



Simarch Kenya Limited v Kenya Commercial Bank Limited (Environment & Land Case E004 of 2022) [2022] KEELC 14986 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14986 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E004 OF 2022
LG KIMANI, J
NOVEMBER 22, 2022**

BETWEEN

SIMARCH KENYA LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. Before the court for determination is the plaintiff's notice of motion application dated March 18, 2022 seeking the following orders:
 1. Spent.
 2. Spent
 3. That pending the hearing and determination of this suit, the defendant/respondent either through themselves, their agents, employees, nominees, assigns, agents or any other persons or authority connected therewith be restrained by a temporary injunction order from offering for sale, selling disposing, leasing, occupying or in any way dealing with or alienating the plaintiff's proprietary rights in property title No Kitui Municipality Block 111/338 Kitui Township.
 4. That costs of this application be provided for.
2. The grounds relied on in support of the application are contained in the supporting affidavit by Simon Musyoka Kaingo, a director of the applicant company and a supplementary affidavit sworn on April 8, 2022. He avers that on or about the October 11, 2010 the respondent offered and the plaintiff/applicant accepted banking facilities amounting of Kshs 12,000,000/= secured by a charge over property title No Kitui Municipality Block 111/338, Kitui Township. The applicant claims to have settled the said loan in full.



3. The defendant/respondent has issued a statutory notice under section 90 of the *Land Act* 2012 claiming payment of Kshs 50,534,483 as at April 21, 2021 and another notice claiming Kshs 80,569,728 as at January 31, 2022, which amount continues to accrue interest.
4. The respondent through Watts Auctioneers issued notification of sale by auction of the applicants property claiming a sum of Kshs 80,569,728 as at January 31, 2022. The auction was scheduled for April 6, 2022 but the same was stopped by an order of this court. The applicant claims that the respondent's statutory power of sale has not accrued in respect of the suit property since they have paid the loan in full.
5. Further to this, the applicant states that the amount claimed by the respondent offends the in duplum rule by being 7 times the principal sum advanced to the applicant.
6. The auction had been scheduled on April 6, 2022 but the same was stopped by a temporary order of this court.

The Respondent's Case

7. The respondent's Credit Support Unit's Manager Amina Jilo swore a replying affidavit and stated that the plaintiff was offered a loan facility of Ksh 12,000,000 as the initial loan which was secured by a Legal Charge over Title No Kitui Municipality Block 11/338 Kitui Township. It was a term of the charge that the property would be a continuing security for the payment of such sum as may be outstanding from time to time.
8. The plaintiff thereafter took a subsequent construction loan of Kshs 87,000,000 and it was an agreed term of the letter of offer that the defendant would continue to hold the securities listed. At the time the letter was issued on September 2, 2014, it was indicated that there was an existing term loan of Kshs 1,661,889 which was the balance of the initial loan. It was secured by a legal Charge dated November 5, 2014 over Yatta B2/Kwa Vonza 1287 Kitui.
9. According to the respondent, as at March 2022, the outstanding amounts owed to them stood at Kshs 80,162,635.55. It was an express term of the charge that the respondent reserved the right to consolidate mortgage or charge securities that the defendant holds from the chargor on any account whatsoever. Therefore, the suit property could only be discharged once the plaintiff had fully settled all the subsequent facilities granted to it after it had taken the initial loan.
10. The respondent reiterated that since it was an express term of the letter of offer dated October 11, 2010, as per clause 8.2, the suit property would continue to be held as security for any other subsequent loan facilities advanced up to and until when all running accounts were fully settled. According to the respondent, the outstanding amount does not offend the in duplum rule since it is based on the continuing loan facilities advanced to the plaintiff/applicant vide the charges dated November 2, 2010 and November 5, 2014.
11. The respondent avers that the plaintiff/applicant is not entitled to the injunctive orders sought and are guilty of material non-disclosure and are economic with the truth and the application should be dismissed.
12. Further the defendant/respondent filed a statement of defence and counterclaim.

Applicant's Submissions

13. Counsel for the applicant submitted that the applicant's case meets the threshold for grant of an interlocutory injunction set out in the case of *Giella v Cassman Brown* while submitting that the



respondent's statutory power of sale is non-existent for the reason that the loan of Kshs 12, 000,000 was settled in full. The applicants counsel relied on the case of *Mrao v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 where the court stated that in civil cases, the court will conclude whether or not there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

14. The applicant pointed out that the charge dated November 5, 2010 does not reserve the right to consolidate it with another charge and only the one dated the November 2014 does, which applies only to the charges and instruments executed after that date.
15. Regarding service of the notice, the applicant submitted that the respondent did not serve them with any notice under section 96 of the *Land Act* 2012 as it was to be served by "registered post" as indicated on the notice dated October 25, 2021 while no certificate of posting has been adduced by the respondent. Relying on the *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna and five others* [2017] eKLR the Court of Appeal held that the statutory notice under section 90 becomes operational upon service but as long as there was doubt the matter calls for interrogation on the evidence at the trial while in the interim, it attracts the issuance of injunctive orders. They therefore submitted that the issue of service is contested and can only be determined at the trial thus the grant of injunctive orders is merited.
16. The applicant further submitted that the three months' statutory notice dated April 21, 2021 was defective as the applicant claims amounts not secured under the charge yet there was no provision in the initial charge for tacking. It is their submission that for amount secured by the charge being Kshs 12, 000,000 to be varied, the respondent needed to have the applicant sign a memorandum under section 84 of the *Land Act* authorizing such increment so as to bring the subsequent loan under the charge dated November 5, 2014. He relied on the case of *Kisimani Holdings Limited & another v Fidelity Bank Limited* [2013] eKLR.
17. The applicant also argued that the right of consolidation as envisaged under section 83 of the *Land Act*, 2012 relates to a chargor who has more than one charge on several securities and not different chargors. Therefore, the respondent cannot consolidate the subsequent loan secured by the second chargor who is Simon Musyoka Kaingo with the initial loan being secured by the suit property registered in the name of the applicant.
18. On irreparable harm, the applicant submitted that if the orders sought are not granted, It will be deprived of its right to property and will therefore suffer irreparable loss when doubtful circumstances as to the respondent's exercise of its right to the statutory power of sale.
19. The applicant submitted that the balance of convenience tilts in its favour since the respondent will not be prejudiced by grant of interlocutory injunction. On the other hand, if the injunction is not granted, the suit property will be expended and any final orders made by the court will be rendered nugatory as they relied on the holding in the case of: *Alice Awino Okello v Trust Bank Ltd & anor* LLR No 625 (CCK) cited in the *Kisimani Holdings Limited & another v Fidelity Bank Limited* (supra).
20. The applicant prays that the court grant them the prayers sought with costs.

The Respondents' Submissions

21. The respondent submitted that the applicant is not entitled to the injunctive orders sought as it is guilty of concealing material facts in order to mislead the court since the respondent had reserved the right to tack and consolidate charges as per sections 83 and 84 of the *Land Registration Act* and as such the applicant is contractually bound by the terms of the said agreement.



22. The respondent relied on the holding in the case of *Equip Agencies v I & M Bank Limited* [2017] eKLR and further submitted that it was a term of the letter of offer dated September 2, 2014, that the respondent would continue holding the suit property as security for the further loan facilities undertaken by the applicant. As such, the respondent submits that the suit property could not be discharged unless the applicant had cleared all amounts secured. They relied on the case of *Sbalom Agencies Limited & another v Family Bank Limited* [2022] eKLR.
23. On receipt of statutory notices, the respondent submitted that it had adduced evidence that the applicant was duly served with the 40 day statutory notice as the director of the applicant acknowledged receipt by signing it on the November 12, 2021.
24. Further, it is the respondent's contention that when the applicant was granted interim orders restraining the respondent from proceeding with the intended auction, it was granted on condition that they deposit with the court auctioneers' fees but the applicant is yet to comply with this court order.
25. It is the respondent's submission that the application herein has been filed in bad faith and with unclean hands as they relied on the case of *Sbalom Agencies Limited & another v Family Bank Limited* [2019] eKLR where the court declined to grant the applicant orders sought on the basis that the suit seemed to be founded on a lie.

Analysis and Determination

26. I am of the opinion that the following issues arise for determination in this matter:
 - a. Whether the plaintiff/applicant's application has met the threshold established in an application for injunction.
 - b. What orders should the court make?
 - c. Who shall bear the cost of the application?
 - d. Whether the plaintiff/applicant's application has met the threshold established in an application for injunction.
27. The conditions for consideration further in granting an injunction is now well settled in the case of *Giella v Cassman Brown & Company Limited* [1973] E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:-

“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.”
28. The applicant has established that they had taken a loan facility with the respondent and a charge registered over the suit property, title No Kitui Municipality Block 111/338. It is further confirmed that they were issued with a statutory notice under section 90 of the *Land Act* vide the letter of offer dated October 11, 2010 and notices of sale of the suit property. The respondent has confirmed the same but raised a claim that she had exercised the right of tacking under section 82 and consolidation



under section 83 of the Land Act and that this was as agreed under clause 10 (d) of the charge dated November 2, 2010. The said clause states:-

“That (notwithstanding the provision of section 84 of the Act) the bank hereby reserve the right to consolidate all mortgages which the bank may from time to time hold from the chargor on any account whatsoever and it is hereby declared that neither the charged property nor any other property of the chargor which at any time during the continuance of this security is subject to a mortgage or charge in favour of, or vested in the bank shall be redeemed except on payment not only of all monies hereby or thereby secured but also all monies secured by every other such mortgage or charge (including this charge) and that the right of the bank hereunder is noted against the register.”

29. The respondent further claims that the right of consolidation was provided for in the 2nd charge registered against land parcel YattaB2/Kwa Vonza 1287 dated November 5, 2014. Further under clause 8.1 of the letter of offer dated 2nd September 2014 the respondent claimed that it was agreed that the respondent would continue to hold the securities listed under schedule 1 of the letter of offer that is including the suit property. Clause 8.3 provides that:

“Unless otherwise agreed by the Bank, any security that is presently held by the bank for other banking facilities will also serve as security for these facilities and no property of the borrower which is the subject to a mortgage, charge, pledge, lien in favour of or vested in the bank shall be redeemed except on payment not only of all the money secured by the mortgage or charge but also of all the money secure under this letter.”

30. The respondent also claims that under clause 1 of the charge document, the suit property which was offered as security was to be a continuing security for the payment of such sum as may from time to time be outstanding together with interest thereon notwithstanding any settlement of account.
31. The applicant on the other hand claims that the right of consolidation does not arise since the amounts borrowed in the two charges were secured by different chargors over different properties. Secondly that the charge over the suit property was for a maximum amount of Kshs 12,000,000/- or lower which sum has been fully paid and such payment is not in dispute. The applicant further disputes that the right of consolidation stating that the right does not arise since the respondent was required under the law to note the said right both in the charge instrument and the register which the respondent failed to do.
32. In my view the issue of whether or not the respondent was entitled to tacking under section 82 and/or consolidation under section 83 of the Land Act and under the charge documents dated November 2, 2010 and November 5, 2014 and the letter of offer arise for determination in the present suit. It is noted that none of the parties have exhibited the title document for the suit land or extract of title to show that the rights under section 82 and 83 of the Land Act were registered as provided under section 83 (2) of the Land Act which provides;

“A chargee who has made provision in accordance with subsection (1) for the consolidation of charges shall record that right in the register or registers against all the charges so consolidated that are registered.”

33. I do find that this is a question for determination at the trial and the same goes into the fundamental question of the validity on the provision for consolidation contained in the charge documents and the letter of offer. Further the question of whether or not the respondent was entitled to continue holding the securities held under the first existing term loan facility advancing the sum of Kshs 12,000,000/-



to secure payment of outstanding balances on the second construction loan facility advancing the sum of Kshs 87,000,000/- arise for determination in this suit. In other words whether the suit property was offered as a continuing security for the payment of such sum as may from time to time be outstanding together with interest notwithstanding any settlement of account falls for determination in the main suit. Many of the above issues can only be determined at the full trial and cannot be determined on affidavit evidence.

34. Further, the issue of whether or not the respondent was entitled to exercise its statutory power of sale in the circumstances of this case arises for determination considering the issues above. All the above issues were considered in the court's ruling dated July 13, 2022 while dealing with the preliminary objection.

35. Has the applicant established a *prima facie* case with a probability of success? [*Black's Law Dictionary*](#) 11th Edition defines a *prima facie* case as

“the establishment of a legally required rebuttable presumption. A parties production of enough evidence to allow the fact –trier to infer the fact at issue and rule in the party's favour”

36. A *prima facie* case was explained as follows in the case of [*Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others*](#) [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank Ag Zurich v Eugene Marion Yakub*, Ca No 43 of 1982 this court considered the role of the court when determining whether or not a *prima facie* case has been made out. The court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

The court further stated

“A *prima facie* case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

37. At this stage of the suit, all the court is required to decide is whether there is a *prima facie* case with a probability of success and it cannot delve into substantive issues and make final conclusions on the dispute or condemn one of the parties before hearing evidence. The applicant therefore need not be assured of success at the end of the trial to establish a *prima facie* case with a probability of success; they simply need to have a case against the respondent which the applicant herein has established so far.

38. In [*Mrao Ltd v First Americal Bank of Kenya Limited and 2 others*](#) [2003] eKLR, the Court of Appeal explained what constitutes a *prima facie* case;

“In civil cases, a *prima facie* is a case in which on the material presented to the court, a tribunal property 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. 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.”



39. It is my opinion that the applicant has established that they have a legal right existing over the suit property as the proprietor and a probability of success during the trial. It is noted that the interests of the respondent are safeguarded by the existence of the charge over the suit property which the applicant cannot discharge unless the discharge of charge is executed by the respondent.
40. 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. In my opinion, the loss of the suit property to another party would certainly cause irreparable injury to the applicant and recovering it would be an uphill task. It is also for this reason that the balance of convenience tilts in the applicant's favour.

What Orders Should The Court Make?

41. Arising from the courts determination above, I do find that the application dated March 18, 2022 has merit and the same is hereby allowed in the following terms;
1. Pending hearing and determination of this suit, the defendant/respondent either through themselves, their agents, employees, nominees, assigns, agents or any other persons or authority connected therewith be and are hereby restrained by a temporary injunction order from offering for sale, selling disposing, leasing, occupying or in any way dealing with or alienating the plaintiff's proprietary rights in property title No Kitui Municipality Block 111/338 Kitui Township.
 2. The plaintiff to set this suit down for hearing forthwith and in any event within the next six months in default of which the orders herein will automatically lapse.
 3. The applicant to pay auctioneers charges as earlier directed within thirty days from the date hereof in default the orders herein will automatically lapse.
 4. Parties are directed to comply with order 11 of the *Civil Procedure Rules* and ELC Practice directions and the suit be set down for pre-trial directions on January 17, 2023.
 5. Costs of this application shall be in the cause.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF NOVEMBER 2022.

LG KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open court and virtually in the presence of-

Musyoki court assistant

M/S Omoya Advocate for the plaintiff/applicant

Mbaji Advocate holding brief for Ndirangu for the defendant/respondent

