Kabucho t/a Oiltex Services Station v ABSA Bank Kenya PLC (Civil Suit E007 of 2025) [2025] KEHC 1676 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1676 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E007 OF 2025

SM MOHOCHI, J

FEBRUARY 7, 2025

BETWEEN

WILFRED MWAURA KABUCHO T/A OILTEX SERVICES STATION ..... PLAINTIFF

AND

ABSA BANK KENYA PLC ..... DEFENDANT

RULING

Background

1. The Applicant, Wilfred Mwaura Kabucho was advanced a principal sum of Kes. 35, 700, 000/- which sum was secured by a charge upon the parcel commonly known as Nakuru/Nakuru Municipality Block: 6/134 dated 21st January 2021 and by 8th May 2024 having been in default was served with the 90 days' notice evenly dated under Section 90 of the *Land Act*.

2. Despite notice the Applicant failed to repay the loan within the statutory period provided for thereby constraining the Respondents to issue and serve the 40 days statutory' Notice to Sell dated 3rd September 2024 under Section 96 of the *Land Act*.

3. After the expiry of the statutory 40 days, the Applicant was still in default therefore constraining the Respondent to issue 45-day redemption notice dated 22nd November 2024 under the rule 15 of the Auctioneers Rules.

4. Upon expiry of the '45 days' redemption period, an advertisement of the auction was published on 27th January 2025 for the property to be sold on 3rd February 2025, the property having been subjected to a valuation in readiness for the public auction as required under Section 97 of the *Land Act*.

Applicants Case

5. The Applicant filed this suit through Messrs Gatitu Muchiri & Co. Advocates on 30th of January 2025. Together with Plaint and the other usual Pleadings accompanying it, the Applicant filed the interlocutory Notice of Motion the subject of this Ruling filed pursuant to the provisions of Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Sections IA, IB & 3A respectively of the *Civil Procedure Act* and all the enabling Provisions of the Law, urging the court to grant the following orders:

    a. That, this application be certified as urgent and service thereof be dispensed with in the first instance. (Spent)

    b. That, the Court be pleased to issue a temporary injunction restraining the Defendant/ Respondent from selling parcel of land known Nakuru Municipality Block: 6/134 via public auction on 10th February, 2025 pending the hearing and determination of this application. (Spent)

    c. That, this Court be pleased to direct the Defendant/Respondent to allow the Plaintiff/ Applicant to apply for a consolidation and restructure of the outstanding loan facilities specifically Kes 31,333,165.75 for A/C1060LXXXXXXX002, Kes.23,179,290.85 for A/c: 1060LXXXXXXX001 and Kes. 1,300,005.45 for A/c.204XXXXX79.

    d. That, the costs of this application be in the cause.

6. The applicant grounds his application on the facts that he is involved in a fiduciary relationship with the Respondent as a borrower/lender dynamic and his loan facilities are in arrears of Kes.31,333,165.75 for A/C1060LXXXXXXX002, Kes.23,179,290.85 for A/C. 1060LXXXXXXX001 and Kes. 1,300,005.45 for A/C.204XXXXX79.

7. That, he is engaged in the energy industry which has beenexperiencing challenges within the industry and he has had difficulties in servicing the aforementioned loan facilities.

8. That, the Respondent had issued a redemption notice dated 22nd November, 2024 which upon expiry, the Respondent shall sell parcel of land known as Nakuru Municipality Block 6/134 via public auction on 10th February, 2025.

9. That, the Applicant is apprehensive of the looming auction sale of the subject parcel of land and intends to make good of its fiduciary obligations with the Respondent by proposing a consolidation and a restructure of the loan facilities.

10. That, this Court is espoused with wide and unfettered discretion to grant the orders sought herein and no conceivable prejudice will be occasioned on any party to the proceedings herein.

11. That, due to a myriad of issues affecting the energy industry, namely the COVID pandemic and the global fuel crisis instigated by the Russia-Ukraine war, he has had difficulties in servicing his loan facilities.

12. That, in regards to the COVID pandemic, the Applicant accuses the Defendant/Respondent for failing and/or ignoring to offer any alleviation in form of a restructure of the loan facility herein to me subject to the Central Bank of Kenya Banking Circular No.3 of 2020 which provided guidelines to banking institutions on emergency measures to be implemented during the pendency of the pandemic.

13. The Applicant attributes the failure to secure a restructured facility to the, Respondent who according to him has set in motion the exercise of statutory power of sale and has issued him a redemption notice dated 22nd November, 2024 which upon expiry of the same, the Defendant/Respondent herein shall

sell parcel of land known as Nakuru Municipality Block 6/134 via public auction on 10th February, 2025.

14. That he is apprehensive of the looming auction sale of the subject parcel of land and he intends to make good of his fiduciary obligations with the Respondent by proposing a consolidation and a restructure of the loan facilities and given the opportunity to consolidate and restructure the subject loan facilities, he undertakes to pay the subject outstanding amount hereto in instalments of Kenya Shillings Three Hundred Thousand (Kshs.300,000/-) only per month as at January 2025 to completion and shall make a lumpsum payment of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) only in September 2025.

15. That, the subject petrol station his sole source of livelihood as well as the only way he can service the loan facility herein hence he shall suffer irreparable loss if the subject parcel is auctioned by the Defendant/ Respondent.

16. That, he has been advised by his advocates on record, whose advise he verily believe to be true, that the subject application herein is an exercise of his equitable right of redemption and he believes that no conceivable prejudice will be occasioned on any party to the proceedings herein.

17. That, he has been advised by his advocates on record, whose advise he verily believe to be true, that the Defendant/Respondent herein ought to exhaust all avenues statutorily prescribed to enable me to comply with the obligations of the loan facility herein.

18. Mr. Muchiri Kimaru Advocate, highlighted his submissions by regurgitating the pleadings articulating orally the irreparable injury and loss should the auction takeplace and urged the court to allow the application as prayed.

Respondent's Case

19. The Application is opposed by the Sworn Replying Affidavit dated 4th February 2025 bySamuel Njuguna, the Secured Lending Team Leader at Absa Bank Kenya Plc who deponed that, the instant application is a feeble attempt at rewriting contractual obligations by a defaulting debtor and is thus an abuse of court process.

20. That the Respondent advanced several loan facilities o the Plaintiff, the loans were secured by a charge over property Title Number: Nakuru Municipality Block 6/134. The Applicant is in arrears and owes the Respondent in excess of KES. 55, 812, 462. All requisite statutory notices have been served on the Applicant thereby crystalizing the Respondent's statutory power of sale.

21. That, the present application is wholly bereft of merit as no single ground is raised to support the prayers for injunctive relief.

22. Firstly, the Applicants admits unequivocally at paragraph 5 of his Supporting Affidavit that he is indebted to the Respondent for KES. 55, 812, 462 /as follows;

    Loan Account Total Outstanding Balance (KES)

    106OLXXXXXXX002 31,333,165.75

    1060LXXXXXXX001 23,179,290.85

    204XXXXX79 1,300,005.45

23. That as advised by the Respondent's Legal Counsel that an injunction cannot issue in favour of an Applicant who admits default. The admission of debt in this case completely collapses the application.

24. That the following germane facts are not contested in the present application;

a. The Defendant advanced a principal sum of Kes. 35, 700, 000 to the Plaintiff secured by a charge dated 21 January 2021. As is exhibited by a copy of the Charge.

b. The Applicant defaulted in repaying the loan. He was issued with the 90 days' notice dated 8th May 2024 under section 90 of the *Land Act*. As is exhibited by a copy of the notice.

25. That the current application and suit by the Plaintiff is ill informed because the Plaintiff is still indebted to the Defendant. The outstanding sum continues to accrue interest until payment on full.

26. That the Applicant contends that, he has defaulted in repaying the loan because of the adverse effects of COVID-19. However, the Applicant accepted the terms of repayment in 2021 with full knowledge of the impacts of Covid-19 on his business. Covid-19 is therefore a scapegoat for default.

27. That as a matter of fact, Banking Circular No 3 of 2020 alluded to by the Plaintiff only applied to running facilities in 2020 and to borrowers whose loan repayments were up to date in March 2020. By this time, the facilities had not been advanced to the Plaintiff.

28. That, the Plaintiff fell in arrears in 2024 when the notices were issued. And way after he adverse effects of COVID had dissipated.

29. That, the Plaintiff seeks to compel the Defendant to restructure the loan. This is an invitation to the court to force an amendment of the existing terms and this is beyond the jurisdiction of the court.

30. Evidently, the Plaintiff is in default with no hope of attaining capacity to repay the due sum. This eventuality was contemplated by the parties and it was agreed that the charge property would be sold on the occurrence of present scenario.

31. That, it cannot, therefore, be said that the Plaintiff has brought for a prima facie case with probability of success at trial as she remains in arrears and has been served with all requisite notices.

32. Similarly, it cannot be said that she risks suffering irreparable loss that cannot be compensated in damages as the charged property can be valued and damages quantified with exactitude in the unlikely event that the sale is later found to be illegal.

33. That, a balance of convenience tilts in favour of dismissing the application since the Applicant remains in arrears with no effort being made at settling the arrears. The charge property has a Forced Sale Value of Kes.41, 250, 000 which is way less than the total outstanding amount of KES. 55, 812, 462.

34. That it is therefore in the interest of justice that the Respondent is allowed to realize its security.

35. In submission the Respondent reiterated its response in opposition regurgitating the arguments as is pleaded, arguing that there is no prima facie case and if at all there was prima facie case then the same is ousted and negated by the Applicants own unequivocal admission of debt.

36. As for the allegations that the Respondent deprived off the b Applicant the benefit of the CBK Circular as the same predate the facility and the charge and that the same was applicable only during the Pandemic.

37. The Respondent invited the court to find that the relief sough by the Applicant to compel the Respondent to restructure and consolidate the Facility is tantamount to inviting a court to wade into an existing contract by parties to rewrite terms and conditions a sitiation untenable in law.

38. That the Investors into the bank accepted the risk of loaning against the collateral security and since the debt is admitted the right of statutory sale has crystalized.

39. That the Respondent is a tier 1 bank in Kenya with sufficient financial resources and able to compensate the Applicant should the sale be found to be unlawful.

40. That the only prayer subsisting the Applicants application mirrors the only relief sought in the plaint and the same is a superficial or illusory claim of cause of action. The Applicant submits that should the court allow the Application it shall have granted the final relief in the plant without any hearing of the suit.

Analysis & Determination

41. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one broad issue that arises for determination:

> "Whether an interim injunction should issue to bar the Respondent from exercising its statutory power of sale pending hearing and determination of the suit"

42. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

> Where in any suit it is proved by affidavit or otherwise —
>
> a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

43. The principles that guides this Court in dealing with applications for injunctions were well settled in the celebrated case of Giella –vs-Cassman Brown and company Limited Civil appeal No.51 of 1972 where it was held as follows:

i. The Applicant must establish a prima facie case with a probability of success.

ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

44. Further, in Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

> "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."

45. It is also settled law, that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection thereto, in Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, the Court of Appeal guided as follows:

> "...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

46. Before I venture into determination of this matter, I may mention that it cannot be a point of debate that a person who receives a loan from a lender and who voluntarily and lawfully gives out his property as collateral or security for the loan is presumed to be fully aware that in the event of default in repayment of the loan within the terms and timelines agreed, the lender is at liberty to sell off the property to recover the money lent out.

47. On this point, Pall J in Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73 held as follows;

> "The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties ..... The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".

48. Further, in the case of Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation), HCCC No. 82 of 2006), Warsame J (as he then was) observed as follows:

> "..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

49. Similarly, Ringera J, in the case of Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540, also held as follows:

> "Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated

in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them."

50. In order to determine whether the application meets the required threshold the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR where the court held that: -

> " 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.

As to whether the Applicant has established a prima facie case?

51. The case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 defined a prima facie case as follows;

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."

52. A close perusal of the affidavit in support of the application the plaint and the Applicant's submissions reveals the "quicksand" on which this suit is constructed;

53. There is an unequivocal admission of the debt.

54. The Applicant anchors his suit in a prospective renegotiation of the terms of the agreement to restructure the facility a judicial relief that is clearly untenable.

55. The Applicant has maintained stealth-silence as to any efforts undertaken at negotiating with the Respondent since when he was served with the 90 days' "notice of default" dated 8th May 2024, the '40 days' statutory' Notice to Sell dated 3rd September 2024, the '45-day redemption notice' dated 22nd November 2024, the '45-day' redemption notice and the Auction notice dated 27th January 2025. To me these notices which are not denied provided multiple window-opportunities to engage in dialogue with a view of restructuring.

56. The three main reliefs sought in the plaint are;

    a. An injunction restraining the Defendant from selling parcel of land known Nakuru Municipality Block 6/134 via public auction on 10th February, 2025.

    b. An order directing the Defendant to allow the Plaintiff to apply for a consolidation and restructure of the outstanding loan facilities specifically Kes.31,333,165.75 for A/

C1060LXXXXXXX002, Kes.23,179,290.85 for A/c. 106OL0XXXXXXXX001 and Kes. 1,300,005.45 for A/c.204XXXXX79.

c. Any other relief the court deems fit.

57. The Reliefs sought in the interlocutory Application are

a. That, this application be certified as urgent and service thereof be dispensed with in the first instance. (Spent)

b. That, the Court be pleased to issue a temporary injunction restraining the Defendant/ Respondent from selling parcel of land known Nakuru Municipality Block: 6/134 via public auction on 10th February, 2025 pending the hearing and determination of this application. (Spent)

c. That, this Court be pleased to direct the Defendant/Respondent to allow the Plaintiff/ Applicant to apply for a consolidation and restructure of the outstanding loan facilities specifically Kes 31,333,165.75 for A/C1060LXXXXXXX002, Kes.23,179,290.85 for A/c: 1060LXXXXXXX001 and Kes. 1,300,005.45 for A/c.204XXXXX79.

d. That, the costs of this application be in the cause.

58. It is apparent and explicit that, reliefs (a) and (b) as sought by the Applicant in his notice of motion are spent with the only solo relief under consideration being "if this court can enter into an existing contract between parties to direct or order changes or terms therein. This court contends that it is now trite law as was held in case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR, the Court of Appeal stated as follows:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

59. The Appellant has alleged exposure to irreparable loss without any iota of evidence if the Respondent is not restrained from undertaking the auction scheduled for the 10th February 2025.

60. The Applicant was fully conscious of the terms (7), (8), (9) and (10) of the Registered Charge dated 21st January 2021 as he assertively proclaims that the instant action is an exercise of his equitable right of redemption.

61. The Applicant has alleged that the petrol station is only source of livelihood without tendering any shred of evidence in support.

62. A Plaintiff/Applicant must demonstrate a legitimate right to sue, rather than merely offering a superficial or illusory claim of cause of action has was held by Telanga Judge in the case of Bajranglal Agarwal v. Smt. Susheela Agarwal and Ors, CCCA.No.62 of 2024.

63. Typical Lender Liability Causes of Action would include;

I. Breach of Contract. A lender and borrower share a contractual relationship, which could result in a lender being held liable for breaching oral, implied and written contracts. Common breach of contract claims include assertions that a bank failed to: advance funds after a loan commitment became legally binding, extend a loan, honor a loan modification or forbear after agreeing to do so; or take actions required under loan documents or interpret loan documents properly.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing. Borrowers have also used traditional breach of contract claims to file claims based on a breach of the Implied covenant of good faith and fair dealing. Some lenders have been found liable for

(a) refusing to release a deed of trust in an effort to pressure the borrower into paying off another loan and

(b) manipulating an appraisal of the borrower's property to cause a default. Economic Duress. Courts have distinguished between a lender

i. making threats and

ii. threatening to do that which it has a legal right to do or refusing to do that which it is not legally required to do.

III. Tortious Interference with a Contract which can occur when a lender intentionally induces a breach of the borrower's contract with a third-party.

IV. Inappropriate Collateral Sales. Lenders have had problems where they sell collateral Inappropriately after a loan default. the method, manner, time, place and terms of the sale must be commercially reasonable. Some courts have held that a sale is *commercially unreasonable if the lender relied on an appraisal/Valuation that it knew or should have known was too low, or provided insufficient publicity for the sale to generate a sufficient number of bids.

V. Instrumentality Theory. A lender could expose itself to liability to the borrower and third-parties where the lender exercises such control over the borrower's day-to-day business operations that, in effect, the borrower becomes an instrumentality of the lender.

VI. Breach of Fiduciary Duty. The elements to establish a fiduciary relationship between a bank and a borrower are

(a) the borrower has faith, confidence, and trust in the bank,

(b) the borrower is in an unequal position and has weakness or lack of knowledge, and

(c) the bank exercises dominion, control, or influence over the borrower's business affairs.

64. The Court observes the slippery formulation in pleading by the Applicant/Plaintiff that is highly likely constitutes quick-sand foundation without a cause-of-action.

65. This Court can only deploy the balance of convenience test where a prima facie case exists and not in a vacuum as is in this case. the concept of balance of convenience was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR as:

> The meaning of balance of convenience will 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

66. In this instance disposal of the Application shall in essence conclude the main suit and that the main suit remains with a relief that may be untenable in law the Applicant shall determine the course of the suit filed.

67. The Upshot is that, the Notice of Motion 30th of January 2025 is without any merit and the same is accordingly dismissed with costs to the Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED ON THIS 7TH DAY OF FEBRUARY 2025.

MOHOCHI S.M.

JUDGE