



Erinpet Enterprises Limited v Equity Bank Limited & another (Environment & Land Case 21 of 2022) [2023] KEELC 18671 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 21 OF 2022**

**JO OLOLA, J
JULY 14, 2023**

BETWEEN

ERINPET ENTERPRISES LIMITED PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

RULING

1. By the Notice of Motion dated and filed on October 19, 2022, Erinpet Enterprises Limited (the Applicant) prays for an order that pending the hearing and determination of the suit herein, this Court be pleased to order that the *status quo* be maintained.
2. The application is supported by an Affidavit sworn by the Applicant's director Peter Njogu plus a Further Affidavit filed on January 13, 2023 and is anchored upon the grounds:
 - i That on about April 22, 2019, the Applicant herein entered into an agreement for sale with one Peter Mahu Muthee for the sale of the property known as Karatina/Township Block 1/420;
 - ii That the 1st Respondent financed the Applicant to assist in the acquisition of the said property;
 - iii That the Applicant has diligently been meeting part of its obligation until when they applied for a loan restructuring to the 1st Respondent requesting for new terms;
 - iv That the said delay caused the Applicant to be charged hefty interests by the 1st Respondent making it unable to service the loan as per the agreement;
 - v That in this regard, unless this Honourable Court grants the orders herein sought, the Applicant is likely to suffer irreparable damage; and



- vi That it is therefore in the interest of justice that the application herein is heard expeditiously and the orders herein sought are granted.
3. The application is opposed. By their joint Grounds of Opposition herein dated December 2, 2022, Messrs Equity Bank (Kenya) Limited and Phillips International Auctioneers (the 1st and 2nd Respondents respectively) oppose the application on the grounds that:
1. The Plaintiff's application is frivolous, incompetent, an abuse of the Court process and has no foundation to stand;
 2. That an injunction should not be granted as the Applicants have not granted and the 1st Respondent does not hold a security in Title No Karatina/Township Block 1/428 as alleged;
 3. That the Plaintiff has not demonstrated a *prima facie* case to warrant being granted the orders for injunction being sought, nor has it furnished an undertaking as to damages and the Applicant can be compensated in damages;
 4. That the application is pre-emptive;
 5. That if the orders sought are granted it will create more hardships to the Defendant/ Respondent than create an advantage to the Plaintiffs;
 6. That an injunction should not be granted as the same would be tantamount to depriving the 1st Defendant of its statutory right guaranteed under Section 96 of the Land Act No 6 of 2012 which has crystallised and became exercisable;
 7. That the Applicant has not come to Court with clean hands. He is not acting in good faith and have failed to disclose to the Court material facts. The Plaintiff therefore does not deserve the equitable order sought. He who comes to Court must come with clean hands;
 8. That the Applicant, as such borrower and guarantor is bound by the lending contract and the Applicant should therefore be estopped from renegeing on the terms and conditions thereof;
 9. What the Applicant is asking the Honourable Court is to re-write the contract and change the terms thereof, which should be discouraged; and
 10. No prejudice will be occasioned to the Plaintiff if the orders sought are not granted.
3. In addition to the Grounds of Opposition, the two Respondents also filed a Notice of Preliminary Objection dated December 5, 2022 wherein they object to the entire suit filed herein on the single ground that:
1. The *ex facie*, the Honourable Court does not have jurisdiction to entertain this matter, the subject herein being a commercial contract.
4. Further to the foregoing and by a Replying Affidavit sworn on its behalf by its Credit Manager Mercy Wambui as filed herein on February 14, 2023, the 1st Respondent avers that sometime in the year 2019, the Applicant applied for and was subsequently granted by the 1st Respondent a loan facility for Kshs 26,000,000/- to finance the purchase of a commercial property being Title No Karatina/Township/ Block 1/420. In addition, the Applicant/Plaintiff had also on April 14, 2020 and April 25, 2020 sought and been granted by the Bank business loans of Kshs 10,000,000/- and Kshs 5,000,000/- respectively all of whose terms were varied by a Facility Variation Letter dated August 31, 2020.
5. The 1st Respondent avers that the Facility Letter contained the terms and conditions of the agreement between the Parties and was therefore for all intents and purposes the lending contract. The loan facility



was secured by a Legal Charge over the suit property providing for repayment of the loan in 120 monthly instalments of Kshs 388,208/- each.

6. The 1st Respondent further avers that after disbursement of the facility, the Applicant breached the contract by constantly defaulting in repayment and that the debt currently outstanding is Kshs 46,431,777.28/-. There being no positive response from the Applicant, the 1st Respondent issued him with a Demand Notice under Section 90 of the Land Act to clear the outstanding arrears of Kshs 8,025,505/- and subsequently proceeded to issue him with a Statutory Notice under Section 96(2) of the Land Act.
7. The 1st Respondent avers further that despite service of the Statutory Notice, the Applicant continued to default in payment as a result whereof they were compelled to instruct the 2nd Respondent Auctioneers to realize and sell by public auction the suit property. The Auctioneers proceeded to issue a Notification of Sale and the 45 days Redemption Notice both dated August 12, 2022.
8. Pursuant thereto, the 1st Respondent asserts that the suit property was sold during a public auction held on December 14, 2022 to one Peter Ngochi Mwangi for Kshs 17,500,000/-. It is the 1st Respondent's case that the suit property having been so sold, the Applicant's right of redemption was extinguished and the Court should hence decline to grant the orders sought.
9. I have carefully perused and considered the Notice of Preliminary Objection dated December 5, 2022, the Notice of Motion dated October 19, 2022 as well as the response thereto. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the parties herein.
10. By their Notice of Preliminary Objection dated December 5, 2022, the two Respondents contended that this Court had, ex facie, no jurisdiction to entertain this matter as the subject thereof is a commercial contract. The basis of that contention was neither clear from the Respondent's Statement of Defence filed herein on December 5, 2022 nor the Replying Affidavit sworn on their behalf by the 1st Respondent's Credit Manager – Mercy Wambui on February 14, 2023.
11. While directions were given herein that both the Respondent's Preliminary Objection and the Applicant's Notice of Motion be disposed of by way of written submissions, I was unable to find any reference to the Preliminary Objection in the Respondents' submissions also filed herein on February 14, 2023. That being the case, the basis upon which that objection was filed by the Respondents was neither explained nor clear.
12. From the material placed before me, it was apparent that the Applicant herein seeks to stop the sale of the parcel of land known as Karatina/Township Block 1/420 which is said to have been purchased with funds lent to Applicant by the 1st Respondent. Pursuant to that lending contract, the Parties had executed a legal Charge over the suit property as security. It was the Respondents' case that the Applicant had violated the terms of the Charge and hence their pursuit to sell the same by way of a public auction.
13. As it were, a Charge is a creation of the Land Act, 2012. Section 2 of the said Act on the meaning of the word "Court", is as follows:

“‘Court’ means the Environment and Land Court established under the Environment and Land Court Act No 19 of 2011.”



14. In regard to the jurisdiction of the Court, Section 150 of the same Act provides as follows:
- “The Environment and Land Court and the subordinate Courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
15. Arising from the foregoing, I was unable to find any basis for the Preliminary Objection as filed by the Respondents.
16. Moving on to the Applicant’s Notice of Motion dated October 19, 2022, it is interesting to note that both sides to this divide have addressed the Court at length in their equally lengthy submissions on the principles guiding the grant of interlocutory injunctions. That in my view, was a complete misdirection on what was before the Court. The prayers as framed by the Plaintiff/Applicant in the Motion were as follows:
1. That this application be certified urgent and service thereof be dispensed with in the first instance;
 2. That pending the hearing and determination of this application *inter-partes*, this Honourable Court be pleased to issue a temporary order of injunction against the 1st Respondent restraining them from disposing off the property No. Karatina/Township Block 1/420;
 3. That pending the hearing and determination of the suit herein, this Court be pleased to order that the status quo be maintained; and
 4. That the costs of this application follow the cause.
17. Arising from the foregoing, there was no prayer by the Applicant seeking an order of injunction pending the hearing and determination of the suit. What the Applicant prays for instead is an order for the maintenance of status quo pending the hearing of the suit as can be seen from its prayer No. 3 above.
18. As it were, an order for the status quo to be maintained is different from an order of injunction both in terms of the principles for the grant thereof and the practical effect of each of them. While the latter is a substantive equitable remedy granted upon establishment of a right, or at the interlocutory stage, establishment of a *prima facie* case, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. An order of status quo does not depend on proof of a right or a *prima facie* case. The order merely leaves the situation or things as they stand pending the hearing of the suit or complaint.
19. As was stated in *Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 Others* [2015] eKLR:
- “Firstly, an order of status quo will issue through a judicial process where the Court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts ..., the second or alternative order for status quo is the one issued by the Court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the Court or by the consent of the Parties. Often the Court would not have been moved by either Party. The Court then expects an existing state of affairs or facts to be preserved until a particular occurrence or until the Court’s further orders. It is intended to also freeze the state of affairs. The state of affairs



however does not always remain static, so it is always crucial for the Court to be very specific and neat in its description of what state of affairs is to be preserved.”

20. In the matter before me, the Applicant asserts both in the Supporting Affidavit to the application as well as its Further Affidavit filed on January 13, 2023 that the suit property registered in its name was on July 9, 2019 Charged to the 1st Respondent to secure a loan of Kshs 26,000,000/-. It goes on to accuse the 1st Respondent of delaying to restructure the loan and charging what it calls hefty interests to an extent it was unable to continue servicing the loan as per the agreement. The Applicant avers that on August 12, 2022, the 2nd Respondent issued him with a 45 days Redemption Notice and that the Respondents are now threatening to dispose of the suit property at a throw away price so as to recover the loan.
21. That position appears to me to be much in consonance with the position taken by the Respondents. It is the Respondents’ case that the Applicant has defaulted on the loan agreement and that the 1st Respondent has since proceeded to exercise its statutory power of sale in accordance therewith.
22. From Paragraph 11 of the 1st Respondent’s Replying Affidavit, it is apparent that the suit property was sold to one Peter Ngochi Mwangi at a public auction conducted on December 14, 2022. That being the case, it was apparent that the prevailing state of affairs in regard to the suit property has since changed and that the issuance of an order of status quo herein would not serve any useful purposes.
23. It was also apparent that despite its knowledge of the said auction, the Plaintiff/Applicant had not taken any steps to enjoin the successful bidder who purchased the property at the auction in these proceedings. To issue such an order of status quo would therefore be tantamount to condemning the bidder without being heard.
24. Accordingly, both the Respondent’s Preliminary Objection and the Applicant’s Notice of Motion application are dismissed with the costs in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 14TH DAY OF JULY, 2023.**

In the presence of:

Mr. Mwiti for the Plaintiff/Applicant

Mr. Mahinda for the Defendant/Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

