



Feast Foods Processors Ltd v Kenya Development Corporation Ltd & another (Civil Case E438 of 2024) [2025] KEHC 2146 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E438 OF 2024
FG MUGAMBI, J
FEBRUARY 14, 2025**

BETWEEN

FEAST FOODS PROCESSORS LTD APPLICANT

AND

KENYA DEVELOPMENT CORPORATION LTD 1ST DEFENDANT

STARTRUCK AUCTIONEERS LTD 2ND DEFENDANT

RULING

Background and Introduction

1. By a redemption notice and notification of sale dated 24th January 2023, the 2nd Defendant (“the Auctioneers”), acting on the instructions of the 1st Defendant (“the Bank”), notified the Plaintiff of its intention to auction the charged property described as LR No. 10901/214, IR No. 65339 Kahawa Sukari Estate (“the suit property”).
2. This notice arose out of a loan facility of Kshs. 276,700,000/= which the Plaintiff confirms was extended by the Bank, and secured by a legal charge over two suit properties. The Plaintiff contends that soon after signing the loan agreement, they experienced unforeseen operational impediments, that frustrated their business, making it difficult to continue meeting the loan repayments as required.
3. The Plaintiff avers that, despite facing serious financial challenges, it made every effort to continue servicing the interest on the loan, as there was a moratorium on the principal amount. It claims that it had made several requests to restructure the loan but that the Bank was hellbent on unjustly enriching itself by the sale of the suit property. The Plaintiff takes issue with the valuation of the property which it argues is an undervalue and also argues that the Bank is yet to reconcile accounts.



4. Contemporaneously with the suit, the Plaintiff has also filed the Notice of Motion application dated 6th August 2024 under Order 40 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#) and sections 63(e), IA and 3A of the [Civil Procedure Act](#) and sections 97 and 103 of the [Land Act](#). It seeks to restrain the Bank from advertising and exercising their statutory power of sale over two suit properties; LR No. 10901/214, IR No. 65339 Kahawa Sukari Estate and Kwale/Galu Kinondo/886 pending the hearing and determination of the suit. Additionally, it seeks to suspend the interests and penalties on the facility until the suit is heard and determined and that there be a loan restructuring.
5. The application is supported by grounds on its face and the supporting and supplementary affidavits of MWANGI WAMAE, a director of the Plaintiff. It is opposed by the Bank through the replying affidavit of MICHAEL RERIMOI KOROSS, the Bank's Assistant Manager- Portfolio Management, sworn on 14th October 2024.
6. The Bank confirms the loan facility and contends that the Plaintiff failed to repay the loan in installments as they fell due. They state that as of 6th August 2024 when the Plaintiff moved to court, the outstanding loan balance was Kshs. 466,567,473/= with arrears of Kshs. 402,595,301.75, which continues to accrue interest. The Bank avers that before the court order of August 2024, the last payment on the loan was on 29th August 2022.
7. The Bank contends that it has complied with the requirements of the law for purposes of exercising its statutory power of sale and has issued all required notices. It further contends that the Plaintiff has all along been aware of the loan accounts and that even if there was any anomaly on the valuation as claimed, the loss can be recovered by way of damages. The Bank notes that the Plaintiff neither denies the debt and default nor challenges the existence of the charge. In summary, the Bank contends that the Plaintiff has not met the threshold for granting a temporary injunction. They therefore pray that the application be dismissed with costs and that the sale of the suit property proceeds to conclusion.

Analysis and Determination

8. I have reviewed the parties' pleadings and submissions. The main issue for determination is whether the Plaintiff has met the threshold for granting the injunction orders they seek. It is trite that the Plaintiff must satisfy the conditions established in *Giella V Cassman Brown & Co Ltd*, [1973] EA 358. These conditions require the Plaintiff to demonstrate a prima facie case with a probability of success, show that it would suffer irreparable harm that could not be adequately compensated by damages and if the Court is in doubt, have the application determined on the balance of convenience.
9. 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)).
10. As to what constitutes a prima facie case, the Court of Appeal in [Mrao Ltd V First American Bank of Kenya Ltd & 2 Others](#), [2003] KECA 175 (KLR) explained 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.”
11. A prima facie case flows from what has been pleaded in the plaint, the averments which I have summarised above. The Plaintiff's main grievance is that the Bank has undervalued the suit property



and that it has not been issued with regular account statements by the Bank and that this fettered the Plaintiff's equity of redemption.

12. In its bid to surmount this burden, the Bank has annexed the demand notices under section 90 of the Land Act dated 20th September and 29th September 2022. The Bank has also annexed copies of the notices of intention to sell under section 96(2) of the Land Act dated 24th January and 25th January 2023. The Plaintiff does not deny having received the notices.
13. It is not true that the Plaintiff was not aware of the loan statements relating to the facility. I say so noting the letters of 2nd February 2022, 3rd March 2022, 29th September 2023, 25th October 2023, 19th April 2024 and numerous email correspondence that the parties had exchanged with a view to restructuring the facility. This fact is not denied by the Plaintiff who has equally annexed further correspondence with the Bank. During this period, it did not express any concerns about the Bank's inconsistency in providing loan statements. If it had truly been unaware, it would not have been able to negotiate the loan restructure effectively.
14. In addition, the mere averment by the Plaintiff that the suit property has been undervalued is not reason enough to bar the Bank from exercising its statutory power of sale. Even if this were true, which the Plaintiff will have to prove, I concur that the same may be compensated by way of damages. It is not to be forgotten that the Plaintiff has admitted even on this occasion, to being indebted to the Bank. Having found that the Bank issued and served the requisite statutory notices, it follows that the right to exercise its statutory power of sale has crystallized and there is no valid reason for the court to stop it from proceeding with the intended sale of the suit property.
15. At this point, I believe it is now obvious that the Plaintiff has not made out a prima facie case with a probability of success. Its inquiry on whether it is entitled to an injunction ends at this point in line with the dicta in *Nguruman Limited V Jane Bonde Nielsen and 2 Others*, (supra). As I have already stated, any loss that is to be suffered by the Plaintiff can ameliorated by an award of damages as per section 99(4) of the Land Act. I have not been shown or told that the Bank is not capable of paying these damages. The balance of convenience also tilts in favour of the Bank realizing their security as early as possible so that the value of the suit properties is not outstripped by the ballooning debt.

Disposition

16. The upshot is that the Plaintiff's application dated 6th August 2024 seeking injunctive relief has no merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

F. MUGAMBI

JUDGE

