Carland Limited & 2 others v SBM Bank (K) Limited & another (Miscellaneous Application E032 of 2025) [2025] KEHC 7758 (KLR) (Commercial and Tax) (3 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7758 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E032 OF 2025

JWW MONG'ARE, J

JUNE 3, 2025

BETWEEN

CARLAND LIMITED ..... 1ST APPLICANT

JAMES NJOGU MUNGAI ..... 2ND APPLICANT

STELLA WAMBUI NJOGU ..... 3RD APPLICANT

AND

SBM BANK (K) LIMITED ..... 1ST DEFENDANT

WATTS AUCTIONS ..... 2ND DEFENDANT

RULING

1. What is before this Honourable Court is a Notice of Motion application filed under a Certificate of Urgency and brought under Orders 40 Rule 1, 2, & 3 of the Civil Procedure Rules as read together with Section 1A, 1B and 3A of the *Civil Procedure Act*, Sections 89, 90, 96, 103 and 104 of the *Land Act* seeking the following orders: -

    1. Spent

    2. Spent

    3. Spent

    4. That pending the hearing and determination of this suit herein a temporary injunction be and is hereby issued restraining the defendants either by themselves or through their agents, servants or employees from advertising, selling, disposing off, transferring dealing with and/or dealing with the property known as NAIROBI/BLOCK 113/361.

5. That costs of this application be provided for.

6. That such other order as the court may deem necessary to grant.

2. The application is supported by the grounds set out on its face and the supporting and further affidavits sworn by JAMES NJOGU MUNGAI on 21st January 2025 and 25th February 2025. The application is opposed and the Respondents have filed a replying affidavit sworn by KEVIN KIMANI on 18th February 2025. Both parties have filed written submissions which I have carefully considered.

3. 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 it has 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)

4. 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.

5. A prima facie case flows from what has been pleaded in the plaint. From what is pleaded in the Plaint, the Deponent who is the second Plaintiff in the suit herein admits to also being a director of the 1st Plaintiff alongside the 3rd Defendant. The Plaintiff's admit to having been accorded a bank loan of Kshs.4,000,000/= and an overdraft facility of Kshs.30,000,000/= by the Chase Bank Limited which was later taken over by the 1st Defendant. The Plaintiff's further admit that they indeed offered the suit property Land Reference NAIROBI/BLOCK 113/361 as security for the said borrowings and indeed offered their personal guarantees thereof as additional security to the loan sometimes in the year 2006. They further depone that they serviced the said loan and overdraft facilities during the time when Chase Bank was operational diligently.

6. The Plaintiffs further aver that after the takeover of Chase Bank Limited, there was no communication from the 1st Defendant until the 29th June 2017 when they received a demand from Keysian Auctioneers under the instructions of Chase Bank Limited demanding the sum of Kshs.185,246,180/= with instructions that the suit property was to be sold by public auction if the same was not paid within 45 days. The Plaintiffs further depone that no additional information was provided in form of Bank Statements or accounts to explain how the sum being demanded was arrived. Instead, the Defendants went quiet and only to emerge again on 5th April 2024 with a new demand of Kshs.175,285,124.07/=

7. The Plaintiffs argue that there has been no explanation on how the demanded amount has been arrived at as nothing in form of bank records between Chase Bank Limited and its successor in title and now the 1st Defendant, including statements of account to justify the jump from 34,000,000 to 175,285,24.07 now been demanded arose. They further argue that the requisite Statutory Notices have never been issued to them and therefore this is a violation of their rights under The *Land Act*. They further argue

that this amount demanded violates Section 44A of the *Banking Act* on the induplum rule. They further argue that if the Defendants are not stopped by the court, they stand to suffer irreparable loss incapable of being remedied by an award of damages as the suit property is their source of livelihood.

8. I have seen the response filed by the Defendant and the averments that this matter is res judicata having been litigated in CMCC No. 6217 of 2017. The Defendants argue that the requisite notices were issuing prompting the 3rd Defendant to file the above said suit in the Magistrates Court and the Defendants further argue once Interim Injunction was issued to the parties, no further action was taken until when the Defendants moved the court for the dismissal of the suit for want of prosecution. They posit that this court lacks the requisite jurisdiction to try the present suit as the same is res judicata.

9. Before proceeding to determine whether or not the present application meets the threshold for a grant of Interim Injunction, it is important in line with the holding in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR to address the question of the courts power or jurisdiction to determine the present application and the suit before it. To paraphrase the words of Justice Nyarangi JA(as he then was) , ...

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Defendants have argued that the present application is res judicata. The doctrine of res judicata is found in Section 7 of the *Civil Procedure Act* which provides as follows:-

Section 7 of the *Civil Procedure Act* which provide:-

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

10. The Court of Appeal in Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR espoused the principles of res judicata as follows ...

> "The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

11. Similarly, the Court of Appeal expounded the doctrine of res judicata in the Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR, where it stated as follows.....

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

12. Flowing from the above decisions of the Court of Appeal and the dictates of section 7 of the *Civil Procedure Act*, the court must satisfy itself that the case before it is not res judicata. From the pleadings I note that the Defendants argue that the Plaintiffs moved the Magistrates Court in CMCC No. 6217 of 2017-Stella Wanjiru Njogu vs James Mungai, Chase Bank Limited, Carland Limited and Chase Bank, where the Plaintiff in that suit sought to restrain the Defendants from proceeding with the sale of the suit property and argued that as a registered owner she did not give consent to the Charge by the Defendants.

13. I note from the pleadings that both parties agree that the suit in the Magistrate's Court was dismissed for want of prosecution. I agree with the position taken by the Plaintiffs that a dismissal for want of prosecution is not a determination of the suit on merit. This position was upheld by the court in Munira *v Attorney General (Constitutional Petition No. E007 of 2020*)[202]KEHC 271 where the court stated:-

> " for the basic ingredients of the doctrine of res judicata to apply, three basic conditions must be satisfied. The party relying on it must show; -
>
> (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;
>
> (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit;
>
> (c) that a court competent to try it had heard and finally decided the controversy between the parties."

14. What is clear from the record is that the parties in CMCC No. 6217 of 2017 were Stella Wanjiru Njogu(Plaintiff) who is the 3rd Plaintiff in the present suit and the Defendants included Chase Bank Limited and Keysian Auctioneers who are not parties in the present suit. Both parties confirm that this suit was dismissed by the court for want of prosecution and determined on merit by the court. I agree with the Applicant that the suit herein is between different parties albeit some of the parties were also parties in the previous suit and that a dismissal for want of prosecution is not a determination on merit. I therefore find that the doctrine of res judicata does not apply in the present suit. This therefore means that this court has the requisite jurisdiction to try this case on merit.

15. I now turn to the substantive question on the issue of injunction. I have considered the arguments by the parties. I note that this court is called to determine the three prerequisites set out by the court in Giella (supra) for a grant of an Interim Injunction. While I agree with the Defendants that the Plaintiffs

admit to the existence of a debt between them and the 1st Defendant, I note that what is admitted is the secured loan of Kshs.10,000,000/= as per the charge and the overdraft amount of Kshs.30,000,000/=. It is therefore not clear, how the figure in excess of Kshs 175 Million has been arrived. Looking at the *Banking Act* Section 44A provides as follows:-

> " 44A. Limit on interest recovered on defaulted loans
>
> (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).
>
> (2) The maximum amount referred to in subsection (1) is the sum of the following—
>
> (a) the principal owing when the loan becomes non-performing;
>
> (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
>
> (c) expenses incurred in the recovery of any amounts owed by the debtor.
>
> (3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.
>
> (4) This section shall not apply to limit any interest under a court order accruing after the order is made.
>
> (5) In this section—
>
> (a) "debtor" includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;
>
> (b) "loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and ;
>
> (c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.
>
> (6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

16. The Defendant rightfully argues that an order of injunction cannot be granted solely on the issue of taking accounts between the parties where the debt has been admitted. I have considered that argument in light of the variances of the amount admitted to have been borrowed and the amount now been claimed by the bank. I am satisfied herein that the issue herein is beyond accounts and one that touches on the legal principles set out in Section 44A of the *Banking Act*. I am therefore satisfied that the Plaintiffs have established a prima facie case as envisioned by the court in Mrao(Supra).

17. Turning to the second issue as to whether the Plaintiffs claim is one where damages are a sufficient remedy, I note that the Plaintiffs argue that the suit property is their livelihood and a sell by public auction would occasion them irreparable hard and great financial difficult. The Plaintiffs have argued that once the issue of how much is owing to the Defendants, they are willing to apply the income from the suit premises to offset the same. I therefore agree with the Plaintiffs that allowing the suit property to be a sold for a claim yet to be determined by and between the parties will indeed occasion them irreparable harm.

18. It follows therefore that in deciding where the balance of convenience tilts the court notes that the charge in respect of the suit place remains in place pending the determination of the suit herein. This therefore means that should the court find that the Plaintiff is not deserving the injunctive relief, the Defendants will have an opportunity to realize the security under the charge and the directors' guarantee and therefore will not be prejudiced by the court orders therein.

19. In sum, I am satisfied that the Plaintiffs have established the threshold required for a grant of an Interim Injunction. I therefore allow the application as prayed. Costs are in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JUNE 2025

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Purity Makori for the Plaintiff/ Applicant.

2. Ms. Odhiambo for the Respondent.

3. Amos - Court Assistant