



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E308 OF 2019

JOSEPH NGAIRA MATERE.....PLAINTIFF/APPLICANT

-VERSUS-

HOUSING FINANCE COMPANY OF

KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Through the application dated 23rd September 2019, the Applicant/Plaintiff seeks the following orders: -

1. Spent

2. Spent

3. That the defendant/respondent herein, its agents, servants, employees and/or any other persons acting on its behalf be and are hereby restrained from selling and/or disposing by way of Public Auction, Private Treaty or to alienate and/or interfere in any manner with the applicant Residential Apartments on L.R No. KAJIADO/KITENGELA/19406 within the Kitengela Township pending the hearing and determination of this suit.

4. That any other order and/or relief that this honourable court may deem fit and just to grant in the premises.

2. The application is supported by the Applicants affidavit and is premised on the grounds that: -

1. That the Defendant/Respondent has advertised the Applicant's property for sell by way of Public Auction on 4th October, 2019 in the Daily Nation Newspaper of Tuesday, September 17, 2019 at page 47 being Residential Apartments on L.R. No. KAJIADO/KITENGELA/19406 within the Kitengela Township.

2. That the applicant executed a Mortgage Loan Facility Agreement with the respondent on 30th August, 2012 and has been servicing the same to date with a repayment period of nine (9) years or one hundred and eight (108) months ending on 1st April 2022.

3. That all the rental income of approximately Kshs 200,000/= from the suit property is paid to the respondent's account and which the applicant tops up from his other sources of income and the applicant has so far made payments of over Kshs 19,200,000/= (Kshs Nineteen Million Two Hundred Thousand only).

4. That the respondent has failed and/or refused to provide the applicant with proper, official, accurate and updated Financial Statements of Account to Enable the applicant verify the payments so far received by the respondent, the interest being charged and any other charges that may not be conscionable.

5. That the operations of the respondent have been shrouded in secrecy and the applicant suspects malice and ill-intention by the respondent in advertising the applicant's property for sell by Public Auction without service of Statutory Notice as is mandatory under the provisions of The Land Act No. 6 of 2012.

6. That the applicant is likely to suffer irreparable loss and damage if the respondent is not restrained by the orders of this honourable court from proceeding with the sale by Public Auction of the suit property which is unlawful and illegal.

7. That the respondent shall not be prejudiced in any manner as the applicant continues to service the Mortgage Loan Facility regularly.

3. The respondent opposed the application through the replying affidavit of its Legal Officer **Mr. Joseph Lule** who states that the applicant executed a Mortgage Loan Facility Agreement for the sum of Kshs 12,650,000 on 30th August 2012 for the construction of residential apartments whose completion date was set for 6 months and was to end on 15th September 2013.

4. He states that the construction of the said apartments was however riddled with delays on the Applicant's part and that the respondent notified the applicant of the changes in Central Bank Rates. He states that following the full disbursement of the loan and the failure, by the applicant, to effect completion, the mortgage was converted into a long term loan facility and the applicant notified of new payment of monthly instalments of Kshs 332,431 instead of the sum of Kshs 195,459 that was earlier communicated to the applicant in the letter dated 30th July 2015.

5. He further avers that as at 4th April 2017, the total outstanding loan together with interest stood at Kshs 14,149,080 and that the applicant was in arrears of Kshs 454,442 having failed to pay the full instalment for 44 days. He states that owing to the repeated failure by the applicant to service the loan, the respondent issued a statutory Notices dated 17th November 2017 and warned the applicant that he was at the risk of being listed with the Central Reference Bureau (CRB).

6. It is the respondent's case that despite issuance of Statutory Notices, the applicant continued in his default thus prompting the respondent to engage the services of an auctioneer in order to recover the debt. He further avers that the applicant entered into negotiations with the respondent wherein he agreed to clear the arrears of Kshs 1,820,000 by 15th August 2018 but that the applicant reneged on his repayments thereby leaving the respondent with no option but to once again engage the services of an auctioneer to recover the debt.

7. He states that as at 27th September 2019, the applicant was in arrears for the amount Kshs 4,917,578.25 with the total balance of Kshs 12,783,917.01/=. He contends that the applicant is not honest in his claim that he was never made aware of his outstanding obligations.

8. Parties canvassed the application by way of written submissions which I have considered.

9. The main issue for determination is whether the applicant has made out a case for the granting of the orders of injunction. The principles on which courts will grant an order of injunction are well known. The principles were restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA NO. 77 OF 2012, together with the mode of their application 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) allay 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).

10. Having regard to the known principles of injunction as set out in the above cited case, I will now turn to consider if the application meets the threshold set therein. On prima facie case, it is well established that, in order to secure the injunctive relief sought, the applicant must first establish a prima facie case with a high chance of success. In *Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR*, the Court of Appeal gave this determination of a prima facie case as follows: -

"...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."

11. In the present case, it was not disputed that the applicant obtained a mortgage facility from the respondent and that he defaulted the loan repayments thus necessitating to the bank's move to exercise its statutory power of sale. I note that the applicant, as can be seen in the contents of the email annexure "JL13" conceded he was in default and stated in part as follows: -

"After reflecting on this painful transfer of resources, I consider it my responsibility to cater for my development/retirement process and resolved as follows:

I use the available resources at my disposal including taking credit facilities to cater for the outstanding amount. This must be done by CoB 15th August failure to which HF can proceed with the auctioning of the property.

I appreciate the working relations with HF and will not take this for granted. I am committed to meeting my side.

I also note for some reason, our headquarters made the same mistake and made wrong deductions thus the monthly Kshs 200,000/- that is usually remitted to HF has been effected. Reversals are usually a challenge at FAO. I have raised this with our payroll team who communicated to Budapest to avoid the mistake.”

12. My finding is that owing to his own acknowledgement of the default, the applicant cannot be said to have made out a prima facie case against the respondent with high chances of success so as to warrant the granting of the equitable orders of injunction. Needless to say, an order of injunction is an equitable remedy available only to parties who come to court with clean hands. In the present case, the applicant has not demonstrated that he has settled his accounts with the respondent prior to or even after filing of this suit so as to warrant the granting of the injunctive orders sought.

13. My findings on the issue of prima facie case would have been sufficient to determine this application as I do not need to consider the two remaining conditions for granting orders of injunction once I find that the first condition has not been proved. I am however still minded, in the interest of justice, to consider the two other issues raised by the applicant regarding the alleged failure by the respondent to issue him with the Statutory Notices and financial statements of account.

Statutory Notices

14. Courts have taken the position that they will not restrain a chargee from exercising its statutory power of sale merely because Statutory Notices were not sent to the chargor. This is the position that was taken by the Court of Appeal in *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.”

15. In the present case, I note that the respondent had through various annexures, established that it sent the requisite notices to the applicant after which the applicant approached it for negotiations geared towards settling the arrears due. I am therefore not satisfied that the applicant proved that he was not served with the Statutory Notices.

Financial Statements.

16. The applicant faulted the respondent for failure to furnish him with proper official, accurate and updated Financial Statements of Account for his verification the respondent, on its part, produced annexure at pages 33 to 47 of the replying affidavit as proof that the applicant was all along aware of his true financial standing with the respondent. I therefore find that contrary to the applicant's contention that the respondent was operating his accounts in secrecy, the applicant was made aware of his financial statements.

17. Having regard to the findings that I have made in this ruling, I find that the application dated 23rd September 2019 is not merited and the order that commends itself to me is the order to dismiss it with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of October 2020 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ashiruma for plaintiff/applicant.

Mr. Mutai for Wanjeri for defendant/respondent.

Court Assistant: Sylvia