Githinji v Faulu Microfinance Bank Limited & another (Civil Suit E010 of 2024) [2025] KEHC 216 (KLR) (22 January 2025) (Ruling)

Neutral citation: [2025] KEHC 216 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E010 OF 2024

DKN MAGARE, J

JANUARY 22, 2025

BETWEEN

JAMES MAINA GITHINJI ..... PLAINTIFF

AND

FAULU MICROFINANCE BANK LIMITED ..... 1ST DEFENDANT

MISTAN AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The matter arises from a dispute between a microfinance bank and its customer. The second defendant is indicated to be an auctioneer. Given that the 2nd defendant is unincorporated, it is important to indicate who the auctioneer is. This helps the court and parties to know whether the auctioneer is properly licensed to trade in the class of licensee he or she is carrying out instructions. However, nothing turns on this aspect.

2. The application dated 5.10.2024 sought the following prayers:

   (a) That this application be certified urgent, service hereof be dispensed in the first place and ex parte orders do issue forthwith as prayed down below.

   (b) That pending the hearing and determination of the application inter partes this Honorable Court be pleased to grant an order of temporary injunction restraining the 1st and 2nd Defendants by themselves, agents and/or servants from selling by public auction or by private treaty or otherwise, the Plaintiff/Applicant's properties situate in the County of Nyeri and known as Thengenge/Karia/1851 and Thengenge/Karia/1385.

   (c) That upon hearing this application inter partes, this Honorable Court be pleased to grant an order of injunction restraining the 1s and 2nd Defendants/Respondents by themselves, agents, and/or servants from selling by public auction or private treaty or otherwise, the Plaintiff/

Applicant's properties situate in the County of Nyeri and known as Thengenge/Karia/1851 and Thengenge/Karia/1385 pending the hearing and determination of this suit.

(d) That costs of this application be provided for.

(e) That this Honorable Court be pleased to make any other order(s) as will be necessary for the end of justice to be met.

3. The application was supported by an affidavit of the Applicant and one Nancy Nyambura Maina. The same was grounded on a record 25 grounds postulating mainly 3 allegations. The first one being that statutory notice were issued but the subsequent notices were issued prematurely. The Respondents placed the suit properties for auction on 9.10.2024. The Applicant's right to property was infringed upon.

4. The 1st Respondent filed a replying affidavit through one Martha Mwakio, who indicated to be an authorized representative of the first Defendant, whatever that means. It is not clear whether, she was a legal officer or an advocate for the 1st Defendant. The thrust of her evidence was that statutory notices were served for each of the 2 properties depending on the date of default. It was her case that the issuance of notices were admitted.

5. The first properties notices over Thengenge/Karia/1851 and Thengenge/Karia/1385, were issued in respect of Ksh 15,000,000. The 1st Defendant issued a notice on 25.3.2024 under Section 90 of the *Land Act* and, another on 20.82024 under Section 96 of the *Land Act*. It is not indicated when the redemption notice was given but the same is attached together with the certificate of posting. It is the same notice given for both properties. She covered it for the second property. Notification of sale was given on 29.7.2024 and posted on 30.7.2024. Advertisement was placed on the Standard of 24.9.2024 for auction of 9.10.2024.

6. The second notice over land parcel numbers Thengenge/Karia/1851 and Thengenge/Karia/1385 involved the loan of Ksh. 10,000,000/=. The 1st Defendant issued a notice on 14.2.2024 under Section 90 of the *Land Act* on 20.82024 and under Section 96 of the *Land Act* and redemption notice and notification of sale on 30.7.2024.

Analysis

7. In this matter, issuance of statutory notices is not in issue. The issues arising herein are:

   a. Whether the notices were valid.

   b. Whether Nancy Nyambura Maina was served.

   c. Whether the prayer for interlocutory injunction is merited.

8. The third question is moot. The raison d'etre for protection of matrimonial properties is to avoid a spouse from surrendering matrimonial property without the knowledge of the other spouse. In this case, both spouses were borrowers. Ipso facto, the issue of whether or not the land was matrimonial property cannot be dealt with in this application. Nancy Nyambura Maina was hesitant to file a case and was content to complain in the husband's suit. The two borrowers have no other spouse declared to the microfinance bank. There is thus no evidence of absence of spousal consent or service on the spouses.

28. In deciding on an injunction of this nature the court is well guided by the decision in the locus classicus case of Giella –vs- Cassman Brown & Co. Ltd (1973) EA, 358, 360, which sets out principles for grant of injunction. The court stated as follows, through the wisdom of Spry VP, as he then was: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. 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."

9. In order to succeed the court must as a corollary, establish a prima facie case capable of succeeding, and damages will not be adequate compensation. It is only when the court is in doubt, that the balance of convenience is considered. This means that the three tests are sequential. The Court of Appeal succinctly dealt with this postulation in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR. The Court stated that:

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
>
> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

10. The Applicant has completely eschewed the main issue in this matter. The debt is not disputed. He has not shown that he has paid. The test of what constitutes a prima facie case was well enunciated in the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR, where the Court of Appeal noted that: -

> 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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 as to call for an explanation or rebuttal from the latter.

11. The question of debt is central to exercise of statutory power of sale. There is absolutely no dispute on that end. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated as doth:

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible"

12. Though this is not an action for recovery of debt, it is an action for statutory recovery of debt. There ought to be evidence that the indebtedness is fully settled. The questions raised, even if they were true do not amount to a prima facie case. The court shall hereinafter deal with the question of notices. Section 90 of the *Land Act* provides as follows:

90.

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters;

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may-

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land; (c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may-

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

13. Section 96 of the *Land Act* provides as doth:

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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on-

(a) the Commission, if the charged land is public land;

(b) the holder of the land out which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

(f) any person who is a co-owner with the chargor;

(g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

(h) any guarantor of the money advanced under the charge;

(i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

14. Rule 15 of the Auctioneers Rules provide as follows:

> Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-
>
> a. record the court warrant or letter of instruction in the register.
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> b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
>
> c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
>
> d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
>
> e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

15. Notification of sale was also issued on 29.7.2024, the same date the redemption date was given. This was outside 90 days given in both notices. There was sufficient time to rectify the default. The period of rectification ought to be not less than 2 months. In this case a 90-days' notice was given. There was no rectification of default. The auctioneer was under duty to issue a redemption notice. The notices were issued.

16. The court is unable to fathom how 90 days could not have lapsed from February to September. The auctioneer is under duty to issue the notices they issued and thereafter publish the auction. In the circumstances I do not find any prima facie case established. In line with the decision in Nguruman Limited v Jan Bonde Nielsen (supra), it is not necessary to go to the other two aspects.

17. In any case, the property once offered became a chose in action. It can be sold and any loss can be ascertained. There is no allegation that the valuation was improper. The loss is thus ascertainable.

18. The issuance of these notices are legal requirements. Once issued under to the charger then the same trigger other legal processes. As held in East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another [2017] eKLR, without the notices the entire process cannot be undertaken. The court posited;

> 45. The statutory notices stipulated under the *Land Act* are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. The Statutory notice in the present case in my humble view was not in accordance with section 90(2) of the *Land Act* and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful.
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> 46. Secondly, section 96 of the *land Act* is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the *Land Act*, before the chargee can sell the charged property. The notice under section 96(2) of the *Land*

Act is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the *Auctioneers Act* as herein explained.

Section 96(2) of the *Land Act* which provides as follows:-

> "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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell".

19. Conversely, when valid notices are issued, the court cannot out of goodwill, fiat, conjecture, or surmise, gratuitously issue an injunction. The loan is unpaid over 2 years later. The loan may soon outstrip the value of the property. The balance of convenience tilts in favour of the 1st Respondent. As the court of appeal held in Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR, banks don't have their own money. They must safeguard those. The court of appeal stated as doth: -

> 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 those funds and had full benefit of it.

20. I am inclined to agree with the Hon. Kwach, JA (as he then was) in the case of in the case of, Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125, when he had this to say:

> "I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."

21. I have said enough to state that I have not seen a case capable of succeeding. I dismiss the application dated 5.10.2024. It lacks merit and is accordingly dismissed with costs of Ksh 20,000/- to the 1st Respondent.

Determination

22. The upshot of the foregoing is that I make the following orders: -

    a. The application dated 5.10.2024 lacks merit and is accordingly dismissed with costs of Ksh 20,000/- to the 1st Respondent.

    b. The matter shall be fixed for mention for directions on the main suit.

    c. For avoidance of doubt, the interim orders hitherto issued are vacated.

    d. Mention on 24/3/2025 for further pre-trial directions.

    e. Ruling and proceedings be supplied to the Plaintiff/Applicant on payment. The same be posited on CTS forthwith.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JANUARY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Aduda for the Plaintiff/Applicant

Ms. Kimathi for the Defendant/Respondent

Court Assistant – Jedidah