Moonlight Shopping Mall Limited v DIB Bank Kenya Limited (Commercial Case E652 of 2024) [2025] KEHC 3311 (KLR) (Commercial and Tax) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E652 OF 2024

JWW MONG'ARE, J

MARCH 17, 2025

BETWEEN

MOONLIGHT SHOPPING MALL LIMITED ..... PLAINTIFF

AND

DIB BANK KENYA LIMITED ..... DEFENDANT

RULING

1. What is before the court is the Plaintiff's application filed on 29th October 2024 brought under Order 40 Rules 1, 2, 4 and 10, sections 82, 84, 90,96, 97, 98, 103, 104(3) of the *Land Act*, seeking the following orders:-

    1. Spent

    2. That this Honourable Court be please to grant a temporary order of injunction restraining the Defendant whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising, for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging, entering into or otherwise howsoever interfering with the Plaintiff's possession and ownership or title to all that piece of land known as Plot number 25 in section 2 Eastleigh being Land Reference number 36/II/25 also known as L.R. No. 36/AXI/1913 and all buildings and improvements erected thereon(the suit property) pending hearing and determination of the suit.

    3. The cost of this application be provided for.

2. The application is supported by the grounds set out on its face and the supporting affidavit of Mohamed Khatar Ali Noor sworn on 29th October 2024. The application is opposed and the

Defendant have filed a replying affidavit sworn by James Karanja, Manager, Collections and Special Asset Management- Risk Management, of the Defendant bank. Both parties filed written submissions which I have considered.

Analysis and Determination:-

3. I have carefully considered the Application before this court and the supporting and further affidavit filed on behalf of the Applicant. Similarly, I have considered the replying affidavit filed in opposition to this application. In addition, I have also looked at the rival submissions filed the parties and I note that only one issue arises for determination by this court, to wit, whether this court should grant the temporary order of injunction sought herein to the Plaintiff.

4. I do not think it is in dispute that for an order of injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see Nguruman Limited v Jan Bonde Nielsen& 2 others [2013] KECA 347 (KLR).

5. The parties also agree that what constitutes "a prima facie case" was set out by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR) as follows:-

> A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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.

6. A prima facie case flows from what has been pleaded in the plaint. A reading of the Plaint filed alongside the present Notice of Motion application reveals that the Plaintiff acknowledges having been advanced an Ijara facility of Kshs.64,000,000/= for the purchase of the suit property, on 13th August 2018 and that, on 15th February 2020, the Plaintiff was advanced a further Kshs.75,000,000/= to secure an Ijara sale and lease back facility making the aggregate loan advanced to stand at Kshs.139,000,000/=.

7. The Plaintiff claims to have religiously and timeously made the repayment of the two facilities and has so far paid back the sum Kshs.120,000,000/= in total towards redemption of the loan. It is the Plaintiff's assertion that the Defendant notified them of their intention to sell the charged property via a WhatsApp message on 23rd October 2024, when the Defendant forwarded the already expired 90-day statutory notice and the 40-day demand notice dated 4th September 2024 and 28th May 2024 respectively.

8. The Plaintiff denies being in default of his obligations or at all and confirms that he has actively communicated with the Defendant bank on a monthly basis and without fail. He also denies having been served with the Statutory Demands and Notices as and when they were issued by the bank and argues that the service by WhatsApp on 23rd October 2024 was the first time the Bank was communicating with it and as such, the same was an ambush and with ill motive with the intention to deprive him of the suit property while he has all along kept his part of the bargain and made payments towards redemption of the charged property.

9. Mr. James Karanja, the Defendant's Manager - Collection and Special Assets Management, in his replying affidavit, has set out in detail how the loan amount was disbursed to the Plaintiff and or its agents or contractors. Mr. Karanja confirms that the loan advanced was for Kshs.139,000,000/= and that it was disbursed in accordance and with the instructions of the Plaintiff. He further deponed that when the account started to go into default, the Defendant duly notified the Plaintiff to rectify the same and that correspondence to this effect was issued on 11th November 2023 and subsequently the Statutory Demand and Notices send out on 25th May 2024 and 4th September 2024.

10. I note that the Plaintiff's argument is that it did not receive any of the alleged notices and that indeed it was only notified via a WhatsApp message on 23rd November 2024, of the Banks intention to proceed with its exercise of its statutory power of sale under the charge. In his replying affidavit, Mr. James Karanja has not demonstrated how the previous notices were sent out and if indeed the Plaintiff had notice of the same. Mr. Karanja has also not controverted the assertion by the Plaintiff that it has dutifully and religiously made payments every month to the loan account and that indeed to date a sum of Kshs.120,000,000/= has been received by the Bank. I am satisfied therefore that the Plaintiff has established a prima facie case to warrant a grant of an order of temporary injunction.

11. I turn therefore to the second tenet of the principles set out in Giella(supra). The principle relates to the question of reparations by was of damages in the event that the court fails to grant a temporary injunction and in the end the Plaintiff succeeds in his quest before the court. The issue is whether the Plaintiff will suffer irreparable damages is capable of being compensated by an award of damages. The Plaintiff has deponed that it has indeed been servicing the loan and to date has paid a total of Kshs.120,000,000/=. The Plaintiff reiterates that it is not in default and has religiously and on a monthly basis made payments to the Defendant. This assertion was not controverted by the Defendant in their reply filed by James Karanja.

12. The Defendant has also not demonstrated how the amount being sought in the Statutory Notices has been arrived at if indeed the Plaintiff has made payments amounting to Kshs.120,000,000/= towards the redemption of the loan. I note that both parties agree that indeed the amount of loan disbursed was Kshs.139,000,000/= and while the Plaintiff made claims of having repaid the sum of Kshs.120,000,000/= so far, the Defendant did not rebut the said assertion. Further and in addition, the Plaintiff argues that it had no notice of the alleged default from the Defendant and has only become aware when it was notified via WhatsApp that Notices had been send out to it. It is the argument put forward by the Plaintiff if it had received these notices in a timely money it would have remedied the default and has indeed been engaged on a monthly basis with the Defendant.

13. It is therefore my finding that to allow the Defendant to proceed with its intended realization by way of sale of the Charged property while at the same time having received and retained the sum of Kshs.120,000,000/= would be a double blow and prejudicial to the Plaintiff. It would deprive the Plaintiff of the property and the money so far paid towards the loan. I find therefore that damages would be an inadequate remedy in the circumstances.

14. On where the balance of convenience tilts, I am persuaded that it tilts in favour of granting the prayers sought by the Plaintiff. The charged property remains available if the loan is not fully repaid, the Defendant will have its recourse as provided therein.

15. In conclusive I find merit in the Application by the Plaintiff dated on 29th October 2024 and grant the prayers sought therein. Costs of this application are in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17th DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Aswani holding brief for Mr. Kusow for the Plaintiff/Applicant.

Mr. Kariuki for the Defendant/Respondent.

Amos - Court Assistant