



Bosco Estates Engineering and Construction Ltd v K-Unity Savings and Credit Co-operative Society Ltd (Civil Suit E020 of 2024) [2025] KEHC 6880 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E020 OF 2024**

**A MSHILA, J
MAY 16, 2025**

BETWEEN

BOSCO ESTATES ENGINEERING AND CONSTRUCTION LTD PLAINTIFF

AND

**K-UNITY SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LTD DEFENDANT**

RULING

1. Before court is an application by way of Notice of Motion dated on 21st June, 2024 and brought under Sections 90, 96, 97 and 103 of the *Land Act*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 40 Rule (1 & 2) & Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Plaintiff/Applicant sought for orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction, restraining the Defendant/Respondent by themselves, their servants or agents or any person claiming under them from transferring, seizing, removing, selling by way of auction, disposing of, alienating, or in any other manner interfering with property known as L.R No. 1X5/63 (Original No. 1X5/X3/2) located off Banana-Limuru Road, Kiambu County measuring approximately 1.201 HA or 2.968 Acres registered in the Plaintiff/Applicant's name.
 - c. That pending the hearing and determination of this Suit, this Honourable Court be pleased to issue a temporary injunction, restraining the Defendant/Respondent by themselves, their servants or agents or any person claiming under them from transferring, seizing, removing, selling by way of auction, disposing of, alienating, or in any other manner interfering with property known as L.R No. 1X5/63 (Original No. 1X5/X3/2) located off Banana-Limuru



Road, Kiambu County measuring approximately 1.201 HA or 2.968 Acres registered in the Plaintiff/Applicant's name.

2. The application is premised on the grounds that the Respondent has advertised for sale and intends to sell by public auction on 26/6/2024 LR NO. 1X5/63 without notifying the Applicant despite making payments of the loan instalments as they fell due thus clogging the Applicant's right of redemption.
3. John Bosco Mbugua Kimani, swore his affidavit in support of this application. He avers that the Defendant/Respondent herein has advertised for sale and intends to sell by way of public auction on 26th June 2024, property known as L.R. No. 1X5/63 (Original No. 1X5/X3/2), which property is situated off Banana-Limuru Road, Kiambu County measuring approximately 1.201 ha or 2.968 Acres registered in the name of the Applicant. He deponed that, he became aware of the Public Auction on 18th June 2024 because some people, who he later confirmed to be auctioneers sent by the Respondent, came to the farm with instructions to sell the property by way of auction on the basis that he had defaulted on his loan payment. Further, he averred that, the Respondent advanced a loan for the sum of Ksh.50,500,000/= to them in February 2023 and charged the suit property as security. He averred that, he made monthly instalments of Ksh 750,000/- towards the loan and the sum due as of 1st June 2024 was Ksh. 11,250,000/= which was already paid up. The Plaintiff, deponed that he maintained a savings account with the Respondent and authorized the Respondent to deduct the loan repayment from the savings account. He averred that the opening balance of the account was 13,445,845.07 as of 1st January 2023 and the Respondent had deducted a total of Ksh. 11,X39,011 towards loan repayment which amount is sufficient to satisfy the loan repayment amounts as at 1st June 2024. He avers that his total contribution to the loan repayment amount was 13,139,783/- and therefore has no loan arrears by the date of the advertisement for the auction of the suit property. He depones that the Plaintiff's company, fulfilled the loan repayment obligations using funds from other sources. He avers that he disputes the computation of the interests and all payments claimed by the Respondent. He swore that, the Respondent did not issue the Plaintiff's company, with the requisite notices before instructing Expeditious Auctioneers to advertise the property for sale by way of public auction as such has a right to approach this court to safeguard his interests from the looming sale.
4. James Osundwa the Recovery Manager at the Respondent's Sacco filed his replying affidavit dated 26th July, 2024. He deposed that the Applicant operates a Jijenge Savings Account which has accrued savings of Kshs. 13,015,188/= as at January 2023. The Applicant applied for a Jijenge loan of Kshs. 52,000,000/= which was secured by a charge over LR NO. 1X5/63 for Kshs. 60,000,000/=. The Applicant also signed a letter for set off authorising the bank to utilize funds held in any of his accounts towards loan repayment. The Applicant's monthly payments was for Kshs. 918,302.11 which he has never paid as such the loan arrears stands at Kshs. 14,692,833.76 as at June 2024 as such the Respondent decided to realise their security by serving the Applicant with a Statutory Notice dated 25/07/2023 demanding payment within Ninety (90) days and service was effected on 31/7/2023 by way of registered post. He contended that there was no agreement with the Applicant that the monthly instalments were to be deducted from the Jijenge Savings Account and only used the arrears as from August 2023 and as at June 2024 had utilized Kshs. 13,432,893.56. that the Applicant continued to default as such a valuation was conducted by Kenstate Valuers and the property was valued at Kshs. 85,000,000/= with a forced value of Kshs. 63,750,000/=. Expeditious Auctioneers were also instructed to sell the property and on 21/3/2024 they issued a Forty-five (45) day redemption notice served personally on 21/6/2024 as such the Applicant was always aware of the intention to sell hence the sale by public auction was legal. In any case, the Applicant has not made attempts to redeem the property which property he submitted as security while the respondent continues to suffer prejudice as the loan continues to accrue.



5. In his supplementary affidavit dated 19/09/2024, the Applicant contended that the bank disbursed 50 million while his loan was for 52 million. He gave consent to charge LR NO. 1X5/63 (original no. 1X5/X3/2) for advancement of Kshs. 48,000,000. He was advanced Kshs. 1,500,000/= which he has been paying diligently. The Respondent has refused to disburse Kshs. 48,000,000/= despite charging his property hence stalling his construction which will affect future loan repayments. He contended that the Respondent should be compelled to release the remaining loan of Kshs. 48,000,000/=. The Respondent sought to sell LR NO. 1X5/63 instead of LR NO. 1X5/58. That he was to be paying monthly instalments of Kshs. 750,000/= and not Kshs. 891,823.01 as deducted by the Respondent. He contended that he had agreed with the bank that they would utilize the funds held in his savings account. He contested that the valuer entered into his property and that in any case valuation was done on the wrong property which the Forty-Five (45) day notice referred to. He denied having defaulted on the loan repayments.
6. The parties were directed to canvass the application by way of written submissions.

Applicant's Submissions.

7. The Applicant submits that it has a genuine and arguable case predicated by the unlawful conduct of the Respondent as they attempted to unlawfully auction the Applicant's premises without following the required procedure. It was submitted that the Respondent did not issue the required notices before attempting to sell rendering the sale ineffective. Reliance was placed in the case of Albert Mario Cordeiro & another vs Vishram Shamji (2015) eKLR. The Respondent failed to carry out valuation which is a mandatory requirement. The intention by the Respondent to auction the property without issuance of the said notices constitutes an illegality clogging the Applicant's right to redemption. The Applicant avers that there is a likelihood of losing his property and damages may not be sufficient to compensate the Applicant especially where the Respondent's actions amount to an illegality. Reliance was placed in the case of Joseph Siro Mosioma VS Housing Finance Company of Kenya Limited & 3 others (2008) eKLR. The Applicant sought for the balance of convenience to swing in its favour as it has an arguable case as such preserving the property is important so as not to render the suit nugatory. Reliance was placed in the case of Eunice Wangui Kiragu vs Mary Adhera Adhaya (2014) eKLR.

Respondent's Submissions.

8. The Respondent submits that the Applicant has not demonstrated a prima facie case as it has never made a single payment towards the loan and as at June 2024 was in arrears of Kshs. 14,692,833.76. The Applicant was served with the Ninety (90) day statutory notice dated 25/7/2023 and a Forty-Five (45) day redemption notice. Further that the property was valued by Kenstate valuers as such the Respondent has followed the laid down procedure in exercising their power of sale. Reliance was placed in the case of John Nduati Kariuki t/a Johnstar Merchants vs National Bank of Kenya (2006) eKLR. It was submitted that in regard to irreparable harm which the Applicant contends that it will suffer if the property is sold, that the Applicant was well aware of the consequence of default when it offered up the property as security for the loan. Reliance was placed in the case of Andrew Muriuki Wanjohi vs Equity Building Society & 2 others (2006) eKLR. Lastly it was submitted that continued escalation of the loan balance over the years tilts the balance of convenience in favour of the bank.

Issues For Determination.

9. Having considered the application by the Applicant, the replying affidavit and the rival submissions, the main issue arising for determination is whether the Applicant is deserving of the order for temporary injunction sought.



Analysis.

10. The law regarding grant of injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provide as follows:

“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;
- (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 order.”

11. The Applicant sought for a temporary injunction as against the Respondent as it has advertised and intends to sell by way of public auction the suit property herein.

12. The conditions for grant of injunctions are well settled in the case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A 358 where it was held that: -

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. 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 doubt, it will decide an application on the balance of convenience.”

13. The Court of Appeal in the case of *Mrao Ltd vs First American Bank Of Kenya Ltd* (2003) eKLR gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. The Applicant averred that the Respondent has advertised the suit property which it intends to sell without issuing the requisite notices and conducting valuation. It was contended that the same is illegal as it is not in default of the loan having authorised the Sacco to deduct money from a savings account which had Kshs. 13,445,845.07/=. In any case the notices issued and the valuation conducted were for the wrong property.

15. The Respondent contends that the Applicant has never paid any money towards the only repayment and did not authorize it to offset the loan monthly installments from the Applicant’s savings account.

16. The court in the instant application is required to satisfy itself that there is a prima facie case established.



17. In the case of *Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another* (2012) eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively.

18. The court at this stage is not required to determine the merits and demerits of the Applicant’s claim. The court is only required to determine whether the Applicant has established a prima facie case.

19. A perusal of the pleadings by the parties shows that the Applicant has a savings account with the Respondent with an opening balance of Kshs. 13,445,845.07. These amounts the Applicant claims were available to set off the monthly loan repayments as and when they fell due as such it did not have arrears as at the time of the advertisement.

20. The Respondent on the other hand contends that the Applicant did not authorize it to use the funds in the savings account to pay the monthly instalments.

21. Be that as it may, the Respondent in his replying affidavit did in fact claim that it used the said funds from the Applicant’s savings account to set off the arrears.

22. In the circumstances, this court finds that the Applicant has established a prima facie having demonstrated to this court that it has a savings account with the Respondent and the same is available for use to set off the monthly instalments.

23. Further, this court finds that the notices alleged to have been served to the Applicant and the valuation alleged to have been conducted are for LR. No. 1X5/63 while the charged property which has a loan for Kshs. 52 Million was LR. No. 1X5/58 as such whether there is an error made this needs to be ascertained.

24. In the end and bearing the above, this Court finds that the Applicant has established a prima facie case to warrant granting the temporary injunction order sought.

25. With regard to irreparable harm the Applicant argues that there is a likelihood of losing the property and the same cannot be compensated by damages and especially where the Respondent has purportedly committed an illegality. The Respondent avers that the Applicant was aware of the consequences of default when he offered his property as security.

26. The Applicant urges the court to protect the suit property so that the main suit is not rendered nugatory if the Respondent is not restrained from selling the suit property.

27. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR irreparable loss was discussed thus;-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by



which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

28. This Court is of the considered view that there is need to preserve property that is subject to court proceedings so as to protect the court from giving orders in vain upon hearing and determining a suit. Order 40, *Civil Procedure Act* gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on property pending further orders by the court.
29. This court is therefore, is satisfied that the Applicant will suffer irreparable loss that cannot be compensated by way of damages in the event the suit property is sold as he has demonstrated that the renotices as issued are questionable.
30. Further, to the fore going, this court is satisfied that the balance of convenience tilts in favour of the Applicant as it stands to suffer the greater harm if the application is disallowed.
31. Refer to the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR where it was held that:-

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

Findings And Determination.

32. The application is found to be meritorious and is hereby allowed; this court finds that the Applicant has met the conditions for the grant of an injunctive order;
 - a. An interlocutory injunction hereby issues pending the hearing and determination of this Suit, restraining the Defendant/Respondent by themselves, their servants or agents or any person claiming under them from transferring, seizing, removing, selling by way of auction, disposing of, alienating, or in any other manner interfering with property known as L.R No. 1X5/63 (Original No. 1X5/X3/2) located off Banana-Limuru Road, Kiambu County measuring approximately 1.201 HA or 2.968 Acres registered in the Plaintiff/Applicant’s name; on condition that;
 - b. The Applicant shall file into court within seven (7) days a written letter of undertaking for security for costs
 - c. The Respondent shall have the costs of this application.
 - d. Mention on 16/06/2025 before the Deputy Registrar for pre-trial conference.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 16TH DAY OF MAY, 2025.

A. MSHILA

JUDGE

