Savannah Healthcare Services Limited & 2 others v KCB Bank Kenya Limited & another (Civil Suit E231 of 2023) [2025] KEHC 3227 (KLR) (Commercial and Tax) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3227 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E231 OF 2023

A MABEYA, J

FEBRUARY 6, 2025

BETWEEN

SAVANNAH HEALTHCARE SERVICES LIMITED ..... 1ST PLAINTIFF

EPHANTUS WACHIRA MURAGE ..... 2ND PLAINTIFF

ANNE WANJIRU KIMANI ..... 3RD PLAINTIFF

AND

KCB BANK KENYA LIMITED ..... 1ST RESPONDENT

GEORGE NJOROGE MUIRURI T/A PHILIPS INTERNATIONAL AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. Before Court is the application dated 29/5/2023 brought under sections 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 laws of Kenya and order 39 rule 1 and order 51 rule 1 of the Civil Procedure rules and section 104 (2) of the *Land Act*.

2. The application sought to restrain the defendants for selling selling the property known as LR No 209/14721 or exercising any rights inuring to the benefit of KCB in its capacity as a Chargee.

3. In support of the application, the applicant relied on the grounds set out on the face of the Motion and the affidavit sworn by Dr. Ephantus Wachira Murage on 29/5/2023. The plaintiffs contended that under the KCB Omnibus Banking Facilities, the 1st plaintiff was granted financial support amounting to Kshs 1.1856 billion, which included an overdraft facility with an approved limit of Kshs 20 million, as well as asset-based finance and insurance premium finance amounting to Kshs 16 million collectively.

4. They contended that in response to the economic impact of the Covid-19 pandemic, the government introduced mitigation measures, including flexible financial requirements through the Central Bank. Despite these measures, the 1st plaintiff received a demand notice from KCB notifying it of a default and requiring remedial action.

5. The plaintiffs contended that the demand notice was triggered by KCB's failure to fulfill its contractual obligation to disburse Kshs 21,056,841/- from the term loan facility of Kshs 1,001,000,000. They further contended that on 20/04/2021, KCB issued a statutory demand notice indicating that the loans were in arrears amounting to Kshs 89,332,875.58.

6. They argued that the statutory notice was invalid as it incorrectly stated that the outstanding loan balance for the term facility was Kshs. 1,185,077,779.90 as of 28/02/2021, whereas the correct balance should have been nil. They contended that, under the facility's terms, the term loan had a repayment period of 15 years, including a 24-month moratorium. The agreement specified that interest for the first six months, amounting to Kshs 85,657,099.00, would be capitalized, while the principal moratorium was to extend for an additional 18 months.

7. The plaintiffs further contended that the bank's demand for Kshs 122,728,067.58 under the 40-day notice of sale was in direct violation of Clause 3.4 of the KCB Omnibus Banking Facilities Offer Letter. They claimed that the bank's demand for payment contravened the 1st plaintiff's rights under Article 46(1)(b) and (c) of *the Constitution* and unlawfully restricted their right to equity of redemption.

8. Additionally, they contended that the proposed auction of the Upper Hill property was based on an invalid statutory notice and would push the 1st plaintiff into insolvency. They claimed that closing the hospital would not serve the public interest.

9. The bank opposed the application through a replying affidavit sworn by Justus Wambua on 06/07/2023. In the affidavit, he asserted that the plaintiffs had been granted multiple financial facilities by the bank, all of which were secured by various securities.

10. According him, the 1st plaintiff defaulted on its obligations by failing to pay interest within the stipulated six-month period, thereby necessitating the issuance of a statutory demand to notify the applicant of the outstanding arrears.

11. When the default remained un-remedied, the bank proceeded to issue a statutory notice demanding payment of Kshs 89,332,875.58 within three months. Subsequently, a 40-day notice of sale was issued, followed by a 45-day redemption notice. The 1st respondent further stated that, in compliance with section 97(2) of the *Land Act*, the suit property was duly valued and a valuation report was prepared before any steps were taken to exercise the bank's statutory power of sale.

12. The bank stated that, as per the letter of offer dated 09/06/2020, the plaintiff was granted the following financial facilities: an overdraft facility of Kshs. 20,000,000/-, asset-based finance/insurance premium finance of Kshs. 16,000,000/-, and a term loan of Kshs. 1,149,600,000/-. That these facilities were applied as follows: an existing term loan of Kshs. 118,600,000/-, a temporary overdraft of Kshs 16,000,000/-, a second temporary overdraft of Kshs. 14,000,000 and the conversion of an SBLC into a term loan amounting to Kshs. 1,001,000,000/-.

13. It was further stated that the Kshs. 1,001,000,000/- represented the maximum liability the 1defendant was willing to settle concerning obligations to the bank in Mauritius. As a result, the plaintiffs were not entitled to access the excess amount of Kshs. 21,056,840/-. It was argued that since the liability owed to the Mauritius bank did not exceed the upper limit allocated, it was not in a position to extend additional funding of Kshs. 21,056,840/- and therefore, no breach of contract had occurred on its part.

14. Regarding the alleged non-compliance with the Omnibus letter of offer, the 1st defendant stated that under Clause 3.4 of the letter of offer, the plaintiffs were required to open an escrow account and deposit Kshs. 3,000,000/- per month to facilitate the capitalization process. However, the plaintiffs failed to meet this requirement. That the outstanding amount arose from the non-payment of interest rather than principal repayments on the term loan.

15. Additionally, while the plaintiffs had made attempts to dispose of certain assets to settle the default, the 1st defendant asserted that it could not release the title without confirmation of ready buyers. The bank maintained that titles could only be released for subdivision purposes, ensuring that the transaction aligned with the agreed financial terms.

16. The application was canvassed by way of written submissions which I have considered. The plaintiffs submitted that they had established a prima facie case with probability of success. That bank did not follow the laid down procedure since the intended sale of the property flows from an invalid statutory notice. It was additionally submitted that the bank would not be prejudiced if the orders sought were granted.

17. On the part of the bank, it was submitted that the plaintiffs had not demonstrated a prima facie case with a probability of success. That the relationship between the parties was contractual and the parties were bound by the terms contained therein. That the contract did not allow the plaintiffs to access the additional sum as alleged therefore the bank cannot be guilty of breaching the contract.

18. It was further submitted that the plaintiffs had breached the contract by not depositing Kshs 3,000,000/- monthly during the moratorium period for the capitalization. That this breach was admitted by the plaintiffs in a letter dated 13/7/2020 wherein it was stated a deposit of the same would not be feasible.

19. That the outstanding debt had not been repaid and the plaintiffs had written several correspondences on restructure. It was submitted that the debt of Kshs.1,416,524,326.23 could outstrip the value of the security.

20. I have considered the party's contestations in their respective pleadings and the submissions on record. The main issue for determination is whether the threshold for granting an injunction has been met.

21. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the case of Giella vs. Cassman Brown [1973] EA 358. This position has been reiterated and in Nguruman Limited vs. Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR, the Court of Appeal held that: -

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to a) establishes his case only at a prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) ally any doubts as to b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

22. In Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR, the Court of Appeal defined what prima facie case was. That 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 that calls for an explanation or rebuttal from the latter.

23. It is undisputed that the plaintiffs and the bank have a contractual relationship by which the bank advanced various financial facilities to the 1st plaintiff secured by multiple securities. The plaintiffs sought to restrain the bank from selling the property known as LR. NO 209/14721.

24. On prima facie case, the plaintiffs challenged the validity of the 90-day statutory notice, arguing that the bank had not followed the proper procedure. They contended that the term loan facility included a 24-month moratorium, with interest amounting to Kshs 85,657,099.00 subject to post-capitalization for six months, followed by an additional 18-month period. Additionally, the plaintiffs accused the bank of breaching its contractual obligations by failing to disburse Kshs. 21,056,841/- as agreed.

25. In response, the bank maintained that the maximum liability to the bank in Mauritius was Kshs. 1,001,000,000/-, and since this limit was not exceeded, the bank was unable to provide the additional Kshs. 21,056,841/- to the plaintiffs.

26. Furthermore, that the plaintiffs had not disputed the outstanding debt. Regarding the statutory notice, the bank asserted that the plaintiffs had failed to comply with the requirement to make monthly deposits of Kshs. 3,000,000/- after opening an escrow account, reiterating that they were obligated to service the interest payments.

27. The Court notes that statutory power of sale is a contractual right that is activated upon default. In this present case, the parties have had a contractual relationship leading to issuance of several facilities bearing substantial amounts. The statutory notice was issued by the 1st respondent for a demand of Kshs 89,332,875.58.

28. Clause 3.4 of the term loan provided that: -

> "The term loan facility shall be repaid in 10 installments each inclusive of interest and other charges set out in this letter from the date of drawdown. The tenor is inclusive of 24month moratorium period on principal repayments. Interest for the first 6 months of the principal moratorium shall continue for an additional 18 months during which period interest shall be serviced on a monthly basis."

29. Based on the foregoing, it is clear that the parties agreed to a 60-day moratorium on principal repayments, with the only default arising from the failure to service interest. The contract explicitly provided that interest for the first six months of the moratorium would be capitalized, after which it would be paid monthly. Therefore, I do not find any defect in the statutory notice, as alleged by the plaintiffs since the obligation to service interest was clearly stipulated.

30. There is no evidence to suggest that the plaintiffs complied with these provisions in a timely manner, making it indisputable that they were in breach. Furthermore, any dispute over the exact amount owed does not prevent the chargee from exercising its statutory power of sale.

31. Section 90 of the *Land Act* allows Chargee to issue notices where a Chargor is in default of any obligation. There is no dispute that there was default to deposit the monthly sum of Kshs.3,000,000/-. Further, there was no dispute as to the receipt of the notices. In any event, there would be no prejudice on the plaintiffs since they stated in the further affidavit that the parties had come to a consensus on repayment of the amount owed.

32. Based on the foregoing, I do not find that the plaintiffs have established a prima facie case with and probability of success as they are truly indebted to the bank. In Nguruman Limited v Jane Bonde

Nielsen and 2 Others (Supra), the court stated that if an applicant does not establish a prima facie case with a probability of success, the issue whether the damages are sufficient to compensate such applicant in the event the suit succeeds does not arise.

33. In the upshot, I find no merit in the application dated 29/5/2023 and the same is dismissed with costs.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE