



REPUBLIC OF KENYA



**KENYA LAW**  
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**TRV Towers Limited v NCBA Bank Kenya PLC (Commercial Case E541 of 2023)  
[2025] KEHC 4602 (KLR) (Commercial and Tax) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E541 OF 2023**

**MN MWANGI, J**

**APRIL 4, 2025**

**BETWEEN**

**TRV TOWERS LIMITED ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion application dated 22<sup>nd</sup> November 2023 pursuant to the provisions of Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* and any other enabling provisions of the law. The plaintiff prays for an order of temporary injunction restraining the defendant from selling, leasing, occupying, trespassing or interfering with the plaintiff's rights over the properties known as TRV Towers and TRV Centre pending the hearing and determination of the instant application and any further orders that the Court deems necessary to grant in the interest of justice.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Purshottam Premji Vera, a Director of the plaintiff company. Mr. Premji averred that the plaintiff, a limited liability company, secured financing from the defendant in 2014 for the construction of apartments, secured by a charge over the suit properties. He deposed that the Loan Agreement required proceeds from sales to be deposited into an escrow account, but funds were instead deposited into a current account. He stated that the defendant has since issued the plaintiff with a Statutory Notice of sale due to the plaintiff's default in its loan repayment obligations and has sought to value the suit properties.
3. Mr. Premji claimed that a forensic audit ordered by the plaintiff revealed financial mismanagement, fraud, and negligence by the defendant, including unauthorized account openings, misallocation of sale proceeds and failure to enforce escrow deposit requirements. He contended that the plaintiff



- sought access to financial records but has been denied, prompting it to institute HCCOMM MISC. NO. E921 of 2023 seeking for an order compelling the defendant to produce the said documents, which suit is still pending before Court. Mr. Premji asserted that the defendant's negligence and contractual breaches contributed to the loan default.
4. In opposition to the application, the defendant filed a replying affidavit sworn on 19<sup>th</sup> April 2024 by Mr. Kenneth Mawira, a Senior Legal Counsel – Corporate Banking, Global Markets & General Operations at the defendant bank. He averred that the plaintiff secured a loan from the defendant for the development of the suit property, secured by a legal charge over L.R. No. 209/1/17, but the plaintiff defaulted in its loan repayment obligations, leading to a debt of Kshs. 425,667,538.68. He further averred that Statutory Notices for loan repayment were duly served, and the plaintiff admitted receiving them, thus the defendant bank's statutory power of sale has arisen. Mr. Mawira contended that a 30% shareholder in the plaintiff company admitted on oath that this suit was not sanctioned by the plaintiff's Board and was a retaliatory move by one of the plaintiff's Directors.
  5. Mr. Mawira alleged that the plaintiff diverted sale proceeds from the escrow account to its own accounts in breach of the Loan Agreement. He asserted that multiple applications filed by the plaintiff in Court to halt the sale of the suit properties have been dismissed. He stated that in as much as the plaintiff claims fraud, it has not provided any evidence in support of the said allegation. Further, that the alleged forensic audit does not exist. He maintained that the defendant has complied with all legal requirements for the intended sale thus the plaintiff's claims are baseless and the sale of the suit properties should proceed as per the contract and statutory provisions.
  6. In a rejoinder, the plaintiff filed a further affidavit sworn on 17<sup>th</sup> December 2024 by Mr. Purshottam Premji Vera, a Director of the plaintiff company. He contended that the defendant acted negligently in managing the loan facility, particularly by discharging units without ensuring that proceeds of sale were deposited into the escrow account, contrary to the Loan Agreement. He claimed that a forensic audit revealed that the defendant's actions led to financial discrepancies since the proceeds from the discharged units should have been sufficient to defray or settle the loan amount. He asserted that the defendant's statutory power of sale is being exercised unlawfully since the Notices served by the defendant were irregular.
  7. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed on 17<sup>th</sup> December 2024 by the law firm of Tito & Associates Advocates. I note that in as much as the defendant's Counsel on 6<sup>th</sup> February 2025 indicated she had filed and served their written submissions, the said submission were however not available on the Case Tracking System (CTS), for me to consider.
  8. Mr. Ogendo, learned Counsel for the plaintiff relied on the cases of *Giella v Cassman Brown* [1973] E.A. 358 & *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, and submitted that the plaintiff has established a prima facie case with a probability of success. He asserted that the defendant has breached the Loan Agreement and acted negligently in managing the loan facility. He argued that the sale proceeds from all discharged units should be sufficient to offset or significantly reduce the loan, which means that the claimed arrears are unjustified. He further submitted that the defendant frustrated the plaintiff's efforts to settle the loan by diverting funds from the escrow account.
  9. Mr. Ogendo referred to the case of *Men Limited v Echuta Farm Limited & 2 others* [2007] eKLR, and contended that the defendant should not be allowed to benefit from its own breach. He asserted that the plaintiff's rights are under threat due to the defendant's breach of contract, breach of fiduciary duty, and negligence in managing the escrow account and loan facility. He stated that despite the said breaches, the defendant seeks to deprive the plaintiff of its properties based on the same contract it



has violated. Counsel cited the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, and contended that the plaintiff will suffer irreparable harm in the event that the orders sought herein are not granted, as the loss of its properties cannot be adequately compensated by damages. Counsel asserted that the balance of conveniences tilts in favour of the plaintiff.

### **Analysis And Determination.**

10. Upon consideration of the instant application, the grounds on the face of it, and the affidavits filed in support thereof, the replying affidavit by the defendant and the written submissions by Counsel for the plaintiff, the issue that arises for determination is whether an order of temporary injunction should issue against the defendant.

11. The instant application has been filed inter alia, pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure, 2010 which provides as hereunder -

Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

12. The principles of injunction were laid down in the case of Giella v Cassman Brown (supra). The Court in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, when dealing with a similar application held as follows -

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.

13. The Court of Appeal in the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 others [2003] eKLR, considered what constitutes a prima facie case and held that -

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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.



14. The plaintiff does not dispute that it secured a loan facility from the defendant for the construction of apartments, which loan was secured by a charge created over the suit properties in favour of the defendant. The plaintiff acknowledges having defaulted in its loan repayment obligations but disputes the extent of the debt. It argues that the defendant contributed to the aforesaid default by breaching the Loan Agreement and mismanaging the loan facility by issuing partial discharges without ensuring that sale proceeds were deposited into the escrow account, thereby violating the loan terms.
15. The plaintiff alleges that a Forensic Audit Report revealed the defendant's involvement in operating secret bank accounts for the plaintiff to divert loan repayment funds.
16. I have perused the Forensic Audit Report which is annexed to the plaintiff's further affidavit, which only lists office units for which the defendant issued partial discharges without confirming deposit of sale proceeds into the escrow account. I however note that the said Report does not mention secret accounts or the defendant's role in fund diversion. Additionally, the plaintiff does not dispute having received Statutory Notices from the defendant.
17. The defendant in opposition to the instant application confirmed that an escrow account was opened for depositing proceeds from unit sales to offset the loan. The defendant however argued that since it was not a party to the Sale Agreements, the plaintiff diverted funds by providing current account details and other bank accounts in the Agreements without the defendant's knowledge or approval.
18. The plaintiff on its part argues that the defendant breached the Loan Agreement by allowing proceeds from unit sales to be deposited into accounts other than the escrow account, thereby contributing to its loan default. The plaintiff does not dispute that the defendant was not a party to the Sale Agreements and that the plaintiff itself provided alternative account details in the Sale Agreements without the defendant's knowledge or approval. That being the case, the defendant cannot be faulted for issuing partial discharges when purchasers had fully paid for the units.
19. In the end, it is my finding that since the plaintiff was entering into Sale Agreements without the defendant's involvement, it was the plaintiff's responsibility to ensure that the proceeds from unit sales were deposited into the escrow account. Failure to do so was a breach of the Loan Agreement by the plaintiff, and not by the defendant as claimed.
20. In the circumstances, I am not persuaded that the plaintiff has demonstrated a prima facie case with a probability of success to warrant being granted the orders being sought herein.
21. It is now well settled that a property offered as security becomes a commodity for sale in the event of default. See the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2013] eKLR, where the Court of Appeal agreed with the High Court's finding that damages could be adequate compensation as the appellant's guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent. In view of the foregoing, and the fact that the value of the suit properties can be ascertained from Valuation Reports, the defendant being a financial institution can easily compensate the plaintiff in the event that the suit is determined in the plaintiff's favour.
22. In the circumstances, I am persuaded that the plaintiff does not stand to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed.
23. The balance of convenience therefore tilts in favour of the defendant since the plaintiff can always be compensated by an award of damages in the event that its suit is successful.



24. At this juncture, it is important to point out that even if the plaintiff had made out a case for being granted of an order of temporary injunction, the said order could still not have been issued as the order being sought by the plaintiff was an order of temporary injunction restraining the defendant from selling, leasing, occupying, trespassing or interfering with the plaintiff's rights over the properties known as TRV Towers and TRV Centre "pending the hearing and determination of the instant application". This means that upon pronouncement of this Ruling, the said Order would elapse. To this end, I concur with the Court's holding in the case of Catherine Njeri Macharia v Macharia Kagio & another [2013] eKLR, where the Court when faced with a similar situation stated the following -

I accept and approve the holding by Hon. Justice Lesiit in HCCC No. 329 of 2003 Ano Shariff Mohammed Vs. Abdulkadir Shariff Abdirahim and Hon. Justice Fred Ochieng in HCCC No. 2047 of 2000 Wilfred O. Musingo Vs. Habo Agencies Ltd where my colleague judges were faced with applications seeking prayers similar in wording as in the instant application by the plaintiff. Justice Lesiit rendered herself as follows in the case referred to:

The prayer seeks a stay of execution of decree pending the hearing and determination of this application. The issue is that once the application is heard and determined then what. I do not think the prayer is worded correctly as the stay of execution should be prayed pending something other than the application itself. Considering this prayer and the manner it is worded, it is my view that the entire application is spent and that there remains nothing for me to stay.

For his part Hon. Justice Ochieng rendered himself thus: -

Now I revert to the orders sought by the Defendant. First it seeks an order of stay of execution pending the hearing and determination of this application. In other words, the very moment the court will have heard and determined the application dated 27<sup>th</sup> September, 2005 there would be no orders for stay of execution. Therefore, even if I were to grant prayer 2 as prayed, it would lapse as soon as I finish reading this ruling. As on 28<sup>th</sup> October, 2005, I had already given an order staying execution until today.

I hold that there is no need for the court to grant another order whose purport and effect would be the same as that which has already been given.

25. I hold that the application dated 22<sup>nd</sup> November 2023 is spent and the orders being sought cannot be granted. The said application is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF APRIL 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Ogendo for the plaintiff/applicant

Ms Mutisya for the defendant/respondent

Ms B. Wokabi - Court Assistant.

