



Kamau v Kenya Women Microfinance Bank PLC & another (Civil Case E011 of 2024) [2025] KEHC 1384 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E011 OF 2024
A MSHILA, J
FEBRUARY 7, 2025**

BETWEEN

CHRISTOPHER KANAI KAMAU APPLICANT

AND

KENYA WOMEN MICROFINANCE BANK PLC 1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 2ND RESPONDENT

RULING

1. Before Court is the application by way of Notice of Motion dated 22nd March, 2024 and brought under Article 40 of *the Constitution*, Order 40 Rule 1, 2, 4 and 5, Order 51 rule 1 & 13 of the Civil Procedure Rules, Section 1A & B, 3A, 63(e) of the *Civil Procedure Act* (Cap 21) and all other enabling provisions of the law. The Plaintiff/Applicant sought for orders that:-
 - a. Spent
 - b. That pending the hearing and determination of this application, this Honourable Court be and is hereby pleased to issue an order of injunction restraining the Defendants herein whether acting by themselves and/or their agents, servants, employees, affiliates, subordinates, assigns and/or whosoever from advertising, selling, offering for sale, transferring or in any other way disposing all that property known as Title Number Kiambu/Municipality Block II/341.
 - c. That pending the hearing and determination of this suit, this Honourable Court be and is hereby pleased to issue an order of injunction restraining the Defendants herein whether acting by themselves and/or their agents, servants, employees, affiliates, subordinates, assigns and/or whosoever from advertising, selling, offering for sale, transferring or in any other way disposing all that property known as Title Number Kiambu/Municipality Block II/341.



2. The application is premised on the grounds that the 1st Respondent advanced Kshs. 205,000,000/= to the applicant and a charge was created over Kiambu/Municipality Block II/341. That the Applicant was diligently servicing the loan until his business was affected by the Covid19 pandemic and he resorted to paying Kshs. 500,000/=. The 1st Respondent has issued the Applicant with notices of intention to sell the property as well as the 2nd Respondent. In the circumstances he is apprehensive that unless this court intervenes to preserve his property by granting the orders sought, the Respondents will exercise their right of sale and infringe on his right of redemption.
3. The application is supported by the affidavit of Christopher Kamau Kanai who deposed that around March 2015 the 1st Respondent advanced him a loan of Kshs. 205,000,000/= the security being Title Number Kiambu/municipality Block II/341 which at the time was valued at Kshs. 280,000,000/=. He was servicing his loan until his business started experiencing difficulties due to Covid19 pandemic. The 1st Respondent issued him with a Ninety (90) days notice for settlement of the outstanding amounts. He requested for a moratorium which was declined by the 1st Respondent, he further requested to be remitting Kshs. 500,000/= which amount he proceeded to deposit towards the loan. He contended that the 1st Respondent issued him with a Forty (40) days Notice to settle the outstanding amounts. He once again communicated and continued payment of Kshs. 500,000/= which he has been paying since June 2020. He also requested the 1st Respondent to sub-lease the charged property so as to get Kshs. 15,000,000/= which they refused as such he was only receiving Kshs. 700,000/= which was being remitted to the 1st Respondent. He has so far paid Kshs. 185,937,269.35. On 15/2/2024 he was served with a 45 days auctioneers notice by the 2nd Respondent herein notifying him of the intention to sell the charged property by way of public auction on 23/4/2024. His contention is that the 1st Respondent cannot purport to act on the notices issued three years ago as the circumstances had changed and the borrower must be properly notified afresh in the event the lender intends to exercise its right of sale later. The amount being claimed by the auctioneers was also said to vary with the amount in the loan statement which conduct smacks of impunity. He sought orders from the court to preserve the subject property to avoid prejudice and irreparable harm to the Applicant.
4. Marion Wasike filed her replying affidavit dated 24th April, 2024. She confirmed that the Applicant was advanced a loan of Kshs. 205,000,000/= where a charge was created over Kiambu/Municipality Block II/341. She contended that the monthly instalment was agreed at Kshs. 3,519,517/= as such the Applicant defaulted causing the account to go into arrears. The Applicant was therefore served with the Ninety (90) days statutory notice as well as the Forty (40) days statutory notice. She refuted the claims that the 1st Respondent refused to sublease the charged premises to Lexo Energy as it is the Applicant who failed to meet the required conditions for consent to be allowed. She stated that the 1st Respondent never agreed to any rescheduling of the repayment of the loan. She further averred that the Applicant was misguided in thinking that the silence by the 1st Respondent to his request meant that the 1st Respondent was agreeable to the Kshs. 500,000/= instalments instead of the agreed 3,519,517.00 as the legal charge has never been renegotiated. The Applicant was said to have been given time to settle the outstanding debt as the 1st Respondent had all the right to sell the property since 2020 but chose to give the Applicant time. In any case, the auctioneers were said to have given the Applicant Forty-Five (45) days redemption notice. She deposed that there was no change of circumstances to warrant new intention to exercise power of sale so as to serve statutory notices afresh. The allegation that the 1st Respondent's interest rates charged on the loan are unlawful was said to be unfounded as the loan granted was to accrue interest at contracted rates. The Applicant was said to be well aware that his property being security was liable for sale unless when discharged. The loan was said to be in default at Kshs. 338,996,458.98. The Applicant being in default renders the application to be an abuse of the court process;



5. Subsequently, in his supplementary affidavit dated 25th July, 2024, Christopher Kamau Kanai deposed that the 1st Respondent never turned down and/or communicated anything in disagreement towards his repayment of instalment of Kshs. 500,000/= but instead encouraged the Applicant to continue with his efforts. He averred that the conditions set by the 1st Respondent could in no way be met. It is untrue for the 1st Respondent to claim that they never agreed to his request for accommodation when the payment has been going on for more than four (4) years and that the auctioneers notice came after three (3) years of payment of the instalments of Kshs. 500,000/= as such the 1st Respondent has to issue fresh notices if its new intention is to exercise its rights. He averred that the 1st Respondent after agreeing to receive Kshs. 500,000/= cannot ambush him with the auctioneers notice as such the court should grant the orders sought.
6. The application was canvassed by way of written submissions.

Applicant's Submissions.

7. The Applicant submits that despite his business going down he has been making efforts to repay Kshs. 500,000/= since June 2020 even though that is not the contracted amount and the 1ST Respondent having accepted the efforts by the Applicant cannot suddenly proceed to sell the charged property without notifying the Applicant of its fresh intention to proceed with the sale. Reliance was placed in the case of Bevaj Furniture Limited vs Gulf African Bank Limited (Civil Case E899 of 2021) (2022) KEHC 9942 (KLR)(Commercial and Tax) (14 July 2022) (Ruling). The court was urged to grant the orders sought limited to the period of issuance of the requisite notices to allow the Applicant an opportunity to remedy the breach. The interest rates were also said to be exorbitant and the amount being claimed by the 1st Respondent is double the principle loan amount.

Respondent's Submissions

8. The 1st Respondent submits that it's not in dispute that the Applicant is indebted to the 1st Respondent for a sum of Kshs. 338,996458.98 as at 16/4/2024. The monthly instalment agreed upon was said to be Kshs. 3,519,517.00 as such the Kshs. 500,000/= paid by the Applicant was termed as inconsequential and that the 1ST Respondent could not have agreed to that proposal by the Applicant as it meant converting a 10 year loan to a 60 year term loan. Reliance was placed in the case of Gimalu Estates Ltd & 4 others vs International Finance Corporation & another (2006) eKLR. The 1st Respondent avers that it is a micro finance thus it is not subject to the interest caps like normal banks as the Applicant claims that the interest of 16% p.a. charged on the loan facility is unlawful and thus implicates the computations of the amounts due. Reliance was placed in the case of Kings Group School Limited & another vs Kenya Women Microfinance Bank Limited. In any case, it was submitted that if there is a dispute in the amount owed, the same is not a bar to the Respondent's exercise of its statutory power of sale. Reliance was placed in the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) eKLR. Further, it was submitted that the 1st defendant's statutory power of sale does not extinguish unless the outstanding loan is fully repaid. The Applicant having failed to regularize the default there was no change of circumstances to warrant new intention to exercise power of sale as such the 1st Respondent was not required to serve statutory notices afresh. To support this proposition the Respondent relied on the case of Ben Gitonga Muiruri Mungai vs Equity Bank (Kenya) Limited (2019) eKLR. It was submitted that the Applicant has failed to demonstrate a prima facie case as he has not placed any material before the court to show that the 1st Respondent agreed to the Applicants' proposal. The Applicant was said to have offered his property as security and was well aware that the same was to secure the loan repayment in case of default as such he will not suffer irreparable loss if the orders are not granted. The Respondent submits that in case there is a discrepancy as to the amounts



payable, the same can be remedied by an award of damages. In any event, it is the Respondent who will not be able to recover the principal amount advanced to the Applicant plus interest which continues to accrue. The court was urged to find that the balance of convenience tilts in favour of the 1st Respondent as they might not be able to recover the money from the Applicant having complied with all the legal requirements bestowed on the a Charge.

Issues for Determination

9. Having considered the application by the Applicant, the replying affidavit, the supplementary affidavit and the rival submissions, the main issue arising for determination is whether the Applicant is deserving of the order for injunction sought.

Analysis

10. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide 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;
- (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 order.”

11. The Applicant sought for an order restraining the Respondents from selling his property by way of public auction pending the hearing and determination of the suit. The conditions for grant of interim injunctions are well settled in the case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358 where it was held that: -

“The conditions for the grant of an interlocutory injunction are 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.”

12. The Applicant submits that after the Ninety (90) days notice, he requested for the 1st Respondent to accommodate him as he proposed to be paying monthly instalments of Kshs. 500,000/= as he was facing financial challenges. By implication and expressly by conduct as expressed in the letter dated 7th July, 2020, the 1st Respondent did accept the loan repayment efforts that were employed by the Applicant even when they were not the contracted installments and never proceeded to sell as such cannot suddenly proceed to sell the charged property without recent notification notifying the Applicant of its fresh intention to proceed with the sale. He urged the court to allow him to redeem the property.



13. The Respondents aver that the Applicant is misguided in claiming that the 1st Respondent having not refuted his request to be paying Kshs. 500,000/= meant that it was agreeable to the proposal as the charge has never been renegotiated. It was averred that the statutory power of sale does not extinguish until the outstanding loan is fully paid as such the 1st Respondent was not required to serve statutory notices afresh as the default had not been regularized. The Applicant was said to have failed to demonstrate a prima facie case as he has failed to repay his loan. The Applicant having offered his property as security available for sale could not suffer irreparable damage. In any case the same can be compensated by award of damages as such the balance of convenience should tilt in favour of the 1st Respondent which is the one likely to suffer loss by failing to recover its money from the Applicant.
14. There is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, Civil Procedure Act gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.
15. The court in the instant application is required to satisfy itself that there is a prima facie case established. In the case of *Silvester Momanyi Marube -Vs- Guizar Ahmed Motari & Another* (2012) eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively.
12. The court at this stage is not required to determine the merits and demerits of the Applicant’s claim. The court is only required to determine whether the Applicant has established a prima facie case.
13. The Applicant herein avers that he was shocked to receive a redemption notice and a notification for sale from Garam Investments Auctioneers dated 14/2/2024 almost 4 years after the 1st Respondent had issued him with the Ninety (90) days statutory notice which was dated 19/3/2020.
14. The Applicant does not deny that he owes the bank though the amount is disputed as well as the interest rate, his main contention is that he had a legitimate expectation that after his proposal of remitting Kshs. 500,000/= as his monthly installment as he was facing financial challenges due to covid-19 and the 1st Respondent having encouraged his efforts in depositing the Kshs. 500,000/= as his monthly installments which he continues to deposit since June 2020, the 1st Respondent having accommodated him, then, in the event the 1st Respondent wanted to exercise its right to sell it was obliged to issue and/or serve the Applicant with fresh notices.
15. In the circumstances and bearing the above, this Court finds that the Applicant has established a prima facie case to warrant granting the injunctive orders sought.
16. The Applicant was served with a Forty-Five (45) days’ redemption notice and a notification of sale both dated 14th February, 2024 by the auctioneers, this was close to 4 years since the 1st Respondent had served him with the Ninety (90) days statutory notice and the Forty (40) days’ notice dated 19th March, 2020 and 3rd November, 2020 respectively. The Applicant does not deny that he is indebted to the bank. His prayer is that the bank should issue him with fresh statutory notices to enable him redeem his property as he had a legitimate expectation that the 1st Respondent had consented to his monthly instalment having not heard from the bank for close to Four (4) years as he diligently paid the proposed sum of Kshs. 500,000/=.



17. It is not in dispute that the Applicant is in default of the loan; but nevertheless this court is inclined to grant an interlocutory order restraining the 1st Respondent from exercising its statutory power of sale solely on the ground that the figures of the outstanding loan have since changed from the initial notices that were issued in 2020 and do not correspond to the amount indicated in the auctioneer's notice issued in 2024; As such this court is satisfied that fresh notices should and ought to have been issued by the 1st Respondent that demonstrate the current outstanding amount.

Findings and Determination

12. For the foregoing reasons this court makes the following findings and determination.

- i. This Court finds the application to be partially meritorious;
- ii. An order of injunction be and is hereby granted restraining the Respondents herein whether acting by themselves and/or their agents, servants, employees, affiliates, subordinates, assigns and/or whosoever from advertising, selling, offering for sale, transferring or in any other way disposing all that property known as Title Number Kiambu/Municipality Block II/341.
- iii. The Order is limited in duration until such time as the 1st Respondent shall issue a fresh statutory notice in compliance with the law.
- iv. The 1st Respondent shall bear the costs of this application.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 7TH DAY OF FEBRUARY, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Omulanya – for Plaintiff/Applicant

Kipkoech – for Defendant/Respondent

