



**Njuguna v Family Bank Limited & another (Environment & Land Miscellaneous Case E271 of 2022) [2023] KEELC 921 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 921 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E271 OF 2022**

**J OMANGE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**DAVID KAIRU NJUGUNA ..... APPLICANT**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JO - MWAKA AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The subject matter of this suit is the exercise of a statutory power of sale against LR No Kabete/Karura/4975.
2. By a Notice of Motion Application dated November 21, 2022, the Applicant seeks the following reliefs:
  - a. Spent
  - b. Spent
  - c. This Honourable Court be pleased to issue injunction orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents or any other person acting on their behalf or authority from selling, dealing or disposing off the parcel of land LR No Kabete/Karura/4975 by public auction or otherwise until the suit filed is heard and determined;
  - d. A declaration that the sale by auction as advertised in the Daily Nation dated November 7, 2022 is fatally premature, irregular, wrongful, null and void.
  - e. A declaration be issued that the issue of 45 days Auctioneer's Notice to sell, served upon the Applicant is a nullity, the 1<sup>st</sup> Respondent has never and/ or



not served upon the Applicant any notices to rectify the default and or sell as required under Section 96(2) of the *Land Act* No 6 of 2012.

f. Costs of this Application be provided for.

3. The Application was based on the grounds set out in the face of the Application and the Applicant's Supporting Affidavit that that the Applicant, who is the owner of the suit property would suffer undue prejudice and substantial loss if the sale by auction scheduled for November 23, 2022 is allowed, and that such sale would amount to loss that would not be adequately compensated.
4. The Applicant deponed that being the proprietor of the suit property, he took out a loan of Kshs 2,200,000 from the 1<sup>st</sup> Respondent, due to factors beyond his control, arising from the collapse of his business, he experienced difficulties in servicing the loan, leading to his default. That on November 7, 2022, he visited the 1<sup>st</sup> Defendant's offices to negotiate a repayment plan only to be informed that his said property had been advertised for sale by public auction.
5. He deponed that the 1<sup>st</sup> Respondent did not serve him with any notices to rectify the default and or intention to realise the security, neither did the 1<sup>st</sup> Respondent conduct a forced sale value of the Property.
6. The Application was opposed by the 1<sup>st</sup> Respondent. Vide the Replying Affidavit of the 1<sup>st</sup> Respondent's Senior Legal Officer sworn on November 28, 2022.
7. The 1<sup>st</sup> Respondent contended that in the year 2021, the Applicant had taken a loan of Kshs 2,200,000 with an agreed interest rate of 13% per annum for the purpose of working capital. That the facility was to be repaid in 48 monthly installments of Kshs 59,221 from the first month of drawdown.
8. The 1<sup>st</sup> Respondent contended that despite receiving the facility, the Applicant did not honour the repayment obligations and as at April 7, 2022, he had arrears of Kshs 158,737.56 and an outstanding of Kshs 2,216,423.55.
9. That on April 7, 2022, the 1<sup>st</sup> Respondent issued a 90 days' redemption notice and thereafter instructed the 2<sup>nd</sup> Respondent who then issued the 45 days' notice on September 15, 2022. Subsequently, a valuation was conducted on the property by Shelter (M) Valuers Limited, who ascertained the forced sale value at Kshs 2,625,000.
10. That the Respondents advertised the property for sale by public auction on November 23, 2022 when it received bids and sold the property to the highest bidder. The Respondents were therefore of the position that the Applicant's application had been overtaken by events.
11. The 1<sup>st</sup> Respondent contended that the Court should not be treated as a safe haven for loan defaulters. If debtors are allowed to avoid paying their just debts, banks will be crippled or driven out of business altogether and no serious investors will bring their capital into a county whose courts are a haven of defaulters.
12. The 1<sup>st</sup> Respondent relied on a set of exhibits including the Letter of offer, Charge instrument, copy of the title deed, the Notice dated April 7, 2022, a Certificate of Postage, Notice dated July 12, 2022, Certificate of Postage, Letter instructing the 2<sup>nd</sup> Respondent, the Auctioneer's Notice, a Valuation Report, the Advertisement, the Auction report and the Applicant's loan statement.
13. Further to the Replying Affidavit, the 1<sup>st</sup> Respondent filed a Preliminary objection contending that there was no proper suit before the Court, as a case cannot be instituted by way of a Notice of Motion. This, according to the 1<sup>st</sup> Respondent, renders the entire suit fatally defective.



14. Neither the Applicant nor the Respondent filed any Written submissions. Nevertheless, I have considered the material placed before me by both the parties.

### **Issue For Determination**

15. Other than this, I note that this is a Bank recovery issue and there is need to address the jurisdiction of this Court.
16. It is trite that this Court is a specialized court to deal with matters related to land and environment. However, only the High Court has jurisdiction in commercial/ accounting matters. This was the position in *Cooperative Bank of Kenya v Patrick Kangethe Njuguna* (2017) eKLR wherein the Court of Appeal held that the High Court was the only one seized with the Jurisdiction to deal with accounting problems.
17. In this case, the Applicant has raised issues with the 1<sup>st</sup> Respondent's action to clog his right of redemption and also challenged the validity of the notice issued by the 2<sup>nd</sup> Respondent. This notice is issued under the *Auctioneers Act*. I find that the Court lacks jurisdiction to handle this aspect.
18. However, the processes leading to the said notice have also been challenged. The process through which a chargee can exercise its statutory power of sale is found in the said *Land Act*, and therefore falls within the Jurisdiction of the Environment and Land Court . In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2018] eKLR the Court held that;-
- “It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the *Land Act* and *Land Registration Act*. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the *Land Act* and *Land Registration Act*, (formerly in the Registered *Land Act* now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of *Stephen Kibowen vs Agricultural Finance Corporation* (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the *Land Act* and *Land Registration Act*, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”
19. Considering the foregoing, I hold that this Court has jurisdiction to deal with the question whether the process leading to the issuance of the Auctioneer's notice was valid.
20. I note that the 1<sup>st</sup> Respondent has raised an issue as to defect of the suit. The Application seeks to restrain the sale of the suit property pending the hearing and determination of a suit. However, the suit itself is the Notice of Motion Application, filed under this miscellaneous cause.
21. I note that other than the Notice of Motion Application, there is no other substantive suit for which the Motion can precede in the grant of an interlocutory application. A main suit has to be alive for there to be an interlocutory order. This is the very purpose of interlocutory orders as provided for under Section 63 (e) of the *Civil Procedure Act*; to prevent the ends of justice from being defeated.



22. In this case, the Applicant has not bothered to file a substantive suit even after the Respondent raised this validity concern with his pleadings.
23. I have no hesitation in agreeing with the dicta of the High Court in *Anastacia Wagiciengo v Ezekiel Wafula* [2018] eKLR where a similar suit was found to be incurably defective and incompetent as it was premised on a miscellaneous application. This Court cannot grant a prayer or order, whose effect is to dispose of the substantive suit through an interlocutory application.
24. Be so as it may, I will delve into the substance of the Applicant's complaint to assess its merits.
25. First, the Applicant acknowledges that he took out a facility from the 1<sup>st</sup> Respondent, admits to being in default.
26. Secondly, the Applicant alleges that he did not receive the statutory notices. However, he did not comment or disown the Postal address for which both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents claimed to have dispatched the notices. Particularly, the Applicant's Address per the Letter of Offer was 12367-00400. This is the address on the Charge instrument, the 1<sup>st</sup> Respondent's Notice and indeed the 2<sup>nd</sup> Respondent's Notice. Curiously, the Applicant confirms receipt of the 2<sup>nd</sup> Respondent's Notice sent to him through the same address.
27. Third, the Applicant does not dispute the debt or any interest charged.
28. The foregoing observations are clear to me that the Applicant has not discharged the burden of establishing that he has a *prima facie* case. A *prima facie* case is the foundation upon which a determination of an application for a temporary injunction must be based. Where there is no *prima facie* case there is no benefit in considering the other requirements.
29. I find no fault in the Respondents' action to sell the suit property. In any event, the suit property being a commercial commodity whose value may be ascertained, the Applicant would still have his day in Court if he filed a substantive suit.

### **Determination**

30. The upshot of the foregoing is that Application is both incompetent and also lacks merit for the reasons outlined above, and is dismissed with costs. Any orders in place are herewith discharged.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**Judy Omenge**

**JUDGE**

In the presence of

Mr. Momanyi for Respondent

Steve- Court Assistant

