defendant/respondent(respondent) or its agents from selling by public auction or in any other manner interfering with parcel No. Kiambu/Kikuyu Trading Centre/43, pending the hearing and determination of this suit. The application is supported by the grounds on the face of the motion and the affidavit of the 3rd applicant sworn on 15th March 2021.

2. According to the grounds on the face of the motion and the affidavit, the 2nd and 3rd applicants are registered joint owners of the suit property and directors of the 1st applicant. The 1st applicant took a credit facility of Kshs. 16,107,150 making an aggregate amount of Kshs. 20,268,030.61, from the defendant/respondent on 31st March 2015. The 2nd and 3rd applicants executed a legal charge dated 31st March 2015 and registered over the property on 1st April 2015 in favour of the respondent to secure that facility.

3. They state that the 1st applicant regularly serviced the loan until 2020 when Covid 19 pandemic struck and its business took a hit. However, in line with the Central Bank of Kenya advisory to financial institutions, they applied for loan forbearance/restructuring from the respondent but it was ignored.

The respondent then instructed an auctioneer (Garam Investments) to sell the property which was to take place on 6th April 2021 without serving requisite statutory notices.

4. According to the applicants, they were shocked to receive a notice dated 12th February 2020 demanding that they regularize the default of Kshs. 1,325,361.11. They visited the respondent's offices several times requesting indulgence and restructuring of the loan to no avail. They have since tried to regularize the account and have even paid a sum of Kshs. 1,634,252 since 12th February 2020, but they were shocked to receive a notice that their property would be sold on 6th April 2021 despite the fact that they had not been served with statutory notices as required by law.

5. The respondent has filed a replying affidavit sworn by Benard Kiprotich on 24th March 2021. He states that the 1ST applicant obtained a loan facility from the respondent of Kshs, 20,268,030.61 which was secured by a legal charge over the suit property. The loan was to be repaid in by monthly installments as provided for in the charge instrument, but the loan facility fell into arrears as earlier as June 2017. The loan was not being serviced regularly and the amount stood at Kshs. 20,135,416.81 when the respondent moved to realize the security.

6. It is the deponent's assertion that the respondent issued and served the three months' notice dated 12th February 2020, requiring the applicants to regularize the default which the applicants admit in their supporting affidavit. The respondent accommodated them but again they failed to pay forcing the respondent to issue another notice dated 16th July 2020 and sent by registered mail asking them to clear the outstanding arrears of Kshs. 3,191,361.76. The respondent issued the forty days' notice dated 6th November 2020 which was also sent by registered mail. It then instructed the auctioneers to issue the forty-five days' notice and advertise the property for sale by public auction. The auctioneer issued a notice dated 29th January 2021 and also served notification of sale and advertised the property for sale The respondent commissioned a presale valuation of the property and Crystal Valuers Ltd valued the property at Kshs. 18,500,000(market price) and Kshs. 14,000,000 forced sale valuation.

7. The respondent contends, therefore, that it complied with the law and served requisite statutory notices by registered mail; that the loan was already in default even before the Covid pandemic and that it had already restructured the loan on several occasions to accommodate the applicants but they still defaulted. The respondent maintains that its statutory power of sale had crystalized and, as such, the application has no merit and should be dismissed with costs.

8. The applicants have filed written submissions dated 22nd September 2021. They submit that the defendant issued a notice dated 12th February 2020 asking them to regularize the default of Kshs. 1,325,361.11. A visit to the respondent's offices seeking indulgence and restructuring of the facility, however, bore no fruits. They continued to repay the loan but they were served with notice to sell the property which was done irregularly.

9. The plaintiffs argue that their postal address in the charge instrument is xxx-00621 Kikuyu, but the letter dated 12th February 2020 addressed to them bears the postal address of Po Box xxx-00621 Nairobi which does not belong to them. They also submit that although the letter dated 16th July 2020 bears their correct address, the certificate of posting is illegible and it is difficult to determine where the letter was sent. They argue, therefore, that there was no proof that the notices were served. They rely on *Peter Kimani Nene v Kenya Commercial Bank Limited* [2016] eKLR and *EMRRE Global Investor Limited v Housing Finance Company of Kenya Ltd & 2 others* [2014] eKLR. They urge that the application be allowed with costs.

10. The respondent has filed its written submissions dated 15th October 2021. It submits that the applicants have admitted their indebtedness to it; that it is not true that the applicants have been

regularly servicing the loan and that statements of account attached to its replying affidavit confirm default. According to the respondent, as at 19th March 2021, the outstanding amount was Kshs. 20,135,416 and the applicants should not be allowed to run away from their loan obligations. It relies on *Jopa Villas LLC V Private Investment Corporation & 2 others* cited in *Brade Gate Holdings Limited & another v Jamii Bora Bank Limited* [2016] eKLR, that an applicant should not run away from obligations lawfully imposed and with its knowledge and participation.

11. It also cites the decision in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) limited* [2014] eKLR, that it is not for the court to rewrite a contract for the parties. (See also *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited & another* [2001] eKLR.

12. Regarding service of statutory notices, the respondent submits that the applicants were dully served with the notices. It maintains that the notice dated 12th February 2020 was dispatched to the applicants (annexture BK3) and it is admitted by the applicants at paragraph 12 of their supporting affidavit. Similarly, the notice dated 16th July 2020 was dispatched on 24th July 2020 to the applicants' postal address of Po. Box xxx-00621 Kikuyu. The respondent relies on *Karige Kihoro v Equity Bank Limited & another* [2016] eKLR, for the argument that notices sent to the respondent's last known Postal address, are by law deemed to have been served.

13. The respondent argues that the applicants have not satisfied the conditions for granting an interlocutory injunction in *Giella v Casman Brown & Company. Llimited* [1973] EA 358. It also relies on *Kenya Commercial Finance Co. Limited v Afraha Education Society* [2001] EA 86, that the conditions in Giella v Casman Brown are sequential and that the second condition can only be considered if the first condition has been satisfied. The respondent relies on may other decisions to argue that the applicants do not deserve the orders they seek. It urges that the application be dismissed with costs.

14. I have considered the application, the response and submissions. I have also considered the authorities relied on by respective parties. Before this court is a motion seeking an interlocutory injunction to restrain the respondent from exercising its statutory power of sale over parcel No Kiambu/Kikuyu Trading Centre/43, pending the hearing and determination of this suit.

15. The main reason for seeking injunction as can be seen from the face of the application and the supporting affidavit is that the respondent did not serve statutory notices before moving to exercise its statutory power of sale. The applicants argue that if the auction is allowed to go on, they will suffer irreparable loss which cannot be adequately compensated by damages.

16. The respondent on its part argues that the application is unmeritorious; that it complied with the law and served notices before exercising its statutory power sale; that the applicants are in default and have not shown that they have a prima facie case with probability of success, or that they will suffer irreparable loss that cannot be adequately compensated by of damages.

17. This being an application for interlocutory injunction, the law is settled that the applicants must demonstrate that they have a prima facie case with probability of success; that they will suffer irreparable loss that cannot be adequately compensated by damages, or that the balance of convenience tilts in their favour. In that regard, it is the applicants' duty to demonstrate that they meet the test laid down in various decisions, leading among them, *Giella v Cassman Brown & Company Limited* (supra).

18. The 1st applicant obtained a financial facility from the respondent which was secured by legal charges over the suit property. The applicants state that the 1st applicant dutifully repaid the loan facility but hard economic times occasioned by the Covid pandemic caused it to face challenges in repaying the loan. It approached the respondent and requested it to restructure the loan but it was ignored. The

respondent however argues that the applicants had defaulted as early as 2017 and it had restructured the loan on several occasions but there was still default.

19. The law is clear that a chargee may exercise its statutory power of sale in the event of default by a chargor to repay the loan. Section 90(1) of the *Land Act*, provided that if a chargor is in default of any obligation and fails to pay interest or any other periodic payment or any part thereof due under a charge or in the performance or observation of any covenant in a charge, and continues to be in default for one month, the chargee may serve a notice in writing on the chargor requiring him to pay the money owing, or to perform and observe the terms of the agreement.

20. Section 90(2) requires that the notice served adequately inform the chargor the nature and extent of the default; the amount that must be paid to rectify the default and the time, being not less than three months, within which the default must be rectified. The notice should also inform the borrower consequences that will follow if he fails to comply.

21. Subsection (3) provides the options available to the chargee if the chargor fails rectify the situation within the period given. One of the options the chargee has is to sell the charged property. That is the option the respondent has opted for in the present matter and instructed auctioneers to advertise the property for sale giving rise to the present application.

22. As is clear from section 90 above, the respondent was required to serve the applicants with a notice calling on them to rectify the default. The applicants argue that statutory notices required under sections 90(1) and 96 were not served, and therefore the intended sale of the property is illegal.

23. First and foremost, a reading of the application, supporting affidavits and submissions by the applicants, reveals that the applicants are not candid to the court. Whereas they state that notices were not served, they at the same time admit that they received a notice dated 12th February 2020, asking them to regularize the default of Kshs. 1,325,361.11. Following receipt of that notice, they visited the respondent's offices seeking indulgence and restructuring of the loan facility to no avail. They again admit in the affidavits that they received a notice dated 16th July 2020. They however assert in their submissions that the letter though addressed to their correct postal address, the certificate of posting is faint to the extent that it is not clear on the address used. This, in my view, is clear that the applicants are approbating and reprobating at the same time.

24. I have gone through the application and the response as well as the documents annexed to the affidavits filed by both parties in support of their respective positions. The respondent has attached notices issued under section 90(1) and 96(2) dated 12th February 2020 and 16th July 2020 respectively, and sent to the applicants by registered post. The auctioneer issued the 45 days' notice dated 29th January 2021 and sent it to the applicants by registered post on 1st February 2021. A notification of sale was also served. The applicants do not seriously dispute service of notices by the auctioneers. The notices issued by the respondent to the applicants have been admitted. The applicant admit receiving notices dated 12th February 2020 and 16th July 2020 and, therefore, the applicants argument that they were not served with notices has no merit.

25. In order to persuade the court to grant an interlocutory injunction in their favour, the law requires the applicants to demonstrate that they have a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal (Bosire JA), stated that the power of the court in an application for an interlocutory injunction is a judicial discretion which has to be exercised on the basis of the law and evidence.

26. The learned Judge of Appeal then stated;

> The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court 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 or rebuttal from the latter.

27. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal agreed with the definition of a prima facie case in the Mrao case and stated:

> The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

28. In the present application, the applicants were required to show that their right is being violated or is likely to be violated by the respondent which would shift the burden to the respondent to explain or rebut the applicants' claim. It is not enough for the applicants to merely state that they have a prima facie case. That alone will not bring them within the meaning of a prima facie case as required by law.

29. I have considered the material placed before this court, the basis of which the applicants seek a temporary injunction. As it is, this court is not conducting a mini trial of the applicants' case. Its task at this stage is to determine on the material placed before it, whether the applicants have put forward a case requiring it to intervene and restrain the respondent from exercising its statutory power of sale. That is to say, the applicants will suffer irreparable injury that cannot otherwise be compensated by way of damages or that the balance of convenience tilts in their favour.

30. The applicants' contention is that the respondent did not serve statutory notices as required by sections 90(1) and 96(2) of the *Land Act*. The respondent has however attached notices addressed to the applicants which the applicants admit to have received. It is stated that notices issued by the auctioneers were also served which the applicants do not specifically dispute. As already alluded to, the applicants admit in their supporting affidavit that they received the notice dated 12th February 2020 requiring them to rectify the default. They also received the notice dated 16th July 2020.

31. On the basis of the facts disclosed in this application, I am not persuaded that the applicants have satisfied the test for granting a temporary injunction. They have not demonstrated that they have a

prima facie case with a probability of success. The applicants have not denied that there is default. They blame the respondent for not restructuring the loan facility as they requested. The respondent however argues, which is not denied by the applicants, that the loan has been in default since 2017 and that it had restructured the loan on several occasions but the applicants still fell into default.

32. Whether to restructure a loan or not is a matter of the respondent's discretion which the court cannot force it to do except where circumstances compel the court to come in, which is not the case here. I therefore find and hold that the respondent served the requisite notices thus complied with the law before exercising its statutory power of sale.

33. On whether the applicants will suffer irreparable injury that cannot be compensated by damages, I am not persuaded that this will be the case. The respondent is a financial institution that would easily compensate the applicants were the suit to eventually succeed. The value of the charged property is also known or can easily be ascertained and, therefore, the applicants can recoup the value of the property if the suit succeeded.

34. Regarding the balance of convenience, I am equally of the considered view that the balance of convenience tilts in favour of the respondent. The loan amount continues to attract interest and, as a result, the amount plus interest could outstrip the value of the property. This means that if the respondent is restrained from exercising its statutory power of sale until the suit is heard and determined, it may not be able to recover the outstanding loan amount plus interest by the time the suit will be determined. This is so because the value of the property cannot be guaranteed to be sufficient to cover the outstanding loan amount and interest then outstanding. In that regard, I find that the balance of convenience tilts in favour of the respondent since it can pay the value of the property if it lost he suit.

35. Finally, the respondent has shown that it complied with the law and conducted a presale valuation before moving to exercise its statutory power of sale, thus its statutory power of sale had crystalized.

36. It is also clear to this court that the applicants are in default which has been admitted and that was why they sought restructuring of the loan. They cannot turn to this court for an injunction to restrain the chargee from exercising its statutory power of sale, when they are clearly in default.

37. As the Court of Appeal stated in *Giro Commercial Bank Limited v Halid Hamad Mutesi* [2002] eKLR, a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. Where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.

38. In the circumstances, having considered the application, the response and submissions as well as the decisions relied on, I am not satisfied that the applicants have made a case for grant of an interlocutory injunction. Consequently, the application dated 15th March 2021 is declined and dismissed. Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021

EC MWITA

JUDGE