



**Equity Bank (Kenya) Limited v Mbuga (Environment and Land Appeal  
11A of 2019) [2023] KEHC 19580 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19580 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 11A OF 2019**

**LC KOMINGOI, J**

**JULY 6, 2023**

**BETWEEN**

**EQUITY BANK (KENYA) LIMITED ..... APPELLANT**

**AND**

**LEONARD MUNYUA MBUGA ..... RESPONDENT**

**JUDGMENT**

1. In a ruling dated February 28, 2019, Hon A Ithuku PM in (Ngong CMCC No 83 of 2018; Leonard Munyua Mbugua Vs Equity Bank Limited: made the following observations;

“ 10. My findings above lead me to conclude that the plaintiff has established special circumstances to warrant grant of mandatory injunction. I am alive to the fact that the order will almost determine the case. In this case, it is deserved otherwise the plaintiff will continue to suffer loss of use of land. I find that the application is merited. It is hereby allowed”.

2. Pursuant to the above Ruling, the following orders were issued on March 11, 2019;

“ 1) That the defendant is restrained from committing the breach of contract and do discharge the charge to the plaintiff’s property known as Ngong Township/ Block 1/310 issued in favour of the defendant to secure the loan amount of Kshs 2,964,500/= dated November 13, 2009 and registered on December 28, 2009.

2) That costs of this application be provided for”.

3. Being dissatisfied with these orders, the appellant preferred an appeal. by a memorandum of appeal dated March 27, 2019, the appellant relies on the following grounds;



1. That the learned magistrate erred in law and in fact by failing to take into consideration and consider the facts of the defendants' contained in the replying affidavit so as to arrive at a just conclusion.
  2. That the learned magistrate erred in law and in fact by failing to consider defendant's rights contained in the instruments used to take up the facilities but the plaintiff and which were duly and freely executed by the plaintiff.
  3. That the learned magistrate erred in law and in fact by failing to consider defendant's rights contained in the instruments and which were well within the knowledge of the plaintiff to combine, consolidate and merge any security offered with the plaintiff's other accounts.
  4. That the learned magistrate erred in law and in fact in awarding a mandatory injunction at an interlocutory stage thus denying the defendant the right to defend the suit herein to its logical determination.
  5. That the learned magistrate erred in law and in fact in awarding a mandatory injunction in a case that did not merit or demonstrate special circumstances which is the threshold for granting such orders at an interlocutory stage.
4. It seeks the following prayers;
- a. That the appeal be allowed.
  - b. That the ruling of the lower court be set aside.
  - c. That alternatively the court do make such order as it deems just to grant.
5. The appeal was canvassed by way of written submissions. In their submissions both parties reiterated the issues in their respective affidavits.
6. I have considered the grounds of appeal, the written submissions and the authorities cited. In my view the issues for determinations are;
- i. Whether the learned trial magistrate erred in law and in fact, by failing to consider the defendant's rights contained in the instruments and which were well within the knowledge of the plaintiff to combine, consolidate and merge any security offered with the plaintiff's other accounts.
  - ii. Whether the learned trial magistrate erred in law and in fact in awarding a mandatory injunction at an interlocutory stage thus denying the defendant the right to defend the suit to its logical determination.
  - iii. Who should bear the costs of this appeal?
7. I will consider issue No (i) and (ii) together.
- It is the Appellants case that the charge allowed for tacking and consolidation as did the *Land Act, 2012*.
8. It is also it's case that the Respondent after taking the first loan fully repaid but proceeded to apply for another facility which was granted. That the Respondent did not service the second facility.
9. The Appellant also stated that the doctrine of continuing securities in banking transactions arises from the practice whereby bank do offer facilities which may be rolled and or renewed if the terms and if the conditions of the facility remain unchanged, the doctrine takes effect.



10. The Respondent's case in the lower court that the Appellant had failed to register a subsequent charge over the suit property. That if there was any intention that the suit property was to be used as a security for the disputed letter of credit, the parties would have executed and registered for the charge which they did not do.
11. The Respondent further stated that the continued default by the Appellant to discharge a charge of which the Respondent had fully serviced the loan is a violation of the plaintiff's rights which cannot be compensated by an award of damages.
12. Clause 1.1 of the charge instrument provides;

“In consideration of the premises, the charger as beneficial owner hereby Charges the Mortgaged Property to the Bank as a continuing security for the payment to the Bank of the prescribed Maximum Debt or so much thereof as shall from time to time be due and owing to the Bank by the Chargor and interest thereon at the rate of rates hereinafter mentioned and all other moneys which the Chargor may be liable to pay to the Bank under the Provisions of this charge and interest thereon likewise”.

Clause 12.2 provides;

“That the security hereby given to the Bank shall be without prejudice and in addition to any other security whether by way of pledge or equitable mortgage or otherwise howsoever which the Bank may now or at any time hereafter hold on the property and assets of the Chargor or any part thereof or any part of the indebtedness of the Chargor”.

Clause 13 provides;

“This Charge shall be a continuing security notwithstanding the death, bankruptcy or incapacity of the Chargor or any settlement of account or other matter whatsoever in addition to and shall not merge with or otherwise prejudice or affect any contract, right or remedy”.

13. I agree with the Appellant's submissions that the charge document contained *inter alia* clauses of continuing security, consolidation and tacking.

In the case of [John Nduati Kariuki t/a Jobester Merchants Vs Nation Bank of Kenya Ltd](#) (2006) eKLR the court stated;

“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The Applicant obtained a large amount of these funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the Appellant, if any and that capability has not been challenged”.

14. I find that the learned trial magistrate erred in finding that the Appellant was required to register a charge as a security for the subsequent facility whereas the second facility was within the prescribed maximum debt secured by the charge.
15. The Learned trial magistrate in his Ruling dated February 28, 2019 granted a mandatory injunction at an interlocutory stage when he granted orders to restrain the Appellant from committing the breach of contract- and directing that the Appellant do discharge the charge over the Respondent's property.



In my view the issue of who had breached the contract was to be determined at the trial where evidence would be tendered by both parties.

16. In the case of *Andrew Kamau Mucuba Vs Ripples Ltd* (2001)eKLR the court stated thus;

“.....In all treatises, precedents, and court arguments etc, whenever the issue of mandatory injunction arises, it is clearly understood and accepted that such an injunction should only issue in exceptional, the clearest and special cases only. It should issue with utmost care, and even reluctance. This court appreciates this stance well. The rationale for this stance, should be that the effect of an order for Mandatory Injunction is that the party against whom the order is made should do or not do something, many side effects may follow such an act. So it's well understood as to why courts issue such orders with care and even reluctance”.

Similarly in the case of *Lucy Wangui Gachara Vs. Minudi Okembi Lore* (2015) eKLR the Court of Appeal stated as follows:

“.....the court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross examination of witnesses must not be sacrificed or substituted by a summary hearing.....”

17. I find that the Learned trial magistrate erred by granting a Mandatory Injunction on an interlocutory application.

18. The upshot of the matter is that I find merit in this appeal and the same is allowed.

19. I therefore set aside the Ruling dated February 28, 2019 in its entirety. The Appellant shall have costs of the Appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

N/A for the Appellant.

N/A for the Respondent.

Court Assistant - Mutisya

