



REPUBLIC OF KENYA



Executive Super Rides Limited & another v Guradian Bank Limited & another (Commercial Case E550 of 2024) [2025] KEHC 2203 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E550 OF 2024
JWW MONG'ARE, J
FEBRUARY 13, 2025**

BETWEEN

EXECUTIVE SUPER RIDES LIMITED 1ST PLAINTIFF

NORTHERN GALAXY HOTEL LIMITED 2ND PLAINTIFF

AND

GURADIAN BANK LIMITED 1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiffs have by a plaint dated 13th September 2024 moved this court for orders seeking to restrain the Defendants from among other orders the intended sale of the Plaintiffs' properties being LR. No. 2/15- Ngong Road, Kilimani, Nairobi And Isiolo Township/block V/4- Northern Galaxy Hotel, Isiolo County (the suit property) that were charged to the 1st Defendant to secure a loan facility advanced to the 1st Plaintiff.
2. Alongside the plaint, the Plaintiffs have filed an application brought under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Section 90, 96, 97 and 104 of the *Land Act*, The Auctioneers Rules 1997, seeking the following orders:-
 1. Spent
 2. Spent
 3. Spent
 4. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a permanent injunction restraining the 1st and 2nd Defendants/Respondents from



advertising, offering for sale, disposing of, auctioning, selling by public auction, or otherwise interfering with Plaintiff's properties known as L.R. No. 2/15 Ngong Road, Kilimani, Nairobi County, And Isiolo Township/block V/4, Galaxy Hotel, Isiolo County.

5. That this Honourable Court be pleased to issue an order compelling the 1st Defendant/ Respondent to provide a full and detailed statement of accounts on the loan facilities extended to the 1st Plaintiff/Applicant, including the exact outstanding balance, any penalties or interest charges, and breakdown of all payments made by the 1st Plaintiff/Applicant to date.
 6. That this Honourable Court be pleased to order a fresh Valuation Of The Plaintiff's Properties Known As L.r. No. 2/15 Ngong Road, Kilimani, Nairobi County, And Isiolo Township/ block V/4, Galaxy Hotel, Isiolo County, to ascertain their current market value and forced sale value in accordance with Section 97 of the Land Act, 2012
 7. That the costs of this Application be provided for.
3. The Application is premised on the grounds set out on its face and the supporting affidavit of Eric Kimathi Kirima sworn on 13th September 2024. It is opposed and the Defendants have filed a replying affidavit sworn on 2nd October 2024 by Edna Mokaya a Legal Officer with the 1st Defendant.

Analysis And Determination

4. On 14th September 2024 when the matter came up before the court *ex parte*, the court issued a temporary order restraining the Defendants from proceeding with the intended realization of the charged security and directed the parties to file their responses alongside their written submissions. The Defendant filed their written submissions on 12th November 2024. The Applicant did not file its written submissions until the 4th February 2024 when and without leave of the court and under a Certificate of Urgency attempted to file its submissions and a supplementary affidavit. The Respondent has on 4th February 2024 filed its grounds of opposition to the same.
5. Upon careful consideration of the same, I find the said documents filed without leave of the court are prejudicial to the Defendants as the manner in which they were introduced denies the Defendants an opportunity to interrogate the same and file an appropriate response in rebuttal thereto. For purposes of the ruling, I will not consider the said documents filed on 4th February 2025 or the grounds of opposition filed thereto by the Defendants.
6. Having therefore considered the pleadings and the supporting affidavit of the Applicant and the response and written submissions of the Defendant, I find that the only issue that arises for determination is whether the Applicant has established the threshold for this court to grant the orders of Temporary Injunction pending the hearing and determination of the present suit.
7. I do not think it is in dispute that for an Order of Injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a *prima facie* case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR).



8. The parties also agree that what constitutes “a prima facie case” was set out by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) as follows:

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.

9. A prima facie case flows from what has been pleaded in the plaint. The Plaintiffs agree that indeed they obtained loan facilities from the Defendant Bank for the sum of Kshs.400,000,000/= which said loan was used to expand their businesses both in the hospitality industry and real estate. They further confirm that as a security for the said loan they offered two securities, L.R. No. 2/15 Ngong Road, Kilimani, Nairobi County, And Isiolo Township/block V/4, Galaxy Hotel, Isiolo County registered in the names of the 1st and 2nd Plaintiffs respectively.
10. The Plaintiffs aver that they duly serviced the loan including making advance payments to the same and that they now fault the actions of the Defendant bank in its quest to exercise its statutory power of sale. They accuse the bank of failing to issue proper notices in accordance with the law and also breaching the in Duplum Rule under section 44A of the *banking act* and allege that the amount being sought to be recovered far exceeds the loan plus interest allowed under the charge. They take issue with the current valuation of the charged property and argue that the same falls outside the mandatory 6 months set out under Section 97 of the *Land Act*. They further argue that they have been denied their statutory right of redemption of the charged property as required by section 900(2) of the *Land Act*. They claim that if the bank is allowed to proceed with the intended sale of the two securities, they stand to suffer irreparable loss as the two securities are of substantial value as the property on Ngong Road, Nairobi County is a major hotel and leisure business which serves as a key hospitality venue while the Isiolo property is a prime hospitality destination which cannot be adequately compensated as the properties are likely to be undersold at a public auction. They argue that despite demand from the Bank for proper and accurate accounts to determine their outstanding loan obligations, the same have not been made available to them. The Plaintiffs argue that they are ready and willing to continue servicing the loans once proper statements of their accounts are made available to them.
11. In opposing this application, the Defendants filed a replying affidavit sworn by the Banks legal officer Edna Mokaya and also filed written submissions thereto. The Defendants deny the alleged failures to comply with the law in exercising its statutory power of sale. The Defendants attached Statutory Notices issued to the Plaintiffs in 2023 and attempts on the request of the Plaintiffs to restructure the loan in 2022 and that despite the said attempt, the Defendants argue that the Plaintiffs failed to make good their pledge to repay the loan arrears.
12. The Defendant further stated that the suit properties were recently valued and have annexed the said valuations by Mwaka Musau Consultants carried out on 1st July 2024. They deny that the outstanding loan balances violate the in Duplum Rule under Section 44A of the *Banking Act* and aver that the two demand loans are outstanding at Kshs.80,33,080.30/= and Kshs.487,789,311.17/= which is less than two times of the amount advanced at Kshs.400,000,000/= in total. The Defendants further have annexed correspondences exchanged between the Bank and the Plaintiffs acknowledging their indebtedness and the same has not been disputed or controverted by the Plaintiffs.
13. I have considered the arguments put forward by the Plaintiffs and the extensive response filed by the Defendants. I note that the Plaintiffs acknowledge the existence of the loan but only point to a failure by the Defendant Bank to provide detailed statements. I have perused the attached statements by the



Bank and note that indeed as early as 2022, the two loans were in arrears. I have also the attached correspondences attached and exchanged between the parties that confirm that at all material times the Plaintiffs were aware of their obligations to repay the loan. I also note that the Bank – Customer relationship between the Plaintiffs and the 1st Defendant Bank started way back in 2013 and there has been several occasions where banking facilities have been advanced to the Plaintiffs over the period. The Plaintiffs acknowledge their indebtedness. There is sufficient proof availed in the documents annexed to the replying affidavit of Edna Mokaya and made available to the court that indeed all statutory notices as required by law were served upon the Plaintiffs and that the Plaintiffs did not come across the Advertisement in the Newspapers, as alleged, of the intended sale of their properties. I am therefore satisfied that the Plaintiffs have been accorded adequate accommodation to rectify their default position on the two demand loans but have failed to do so. Its is therefore clear to me that the Plaintiffs have not made out a prima facie case to warrant this court to grant the orders sought. In line with the dicta in Nguruman Limited(supra) I will not therefore consider the other two elements necessary for grant of an order of injunction. In any event, it is trite that once a property has been offered as a security for a loan, the same becomes a commodity for sale. This was reiterated by the Court in the case of John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR.

14. The sum total of my findings are that the Application by the Plaintiffs dated 13th September 2024 is devoid of merit. The same is dismissed with costs to the Defendants. The Interim Orders issued herein before are discharged and vacated forthwith. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2025

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J.W.W. MONGARE

JUDGE

In the Presence of:-

1. Mr. Otieno for the Plaintiffs /Applicants.
2. Mr. Mutua for the Defendants/Respondents.
3. Amos - Court Assistant

