



Sumac Microfinance Bank Limited v Nderitu (Environment and Land Appeal E15 of 2021) [2022] KEELC 2715 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E15 OF 2021**

JM MUTUNGI, J

JULY 26, 2022

BETWEEN

SUMAC MICROFINANCE BANK LIMITED APPELLANT

AND

ANNE WANGUI NDERITU RESPONDENT

(An appeal from the Ruling of the Chief Magistrate's Court at Nakuru delivered by Hon. Eunice Kelly (SRM) on 4th June 2021 in Nakuru CM ELC Suit No. E14 of 2021)

JUDGMENT

1. This appeal is against the ruling delivered by Hon. Eunice Kelly (SRM) on 4th June 2021 in Nakuru ELC No. E14 of 2021. The ruling was on the Respondent's (plaintiff in the subordinate court) Notice of Motion application dated 4th February 2021 where the following orders were sought:
 - (a) That this application be certified urgent and be heard ex parte in the first instance due to the nature of its urgency.
 - (b) That this honourable court be pleased to restrain the defendant by way of injunction by itself, its agents and/or servants from attaching, selling, transferring, alienating or in any way interfering with the plaintiff's quiet possession and use of title number Kiambogo/Kiambogo Block 2/11263 (Mwariki) pending hearing of this application inter-parties.
 - (c) That this honourable court be pleased to restrain the defendants by way of an injunction from attaching, selling, transferring, alienating or in any way interfering with the plaintiff's quiet possession and use of title number Kiambogo/Kiambogo Block 2/11263 Mwariki (Nakuru County) pending hearing and determination of the main suit.
 - (d) That costs of this application be provided for.



2. The application was supported on the grounds on the face of the application and the respondent's affidavit sworn in support thereof on 4th February 2021. The appellant opposed the application vide the replying affidavit sworn by Jeremy Mutugi the appellant's Collection and Recoveries officer on 24th February 2021.
3. After hearing the parties on the application the learned trial magistrate rendered her ruling. The learned trial magistrate allowed the application and issued an injunction restraining the appellant from attaching, selling, transferring, alienating or in any way interfering with the plaintiff's quiet possession and use of land title number Kiambogo/Kiambogo Block 2/11362 Mwariki (Nakuru County) pending the hearing and determination of the main suit.
4. Aggrieved by the learned trial magistrate's ruling, the appellant appealed to this court and set out five grounds of appeal in its memorandum of appeal as hereunder:-
 - (1) The learned magistrate erred in fact and in law by granting the plaintiff an interlocutory injunction pending determination of the suit despite ruling that the plaintiff failed to establish a prima facie case with a probability of success.
 2. The learned magistrate erred in fact and in law by granting the plaintiff an interlocutory injunction pending determination of the suit despite ruling that the plaintiff failed to demonstrate irreparable loss which would not be otherwise compensated by an award of damages.
 - (3) The learned magistrate erred in fact and in law in granting the plaintiff an interlocutory injunction pending determination of the suit on the sole consideration of balance of convenience.
 - (4) The learned magistrate erred in fact and in law by failing to subject to plaintiff's injunctive application against the separate, distinct, and logical conditions for an interlocutory injunction which are to be surmounted sequentially.
 - (5) The learned magistrate erred in fact and in law by wholly misdirecting the application of law and irregularly granting the plaintiff an interlocutory injunction pending the hearing and determination of the main suit.
5. Based on the grounds the appellant prayed that the court allows the appeal and the said ruling be set aside.
6. The respondent vide the plaint dated 4th February 2021 filed on 5th February 2021 sought for a declaration that the intended auction of all that parcel of land known as Kiambogo/Kiambogo Block 2/11263 (Mwariki) is illegal as the statutory sale did not accrue, a permanent injunction restraining the defendant by itself, its agents and/or servants from entering, attaching, selling, transferring, alienating, possessing or in any way dealing with all that parcel of land known as title number Kiambogo/Kiambogo Block 2/11263 (Mwariki).
7. Simultaneously with the plaint, the respondent filed the Notice of Motion application praying for an injunction to stop the appellant from attaching and selling land parcel No. Kiambogo/Kiambogo Block 2/11263. The respondent averred that the appellant advertised the suit property for sale by public auction without giving the requisite notices as provided for by law.
8. The appellant filed a replying affidavit in opposition to the respondent's application. The appellant stated that it advanced a loan to the respondent that was secured by a charge of Kshs.800,000/= over land parcel No. Kiambogo/Kiambogo Block 2/11263 (Mwariki).



9. The appellant stated that the respondent only made consistent repayments for the first twelve months before defaulting. The appellant contended that it gave the respondent a conditional offer to waive the respondent's contractual default penalties upon the immediate settlement of the facility which the respondent failed to do. The appellant contended further that it gave the respondent a formal thirty day demand notice on 16th October 2019 and a three months statutory notice on 17th December 2019 after the respondent still remained in default.
10. It was the appellant's contention that it issued the respondent with a forty (40) days Statutory Notice of Intention to Sell on 16th July 2020 and after the lapse of the said period, it issued the respondent with a notification of sale dated 1st December 2020 and a forty five days redemption notice that was served on 7th December 2020. The appellant averred that the respondent continued to be in default and so it lawfully advertised the suit property for sale.
11. The parties before the lower court argued the application by way of written submissions and the learned magistrate delivered her ruling on 4th June 2021. In her ruling the trial magistrate pointed out that it was evident that the statutory notice pursuant to Section 90(2) of the Land Act was not complied with as the respondent was not served with it and for that reason, the trial court observed that it would occasion injustice to the respondent for the court to decline her application for an injunction and it therefore allowed it.
12. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 28th February 2022 while the respondent's submissions were filed on 30th May 2022.
13. The appellant submitted that the learned trial magistrate misdirected herself on the application of law in affirming an order of temporary injunction in favor of the respondent. The appellant submitted that before an interlocutory injunction is granted, the injunction application must be subjected to the three-part test set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. The appellant submitted that all three conditions must be applied as separate, distinct and logical hurdles that have to be surmounted sequentially. The appellant submitted further that where an applicant fails to meet the first condition for an injunction, the trial court had no duty to invite further scrutiny as to the other conditions and therefore an injunctive application must fail.
14. It was further submitted that the trial court in its ruling delivered on 4th June 2021 affirmed that the applicant had failed to establish a prima facie case with a probability of success and that it was therefore peculiar that the court went ahead to consider the other considerations for grant of an injunction. The appellant submitted that there was a misdirection of the trial court's exercise of discretion in granting of the injunction. The appellant relied on the case of *Nguruman Limited vs Jan Bonde Nielson & 2 Others* [2014] eKLR and reiterated that once an applicant failed to establish a prima facie case, the trial court had no basis to grant an injunction in the matter.
15. The appellant submitted that the injunctive order granted on 4th June 2021 was granted solely on the assessment of the balance of convenience that tilted in favor of the Respondent which injunctive order she was not entitled to and relied on the case of *Total Kenya Limited v David Njane T/A Argwings Twin Service Station & 2 Others* [2018] eKLR where the court observed as follows:

“The three conditions for granting an injunction are considered sequentially, so that the second and third conditions cannot be considered once the first condition is not established.



The learned judge totally failed to properly address the considerations in a logical sequential manner but merely latched onto the last consideration of balance of convenience. That, he was not entitled to do”

16. In conclusion the appellant sought that the trial court’s ruling and the orders issued on 4th June 2021 be set aside entirely.
17. The respondent in her response submitted that the trial court issued an injunction on the basis that the statutory notices were not served on the respondent herein as required under Section 90(2) of the Land Act. The respondent relied on the case of Albert Mario Cordeiro & another vs Vishram Shamji [2015] eKLR where the court held that:

“...injunction is an equitable remedy, a court of equity would still deny the remedy sought if the conduct of the applicant is such that it does not receive approval of equity. All the other legal thresholds may be suppressed by the offensive conduct relevant to the transaction and litigation before the court. But that notwithstanding, I will take a path which is fair and just to all, and which carries the lower risk of injustice. Accordingly, I am prepared to and hereby grant an injunction to restrain the sale of the suit property as long as a proper notice to sell the property and Notification of sale under Section 96(2) of the Land Act and Rule 15(c) of the Auctioneers Rules have not been issued.”
18. The respondent submitted that the learned magistrate rightly found the appellant to be in violation of the provisions of the Land Act 2012 therefore rendering the intention to exercise the power of sale on the part of the appellant nugatory and sought for the appeal to be dismissed with costs to the respondents.

Analysis and Determination

19. The grounds of appeal can be condensed into basically a single ground namely whether on the basis of the facts and evidence placed before the learned trial magistrate the respondent was entitled to the injunction sought in her application dated 4th February 2021.
20. In determining whether or not the learned trial magistrate was justified in reaching the decision she did, the court is under a duty to re-evaluate the evidence and material that was placed before the subordinate court. This principle was set out in the case of Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123 where the Court of Appeal stated that:

“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”.
21. In the present matter, the learned magistrate granted the injunction on a balance of convenience and held that the statutory notice pursuant to Section 90(2) of the Land Act was not served upon the respondent.



22. The principles of granting a temporary injunction were laid down by the court in the case of *Giella - vs- Cassman Brown Co. Ltd* 1973 EA 358 and restated in the case of [*James Njoro Kibutiri -vs- Kenya Shell*](#), Nairobi High Court, Civil Case No.3398 of 1980 (1981) eKLR as follows:

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also *E.A Industries -vs-Trufoods* (1972) EA 420.”

23. For a party to be granted a temporary injunction, all the three conditions must be met and in the event there is failure to meet even one condition, then a party would not be entitled to a temporary injunction. The respondent in this matter had to therefore demonstrate that she had a prima facie case with a probability of success and that she would suffer irreparable loss which would not adequately be compensated by an award of damages if the injunction was not granted.

24. The Court of Appeal in the case of [*Mrao Ltd -Vs- First American Bank of Kenya Limited and 2 Others*](#) [2003] eKLR defined a prima facie case as follows:

“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.”

25. The issue therefore for determination is whether the respondent met the threshold for grant of a temporary injunction. In the present matter, the respondent is the registered owner of the suit property which was charged to the appellant. It is not disputed that the respondent defaulted in repaying the loan. As a result of the default in repayment, the appellant was obligated under the law to issue various notices that included the 90 days demand notice, 40 day notice of sale and the redemption notice before a valid sale under the charge could be effected.

26. The respondent averred that the relevant notices were not served upon her as she came to learn about the sale after seeing a notice in the Daily Newspaper. The appellant on the other hand averred that it served upon the respondent all the relevant notices. If the court found that the said notices were not served upon the respondent, then her rights would have been infringed. In order to determine whether the respondent had a prima facie case, it is necessary to consider whether the provisions of the [*Land Act, 2012*](#) with regard to the issuance of the various notices were complied with.

27. If a chargor defaults in repayment of a loan, the chargee is obligated under the [*Land Act*](#) 2012 to issue a notice under Section 90 making demand for the amount due. If the chargor fails to comply with the notice, then the chargee’s right to take the necessary steps to exercise its statutory power of sale accrues.

28. Further under Section 96(1) and (2) of the [*Land Act*](#), the chargee is required to issue a 40 day notice to sell as follows:

96.

- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.



- (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

29. The appellant's contention was that it served the respondent with a thirty-day demand notice dated 16th October 2019, a statutory notice under section 90(1) & (2) of the *Land Act* dated 17th December 2019, Notice of Intention to sell dated 16th July 2020, and a forty five day Redemption Notice dated 7th December 2020. The notices were served by way of registered post except for the 45 days Redemption Notice. The address on the notices sent by way of registered post was P.O Box 508-20106 Molo. The address of the respondent in the charge instrument was P.O Box 625-20100 Nakuru.
30. In the loan agreement dated 26th April 2018 and the affidavit of civil status sworn on 25th of June 2018, and on the copy of the Title Deed the address of the respondent is indicated as P.O Box 508-20106 Molo. A certificate of postage is attached to the statutory notice which is dated 13th January 2020. With regard to the Notice of Intention to Sell, what was attached was the appellant's postage book which had a list of people and their addresses. There was no certificate of postage annexed. The appellant further contended that the Notice of Intention to Sell was also sent to the respondent via email. The said email was addressed to ndirituann50@gmail.com but a perusal of the loan agreement dated 26th April 2018 indicates the email address of the respondent to be nderituann50@gmail.com. There was a variance in the two email addresses and hence the email may not have been received by the respondent. Further, the appellant attached an affidavit of service sworn by one Michael Thuita Gachoka on 10th December 2020 where he deposed that he served the respondent with the 45 days redemption notice and notification of sale.
31. Where a chargor alleges that the statutory notices were not served, it is upon the chargee to prove that the said notices were served. The court in the case of *Moses Kibiego Yator -vs- Eco Bank Kenya Limited* NKU E& L No. 426 of 2013 [2014] eKLR held that:
- “In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.”
32. From the material placed on the court record, it is my view that there was proper service of the statutory notice under Section 90(1) and (2) of the *Land Act* as it was addressed to the respondent as per the certificate of postage attached. However, in absence of the certificate of posting of the Notice to sell under Section 96(2) of the *Land Act*, there is doubt if this notice was served on the respondent. Nonetheless considering that all the other notices were served on the respondent, I am satisfied the Respondent had proper notice that the appellant intended to exercise its power of sale conferred under the charge. The respondent does not deny that she had defaulted in the loan repayment and that was the trigger for the appellant to seek to enforce the security that it held for the loan.
33. The learned trial magistrate properly found and held that the respondent had not demonstrated she had a prima facie case with any probability of success. Even if she held that the appellant had not proved that the Noticed to sell under section 96 (2) of the *Land Act* had not been validly served, having found



no prima facie case had been established, the trial magistrate ought not to have given an injunction but to permit the security realization to proceed provided the appropriate notice under section 96 (2) of the Land Act was given to the Respondent.

34. In the premises it is my determination that the order of injunction granted in favour of the respondent on the terms that it was granted was not merited. The appellant in my view had satisfied all the requirements to entitle it to exercise its power of sale under the charge save that there was no proof of service of the Notice to sell the charged property under section 96 (2) of the Land Act. I consequently allow the appeal and set aside the ruling and the injunctive order issued by Hon. Eunice Kelly (SRM) on 4th June 2021. For clarity provided the appellant serves a proper Notice to sell the property under section 96 (2) of the Land Act and there is appropriate compliance with Rule 15 of the Auctioneers Rules, the Appellant will be at liberty to sell the charged property. The costs of the appeal are awarded to the Appellant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH JULY 2022.

J M MUTUNGI

JUDGE

