Masakha v Family Bank Limited & 2 others (Civil Suit E051 of 2024)
[2025] KEHC 2209 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEHC 2209 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E051 OF 2024

JK NG'ARNG'AR, J

JANUARY 20, 2025

BETWEEN

DANIEL K. M. MASAKHA ..... PLAINTIFF

AND

FAMILY BANK LIMITED ..... 1ST DEFENDANT

MASHINANI DISTRIBUTION LIMITED ..... 2ND DEFENDANT

SUSAN WAWERU T/A TREVO AUCTIONEERS ..... 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion application dated 13th August 2024 under Certificate of Urgency pursuant to Article 40 of the *Constitution*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 (1) and (2) and Order 50 (1) of the Civil Procedure Rules, and all other enabling provisions of the law.

2. The Plaintiff/Applicant seeks for orders that pending the hearing and determination of the suit, this court grants an order of temporary injunction restraining the Defendants through themselves, their servants, employees, nominees, assigns, agents, and/or other person or authority connected therewith from interfering, offering for sale, selling, leasing or in any other way dealing with or alienating the property rights of the Plaintiff's charged property known as L.R. No. Mombasa/Mainland North/ Block 2/5. The Plaintiff/Applicant also prayed that costs of the application be provided for.

3. The application is based on grounds on its face and the Supporting Affidavit sworn by the Plaintiff/ Applicant on 13th August 2024 that the Plaintiff is one of the proprietors of L.R. No. Mombasa/ Mainland North/Block 2/5 which is matrimonial property. That by way of a letter of offer dated 3rd February 2016, the 1st Defendant advanced to the 2nd Defendant a facility of Kshs. 30,000,000 and the purpose of the facility was to facilitate the importation of various commodities by the 2nd Defendant.

That the facility was secured by 4 securities including but not limited to the Plaintiff's guarantee in form of a charge over his matrimonial property being L.R. No. Mombasa/Mainland North/Block 2/5.

4. The Plaintiff/Applicant stated that it was agreed by the 1st Defendant, 2nd Defendant and himself that his liability to the 2nd Defendant's loan obligation will only be to the extent of Kshs. 6,300,000.00. That this was captured in in Clause 6 of the letter of offer, the charge instrument dated 30th May 2016 and the letter of guarantee and indemnity executed on 19th May 2016. That it was agreed between the Plaintiff and the 1st Defendant that upon the 2nd Defendant's fulfilment of its secured obligations under the letter of offer, the 1st Defendant shall discharge the Plaintiff from liability.

5. The Plaintiff/Applicant further averred that the 2nd Defendant duly performed and fulfilled its obligations under the letter of offer dated 3rd February 2016. That however, in June 2024, the Plaintiff received a letter from the 3rd Defendant notifying him of its intention to sell the suit property on behalf of the 1st Defendant on 15th August 2024 to recover Kshs. 52,238,452.17 plus costs and interests. That on inquiry, the Plaintiff was informed that the said sums arose out of facilities advanced to the 2nd Defendant by the 1st Defendant on 8th April 2017, 6th April 2018 and 3rd December 2018 for the sum of Kshs. 45,000,000, Kshs. 23,423,000 and Kshs. 45,400,000 respectively. That the Plaintiff did not sign or agree to his property being used as security in the further advancements made to the 2nd Defendant. That save for the notification of sale dated 4th June 2024, the 1st Defendant has not served upon the Plaintiff any other statutory notice as required by the *Land Act*.

6. The 1st Defendant/Respondent in their Replying Affidavit sworn on 16th August 2024 by Sylvia Wambani, the Legal Manager of the 1st Defendant, stated that the facility of Kshs. 30,000,000 advanced to the 2nd Defendant via the letter of offer dated 3rd February 2016 was a complex financial instrument including post import finance, bill avalisation and letters of credit. That it is incorrect for the Plaintiff to state that his liability was limited to Kshs. 6,300,000. That the charge created over the property is a continuing security for all the monies as secured by the charge and clearly stated in Clause 4 and further reinforced by Clause 24 of the charge document. That neither the charge nor letter of guarantee and indemnity contain any clause limiting the Plaintiff's liability to Kshs. 6,300,000.

7. The 1st Defendant/Respondent stated that the Plaintiff's wife and co-owner being a Director of the 2nd Defendant had full knowledge of all financial dealings of the company including the facilities. That these were not new loans but restructuring and extensions of the original facility necessitated by the trade finance arrangements. That the letters dated 8th April 2017, 6th April 2018 and 3rd December 2018 clearly show the said extensions or restructuring. That any changes in the amounts, repayment periods or additional securities were within the scope of the original charge and did not increase the Plaintiff's liability beyond what was originally agreed. That contrary to the Plaintiff's assertions, all the required statutory notices were sent to the Plaintiff which included copies of Section 90 and 96 notice under the *Land Act*, Redemption Notice and the notification of sale of immovable property by the Auctioneer.

8. The application was canvassed by way of written submissions. The Plaintiff/Applicant in their submissions dated 26th September 2024 relied on the holding in Mrao v First American Bank of Kenya Limited & 2 Others, C.A. No. 39 of 2002 which was cited with authority in Stek Cosmetics Limited v Family Bank Limited & Another (2020) eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR where a prima facie case was defined. The Plaintiff submitted that they have a prima facie case as the 1st Defendant advanced facilities to the 2nd Defendant without their knowledge, that the Plaintiff did not offer his property as security for the facilities advanced on 8th April 2017, 6th April 2018 and 3rd December 2018, and that the 1st Defendant did not serve statutory notices upon the Plaintiff.

9. The Plaintiff argued that the doctrine of continuing security was explained in the case of Equip Agencies Limited v I & M Bank Limited (2017) eKLR cited in John Karanja Kihagi & Another v Jamii Bora Bank & 2 Others (2020) eKLR and that it is clear that the doctrine of continuing security only takes effect if the terms and conditions of the facility remain materially unchanged, which is not the case herein. That the facility advanced to the 2nd Defendant was repaid in full and when further loans were advanced to the 1st Defendant, major alterations and variations were made which required the 1st Defendant to call for and was furnished with additional security without the knowledge of the Plaintiff. The Plaintiff relied on the case of Harilal & Co. v The Standard Bank Limited (1967) EA 512 and Abraham K. Kiptanui v Delphis Bank Ltd & Another, Nairobi (Milimani Commercial Courts) HCCC No. 1864 of 1999 which were cited with authority in the case of George Williams Omondi & Another v Co-operative Bank of Kenya Limited & 2 Others (2016) eKLR.

10. The Plaintiff/Applicant submitted that the increase of the secured amount was done without consent of the guarantor through a signed memorandum which was a violation of not only the charge instrument but also provisions of Section 84 (2) of the *Land Act*. Reliance was placed on the case of Kisimani Holdings Limited & Another v Fidelity Bank Limited (2013) eKLR, Gakena v Consolidated Bank of Kenya Limited & 2 Others (Civil Case No. 13 of 2018) (2002) KEHC 436 KLR (28 April 2022) Judgment and Surya Holdings Limited & 4 Others v ICICI Bank Limited & Another (2015) eKLR.

11. The Plaintiff/Applicant submitted that Section 90 of the *Land Act* places an obligation upon the charge to issue statutory notice of 90 days in the event a charger defaults in payment of periodic instalments. That the purpose of this notice is to prompt the process of realization of the security which is one of the remedies under Section 90 (3) of the *Land Act*. That the importance of serving the notice is emphasized in the case of First Choice Mega Store Limited v Ecobank Kenya (2017) eKLR. That Section 96 (2) of the *Land Act* provides that before exercising the power of selling the charged land, the chargee must 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 lapsed from the date of service of the notice. That under Section 96 (3), a copy of the notice served in accordance with subsection 2 shall also be served upon a spouse of the chargor who had given consent to registration of the charge.

12. The Plaintiff/Applicant stated that the 1st Defendant maintains that the Plaintiff was served with all the statutory notices while the Plaintiff claims that he was not served. That when a chargor alleges non-receipt of the statutory notice, the charge must prove that such notice was in fact sent as was held in the case of Nyagilo Ochieng' & Another v Kenya Commercial Bank Court at Kisumu, Civil Appeal No. 48 of 1995 (1996) eKLR. The Plaintiff/Applicant submitted that he was not notified of alleged default. That the 1st Defendant's power of sale has therefore not crystalized as was held in Peter Ngure v Pioneer Building Society (in liquidation) (2014) eKLR cited in John Karanja Kihagi & Another v Jamii Bora Bank & 2 Others (2020) KLR. That the 1st Defendant in their response annexed a letter dated 17th April 2024 as proof of issuance of the statutory notice which is addressed to P.O. Box 93232-80100 Mombasa. That however, the Plaintiff's documents and specifically the copy of title deed shows that the Plaintiff's postal address is P.O. Box 93231 Mombasa, which is clear evidence that the alleged statutory notice did not reach the mailbox of the Plaintiff.

13. The Plaintiff/Applicant submitted that if this court fails to grant an injunction, he will suffer irreparable damage that cannot be compensated by an award of damages. The Plaintiff/Applicant cited the case of Joseph Siro Mosiomo v HFCK & 3 Others, Nairobi HCCC No. 265 of 2007 (UR) cited in the case of Charles Alex Njoroge v National Bank of Kenya Ltd & Another (2015) eKLR. On

whose side the balance of convenience tilts, the Plaintiff/Applicant relied on the holding in the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others (2016) eKLR. The Plaintiff/Applicant therefore prayed that this court grants the orders as sought.

14. The 1st Defendant/Respondent filed submissions dated 5th November 2024 and contended that the principles governing the grant of injunctive relief are well established in the case of Giella v Cassman Brown & Co. Ltd (1973) EA 358 and further elaborated in Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR that the principles must be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. That this court is called upon to determine whether the Plaintiff has established grounds warranting the grant of temporary injunction restraining the Defendants from exercising their Statutory power of sale over the suit property.

15. On prima facie case, the 1st Defendant/Respondent submitted that Clause 4 of the Charge confirms that it serves as continuing security for all money, obligations and liabilities of the borrower, covering both initial and subsequent advances without requiring fresh security instruments. That this clause reflects the initial intent of the charge which contemplates flexibility in the facility's structure and acknowledges that trade finance arrangements may require adjustments and rollovers to accommodate business needs. That the Plaintiff's argument that the doctrine of continuing security is misapplied is mistaken as the very nature of a continuing security as clearly established in Kenyan banking practices and affirmed by judicial decisions, is to secure all current and future obligations within a single, comprehensive security instrument. That this structure is designed to eliminate the need for repeated consents or fresh documentation for each advance within the facility's scope.

16. The 1st Defendant/Respondent contends that the Plaintiff has failed to establish a prima facie case with probability of success. That the test laid out in Mrao Ltd v First American Bank of Kenya Limited & 2 Others (2003) KLR 125 requires evidence that suggests an infringement of a right by the opposing party, sufficient to call for a rebuttal. That there is dual security structure established in this case and the bank holds two distinct securities of an unlimited continuing charge over the property and a limited personal guarantee capping the Plaintiff's liability at Kshs. 6.3 million. That dual security structure is standard in commercial banking, especially in facilities involving trade finance, which require flexibility in structuring obligations. That the charge covers the property's liability for the full debt while the guarantee limits the Plaintiff's personal exposure.

17. The 1st Defendant/Respondent further stated that the Plaintiff's spouse and co-owner of the charged property is a Director of the 2nd Defendant and had access to all relevant information regarding the facility's operations including restructuring or rollovers within the facility. That her direct involvement in the company imputes constructive knowledge to the Plaintiff. That the 1st Defendant/Respondent also complied with all statutory notice requirements under the *Land Act* as they were properly served on both the Plaintiff and the borrower company. That the statutory notices dated 16th January 2024 and 17th April 2024 include proof of service. That the Plaintiff has acknowledged that his address of service is P.O. Box 93231-80100 Mombasa which corresponds with the address on the served notices. That the postal corporation's registered mail list attached to each notice, duly stamped, confirms delivery at entries 30, 31 and 58.

18. On irreparable injury that cannot be compensated by an award of damages, the 1st Defendant/Respondent submitted that the second limb of the Giella test requires the Plaintiff to demonstrate irreparable injury that cannot be adequately compensated by damages. That this threshold requirement was elaborated in Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR. That the court in Nguruman held that speculative injury will not do, there must be more than an unfounded fear or apprehension. That the fear must be actual, substantial and demonstrable and that the Plaintiff has failed to meet this threshold. That the property was voluntarily offered as security with

full knowledge of the consequences of default and that the charge instrument specifically contemplates the bank's power of sale as an enforcement mechanism. The 1st Defendant cited the case of Maithya v Housing Finance Company of Kenya & Another (2003) 1 EA 133.

19. On the balance of convenience, the 1st Defendant/Respondent argued that the same is in their favour. Reliance was placed on the case of Julius Mainye Anyega v Eco Bank Limited (2014) eKLR where the court clarified that the only requirements for sale of matrimonial property are obtaining spousal consent at creation of charge and proper notices to interested parties. That this position was reinforced in Matex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation) (2017) eKLR and Isaac Litali v Ambrose W. Subai & 2 Others, NBI HCCC No. 2092 of 2000 (UR). The 1st Defendant/Respondent submitted that the balance of convenience allows the bank to exercise its statutory power of sale. That the property's matrimonial status having been voluntarily offered as security with spousal consent and director knowledge cannot override the clear commercial nature of the transaction and the bank's right to realise its security.

20. I have considered the Notice of Motion application dated 13th August 2024, the 1st Defendant/ Respondent's Replying Affidavit sworn on 16th August 2024 and submissions by the Plaintiff and the 1st Defendant. The issue for determination is whether the application is merited for grant of the orders sought.

21. The principles for grant of temporary injunction have been set out in Giella v Cassman Brown (1973) EA 358 as follows: -

    (a) The applicant must first establish a prima facie case with a probability of success.

    (b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

    (c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.

22. On whether a prima facie case with probability of success has been established, the court in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 held as follows: -

> " So what is a prima facie case ... In civil cases it is a case which on the material presented to the court or 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 on rebuttal from the latter."

23. It is not in dispute that the 1st Defendant advanced a facility of Kshs. 30,000,000 to the 2nd Defendant which was secured by among other securities, the Plaintiff's guarantee in the form of a charge over his matrimonial property being L.R. No. Mombasa/Mainland North/Block 2/5.

24. On the one hand, the Plaintiff argues that his liability to the 2nd Defendant's loan obligation was only to the extent of Kshs. 6,300,000. According to the Plaintiff, the 1st Defendant was required to discharge him from liability upon the 2nd Defendant's fulfilment of its secured obligations under the letter of offer dated 3rd February 2016. That the 2nd Defendant duly performed and fulfilled its obligations but in June 2024, the Plaintiff received a letter from the 3rd Defendant notifying him of its intention to sell the suit property on behalf of the 1st Defendant on 15th August 2024 to recover Kshs. 52,238,452.7 plus costs and interests. The Plaintiff denies offering his property as security for facilities for the sum of Kshs. 45,000,000, Kshs. 23,423,000 and Kshs. 45,400,000 advanced on 8th April 2017, 6th April 2018

and 3rd December 2018 respectively. The Plaintiff also stated that he was never served with statutory notices as required by the *Land Act*.

25. On the other hand, the 1st Defendant argued that the facility of Kshs. 30,000,000 advanced to the 2nd Defendant through a letter of offer dated 3rd February 2016 was a complex financial instrument including post import finance, bill of avalisation and letters of credit. That the charge created over the property is a continuing security for all monies as secured by the charge as stated in Clause 4 and 24. That it is therefore incorrect for the Plaintiff to state that his liability was limited to Kshs. 6,300,000. The 1st Defendant argued that the Plaintiff's spouse and co-owner of the charged property is a director of the 2nd Defendant and had access to all relevant information regarding the facility's operations including restructuring or rollovers within the facility. That her direct involvement in the company imputes constructive knowledge to the Plaintiff. The 1st Defendant maintained that they complied with all statutory notice requirements and the notices dated 16th January 2024 and 17th April 2024 furnished to this court are proof of service.

26. On the basis of the above, this court finds that the Plaintiff has established a prima facie case.

27. On whether the Plaintiff/Applicant stands to suffer irreparable loss, it was expressed in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR that: -

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

28. The Plaintiff/Applicant has furnished this court with a copy of the lease certificate which demonstrates joint ownership of the suit property that is matrimonial property. This court is satisfied that if an order of temporary injunction is not granted and the suit property is sold by public auction, the Plaintiff/Applicant will suffer irreparable damages that cannot be compensated by an award of damages.

29. On the issue of the balance of convenience, this court relies on the holding in Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR where the court held as follows: -

> "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

30. In light of the findings above, this court is satisfied that the Plaintiff has met the necessary conditions for grant of the orders of temporary injunction.

31. The Notice of Motion application dated 13th August 2024 is merited and allowed in terms of prayer (c). A temporary injunction is hereby issued restraining the Defendants through themselves, their servants, employees, nominees, assigns, agents and/or other person or authority connected therewith from interfering, offering for sale, selling, leasing or in any other way dealing with or alienating the property rights in the 1st Plaintiff's charged property known as L.R. Mombasa/Mainland North/Block 2/5. Costs be in the cause.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 20TH DAY OF JANUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff/Applicant

..... Advocate for the 1st Defendant/Respondent

..... Advocate for the 2nd Defendant/Respondent

..... Advocate for the 3rd Defendant/Respondent

Court Assistant – Shitemi

J.K. NG'ARNG'AR, J.