Ajwang t/a Milambo Bajaj Spares & Services v SBM Bank & another (Commercial Case E008 of 2024) [2025] KEHC 10061 (KLR) (Commercial and Tax) (11 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E008 OF 2024

A MABEYA, J

JULY 11, 2025

BETWEEN

VICTOR OYOO AJWANG T/A MILAMBO BAJAJ SPARES & SERVICES ..... APPLICANT

AND

SBM BANK ..... 1ST DEFENDANT

NYALUOYO AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The applicant moved this Court for injunctive orders vide an application dated 7/11/2024. The same was brought under Order 40 Rules 1 and 3, Order 51 Rule 1 of the *Civil Procedure Rules 2010*, sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* and sections 26, 30, 33, 105 of the *Land Registration Act*, 2012.

2. The applicants sought orders to restrain the respondents and their agents from advertising for sale, auctioning, selling, transferring, disposing, dealing with or in any way interfering with the Plaintiff/ Applicant's properties known as Kisumu/Municipality Block 9/129, North Sakwa/Nyawita/6643, North Sakwa/Ajigo/2893, South Sakwa/Barkowino/3277 and South Sakwa/Barkowino/2729 ("the suit properties") pending the hearing and determination of the suit.

3. The application was based on the grounds set out on the face of the Motion and the supporting affidavit of the applicant. These were that; the applicant applied for and obtained various facility from the 1st respondent amounting to Kshs. 32,000,000/- vide a letter of offer dated 31/3/2021 which facility was secured vide a charge over the suit properties dated 14/10/2020.

4. That the applicant diligently and consistently made monthly installments until July 2024 when he defaulted due to business constraints. However, being desirous of continuing to service his facility, he requested the 1st respondent vide a letter dated 21/8/2024 to enable him continue with the payments.

5. That there was no response to the letter and the applicant proceeded to deposit cheques amounting to Kshs. 400,000 in payment of the instalments as per the request for restructure.

6. That on 4/10/2024, the 1st respondent, in purported exercise of its statutory power of sale, caused the Notice of Intention to sell the suit properties to be issued and instructed the 2nd respondent to advertise the suit properties for auction. The auction was to be on 18/11/2024.

7. That no Statutory Notices were served upon him in accordance with the requirements of sections 90 (3) and 96 (2) of the *Land Act* and that there is present risk that the applicant shall suffer irreparable loss and damage if the intended sale is allowed to proceed and the orders sought not granted. He therefore prayed for the injunctive orders aforesaid.

8. The respondents opposed the application vide a replying affidavit sworn on the 22/1/2025 by one Martha Kanyige. It was deposed that the bank issued the applicant with a facility of Kshs. 31,000,000/- vide a letter of offer dated 31/5/2021 which was secured by the suit properties. That the loan advanced was a term loan to clear an existing loan.

9. That subsequently, vide a letter dated 31/8/2022, the applicant requested the bank to restructure the loan which was accepted via a letter dated 7/8/2022. In that letter, the bank agreed to advance the applicant Kshs. 24,689,077/- but the applicant still defaulted in repaying the loan facilities which currently stands at Kshs. 30,454,586.94.

10. That on the 26/2/2024, the bank issued the applicant a 14 days' demand letter informing him that his account was in arrears. Thereafter, it issued a 90 days Statutory Notice dated 22/3/2024 over one of the suit properties Kisumu/Municipality 9/129 to the applicant and his spouse and another 90 days Statutory Notice dated 22/3/2024 over the remaining suit properties.

11. That the applicant ignored, refused and/or neglected to clear the outstanding sum and therefore the bank instructed the 2nd respondent to serve the applicant with the 45 days Redemption Notice dated 4/10/2024 together with Notification of Sale personally and via registered post.

12. That it also instructed Adept Realtors Limited to value the suit properties which it did as detailed in its valuation reports dated 16/10/2024. It was therefore urged that the application be dismissed.

13. I have considered the rival contestations and the submissions on record. This being an application for interlocutory injunction, the same is governed by the well-established principles laid down in the case of *Giella v Casman Brown & Co. Ltd* [1973] 358. These are that; an applicant must establish a prima facie case with a probability of success, must establish that he/she stands to suffer irreparable that cannot be compensated by an award of damages if the injunction is denied and where the court is in doubt, it will determine the matter on a balance of the convenience.

14. In *Otieno v. Premier Bank Kenya Ltd & 2 Others* [2024] KEHC 6832 (KLR) (10 June, 2024) (Ruling), the court quoted with approval the holding in *Dr Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi* (Milimani) HCCC No 360 of 2001, wherein it was held as follows: -

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an

interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

15. The first issue is whether the applicants have established a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, the Court of Appeal defined prima facie as 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 to call for an explanation or rebuttal from the latter. 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.

16. In this case, the applicant has not denied obtaining finance from the 1st respondent. He does not dispute that he is in default. The only reason he advances for the default is that the same was occasioned financial business constraints. He has also denied being served with the requisite statutory notices required by sections 90 (3) and 96 (2) of the *Land Act*.

17. In rebuttal, the respondents described the applicant as a blatant defaulter. That the applicant had been duly served with all the requisite statutory notices.

18. It is a common ground that the applicant obtained financing from the 1st respondent and that he eventually defaulted in payment of the instalments. Equally, evidence on record is that the applicant was duly served with all the Statutory Notices required by law.

19. Section 90(1) of the *Land Act*, 2012 provides that: -

> " If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the Chargee may serve on the Chargor a Notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

20. Section 96(1) of the same *Act* on the other hand provides: -

> " Where a Chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the Chargor under section 90 (1), a Chargee may exercise the power to sell the charged land."

21. In their replying affidavit, the respondents annexed a 14 days' demand letter to the applicant, the two 90 days Statutory Notice dated 22/3/2024 as well as the 45 days Redemption Notice dated 4/10/2024 and Notification for Sale. In those notices, it demanded that the applicant do rectify the default with respect to the outstanding payments but the applicants did not do so.

22. It is trite that parties are bound by their contracts and a Court cannot rewrite the contract for the parties. The Court of Appeal has firmly laid it that parties to contract are bound by the terms and

conditions thereof, and that it is not the business of courts to rewrite such contracts. See *National Bank of Kenya Limited v Pipe Plastic Samkolit* (K) Ltd [2002] 2 EA 503 [2011] eKLR.

23. Further, it is not a ground for an injunction for a borrower to allege that he has suffered financial constraints and that he should be favoured with an injunction when the lander comes calling. The defence against a lender who comes calling is to rectify the default or clear one's outstanding's with the lender.

24. In the present case, it is clear that the applicant is in default. There is clear evidence that he was served with all the requisite notices despite his allegation that he had not been served with the same. When the same were produced in the replying affidavit, there was no answer to the same. The 1st respondent's statutory power of sale has arisen.

25. In this regard, the Court is of the opinion and so holds, that the applicant has not established a facie case with a probability of success. He has failed on the first principle of the *Giella v Cassman Brown* case.

26. The second principle is that an applicant must show that unless an injunction is granted, he may otherwise suffer loss that cannot be compensated by an award of damages. In the present case, the applicant alleges that he stands to suffer irreparable loss if the orders sought are not granted.

27. There is no doubt that once a property has been charged to secure financial accommodation, it ipso facto becomes a commodity for sale once there is default and there is no commodity for sale whose loss cannot be compensated by an award in damages. A Chargor who offers his property as security clearly anticipates the sale of the same in the event that he fails to service the loan.

28. In this regard, the claim that the applicant stands to suffer irreparable loss does not assist in advancing his case. The Court is not satisfied that there is any evidence that the applicant would suffer irreparable loss and damage if the injunction is not granted.

29. On the third limb, the balance of convenience tilts in favor of letting the 1st respondent to recoup its outlay.

30. In view of the foregoing, the Court finds the application dated 7/11/2024 to be without merit and hereby dismisses the same with costs to the respondents.

    It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE