



REPUBLIC OF KENYA



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Jingo Tours & Safaris Limited & another v Auctioneers & another (Civil Suit E027 of 2025) [2025] KEHC 4020 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E027 OF 2025
G MUTAI, J
MARCH 19, 2025**

BETWEEN

JINGO TOURS & SAFARIS LIMITED 1ST PLAINTIFF

ABDULGADER SHARIFF SALEH 2ND PLAINTIFF

AND

NOREEN AUCTIONEERS 1ST DEFENDANT

EQUITY BANK (KENYA) LIMITED 2ND DEFENDANT

RULING

1. Vide a plaint dated 28th February 2025, the plaintiffs averred that the 1st defendant had commenced a recovery action through it sought to sell the property known as Title No Mombasa/Block/XVII/797, which is registered in the name of the 2nd plaintiff/respondent, with a view to recovering Kes 51,556,078/- allegedly owned by the 1st plaintiff/applicant to the 1st defendant. The plaintiffs denied being indebted to the 1st defendant. The plaintiff also denied that they had ever entered into a contract with the 1st defendant, which could possibly give rise to the recovery action. Further, they stated that they did not receive statutory notices notifying them of the 1st defendant/respondent's intention to sell the charged property on account of the alleged indebtedness.
2. It was urged that there were no grounds entitling the 1st respondent to sell Title No Mombasa/Block/XVII/797 in a purported exercise of a statutory power of sale. The plaintiffs, therefore, sought a permanent injunction against the defendants as well as declaratory reliefs, exemplary and aggravated damages for the wrongful exercise of the statutory power of sale, costs of the suit and interest.
3. The plaintiffs/applicants concomitantly filed a notice of motion application dated 28th February 2025, vide which they sought the following orders:-
 - a. Spent;



- b. Spent;
 - c. That pending hearing and determination of this suit, an order of temporary injunction be and is hereby issued, restraining the 1st defendant, either by themselves and or its employees, agents and or any other person purporting to act under their instructions, including the 2nd defendant, from taking any steps or measures, including the sale, advertisement for sale, disposing of or taking any other incidental step towards the exercise of a purported statutory power of sale over the plaintiffs or any of its properties or any other property which the 1st defendant claims as security on account of an alleged debt owing from the plaintiffs to the 1st defendant, including the property known as Title No Mombasa/Block/XVII/797;
 - d. That this honourable court be pleased to issue other or further orders as it may deem just and fit to serve the interest of justice; and
 - e. That costs of this application be provided for.
4. The application is premised on the fact that the 2nd defendant /respondent issued a courtesy 14-day redemption notice to the plaintiffs/applicants, on the instructions of the 1st defendant / respondent. The plaintiffs/applicants are apprehensive that the charged property would be unlawfully, unprocedurally and unjustifiably sold because of a debt they deny owing.
 5. When the application was filed, this court declined to issue exparte injunction orders. Counsel for the plaintiffs/applicants was, however, directed to effect service within 3 days of the date the matter was considered in chambers, for hearing of the application interpartes on 13th March 2025.
 6. The 1st defendant /respondent entered appearance through the firm of Muriu Mungai &Co Advocates LLP and filed a replying affidavit sworn by Mr George Mabeya. They also filed a notice of motion application dated 12th March 2025 which was, however, withdrawn on 14th March 2025. I will say no more about the said application as it is spent.
 7. Mr Mabeya, in his affidavit sworn on 12th March 2025, deposed that the charge giving rise to the recovery action was entered into by the 2nd plaintiff and the Southern Credit Banking Corporation Ltd. The said bank was taken over by Equatorial Commercial Bank Ltd, which, in turn, was acquired by Spire Bank Ltd. Spire Bank Ltd was purchased by the 1st defendant.
 8. He further deposed that the exercise by 1st defendant, and its predecessors in the title was contested by the plaintiffs in the following matters: -
 - a. Mombasa HCC No. 90 of 2014, which was dismissed on 24th March 2015;
 - b. Mombasa HCC No. 245 of 2010 and 105 of 2010, which had been dismissed and reinstated, was dismissed for the last time on 18th April 2023 and wasn't reinstated as prayed, in a ruling delivered by the court on 14th December 2023; and
 - c. The wife of the 2nd plaintiff filed a suit in the lower court to wit Mombasa CMCC No. E1169 of 2023 seeking an injunction. The said suit was struck out on 25th January 2025 for want of jurisdiction and for being an abuse of the process of court.
 9. Mr Mabeya deposed that the present suit was res judicata having been heard and dismissed by courts with jurisdiction, but was also an abuse of the process of court and should be struck out in limine, with costs to the 1st defendant.



10. As the public auction was due to be conducted on 20th March 2025, and in the interests of justice, the application was urged before me on 14th March 2025. Both counsels made oral submissions. I shall give a precis of their submissions below.
11. In his submissions, Mr Derrick Odhiambo, learned counsel for the plaintiffs/applicants, urged that the sale of the suit property was due to take place on 20th March, 20245. He submitted that the plaintiffs had never procured a credit facility from the Equity Bank and that the redemption notice was contrary to law as they did not receive statutory notices, save for the documents served on them on 14th February 2025.
12. Mr Odhiambo stated that the 2nd plaintiff owned the suit property. The same was changed to Southern Credit Banking Corporation Ltd and hadn't been discharged though his clients had repaid the loan facility in full. He was apprehensive that unless a stay was issued, the property worth over Kes.100,00,000/- would be sold.
13. Regarding the litigation Mr Odhiambo urged that they were between the plaintiffs and Sothern Credit Banking Corporation Ltd and not the 1st defendant. He, therefore, denied that this cause is res judicata.
14. Counsel stated that the application before the court met the conditions stated by the Court of Appeal of Eastern Africa in the celebrated case of Giella vs Cassman Brown & Co Ltd (1973) EA 358 and prayed that this court allows the application.
15. Mr Kongere, learned counsel for the 1st defendant/respondent, urged that Southern Credit Banking Corporation Ltd had, through a process of mergers and acquisitions, been taken over by Equity Bank Ltd, the 1st defendant/respondent.
16. He submitted that there had been a series of cases between the parties, the last of which was determined by the Chief Magistrate's Court in January 2025. The High Court declined to reinstate the case before it in December 2023. Counsel submitted that the option available to the plaintiffs was to procure the reinstatement of the previously dismissed action rather than filing a fresh case. It was urged that by filing a fresh cause, the plaintiffs were abusing the court process.
17. In this view, the matter was res judicata as the subject matter of the suit had been heard and determined by courts with jurisdiction. The subject matter of the previous suits, which were between the same parties, or parties under whose title they were litigating, was the same.
18. Regarding the question as to whether the suit property was matrimonial or not, it was urged that the issue was canvassed before the Chief Magistrate in the suit that was subsequently struck out. The court below found the suit to be an abuse of the process of the court.
19. Mr Kongere stated that it would not be in order for this court to grant orders that the court below had found to be without merit. The court was thus urged to disallow the application.
20. In his response, Mr Odhiambo submitted that the court could not take judicial notice of matters which require proof of authenticity. In his submissions, the chain of ownership of the banks, leading to the alleged acquisition of ownership interest by the 1st defendant, as stated in the affidavit of Mr Mabeya, needed to be proved.
21. He reiterated that the applicants were not indebted to the 1st defendant and that there was no connection between them to justify the excise of the statutory power of sale by the 1st defendant through the 2nd defendant.
22. Counsel thus prayed that this court grants the orders sought.



23. I have considered the application and the annexures thereto, the replying affidavit and its annexures and the oral submissions made by the parties.

24. The law regarding the principles /conditions under which the court may grant an injunction is well settled. In *Giella vs Cassman Brown & Co Ltd* (1973) EA 358 the court stated as follows:-

“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.”

25. The above principles were expounded by the Court of Appeal in the case *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) where it was stated that:-

“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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

26. Has a case for grant of injunction been made in this case? As held in the case of *Nguruman Ltd* case (supra), I will look at the conditions stated in the case of *Giella vs Cassman Brown* sequentially and won’t leapfrog any condition to see whether an interim injunction should be issued.

27. Does a prima facie case exist? From what I can tell, the foundation of the plaintiffs’ case is that Southern Credit Banking Corporation Ltd has no nexus with Equity Bank, the 1st defendant herein, and, therefore, that the actions of the defendants are wrongful. It is not denied that the plaintiffs procured a facility from Southern Credit Banking Corporation Ltd and that its title has not been discharged.

28. The question of whether a prima facie case exists would then turn on whether Equity Bank Ltd is a successor institution to the Southern Credit Banking Corporation Ltd. It was urged on behalf of the 1st defendant/respondent that it was. The court was urged to take judicial notice of the said alleged fact.



29. Section 60 of the *Evidence Act* provides for facts which the court shall take judicial notice. Section 60 (1) (o) of the said Act specifically mentions all matters of general or local notoriety. It states that:-

“ 60. Facts of which court shall take judicial notice

1. The courts shall take judicial notice of the following facts—

...

(o) all matters of general or local notoriety...”

30. In this court’s view, the evolution of Southern Credit Banking Corporation Ltd, its merger with Equatorial Commercial Ltd (which post-merger operated as Equatorial Commercial Bank), acquisition of the post-merger Equatorial Commercial Bank by the Mwalimu Savings & Credit Cooperative Society Ltd, the change of name to Spire Bank Ltd and the subsequent sale of Spire Bank Ltd to Equity Bank are matters of general or local notoriety that it can take judicial notice of. These transactions were reported in the local media and published in the Kenya Gazette.

31. In the circumstance, this court takes judicial notice of the fact that that Equity Bank is a successor institution of the Southern Credit Banking Corporation.

32. Having established that Equity Bank is a proper party and that it is entitled to litigate or exercise the legal rights of Southern Credit Banking Corporation Ltd, I must then determine whether the plaintiffs have a prima facie case. What amounts to 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. In the said case, Bosire, JA stated as follows: -

“ So what is a prima facie case? 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...

But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”

33. Flowing from what this Court sees as a deliberate attempt by the plaintiffs to mislead the court as to the nexus between Southern Credit Banking Corporation Limited and Equity Bank so as to deny the alleged indebtedness to the said institution, the plaintiffs do not have a prima facie case. It would appear to me that as a successor institution, Equity Bank is entitled to exercise its statutory power of sale as it has proposed to do. In my view, and without judging the case’s merits, there is no prima facie case before this court.

34. Further from the material before the court, the plaintiff has engaged the 1st defendant and or its predecessors in title in a number of cases over the proposed exercise of the statutory power of sale.

35. The foregoing buttresses the prior paragraphs’ findings. Given that this matter has been severely litigated, there can be no new around that could possibly be said to give rise to a prima facie.

36. Having found that there is no prima facie case, the whole application fails as the applicants have flopped in their attempt to surmount the 1st hurdle. As was determined in the *Nguruman Ltd* case, there is no need for me to determine if damages would be an adequate remedy or where the balance of convenience



tilts. Under the circumstances, I find and hold that the application for an injunction has no merit and is for dismissal.

37. The orders that therefore command themselves to me are that: -
- a. The application dated 28th February 2025 is hereby dismissed; and
 - b. The 1st respondent shall have the costs of the application.

38. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Derrick Odhiambo, for the Plaintiffs/Applicants;

Mr Billy Kongere, for the 1st Defendant/Respondent;

No appearance for the 2nd Defendant/Respondent; and

Arthur – Court Assistant.

