



Shelanget Investment Group Ltd v Access Bank (Kenya) Ltd & another (Environment and Land Case Civil Suit E001 of 2022) [2022] KEELC 3018 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3018 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2022
MN MWANYALE, J
MAY 19, 2022

BETWEEN

SHELANGET INVESTMENT GROUP LTD PLAINTIFF

AND

ACCESS BANK (KENYA) LTD 1ST DEFENDANT

WATTS AUCTIONEERS 2ND DEFENDANT

RULING

1. Vide a Notice of Motion brought under Certificate of Urgency dated 2nd February 2022, the Applicant seeks the substantive injunctive prayer No. 3 of the application pending hearing and determination of the suit.
2. The other prayers sought in the application being prayers 2, 4 and 5 thereof were allowed by consent of the parties when the matter came up for interparte hearing on 9th February 2022.
3. On 9th February 2022, Parties were directed by this Court to file respective responses and submissions and a mention date to confirm compliance was set for 24th March 2022.
4. On the said date, the applicant raised an issue that the Respondent had not complied with the consent order of 9th February 2022 particularly Order No. 5 which was prayer No. 4 in the Notice of Motion application dated 2nd February 2022.
5. As a result, this Court directed on the same day that the Respondent to comply with the Orders granted on 9th February 2022 within 5 days.
6. The application coming up for consideration is premised on the grounds stated on the face of the grounds stated on the face of the application and on the Supporting Affidavit of the Plaintiff/Applicant Philemon Mutai. These grounds include;



- a) That the Plaintiff/Applicant is the registered proprietor of Title Number L.R. No. 7830/57 situated in Nandi Hills town within Nandi County.
 - b) That the Plaintiff was advanced loan facility amounting to kshs 30,000,000.00 (Kenya Shillings Thirty Million) by the 1st Defendant Respondent which was secured by a legal charge over title Number L.R. No. 7830/57.
 - c) That the Plaintiff has been servicing the aforementioned loan together with interest diligently.
 - d) That against the loan amount, the outstanding amount is below kshs. 10,000,000.00 (Kenya Shillings Ten Million) Which the Plaintiff Applicant continues to repay.
 - e) That on 27th January, 2022, the Plaintiff Applicant saw advertisement in the Daily Nation Newspaper of 25th January 2022 that the 2nd Defendant/Respondent intended to sell the suit property on 11th February 2022 on instructions of 1st Defendant Respondent.
 - f) That the Plaintiff/Applicant has never been served with the requisite statutory notice or demand of any kind.
 - g) That the Plaintiff/Applicant had only been served with a 45 days Redemption Notice and Notification of sale of the charged property.
 - h) That upon service of the said Notice and Notification of Sale, the Plaintiff/Applicant reached out to the 1st Defendant/Respondent for a restructure of the loan and there was no communication from the 1st Defendant.
 - i) That failure to issue the statutory notices rendered the auctioneers notices illegal and void as initio and failure to issue the said notices as prescribed by the law, the 1st Defendant/Respondent's statutory power of sale had not crystallized.
 - j) That the 1st Defendant/Respondent failed to conduct a forced sale valuation to establish forced sale value before auction is carried out thereby occasioning irreparable loss and damage to the Plaintiff/Applicant in the event the auction happened.
 - k) That the 1st Defendant/Respondent continued to charge and levy illegal, unconscionable and exorbitant penalties thereby clogging the Applicant's right to redemption.
 - l) That unless this Honourable Court, issues an order of injunction, the Plaintiff/Applicant will suffer irreparable loss and damage together with the shareholders of the Plaintiff/Applicant.
 - m) That the applicant has met the conditions precedent to grant of injunction.
7. The application is contested vide Replying Affidavit deponed by Isaac Kevin Onyango, a legal officer of the 1st Defendant/Respondent. He avers as follows;
- a) That the Plaintiff/Applicant was offered various banking facilities which were secured by legal charge over property title number LR. No. 7830/57 registered in the name of the Plaintiff.
 - b) That the statutory Notices required by Law were issued to the Plaintiff/Applicant through registered post to the Plaintiff's last known address.
 - c) That prior to exercising statutory power of sale, the 1st Defendant/Respondent carried out valuation over the charged property.
 - d) That the Plaintiff/Applicant does not dispute indebtedness to the 1st Defendant/Respondent.



- e) That the Plaintiff/Applicant is in breach of a binding contract entered into between them and the 1st Defendant/Respondent by failing to repay the loan amount which continues to incur extra charges.
- f) That the intended sale is within the law since the Plaintiff/Applicant was served with the Statutory Notices.
- g) That the application is devoid of merit does not meet the threshold to warrant grant of injunction hence the same be dismissed with costs.

Analysis and Determination

8. Parties were directed by this Court on 9th February 2022 to canvass the application by way of written submissions. Whereas the Defendants/Respondents filed their submissions through their advocates, the Plaintiff/ Applicants submissions are not on record.
9. I have carefully considered the Notice of Motion herein, the affidavit in support as well as Replying Affidavit. I have also considered written submissions filed herein and the main issue for determination is whether on the material placed before Court, the Plaintiff/Applicant has satisfied the conditions upon which a temporary injunction can be granted.
10. The law on granting of temporary/interlocutory injunction is set out under Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules which provides: -Where in any suit it is proved by affidavit or otherwise;-
 - “Where in any suit it is proved by affidavit or otherwise –
 - a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal or disposition of the property as the Court thinks fit until the disposal of the suit.”
11. Further, the condition for consideration in granting injunction is now well settled in the case of *Giella vs Cassman Brown and Company Limited* (1973) E. A. 358, where the Honourable Court expressed itself on the conditions that a party must satisfy for the Court to grant interlocutory injunction. It was held thus;
 - “First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”



12. Has the Plaintiff/Applicant made out a prima facie case with probability of success? In the case of *Mrao -vs- First American Bank of Kenya Limited and 2 others* (2003) KLR 125, a prima facie case was described as follows;

“A prima facie case in a civil application included but is not confined to a genuine and arguable case. It is a case which, 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.”

13. In *Nguruman Limited -vs- Jan Bonde Nielsen and 2 others* (2014) eKLR, the Court of Appeal agreed with the definition of a prima facie case in the Mrao case and stated.

“We adopt that definition save to add the following conditions by way of explaining it. 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 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 to establish title, it is enough if he can show that he had a fair and bonafide 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.”

14. In the present application, the Plaintiff/Applicant was required to show that its right is being violated or is likely to be violated. Proof of this would shift the burden onto the Respondents to explain or rebut the Applicant’s claims. There is no doubt that the suit property is in danger of being alienated as the 1st Defendant/Respondent do not deny that but contends that it has a legal right to exercise a statutory power of sale, while the Plaintiff/Applicant challenges such a right averring that they have been serving the loan by making daily or weekly deposit to the loan account. The Applicant further stated that no statutory notices had been served upon them or a valuation of the charged property conducted to establish forced sale value before auction.

15. Without considering the merits of the case, it is no doubt that the suit property is in danger of being sold by the Respondents. The Replying Affidavit filed by 1st Defendant/Respondent did set in motion the process undertaken by them to alienate the suit property. It is evident; from the material before Court presented by the 1st Defendant/Respondent that the Plaintiff/Applicant was indeed served with Statutory Notices vide registered post to their last known address. A perusal of annexures KO – 3 (a) and (b), KO 4 (a) and (b) as well as KO – 5 (a) and (b) annexed to Replying Affidavit by 1st Defendant/Respondent confirm this assertion. I note that the postal address in the Statutory Notices issued on behalf of 1st Defendant by Joe Ngigi and Company Advocates LLP correspond with the Postal address on the letter of Offer annexed as KO – 1. The postal address has also not been disputed by the Plaintiff/Applicant. Therefore it is my conclusion on this issue that the Plaintiff/Applicant was served with the Statutory Notices as required by law.



16. On the Plaintiff's assertion that no valuation of the charged property has been concluded by the 1st Defendant/. Respondent, this was rebutted vide annexure KO – 6(a) in the Replying Affidavit whereby a valuation report was provided by the 1st Defendant/Respondent confirming that a valuation of the charged property prior to the intended auction. I also conclude that indeed a valuation had been carried out to establish forced sale value.
17. The other issue the Plaintiff/Applicant is in arrears. None of the parties filed an updated statement of account particularising inter-alia the chronology of loan repayments and the outstanding balance thereof.
18. As aforementioned, this Court ordered on 9th February 2022 that an updated statement of account be issued by the 1st Defendant/Respondent. However as at 24th March 2022 these orders had not been complied with prompting a directive that the 1st Defendant/Respondent to comply with the Court Order within 5 days.
19. At this juncture therefore, the issue as to whether the Plaintiff/Applicant is in default can only be determined by calling evidence at the main trial. For this reason, the Court finds that the Plaintiff/Applicant has established a prima facie case with probability of success.
20. On the second limb of conditions necessary to warrant grant of interlocutory injunction which is whether the applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages, the Plaintiff/Applicant stated that the shareholders made massive investments on the suit property which has a sentimental value. Since it has not been demonstrated whether the Applicant is in arrears or not through an updated statement of accounts, the applicant stands to suffer irreparable loss and damage, if an injunction is not granted at this stage.
21. Moreover the balance of convenience tilts in favour of the Plaintiff/Applicant based on the material of lack of material before Court. I insist that it is only during trial that the Court will have an opportunity to scrutinize evidence and establish whether the Applicant was in default or not and what extra charges have been included in the loan facility. At this stage therefore the Applicant stands to suffer greater harm if the application for injunction is dismissed. The 1st Respondent on the other hand will suffer no harm if the injunction is granted as in the event that it is successful in the main suit, and the fact that it has applicant's property as security, it will be at liberty to exercise its stature power of sale. The security being land is not likely to lose its value but appreciate in value. It will therefore lawfully sell the property and recover what it's lawfully owed.
22. Having said that much, I find that the Plaintiff/Applicants Notice of Motion dated 2nd February, 2022 is merited and the same is allowed as follows;
 - a) That pending the hearing and determination of this suit, an order of temporary injunction do issue against the Defendant/Respondents by themselves, their agents, servants and/or other persons acting under their instructions from selling, disposing and/or auction and/or dealing in any matter adverse to the Plaintiff/Applicant with the Plaintiff/Applicant's parcel of land being L.R. No. 7830/57 situated in Nandi Hills Town, Nandi Country.
 - b) I further order that statements of account be supplied to the Plaintiff's within 5 days from the date of this Ruling.
 - c) Costs of the application be in the cause.
23. It is so ordered.

DATED AND DELIVERED IN KAPSABET THIS 19TH DAY OF MAY, 2022.



HON. M. N. MWANYALE,

JUDGE

In the presence of:

Mr. Maiyo for the Plaintiff/Applicant

Miss Bittok for Defendant/Respondent

