Anyango & another v Kenya Commercial Bank Limited & another (Civil Case E005 of 2024) [2025] KEHC 3465 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3465 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL CASE E005 OF 2024

WM MUSYOKA, J

MARCH 21, 2025

BETWEEN

JAMES ODIWOUR ERASTO ANYANGO ..... 1ST PLAINTIFF

ARSENE AGENCIES LIMITED ..... 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED ..... 1ST DEFENDANT

REGENT AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The suit herein was commenced by the plaintiffs against the defendants, to stop exercise of the statutory power accruing to the 1st defendant as chargee. The plaintiffs had been granted credit facilities by the 1st defendant, secured against North Teso/Kamuriai/3289. The 1st defendant has moved to foreclose on the secured property, on grounds that the plaintiffs are in breach, and the plaintiffs have come to court disputing the amounts claimed to be due, arguing that the balance claimed by the 1st defendant was not true and that the figures were inflated. They seek an account, permanent injunction, a refund, a penalty against the 2nd defendant, a declaration and damages.

2. The suit was filed contemporaneously with a Motion, dated 29th October 2024, to restrain disposal, by way of sale, of the securities, pending hearing of the suit. The application also seeks rendering of accounts; stopping of levies, interest, commissions and penalties; and a copy of the valuation reports on the securities, being relied upon by the defendants for the purpose of the proposed sale.

3. The case by the plaintiff is that the amount claimed to be outstanding did not reflect a true state of accounts of the unpaid loan balances, hence the request for accounts. It is further argued that the redemption notice was issued contrary to the law, as the conditionalities in the law were not observed. It is further argued that the properties offered as security were ancestral lands, occupied by the extended family of the 1st plaintiff, and the eviction of the occupants would require notice to those individuals.

The plaintiffs dispute the market value indicated in the valuations done at the instance of the 1st defendant, arguing that there was an under valuation.

4. The plaintiffs have attached several documents to support their case. There is the offer from the 1st defendant, of September 2013, for an overdraft of Kshs. 2,000,000.00. There is also a letter from the 1st plaintiff, dated 11th September 2024, in response to a statutory demand, where liability of Kshs. 9,742,825.00 is acknowledged, and a request is made to repay that amount by 72 equal instalments. There are also documents from the 2nd defendant, demanding Kshs. 11,042,076.64, and giving a notification of sale. Lastly, there is a bank statement, dated 15th October 2024, with respect to a loan of Kshs. 3,000,000.00, disbursed in May 2022, which suggests that that loan account does not have any issues, as the said loan was being serviced.

5. The defendants filed a defence, which gives a history of dealings between the plaintiffs and the 1st defendant. It is indicated that 4 loans were disbursed to the plaintiffs. The first was of Kshs. 1,000,000.00, granted on 16th December 2009, secured by North Teso/Kamuriai/3289. The second was for Kshs. 2,000,000.00, given on 4th May 2010, secured by North Teso/Kamuriai /3229. The third was of Kshs. 5,000,000.00, granted on 13th April 2016, and secured by South Teso/Apokor/639. The last was of Kshs. 3,000,000.00, of 11th July 2017, secured by South Teso/Apokor/639. There was also an LPO facility of Kshs. 2,500,000.00, secured by the same assets, to be repaid on or before 5th September 2022. A further amount was advanced in May 2022, of Kshs. 3,000,000.00, being an overdraft, and another Kshs. 3,000,000.00, being an SME loan. The 2 were also secured by the same securities. It is asserted that the plaintiffs have defaulted in their obligations, by failing to pay the instalments due.

6. A reply to the application came by the form of an affidavit by Patricia Olita, of 27th November 2024. She reiterates the contents of the defence, on the history of the matter. She asserts that there was default, and that valuations were done on the securities. North Teso/Kamuriai/3229 was given a market value of Kshs. 5,500,000.00, and a forced sale value of Kshs. 4,200,000.00; while South Teso/Apokor/639 was given a market value of Kshs. 22,000,000.00, with a forced sale value of Kshs. 16,500,000.00. Statutory notices were issued. The first was dated 20th December 2023, indicating that arrears stood at Kshs. 6,495,288.54, while the total debt stood at Kshs. 9,379,384.49. The plaintiffs made a repayment proposal, by a letter dated 20th December 2023. Another statutory notice issued on 14th February 2024, which showed the arrears standing at Kshs. 7,019,793.04, while the total debt was at Kshs. 9,742,824.34. The 2nd defendant was instructed thereafter, to realise the securities.

7. The defendants filed a further affidavit, through Patricia Olita, sworn on 9th December 2024, to disclose that the total outstanding stood at Kshs. 11,042,076.64, as of 16th December 2024. It is averred that notices were properly issued and served, and a publication was done in the media, advertising the proposed sale. The relevant documents have been attached.

8. Directions were taken, on 27th November 2024, for canvassing of the application, by way of written submissions. I see that both sides have placed on record their respective written submissions.

9. The plaintiffs submit on 3 issues: the principles for grant of the relief sought, non-compliance with the law on statutory notices, and breach on loan terms.

10. On the first issue, on principles for grant of injunctions, the plaintiffs rely on Giella vs. Cassman Brown & Company Limited [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA), Mrao Limited vs. First American Bank of Kenya Limited & 2 others [2003] eKLR (Kwach, Bosire & O'Kubasu, JJA) and Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR (Ouko, Kiage & M'Inoti, JJA), with respect a prima facie case being established, the possibility of suffering irreparable harm,

and, where doubts exist on the first 2, balance of convenience. It is submitted that the 1st defendant is not entitled to exercise the statutory power of sale, as there were breaches of the loan terms, non-compliance with issuance of the required statutory notices, among others.

11. On the second issue, it is submitted that the exercise of the statutory power of sale is preceded by issuance of the notice under section 90 of the *Land Act*, Cap 280, Laws of Kenya, demanding payment of the moneys due. The chargee may only proceed with sale where there is no compliance with that notice upon expiry of the 90 days, when the statutory power of sale is said to crystalise. Upon crystallisation, another notice, of 40 days, is issued, under section 96 of the *Land Act*, for disposal of the security. Nyagilo Ochieng & another vs. Fanuel Ochieng & 2 others [1995-1998] 2 EA 260 [1996] eKLR (Gicheru, Tunoi & Shah, JJA) and Muga Developers Limited vs. Equity Bank of Kenya Limited & 4 others [2020] eKLR [2020] KEHC 1065 (KLR) (Majanja, J) are relied upon, for the point that it is up to the chargee to prove compliance with sections 90 and 96 of the *Land Act*. It is argued that whereas the 90-day notice was issued, the 45-day notice was not properly served.

12. On the third issue, the plaintiffs argue that the documents presented by both sides differ on the documents that evidence the loans taken by the plaintiffs. They submit that the contract documents made provision for review of the facility, which suggested that the said review had to be done with the participation of the plaintiffs. They aver that that review was not done, in the manner envisaged, hence there was a breach of the terms of the lending arrangement. They cite Kenya Commercial Finance Company Limited vs. Ngeny & another [2002] 1 KLR 106 Gicheru, Lakha & Owuor, JJA) and Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR [2014] KECA 319 (KLR) (Waki, Warsame & Gatembu, JJA).

13. The defendants have flagged 6 issues for determination: compliance by the plaintiffs with repayment obligations, awareness by the plaintiffs of their indebtedness to the 1st defendant, the issuance of the requisite statutory notices to facilitate exercise of the statutory power of sale, the pre-sale valuation, the threshold for grant of the orders sought and whether the plaintiffs have come to court with clean hands.

14. On the first issue, it is submitted that parties are bound by the terms of their contracts, and, in this case, the plaintiffs were not faithful to the terms of the contracts that they entered into with the 1st defendant, for they defaulted by not repaying the loans. They rely on Centurion Engineers & Builders Limited vs. Kenya Bureau of Standards [2023] KECA 1289 (KLR)(Omondi, Laibuta & Macharia), Twiga Chemicals Industries Limited vs. Allan Stephen Reynolds [2014] eKLR [2014] KECA 730 (KLR) (Maraga, Gatembu, & Mohammed, JJA), Jopa Villas LLC vs. Private Investment Corporation & 2 others [2009] eKLR (Lenaola, J).

15. On whether the plaintiffs were aware of their indebtedness, it is submitted that they were always supplied with copies of statements of accounts, for the various facilities advanced, and that the demand notices served on them always indicated the amounts outstanding. It is submitted that a dispute on accounts and payment was not a ground for grant of injunctive relief, and Halsbury's Laws of England, Volume 32 (4th edition) Paragraph 725, Air Travel & Related Studies Ltd vs. Equity Bank (Kenya) Limited [2017] KECA 83 (KLR) (Visram, Koome & Makhandia, JJA) and Thathy vs. Middle East Bank (K) Limited & another [2002] 1 KLR 595 (Ringera, J).

16. On the third issue, about the issuance of the 3 statutory notices, being that for payment of the amount due, under section 90 of the *Land Act*; that for sale, under section 96 of the *Land Act*; and the redemption notice, under Rule 15 of the Auctioneers Rules, 1997, it is submitted that there was compliance, for all 3 notices were issued and served, and David Limo Bundotich vs. Housing Finance Company of Kenya [2022] eKLR [2022] KEHC 2333 (KLR) (Nyakundi, J) and Amendi vs. Family Bank Limited [2023] KEHC 20923 (KLR)(J. Kamau, J) are cited. It is argued that, in the event it is

established that the said notices were not issued, the remedy would lie with a temporary injunction being issued pending the issuance of the fresh notices. Mesgo Limited & another vs. National Bank of Kenya Limited [2020] eKLR (Okwany, J) is relied upon.

17. On whether the 1st defendant had pre-valued the securities before advertising them for sale, it is asserted that that was done, and copies of the valuations have been attached to the application. It is submitted that a valuation can only be challenged by another, and, despite the plaintiffs complaining about undervaluation, they have not provided proof of the undervaluation. Calvin Ouma Miganda vs. Sammy Traders Limited [2021] eKLR [2021] KEHC 1240 (KLR) (J. Kamau, J), Zum Zum Investment Limited vs. Habib Bank Limited [2014] eKLR (Kasango, J) and Palmy Company Limited vs. Consolidated Bank of Kenya Limited [2014] eKLR [2014] KEHC 4811 (KLR) (Gikonyo, J) are relied upon.

18. On whether the threshold for grant of the orders sought has been reached, it is submitted that that has not been done. It is argued that the plaintiffs have not demonstrated that they have an arguable case, as they have not shown how their rights have been infringed. It is further argued that probability of success has not been demonstrated, for the plaintiffs took out loans, which they have not repaid. They were served with the requisite notices. On suffering irreparable harm, it is argued that the value of the assets can be compensated by way of damages. It is submitted that balance of convenience tilted in favour of the 1st defendant, for the 1st defendant has no other way of recovering the moneys advanced. Giella vs. Cassman Brown & Company Limited [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA), Mrao Limited vs. First American Bank of Kenya Limited & 2 others [2003] eKLR (Kwach, Bosire & O'Kubasu, JJA) and Jim Kennedy Kiriro Njeru vs. Equity Bank (K) Limited [2019] eKLR [2019] KEHC 9788 (KLR) (Nyakundi, J) are cited.

19. The last issue is whether the plaintiffs have come to court with clean hands. It is submitted that they have not, for they lied that they had not been served with the requisite notices, yet evidence has been placed before the court to that extent. Tecno Holdings Limited & 4 others vs. National Social Security Fund Board Trustees [2018] eKLR [2018] KEELC 2612 (KLR) (Komingoi, J), is cited on the need for full and frank disclosure.

20. Let me start by stating that determining an application for temporary restraint of the exercise of the statutory power of sale, which is alleged to have accrued, is like walking a tightrope, for there is a real risk that the determination of the interlocutory application may, in fact, amount to a final disposal of the suit. The facts that the court must consider, for the purposes of the interlocutory application, are the very same ones that are to be considered for the purpose of disposing of the main suit. I shall make a conscious effort to determine the interlocutory application, without seeming to dispose of the main suit.

21. I am persuaded that the frame of issues by the defendants properly and comprehensively captures the matters that ought to be considered in the determination of the instant application. I shall adopt them, with only 1 amendment, that consideration, as to whether the threshold for grant of temporary injunctive relief has been met, shall be considered last.

22. The first issue is on whether the plaintiffs have met their obligations under the various loan agreements that they had executed. This issue would be critical, given that the exercise of the statutory power of sale rests on it, where the charger fails to meet their obligations by default in repaying the moneys due, contrary to the terms of the loan agreements. The 1st defendant argues that its statutory right to exercise the power of sale, of the securities, has accrued. I have seen documents which show that the plaintiffs took the loans in question, and secured them with the assets in question. The plaintiffs have not denied that. I have seen notices that the loans were in arrears. I have equally seen 2 responses to those notices,

1 filed by the plaintiffs and several by the defendants. In those responses, there is acknowledgement of the debt, and proposals were made for either repayment or restructuring of the loans. No challenge was mounted to the amounts set out in the notices on arrears, in the letters from the plaintiffs. I feel entitled to rely on those responses, for they were not written without prejudice, and I trust that they were written in good faith. See Randu Nzau vs. Mbuni Transport Company Ltd [1989] KEHC 119 (KLR)(Bosire, J) and Luka Kipkorir Kigen vs. Kenya Commercial Bank Limited [2015] KEHC 2958 (KLR)(Janet Mulwa, J).

23. There is adequate material, therefore, to demonstrate that there is indebtedness, which suggest default in meeting financial obligations, and ultimately non-compliance with the contractual terms to repay the loans in question.

24. On the second issue, on awareness by the plaintiffs of their extent of their indebtedness to the 1st defendant, I will reiterate, that I have seen correspondence from the 1st defendant to the plaintiffs, notifying them of the indebtedness, by way of the arrears on the loans. I have equally seen correspondence from the plaintiffs, acknowledging those figures on arrears, and making proposals on repayment. I have in mind, the letter dated 20th December 2023, which communicated that the arrears on those loans stood at Kshs. 6,495,288.54, while the total debt stood at Kshs. 9,379,384.49. The plaintiffs responded to that notice of arrears by making a repayment proposal, vide a letter dated 20th December 2023. A statutory notice was issued, dated 14th February 2024, which showed the arrears as standing at Kshs. 7,019,793.04, while the total debt was at Kshs. 9,742,824.34. The plaintiffs have exhibited a letter, from the 1st plaintiff, dated 11th September 2024, in response to a statutory demand, where liability of Kshs. 9,742,825.00 is acknowledged, and a request is made to repay that amount by 72 equal instalments.

25. For all practical purposes, the plaintiffs seem to have been aware of the extent of their indebtedness, and the steps taken by the defendants, to realise the securities, could not have come as a surprise.

26. On whether the 3 statutory notices, pointed out in Air Travel & Related Studies Limited vs. Equity Bank (Kenya) Limited [2017] KECA 83 (KLR) (Visram, Koome & Makhandia, JJA), were properly issued and served, I must go through the material presented by the defendants. I have come across a notice purported to have been issued under section 90(1)(2)(3)(e) of the *Land Act*, dated 18th September 2023, from the 1st defendant; a notice purported to have been issued under section 96(1) of the *Land Act*, by the 1st defendant, dated 14th February 2024; and a redemption notice, issued by the 2nd defendant, dated 25th September 2024. I am persuaded the 3 notices, which are prerequisites, according to Air Travel & Related Studies Ltd vs. Equity Bank (Kenya) Ltd [2017] KECA 83 (KLR) (Visram, Koome & Makhandia, JJA), to exercise of the statutory power of sale, were issued.

27. However, issuance of those notices alone is not sufficient. They can only become effective as notices when served. The notices dated 18th September 2023 and 14th February 2024 were purported, on their faces, to have been sent by registered post, to the known addresses of the plaintiffs. Were they in fact sent by registered post? I have not seen any certificates of posting, from the Postal Corporation of Kenya, which would evidence such postage. What I see are documents headed "SDNs DISPATCH FROM KCB LEGAL DEPARTMENT," but the same are not good evidence of postage. It would appear, though, that the notice of 18th September 2023 was received by the 1st plaintiff, for he wrote a letter to the 1st defendant, dated 11th September 2024, acknowledging it, and making proposals on repayment of the moneys due. However, there is nothing to show that that of 14th February 2024 was ever received by the plaintiffs.

28. For the redemption notice, dated 25th September 2024, there is an affidavit of service, by the auctioneer, of 14th October 2024, indicating that he served the notice on an employee of the plaintiffs, known as Haron Wanjala, who received and signed it. Haron Wanjala has not been renounced by the plaintiffs, for they did not swear a further affidavit to denounce him. There is also an image from a phone, allegedly belonging to the 2nd plaintiff, indicating service upon that 2nd plaintiff by WhatsApp message.

29. Were the 3 statutory notices properly served on the plaintiffs? I do not think that I have before me material that would support proper service. As the 1st plaintiff did acknowledge receipt of the notice dated 18th September 2023, in his letter of 11th September 2024, it should be taken that he was properly served with that notice. Regarding the second notice, of 14th February 2024, there is absolutely nothing to show service upon the plaintiffs, or receipt by them, of that notice. However, I do note that the plaintiffs have conceded service of these 2 notices, and what they have an issue with is the redemption notice by the auctioneer. I shall take it, therefore, that the first 2 notices were properly served.

30. The third notice, to redeem the securities, was served on the 2nd plaintiff, going by what I can see. However, that notice was never served on the 1st plaintiff, yet the 1st plaintiff was the principal borrower, and the securities sought to be sold were his. The notice was, in fact, not even addressed to him. It is only him as the registered proprietor, who could have charged the same, and redemption could only be by him. One would wonder how redemption could be accomplished when no notice issued in his name, leave alone the same being served upon him. The matter is about his property.

31. So, it would be my conclusion, that there was proper service of the first 2 notices upon the 2 plaintiffs, but the third notice was not properly served, and the defendants shall have to serve it afresh, before proceeding with exercise of the right to sell the charged property.

32. On whether the secured assets were pre-valued, I have seen the reports on valuation placed on record by the 1st defendant, and I am satisfied that there was pre-valuation. The plaintiffs raise issue with the valuation, and suggest that the assets were undervalued. I have not seen any material that would suggest undervaluation. Such material could only come from other valuations carried out on the same assets, and placed in the record for comparison purposes. That other valuation could only be undertaken by the plaintiffs, at their own expense. Carrying out the same would not be hard, for the said assets are in the name of the 1st plaintiff, and under the control of both the plaintiffs, and they are in possession and have custody of the same, going by the filings before me.

33. Have the plaintiffs come to court with clean hands? I do not think so. The 1st plaintiff, in the letters that I have in the record, has admitted indebtedness to the 1st defendant, and even proposed how to repay the amounts due. He cannot now turnaround and raise some of the issues he is now raising, about accounts, and about some terms of the loan arrangements not being met, when he did not raise those issues in his letters admitting the amounts due. The plaintiffs appear to have not complied with the terms under which the moneys were advanced to them.

34. Should I grant the reliefs sought? Regarding the injunction, I would not grant the same, given the admission of indebtedness. I am persuaded that no prima facie case exists with probability of success. The loss the plaintiffs are exposed to, should the sale go ahead, is compensable in damages, for land is a mere commodity, which is readily available in the market. The 1st defendant is a bank or financial institution with connections to the State, and there is no evidence that its liquidity is questionable. I have no doubt about these 2, and there would be no need to consider balance of convenience.

35. One of the issues put forward by the plaintiffs is that the charged property was occupied by the extended family of the 1st plaintiff, who would be require notification before eviction. The property is

registered in the name of the 1st plaintiff. He offered the land while well knowing that these individuals were in occupation, which of itself could be deemed to be bad faith. The said occupants should be his responsibility, and not that of the 1st defendant. It is not the 1st defendant who is putting them into jeopardy, but rather the jeopardy was created by the plaintiffs when they offered that property as security. In any event, the proposed exercise of power of sale has nothing to do with eviction, and where eviction must be done, there are elaborate provisions, in the *Land Act*, on how it should be done, and the 1st defendant should be trusted to have access to able legal counsel, to guide the process.

36. Regarding the accounts, the 1st defendant has attached bank statements of the accounts, in the reply to the application, and there would be no basis for granting the prayer. As for stopping the levying of fees, commissions, interests and penalties, a case was not made out for grant of that order. Such can only be made upon the taking of evidence at the hearing of the main suit. As to the provision of copies of the valuations the 1st defendant is depending on, the same have been attached to the reply, and are available to the plaintiffs.

37. The final orders are that I will only allow the application, as I hereby do, to the limited extent of stopping the proposed sale, pending compliance with Rule 15 of the Auctioneers Rules, 1997, in the manner alluded to above. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 21ST DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Joseph Makokha, instructed by JP Makokha & Company, Advocates for the plaintiffs.

Mr. Macharia, instructed by Mukele Moni & Company, Advocates for the defendants.