



Rojan Productions Limited & 2 others v Co-operative Bank of Kenya (Commercial Case E013 of 2024) [2025] KEHC 1982 (KLR) (Commercial and Tax) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E013 OF 2024
MN MWANGI, J
FEBRUARY 7, 2025**

BETWEEN

**ROJAN PRODUCTIONS LIMITED 1ST PLAINTIFF
JUSTNICE LIMITED 2ND PLAINTIFF
QUOTA LIMITED 3RD PLAINTIFF**

AND

CO-OPERATIVE BANK OF KENYA DEFENDANT

RULING

1. The plaintiffs/applicants filed a Notice of Motion application dated 17th January 2024 pursuant to the provisions of Sections 89, 90, 96, 103, 104, 105 & 106 of the *Land Act*, 2012, Order 40 Rules 1, 2, 3, 4, 10 & 9 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, and all other enabling provisions of the law. The plaintiffs seek orders for the time for rectifying any default in the loan secured by Title No. L.R. No. 3734/24 (Original No. 3734/3/19) to be extended for 12 months or a period determined by the Court, in the alternative to the foregoing prayer, the plaintiffs pray that the defendant's statutory power of sale be suspended for 24 months or a period determined by Court to allow the plaintiffs to redeem the suit property and/or the Court issues a restraining order preventing the defendant from selling, leasing, transferring, or otherwise interfering with the suit property pending the determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Justry P. Lumumba Nyaberi, a Director of the plaintiff companies. He averred that the 1st plaintiff is the registered owner of the suit property, and that the 2nd and 3rd plaintiffs secured a financial facility of Kshs.150,000,000/= from the defendant, secured by a third-party charge over the suit property and guarantees from the 1st plaintiff and Swiss Grade Consult Limited.



3. He contended that despite consistent loan repayments by the 2nd and 3rd plaintiffs, the defendant scheduled a public auction of the suit property on 31st January 2024 through Keysian Auctioneers, without proper legal compliance since the plaintiffs have never been issued with a 90-days' statutory notice, a 40-days' notice, a notification of sale, and a 45-days' redemption notice. In addition, he asserted that no valuation of the suit property had been done despite the fact that it is a prime property valued at over Kshs.230,000,000/=, hence risking an undervalued sale. He urged this Court to grant the orders sought arguing that Swiss Grade Consult Limited has since secured a lucrative government construction contract that will generate sufficient funds to repay the loan.
4. In opposition to the application, the defendant filed a replying affidavit sworn on 23rd January 2024 by Duncan Matisero, the defendant's Legal Manager. He stated that the plaintiffs stopped servicing the loan and as at 11th November 2022, they owed the defendant Kshs.122,782,684.72. That demand letters were sent to the plaintiffs by the defendant on 11th November 2022, 20th December 2022 and 11th January 2023. He stated that the demand letter sent on 11th January 2023 was also accompanied with a 90-days' statutory notice, both sent to the plaintiffs by way of registered post to their last known addresses.
5. He averred that despite service of the statutory notices, the plaintiffs did not rectify the default prompting the defendant to issue them with a 40-days' notice on 19th June 2023 which was also sent to them via registered post to their last known addresses but still, the plaintiffs did not rectify the default. Mr. Matisero averred that the defendant engaged Abigael Mbagaya & Associates, a valuation firm, to carry out a valuation of the suit property, and a report was produced, and thereafter, the defendant instructed Keysian Auctioneers to market the suit property to attract competitive bids. He asserted that the plaintiffs owe the defendant a total of Kshs.133,366,041.10, which sum continues to accrue interest. He denied knowledge of Swiss Grade Consult Limited or any proposal to use contract profits from the said entity to repay the loan.
6. In a rejoinder, the plaintiffs filed a supplementary affidavit sworn on 18th March 2024 by Justry P. Lumumba Nyaberi, a Director of the plaintiff companies. He stated that the plaintiffs vide a letter dated 17th November 2023 addressed to the defendant sought an extension of time or restructuring of the loan facility due to economic conditions beyond their control. He averred that the 90-days statutory notice issued on 11th January 2023 was only addressed to the 3rd plaintiff, rendering it invalid. Mr. Nyaberi asserted that the defendant neither issued a redemption notice nor a notification of sale to the plaintiffs, making the planned sale illegal.
7. The defendant filed a further affidavit sworn on 30th April 2024 by Duncan Matisero, the defendant's Legal Manager. He contended that all the plaintiffs share the same postal addresses as evidenced by loan documents, therefore the demand and statutory notices sent to the said address were received by all the plaintiffs.
8. The application herein was canvassed by way of written submissions which were highlighted on 23rd October 2024. The plaintiffs' submissions were filed on 6th March 2024 by the law firm of Nyaanga & Mugisha Advocates, while the defendant's submissions were filed by the law firm of LJA Associates LLP on 3rd May 2024.
9. Mr. Rotich, learned Counsel for the plaintiffs relied on the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, and submitted that the plaintiffs were not served with all the requisite statutory notices, save for the 3rd plaintiff who was issued with the 90 days' statutory notice. He argued that the defendant's statutory power of sale had not crystallized thus it could not sell the suit property. He contended that the plaintiffs had established a prima facie case to warrant the issuance of



the injunctive orders sought. Mr. Rotich submitted that the suit property is fully developed hence if it is sold to third parties on the strength of an illegal process, the plaintiffs will suffer irreparable harm.

10. Counsel referred to the provisions of Sections 103(1)(a) & 104(2) of the Land Act and asserted that having established that no statutory notices were issued to the plaintiffs, they ought to be granted an extension of rectification period to enable them redeem the suit property. Additionally, he submitted that the plaintiffs have demonstrated that Swiss Grade Consult Limited, a guarantor of the financial facility in question secured a contract worth Kshs.487,548,670.00 with the County Government of Kajiado, which proceeds once paid will be sufficient to repay the outstanding loan, which warrants the plaintiffs to be granted the orders sought herein. To buttress these submissions Counsel relied on the case of Showcase Properties Limited v Kenya Commercial Bank Ltd [2014] eKLR.
11. Ms. Dave, learned Counsel for the defendant relied on the case of Wesley Kibagendi Jason v ECO Bank Ltd & another [2020] eKLR, and submitted that the defendant had demonstrated that the plaintiffs were served with all the requisite statutory notices, and that the plaintiffs right of redemption was extinguished at the lapse of the 40 days' notice since they did not rectify the debt. She contended that the defendant's right to exercise its statutory power of sale over the suit property accrued after the said period. Counsel referred to the case of Seahawk General Logistics Limited & 2 others v Stanbic Bank Kenya Limited [2021] eKLR, and contended that reliefs under Section 104(2) of the Land Act are only granted in instances where the applicant proposes alternative remedies and demonstrates factors affecting their financial situation that hinder loan repayment. He submitted that the plaintiffs have not met the said requirements in this case.
12. Ms. Dave cited the provisions of Order 40 Rules 1(a) & (b) of the Civil Procedure Rules, 2010 and argued that the plaintiffs had not demonstrated the conditions laid down by the Court in the case of Giella v Cassman Brown & Company Limited [1973] E A 358, to warrant this Court to exercise its discretion in their favour, more so in view of the fact that the debt owed to the defendant by the plaintiffs was not disputed, and the defendant's statutory power of sale had not been impugned. Counsel submitted that the plaintiffs had not discharged their burden of demonstrating that they would suffer damages that could not be adequately compensated in damages to warrant being granted an order for injunction. Ms. Dave asserted that the balance of convenience lay in favour of the defendant.

Analysis and Determination.

13. Upon consideration of the instant application, the affidavits filed in support thereof, the replying and further affidavits by the defendant, as well as the written submissions by Counsel for the parties, the issues that arise for determination are-
 - i. Whether an order for injunction against the defendant should issue; and
 - ii. Whether the plaintiffs are entitled to reliefs under Section 104 of the Land Act.

Whether an order for injunction against the defendant should issue.

14. Interlocutory injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states that -

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.

15. An applicant in an application for injunction is required to demonstrate the three elements that were set out by the Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court held as follows -

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

16. What constitutes a prima facie case was defined by the Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, as hereunder -

...I would say that in civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

17. It is not contested that the 2nd & 3rd plaintiffs obtained a financial facility from the defendant which was secured by a charge over the suit property registered in the name of the 1st plaintiff, in favour of the defendant. It is evident from the plaintiffs' supplementary affidavit and the annexures thereto that the said financial facility was also secured by a deed of guarantee executed by Swiss Grade Consult Limited in favour of the defendant. It is not disputed that the said financial facility has not yet been fully repaid to the defendant. The plaintiffs however challenge the defendant's exercise of its statutory power of sale over the suit property on grounds that they were not served with the requisite statutory notices prior to the defendant's attempt to exercise the said power. For the said reason, the plaintiffs contended that their right of redemption in respect to the suit property had not been extinguished to warrant the defendant to exercise its statutory power of sale over the suit property.

18. The defendant on the other hand averred that prior to it exercising its statutory power of sale over the suit property, it served the plaintiffs with all the requisite statutory notices but they failed to rectify the default in payment of the debt. They then instructed Auctioneers to issue the plaintiffs with a 45 days' redemption notice and a notification of sale, and if the plaintiffs still did not rectify the debt, they would advertise the suit property for sale by public auction. On perusal of the annexures to the defendant's replying affidavit, it is evident that vide a letter dated 11th January 2023, the defendant



issued the 3rd plaintiff with a 90-days' statutory notice, which was sent to the 3rd plaintiff via registered post as evidenced by the certificate of postage annexed thereto.

19. In as much as the plaintiffs admit that the 90-days' statutory notice was sent to the 3rd plaintiff, they argue that the said notice ought to have been sent to the chargor, the 1st plaintiff herein, as provided for under Section 90(2)(b) of the *Land Act*. Section 90 of the *Land Act* provides that –
1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 2. The notice required by subsection (1) shall adequately inform the recipient of the following matters –
 - a. the nature and extent of the default by the chargor;
 - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
 3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may -
 - a. sue the chargor for any money due and owing under the charge;
 - b. appoint a receiver of the income of the charged land;
 - c. lease the charged land, or if the charge is of a lease, sublease the land;
 - d. enter into possession of the charged land; or
 - e. sell the charged land;...
20. It is evident from the above provisions that the 90-days' notice provided for under Section 90 of the *Land Act* ought to be issued to the chargor. The Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auc [2017] KECA 79 (KLR) in considering the operation of the notice under Section 90 of the *Land Act* held thus -

But even while so doing, it is to be remembered that under section 90 aforesaid, the operation of the statutory notice is triggered by service of the same upon the mortgagor.



21. In this case, the defendant did not dispute that the said notice was only issued to the 3rd plaintiff, who was the borrower and not the chargor, instead, it stated that the chargor and the borrower share the same postal address, thus the chargor, the 1st plaintiff herein, must have received the said notice. The plaintiffs asserted that since the notice under Section 90 of the Land Act was not served upon the chargor, any other statutory notices whether or not served to the plaintiffs were of no legal effect. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auc* (supra), addressed itself on this issue and held that –

In this case, the material before court lends credence to the possibility or likelihood that the procedure might have been flouted. This is because, the statutory notice under Section 90 of the Land Act becomes operational upon service of the same upon the mortgagor and as long as doubt on that aspect persists, then the matter calls for interrogation of the evidence and the same can only be done at trial. In the interim, the same attracts the issuance of injunctive orders and the judge cannot be faulted for holding as much.

22. Based on the holding in the above case, this Court finds that the plaintiffs herein have established a prima facie case with a probability of success but only in so far as non-service of the 90 days' statutory notice to the chargor is concerned.

23. On the issue of if damages can be an adequate remedy, and if the plaintiffs will suffer irreparable loss; having demonstrated that they have a prima facie case with a probability of success, in the event that the instant application is disallowed, the suit property will be sold yet there was non-compliance with Section 90 of the Land Act, prior to the defendant exercising its statutory power of sale over the suit property.

24. In the said circumstances, the balance of convenience tilts in favour of the plaintiffs. Having so found, it will be an academic exercise to address the 2nd issue that I identified for determination.

25. However, it is not disputed that the plaintiffs owe the defendant a substantial amount of money which remains unpaid. The plaintiffs sought to be given time to rectify the defect. Due to the said fact, and non-service of the 90 days' statutory notice to the chargor, the order that commends itself to me is to grant a temporary injunction for a limited period of six (6) months to give the defendant time to comply with the provisions of Section 90 of the Land Act, and other provisions of the said Act. The order that I have granted is in the following terms-

- i. The defendant whether acting by itself, employees, servants and/or agents, or otherwise assigns and/or any person whatsoever acting on behalf and/or under its mandate and/or instructions, is hereby restrained from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Title No. L.R. No. 3734/24 (Original No. 3734/3/19) for a period of six (6) months; and
- ii. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE



In the presence of:

Ms Wetunga h/b for Mr. Rotich for the plaintiffs/applicants

Ms Dave for the defendant/respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

