Bakhsons Distributors Limited v Gulf African Bank & another (Civil Case E003 of 2025) [2025] KEHC 2661 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2661 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E003 OF 2025

J NGAAH, J

MARCH 7, 2025

BETWEEN

BAKHSONS DISTRIBUTORS LIMITED ..... PLAINTIFF

AND

GULF AFRICAN BANK ..... 1ST DEFENDANT

AL-HILAM AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The application before court is the plaintiff's motion dated 6 January 2025 expressed to be brought under sections 3, 3A, and 63 (e) of the *Civil Procedure Act*, cap. 21 and Order 40 Rules 1 (a) and 2 of the Civil Procedure Rules. The prayers in the application have been couched as follows:

> " a) That the Application herein be certified as urgent and service of the same be dispensed with in the first instance.
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> b) That this Honourable Court be pleased to issue a Temporary Order of Injunction restraining the Defendants whether by themselves, their agents, servants and/or employees from attaching, repossessing, selling, auctioning or in any other way alienating properties known as Title Number: Nairobi/block 103/391 Mugoya Estate phase ill, Title No. L.R 12715/13184 (IR no.175551) Fortis Industrial Park, Syokimau Machakos County and Mombasa/ Block XV/719 pending the hearing of this Application inter partes.
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> c) That in the alternative this Honourable Court be pleased to issue an interlocutory Order of Injunction restraining the Defendants whether by themselves, their agents, servants and/or employees from attaching, repossessing, selling, auctioning or in any other way alienating the Plaintiffs Property known as property Title Number: Nairobi/block 103/391 Mugoya

Estate phase m ,Title No. L.R 12715/13184 (IR no.175551) Fortis Industrial Park, Syokimau Machakos County and Mombasa/ Block XV/719 pending the hearing and determination of this suit.

d) That an order do issue that land parcels known as Title Number: Nairobi/ block 103/391 Mugoya Estate phase m, Title No._L.R 12715/i3184 (IR no.175551) Fortis. Industrial Park, Syokimau Machakos County and Mombasa/ Block XVn19 be valued by an Independent Valuer to ascertain its current market value.

e) That an order compelling the 1st Defendant to render accounts to the Plaintiff showing how the sum claimed by the 1st Defendant in respect of the Plaintiff's loan at the Defendant's company has been accrued.

f) An Order compelling the 1st Defendant to delist the Applicant/ Plaintiff from CRB.

g) That costs of this Application be provided for."

2. The application is supported by the affidavit of Harun Salim Ghaitan who has sworn that he is the director of the plaintiff company. He has sworn further that through a letter of offer dated 13 May, 2023, the applicant entered into what he has described as "a new financing agreement" with the 1st respondent according to which the 1st respondent agreed to finance the applicant to the tune of Kenya Shillings Forty-Five Million, Five Hundred Thousand (Kshs.45,500,000/=). The applicant was to use this sum as "a working capital" and "purchase of commodities".

3. The loan facility was secured by joint, several and personal guarantees upon which a charge was registered over property known as Title Number: Nairobi/block 103/391 Mugoya Estate phase III, Title No. L.R 12715/13184 (IR no.175551) Fortis Industrial Park, Syokimau Machakos County and Mombasa/ Block XV/719 which is registered in the names of the applicant and the directors of the applicant.

4. The applicant is said to have been advised by the 1st respondent's agent that the loan was to be provided as working capital with repayment period of one year with sub terms of 180 days but with an option of extension of repayment period and restructure to term loan in the event the applicant's business failed.

5. The applicant's business eventually suffered immense loss after its main supplier from Turkey stopped supplying business products to Africa, making it difficult for the applicant's business to service the loan promptly. This situation was communicated to the 1st respondent which, in turn, promised to extent the payment period with an option of restructuring the loan to term loan. However, in spite of the promise, no communication was received from the 1st respondent in this regard.

6. Nonetheless, it is the applicant's position that it has been making prompt payments the last of which was made in October, 2024. The applicant is said to be making arrangements to clear the balance, and, in any event, in accordance with the loan schedule. To demonstrate its willingness to clear the loan, the applicant is ready to pay a lumpsum of Kshs. 10,000,000/= and the balance to be paid within the agreed timelines.

7. On 26 November, 2024 the 1st respondent, through the 2nd responded issued a Statutory Notice together with Redemption Notice upon which the 2nd respondent has initiated the process of selling the Title Number: Nairobi/block 103/391 Mugoya Estate phase III, Title No. L.R 12715/13184 (IR no.175551) Fortis Industrial Park, Syokimau Machakos County and Mombasa/Block XV/719. In particular, on on 4 January, 2025, the 2nd respondent advertised for sale property Title Number:

Nairobi/block 103/391 Mugoya Estate phase III, Title No. L.R 12715/13184 (IR no.175551) Fortis Industrial Park, Syokimau Machakos County and Mombasa/ Block XV/719 and the said sale by auction was slated for 20 January, 2025.

8. The 1st respondent has since instructed the 2nd respondent to sell property known as Title Number: Nairobi/block 103/39.1 Mugoya Estate phase I.II which is a family house where Ghaitam and his family reside.

9. According to Ghaitam, the properties are likely to be sold at a value lower than their market value and, therefore, it is necessary that an independent valuation be undertaken. Again, if the auction proceeds, the applicant's equity of redemption is likely to be fettered and it will also suffer loss and damage.

10. The respondents have opposed the motion and filed a replying affidavit to this end. The replying affidavit has been sworn by Grace M. Mwangombe who has introduced herself as the 1st respondent's legal counsel.

11. According to Mwangombe, the injunction in respect of Mombasa/Block XV/719 ought to be declined because the applicant lacks the locus to seek an injunction over property owned by Anwar Salim Ghaithan and Harun Salim Ghaithan.

12. It has been sworn on behalf of the respondents that the allegation that the applicant was misled about the nature of the facility is an afterthought. Apart from the Letter of Offer dated 13 December 2023, which the applicant has exhibited, there was an earlier letter of 22 November 2022 on the nature of the loan facility. Thus, it is urged, the applicant cannot enter into two loan arrangements, one after the other, receive and utilize the funds and then feign ignorance three years later.

13. It is denied that the 1st respondent refused to restructure the loan.When the applicant defaulted in repaying the loan, it was issued with two- and three-months' statutory notices both dated 19 June 2024. The default was not rectified resulting in the issuance of two forty days' notices to sell, both dated 25 September 2024.

14. It is only after the lapse of the forty days' notice to sell that the applicant wrote to the defendant on 11 November 2024. The applicant's letter was not a request for the restructuring of the loan but a plea to delay the issuance of the forty-five days redemption notices by two weeks. The 1st respondent responded to the request the same day and, therefore, it is not true that the 1st respondent declined to respond to the applicant's request. In any event, acceptance of the request is at the 1st respondent's discretion.

15. The 1st respondent has also sworn the applicant's allegation that the 1st respondent has not provided a basis for the amount demanded is not true because in the statement which the applicant has itself provided, there are entries which show how the outstanding loan was arrived at and the applicant has not pointed out any entry in the statement that is inaccurate.

16. As far as valuation of the properties is concerned, it has been sworn that prior to instructing the 2nd respondent to auction the properties, the 1st respondent received valuation reports in respect of these properties. These reports were:

    a. Valuation report dated 17 October 2024 over Warehouse No. 48 on LR No. 12715/13184.

    b. Valuation report dated 17 October 2024 over Title No. Nairobi/Block 103/391.

    c. Valuation report dated 29 October 2024 over Title No. Mombasa/Block XV/719.

    The valuations are said to have been conducted by qualified professionals.

The 1st respondent prays that the application be dismissed with costs so that the 1st respondent can recover the Kshs, 59,107,998.86 owed as at 14 November 2024.

17. Besides the replying affidavit, the respondents also filed a preliminary objection in which they have contended that the suit against the 2nd respondent ought to be struck out with costs for violating the principle that an agent of a disclosed principal cannot be sued. Secondly, it is averred that the applicant lacks locus to seek an injunction over Title No. Mombasa/Block XV/719 owned by Anwar Salim Ghaithan and Harun Salim Ghaithan.

18. It is apparent from the applicant's pleadings and affidavits, and it is not in dispute, that there exists a contract between the applicant and the 1st respondent. The contract is in the form of a charge according to which the applicant offered certain immoveable properties as security for a loan given to the applicant by the respondent. None of the parties has exhibited the charge document which, no doubt, encapsulated the terms of the contract. However, copies of the letters of offer which both the applicant and the 1st respondent have made reference to show that the suit properties were offered as securities for recovery of the loan, in the event of default.

19. It is also not in dispute that the applicant has defaulted in the repayment of the loan and, in the wake of the applicant's own admission of the default, the 1st defendant would be entitled to enforce the contract and exercise its statutory power of sale. As far as I understand the applicant, it does not dispute the 1st respondent's right in this regard except that it is aggrieved by the 1st respondent's exercise of its power of sale on grounds that:

    i. "...the 1st Defendant intentionally failed to disclose that the said loan was as a revolving fund and further no provision of the payable instalment was captured on the initial documents of the said financial arrangement. (see ground €, on the face of the motion").

    ii. "... the plaintiffs (sic) business was greatly affected after the main supplier of materials from Turkey stopped supplying products to Africa, and as such it was unable to make substantial payments in realisation of the loan. (See ground (f) of the application).

    iii. "...the 2nd Respondent has not served the applicant with any valuation report and as such, the property stands to be sold at an extremely lower value below the current market price in the event that the auction slated for 20th January takes place."

20. According to the letter dated 13 December 2023 signed by both the applicant and the 1st respondent, what has been described as "the tenor" of the loan was captured in the following terms:

> " 3. Tenor
>
> The Facility shall be available for a period of Twelve (12) Months from the date of this letter and shall expire after Twelve (12) Months. Thereafter the Bank may elect to renew the Facility at its sole and absolute discretion. Notwithstanding any provision in this Leiter (including in regard to the expiry of the Facility) the provisions of this Letter shall, unless the Bank shall in its discretion otherwise decide by notice in writing to the Customer or the Bank shall have demanded."

21. And on the availability of the loan, it was agreed between the parties as follows:

> " The Facility shall be available for a period of Twelve (12) Months from the date of this feller and shall expire after Twelve (12) Months. Thereafter the Bank may elect to renew

the Facility at its sole and absolute discretion. Notwithstanding any provision in this Leiter (including in regard to the expiry of the Facility) the provisions of this Letter shall, unless the Bank shall in its discretion otherwise decide by notice in writing to the Customer or the Bank shall have demanded the immediate payment of the Facility, continue in full force and effect until any renewal extension variation or replacement letter of Offer shall be offered to and accepted by the Customer."

22. These are some of the conditions upon which the loan was given. It has not been demonstrated how, in exercising its statutory power of sale, the 1st respondent resiled from these terms or, to be precise, how the 1st respondent has "intentionally failed to disclose that the said loan was as a revolving fund and further no provision of the payable instalment was captured on the initial documents of the said financial arrangement."

23. Having admitted default in repayment of the loan which, according to the applicant's own explanation, is attributed to failure of its business, it is not open to the applicant to turn around and blame the 1st respondent for initiating the processes of recovery of its loan. The 1st respondent cannot be blamed, for instance, for failure by a Turkish supplier to supply certain materials to the applicant unless the applicant demonstrates that the repayment of the loan was pegged on the supply of these materials.

24. As far as the question of valuation of the securities is concerned, there is uncontroverted evidence by the 1st respondent that the properties set for auction were valued before the 2nd respondent was instructed to auction them. There is, therefore, no basis for the applicant's allegation that the securities would be auctioned at a throwaway price for the reason that they have not been valued. Neither is there any basis for the apprehension that the properties have been undervalued since the applicant has not produced any alternative valuation that would have provided some substance for this allegation.

25. The principles upon which an interlocutory injunction may be granted pending the hearing of the substantive suit are well settled. According to these principles, the applicant must first demonstrate a prima facie case with a probability of success at the trial. Where the court is in doubt whether this condition has been met, it would decide the application on a balance of convenience. Secondly, an interlocutory injunction will ordinarily not be granted unless the applicant can satisfy the court that he is likely to suffer an injury which cannot adequately be compensated in damages. (see Giella v Cassman Brown & Co Ltd [1973] EA 358).

26. In this Honourable Court's case of Thathy versus Middle East Bank (K) Ltd & another (2002) KEHC 1159 (KLR), a case in which I represented the plaintiff long before I joined the bench, Ringera, J. (as he then was) held that these principles, though necessary, are not sufficient. The learned judge held:

> " Of equal importance is this: an injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a court of equity."

27. Based on the material before court, and for reasons I have given, I am not satisfied that the applicant has met the very first threshold. It has not been shown that the applicant has made out a prima facie case with a probability of success. The grounds upon which the application has been made do not elicit such a case.

28. If I may say more on the question of accounts, first, the 1st respondent has demonstrated how the amount owing has been computed. The applicant has not provided any contrary or alternative computation. But even if the dispute was about computation, that in itself cannot be a basis for grant

of an injunction. In Thathy versus Middle East Bank (K) Ltd & another (supra), the court addressed this question and held:

> "As regards the furnishing of a statement of account to the plaintiff, I don't think much would turn on it at this stage. In view of the fact that the plaintiff's substantial indebtedness to the bank is not disputed, a statement of account would at most only raise issues about the exact amount owed. Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injuncting the mortgagee from exercising his statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff's attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed."(Emphasis added).

29. Secondly, there is no evidence that if the injunction is not granted, the applicant will suffer irreparable damage. The value of the properties set to be sold are ascertainable and, therefore, assuming that the applicant ultimately convinces the court that it is entitled to compensation, the extent of the loss for which compensation is necessary is ascertainable.

30. Talking about why an injunction would not issue in these circumstances, the learned judge in Thathy versus Middle East Bank (K) Ltd & another (supra) held as follows:

> "I now turn to a consideration of the other conditions for the grant of an interlocutory injunction. Is the plaintiff likely to suffer an irreparable harm which cannot adequately be compensated in damages if the injunction sought is not granted? In paragraph 21 of his affidavit in support of the application, the plaintiff's Attorney depones that unless the defendant is restrained as prayed the plaintiff will suffer irreparable harm. On the other hand, in ground 5 of the grounds of opposition filed by the defendant the defendant's advocates contends that the plaintiff can be compensated in damages. The compessability or otherwise in damages as a condition for the grant of an interlocutory injunction is an old one which is firmly rooted in the history of an injunction as an equitable remedy. In the matter at hand, the property sought to be sold is a residential house which the plaintiff leases out for economic gain. Its value is easily ascertainable. It has been mortgaged to the bank with full knowledge that if the mortgage debt is not paid as covenanted in the contract, the same would be sold. In those circumstances, it does not lie in the mouth of the mortgagor to say that if he is in default, as he undoubtedly is, the sale of the security would result in irreparable harm to him. In my opinion, his loss is perfectly capable of being compensated in damages and it has not even been suggested by his advocate that the defendant Bank is incapable of so compensating him. The plaintiff does not therefore surmount this hurdle."

31. The final question which I need address but which is inconsequential as far as the fate of the applicant's application is concerned is whether the auctioneer ought to have been sued considering his principal is one that is disclosed.

32. According to Cheshire, Fifoot & Furmston's Law of Contract 12th Edition, pages 479, 480 and 481, if the contract is for a named principal, then the principal alone can sue and be sued. This position was reiterated in the Court of Appeal in Victor Mabachi & another v Nurtun Bates Limited [2013] eKLR where the court held:

> "(21) It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal. In Anthony Francis

Wareheim t/a Wareheim & 2 Others vs. Kenya Post Office Savings Bank, Civil Application Nos. Nai 5 & 48 of 2002, at page 10, this Court unanimously held as follows:

> "It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."

(22) The principle established in the above case still holds good. In the absence of factors vitiating the liability of the principal, we consider that the enjoinment of the appellants in the case is unwarranted ..."

33. While I agree with this general principle, an auctioneer stands in a rather unique position. According to G.H.L Fridman, The Law of Agency 6th Edition, pg. 40, a peculiarity of auctioneers is that they are agents of both parties to the sale which they negotiate (see Hinde versus Whitehouse (1806) 7 East 558). Also, an auctioneer, although an agent may personally sue for the price of goods sold and delivered by himself as an auctioneer (see Williams versus Millington (1788) 1 Hy BI 81. It is also the case that where an auctioneer sells goods by knocking them down with his hammer at an auction, after which he delivers the goods to the purchaser, then, even though the auctioneer is an agent, not a principal, if the vendor of the goods lacked title to them, the auctioneer, as well as the purchaser, will be liable in conversion to the true owner, despite the innocence of the auctioneer when he handled the goods (or the purchaser when he acquired them). (See Barker versus Furlong (1891) 2 Ch 72; Consolidated Co versus Curtis and Son(1892) 1 QB 495.

34. In any case, according to Halsbury's Laws of England/AGENCY (VOLUME 1 (2008) 5TH EDITION)/5. RELATIONS BETWEEN PRINCIPAL AND AGENT/(3) RIGHTS OF AGENT AGAINST PRINCIPAL/(iii) Reimbursement and Indemnity/111, the relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them. (See Adamson v Jarvis (1827) 4 Bing 66; Frixione v Tagliaferro & Sons (1856) 10 Moo PCC 175).

35. At paragraph 151 of Halsbury's Laws of England (supra), where the act complained of is not expressly authorised by the principal, the principal is, while the agent is acting within the scope of his implied authority or within the scope of his apparent or ostensible authority, jointly and severally responsible with the agent, however improper or imperfect the manner in which the authority is carried out.

36. What these authorities demonstrate is that notwithstanding the general principle that only the principal should be sued where he is disclosed, there are circumstances in which auctioneers, even in their capacity as agents of a disclosed principal, may be sued jointly and severally with the principal. Under our civil procedure architecture, Order 1 rule 10(2) thereof, the auctioneers may be sued as necessary parties. This rule reads as follows:

10.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

37. If an issue was to arise, as indeed it appears to have arisen in the instant application, as to the process leading to the auction or the manner the auction is being conducted; or if, for instance, the sale by auction was to proceed despite a court order to the contrary, questions arising from the auction would be effectually and completely adjudicated upon if the auctioneer was party to the suit. If, at the conclusion of the trial it turns out that joinder of auctioneer was unnecessary he will be entitled to seek for costs of the suit. As noted, the auctioneer also reserves the right to indemnity against the principal.

38. For the reasons I have given, I overrule the preliminary objection. Nonetheless, I do not find any merit in the applicant's application. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 7 MARCH 2025

NGAAH JAIRUS

JUDGE