



**Minazini Enterprises Limited & 2 others v SBM Bank (K) Ltd & another (Environment & Land Case 203 of 2020) [2023] KEELC 19124 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 203 OF 2020  
NA MATHEKA, J  
JULY 25, 2023**

**BETWEEN**

**MINAZINI ENTERPRISES LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
ABDALLA MOHAMED ABDALLA (SUING THRO' HIS REGISTERED  
ATTORNEY SANIYA ABDALLA MOHAMED) ..... 2<sup>ND</sup> PLAINTIFF  
ZUBEDA SAID MOHAMED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SBM BANK (K) LTD ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated 5<sup>th</sup> November 2020 and is brought under Sections 1, 1A, 1B, 3, 3A, 63(e), [Civil Procedure Act](#), Cap 21, Laws of Kenya; Order 40 Rules 1, 2 & 4; Order 51 Rule 1, [Civil Procedure Rules](#), 2010 and Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259, [Constitution of Kenya](#), 2010 seeking the following orders;
  1. That this matter be certified urgent and service thereof be dispensed with in the first instance;
  2. An order of temporary injunction do issue restraining the 1<sup>st</sup> Defendant, whether by herself, her agents/employees/ servants and/or anyone whosoever laying claim through them, jointly and severally, from disposing, transferring, alienating entering into, dwelling upon, interfering with the Plaintiff's open, peaceful, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use, and/or in any other manner whatsoever, dealing with the suit property reference title numbers: Mombasa/Block XVI/601 – (0.0166 Ha); Mombasa/Block XVI/602 – (0.0166 Ha); Mombasa/Block XVI/606 – (0.0176 Ha); Mombasa/Block XVI/607 – (0.0176 Ha); Mombasa/Block XVI/608 – (0.0176 Ha) and



Mombasa/Block XVI/609 – (0.0176 Ha) all located within the Municipality of Mombasa, County of Mombasa together with all developments thereon in any manner adverse to the Plaintiffs’ interest therein.

3. That the orders subject of prayer/item no. 2 above be served upon the Court Bailiff, Mombasa Law Courts and the OCS Central Police Station for purposes of ensuring execution of this order, provide security, and ensure no public disturbance ensues, whilst maintaining law and order throughout and after the execution of this order.
  4. That the orders subject of prayers/items no. 2 and 3 above do persist until the hearing and determination of this application and ultimately the suit.
  5. That costs of this application be provided for.
2. It is premised upon the supporting affidavits of Joshua Opee Mboya and Ann Wahu Ichangai, the 1<sup>st</sup> Plaintiff’s Directors, and on the following grounds that at all times material the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were, are and remain legally married spouses, under the provisions of the Marriage Act, 2014, Laws of Kenya; The Registered Legal Attorney of the 2<sup>nd</sup> Plaintiff, as Donee of the general power of attorney donated by the 2<sup>nd</sup> Plaintiff, Saniya Abdalla Mohamed, was, is and remains the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs’ biological daughter; The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were, are and remain the Directors and Shareholders of the 1<sup>st</sup> Plaintiff Company; The 2<sup>nd</sup> Plaintiff was, is and remain the lawful, registered proprietor of all those parcels all located within the Municipality of Mombasa, County of Mombasa.

That vide conditional offer of banking facility dated 14<sup>th</sup> June 2019, a modification of the conditional offer of banking facility dated 24<sup>th</sup> May 2019 the 1<sup>st</sup> Defendant offered to take up the 1<sup>st</sup> Plaintiff’s existing liability with M/S Fidelity Commercial Bank Limited with effect from the date of Execution thereof. However, the 1<sup>st</sup> Defendant through their Acts and/or Omissions amounting to Fraud and/or Misrepresentation in the Unilateral, Non-consensual inclusion of “Clause 10: Other Conditions” in the Conditional Offer of Banking Facility dated 14<sup>th</sup> June 2019, the 1<sup>st</sup> Defendant has engaged the Plaintiffs in a myriad of correspondence seeking clarification from the 1<sup>st</sup> Defendant on the various issues. That the unprecedented interruption of the Plaintiffs’ peaceful, open, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the parcels by trespass by the 2<sup>nd</sup> Defendant by construction of a public utility (public access road) by the 2<sup>nd</sup> Defendant. That pursuant to the foregoing as viewed against trite law on (compulsory) acquisition any interruption of and/or alteration in/of the Plaintiffs’ peaceful, open, quiet, lawful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the suit properties should have been conducted strictly.

3. That the Defendants have, despite the Plaintiffs’ reasonable attempts to resolve all issues subject hereof amicably, declined Dialogue and Amicable Resolution hereof and want to proceed and sell the suit properties. That should the threatened exercise of statutory power of sale over the suit properties be allowed to proceed to its logical conclusion as maliciously and unlawfully instituted, the same shall only serve to clog and/or fetter the Plaintiffs’ inalienable equity of redemption in respect of the said property, whilst gravely violating their constitutionally-guaranteed right to property, the end result being that the Defendants and particularly the 1<sup>st</sup> Defendant shall have stolen a match on the Plaintiffs’ by virtue of the Plaintiffs’ right to redemption as foregoing, as juxtaposed against the provisions of the conditional offer of banking facility dated 14<sup>th</sup> June 2019 applicable herein. That therefore unless averted by this Honourable Court, the Defendants’ intention to sell/dispose of the issue property will occasion irreparable loss and damage to the Plaintiffs, incomensurable by any award of damages. That



the Plaintiffs maintain that the Illegality subject hereof cannot be sanctioned and/or rendered lawful by whatever argument.

4. That, therefore, unless averted by this Honourable Court, the 1<sup>st</sup> Defendant's intention to sell/dispose of the suit properties shall proceed unabated to the Plaintiffs' Grave Obvious, Unjustified and Unjustifiable Prejudice and Detriment, the net resultant Loss, Injury and Damage whereof would be too onerous to be compensable in any Way, manner or form by any award in damages or elsehow.

1<sup>st</sup> Defendant/ Respondent stated that it is a Bank, its rights to exercise the power of sale vested on it by law in pursuit of its rights as set out in the Agreement of the parties. That vide the Conditional Letter of Offer dated 14<sup>th</sup> June, 2019, the 1<sup>st</sup> Defendant agreed to take over the 1<sup>st</sup> Plaintiff/Applicant's existing facility with Fidelity Commercial Bank Limited of Kshs.53, 908, 083.30 (Annexed and marked hereto as "DM-I" is a copy of the Conditional Letter of Offer dated 14<sup>th</sup> June, 2019). That in the foregoing and as a consequence, the 1<sup>st</sup> Defendant took over the existing Charges created over Mombasa/Block XVI (601& 602, Mombasa/Block XV1/606, 607, 608 & 609 and Mombasa/Block/784 respectively, as security. (Annexed and marked as "DM-2 A, B & C" are copies of Charges created over Mombasa/Block XVI/601 & 602 and Mombasa/Block XVI/606, 607, 608 & 609 & and Mombasa/Block/784 respectively, evenly dated 22<sup>nd</sup> December, 2015,). That similarly, the 1<sup>st</sup> Defendant took over the existing Debenture created over the 1<sup>st</sup> Plaintiffs assets for Kshs. 52, 600,000.00, as security. (Annexed and marked hereto as "DM-3" is a copy of the Debenture dated 22<sup>nd</sup> December, 2015, created over the 1<sup>st</sup> Plaintiffs Assets). That further, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants issued Personal Guarantee and Indemnity as the directors of the 1<sup>st</sup> Plaintiff for Kshs.53, 908, 083.60. (Annexed marked hereto as "DM-4" is a copy of the Personal Guarantee and Indemnity by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants)

5. That the facility was governed by the terms and conditions contained in the conditional Letter of Offer dated 14<sup>th</sup> June, 2019. That the purpose of the charges was to secure the payment of monies lent to the 1<sup>st</sup> Plaintiff/ Applicant by the 1<sup>st</sup> Defendant/ Respondent together with interest and any other associated costs. That the Plaintiffs/ Applicants do not deny the existence of the debt. That during the performance of the said facility the 1<sup>st</sup> Plaintiff/ Applicant has been in total perpetual default of the terms and conditions of the subject conditional Letter of Offer leading to the 1<sup>st</sup> Defendant/ Applicant to issue various letter issued to the Plaintiff calling for regularization of the account. (Marked and Annexed hereto as "DM 5" are the various notices). That the effect of such default is that the account would go into arrears and accrue interests and penalty charges.

That it is evident from the letter by the 1<sup>st</sup> Plaintiff/Applicant dated 21<sup>st</sup> August, 2020 that it failed to discharge its obligations to the 1<sup>st</sup> Defendant/Applicant, which failure the Plaintiffs/Applicants seek to attribute to other extraneous factors that did not constitute part of the terms of the Agreement of the parties. (Marked and Annexed hereto as "DM 6" is a copy of the letter by the 1<sup>st</sup> Plaintiff/Applicant dated 21<sup>st</sup> August, 2020). That it is upon having failed to heed any of the demands that the Respondent opted to proceed as by law provided, and recover the amounts due to it and avoid having the account spiral out of control, and in that regard instructed its Advocates to issue the requisite three (3) months (90 days) statutory notice. (Marked and Annexed hereto as "DM-7" is the 90 days Statutory Notice). That the facility in the meantime continues to accrue and as at 15<sup>th</sup> February, 2021 stood at the sum of Kshs 64,803,707.35 as per the annexed statements of account, being made up of the principle plus interest. (Marked and Annexed hereto as "DM-8" are the Statement of Accounts).

6. That the 1<sup>st</sup> Defendant/ Respondent was not a party to the said suits Mombasa ELC No. 285 of 2015 *Abdalla Mohamed vs The County Government of Mombasa*; Mombasa Civil Appeal No. 114 of 2018 *Abdalla Mohamed vs The County Government of Mombasa* and Mombasa ELC Misc Civil



Application No. 12 of 2019 *Abdalla Mohamed vs The County Government of Mombasa* and neither do the orders therein apply to the 1<sup>st</sup> Defendant/ Applicant.

This court has considered the application and submissions therein. An order of interlocutory injunction is an equitable relief that is granted at the discretion of the court as guided by the principles set down in *Giella vs Cassman Brown Co. Ltd* (1973) EA 358. The first issue to consider is whether the 1<sup>st</sup> Respondent had proved the existence of an arguable case which raise a serious question to be tried. The Court of Appeal in *Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 fashioned a definition for “*prima facie* case” in civil cases in the following words;

In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

7. The Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR held that;

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.”

8. The Plaintiffs/Applicants do not dispute that vide the Conditional Letter of Offer dated 14<sup>th</sup> June, 2019, the 1<sup>st</sup> Defendant agreed to take over the 1<sup>st</sup> Plaintiff/Applicant’s existing facility with Fidelity Commercial Bank Limited of Kshs.53, 908, 083.30 (Annexed and marked hereto as “DM-I” is a copy of the Conditional Letter of Offer dated 14<sup>th</sup> June, 2019). They however state that, the 1<sup>st</sup> Defendant have rendered the conditional offer of banking facility dated 14<sup>th</sup> June 2019 inoperable and illegal, null and void, with respect to the unilateral, non-consensual inclusion of “clause 10: other conditions” therein, thereby resulting in the unconscionable notice of exercise of statutory power of sale over the suit properties and the Plaintiffs unable to perform their agreed obligations under the conditional offer of banking facility dated 14<sup>th</sup> June 2019. A question of whether a the 1<sup>st</sup> Defendant unilaterally altered the terms of the agreement so as to render it inoperable is a serious question of law that qualifies as a *prima facie* case at an interlocutory stage.

On the second issue of irreparable damage, I am guided by the Court of Appeal in *Nguruman* (supra), where it was held that;

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, 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.”

9. The Respondent states that the Plaintiff/ Applicants were well aware at the time of taking out the facility that the security was to secure the facility, and in case of default, then the same would be liable for sale to recover the amounts due and outstanding, and the securities thus became a commodity for sale at that point, unless when discharged. The Plaintiffs/Applicants state that they are the lawful, registered proprietor of all the suit parcels located within the Municipality of Mombasa, County of Mombasa and have developed them extensively with some of them being commercial premises with plant and machinery and this is their sole source of livelihood. I find that the Plaintiffs/Applicants stand to suffer irreparable loss if the Respondent is allowed to exercise its statutory power of sale should their case be proved. It is my finding that the Plaintiffs/Applicants stand to suffer irreparable injury that cannot be adequately compensated by an award of damages since they are raising fraud and illegality in the management of the loan facility, it is only fair and just for this court of equity to exercise its discretion and tilt the balance of convenience in favour of the Plaintiffs/Applicants. The suit property must be preserved, which will be done by maintaining the status quo until the case is heard and determined. I find that the application is merited and order that the status quo be maintained pending the hearing and determination of this suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**N.A. MATHEKA**

**JUDGE**

TABLE

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