Unispan Limited & 2 others v I&M Bank Limited (Commercial Case E531 of 2023) [2025] KEHC 11046 (KLR) (Commercial and Tax) (25 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11046 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E531 OF 2023

A MABEYA, J

JULY 25, 2025

BETWEEN

UNISPAN LIMITED ..... 1ST PLAINTIFF

RAVINDER SINGH ..... 2ND PLAINTIFF

GURMEET KAUR ..... 3RD PLAINTIFF

AND

I&M BANK LIMITED ..... DEFENDANT

RULING

1. This is a ruling of the plaintiff's Motion on Notice dated 2/11/2023. The same was brought under sections 1A, 1B, 3B & 63 of the *Civil Procedure Act* and Orders 39 and 40 of the *Civil Procedure Rules*.

2. In the Motion, the plaintiffs sought that the defendant and its auctioneers be restrained from selling or auctioning the 2nd and 3rd plaintiffs' properties known as LR no 209/8000/82, Thigiri Close, New Muthaiga Estate, Nairobi and LR no 17/197 (Original Number 17/47(2)), Thigiri Close, New Muthaiga Estate, Nairobi pending the hearing and determination of the suit.

3. The plaintiffs contended that the defendant was the banker of the 1st plaintiff and had granted it financial facility for trading purposes; that the defendant also acquired Giro Commercial Bank ("Giro Bank") Limited which was its previous banker.

4. The 1st plaintiff had acquired a financial facility from Giro Bank which it used to acquire moveable assets valued at over Kshs. 25,000,000/-. That it had fully repaid the said facility prior to Giro Bank's merger with the defendant but that the moveable assets had not been released back to it.

5. It was contended that the 1st plaintiff suffered cash flow constraints and defaulted in payments to the defendant, a fact the defendant was aware of, and in an effort to regularize its account the 1st plaintiff decided to dispose off its assets which it had no indebtedness and thereafter restructure the facility. However, that the defendant had refused to release its assets by notifying the NTSA that it no longer had any interest in the machinery and graders whereby the defendant continued to clog the 1st plaintiff's equity of redemption.

6. The plaintiffs contended that the defendant's aforesaid action was wrongful and unconscionable as it continued to impose penalty interest and charges on the account while on the other hand it had declined and frustrated the 1st plaintiff's efforts to regularize the account. That in the negotiations held on 7/10/2023, the defendant agreed to a waiver of substantial part of interest if the plaintiffs paid Kshs. 4,000,000/-, which the plaintiffs did. However, the defendant reneged on the agreement and caused to be advertised the plaintiffs two immovable properties for auction on 7/11/2023.

7. It was further contended that the plaintiffs managed to procure a buyer for one excavator for Kshs. 10,000,000/- which sale the defendant blocked. That the 2nd and 3rd plaintiffs' properties were cumulatively valued at an amount in excess of just about three times the amount claimed by the defendant and are occupied by the 2nd and 3rd plaintiffs' sons as their family residences.

8. In conclusion, it was contended that no notification had been given to either of the sons of the 2nd and 3rd plaintiffs' as per the provisions of section 96 (1) of the *Land Act* 2012 and that no current valuation of the suit properties had been carried out or availed to them contrary to the provisions of section 97 (2) of the *Land Act*.

9. In opposition, the defendant filed grounds of opposition dated 15/11/2023 as well as a replying affidavit of Andrew Muchina sworn on 1/7/2024.

10. It was deposed that the defendant had a banker-customer relationship with the 1st plaintiff as from 2015. As a result, the 1st plaintiff held several accounts with the bank through which the latter offered various credit facilities for which it was provided with various securities.

11. That by a legal charge dated 27/10/2015 and 28/10/2015 by which the 2nd and 3rd plaintiffs were chargors, the 1st plaintiff obtained a facility of Kshs. 3 million secured by LR no 209/8000/82. On 30/11/2016 a further charge over the same property for a further advance of Kshs. 12,500,000/- was executed. On 27/3/2019, a further advance of Kshs. 55,000,000/- was made and was secured by a legal charge over LR no 17/197. By 25/5/2022, the 1st plaintiff was indebted to the defendant for the aggregate sum of Kshs. 92,821,347.35.

12. It was deposed that the 1st plaintiff acquired movable assets, in particular motor vehicles, through credit facilities granted by Giro Bank. That all securities held by Giro Bank in relation to these credit facilities were released to the 1st plaintiff by a letter dated 19/2/2015 before Giro Bank was acquired by the defendant. That what remained was the removal of Giro Bank's name from the logbooks and that the plaintiffs were yet to prompt the defendant on TIMS to effect that removal. Thus, the allegation that the defendant had refused to release the moveable assets was untrue.

13. It was deposed that following the 1st plaintiff's default, the defendant issued several demands to the 1st plaintiff culminating in a 14 days' demand notice dated 18/11/2022. That after the 1st plaintiff failed to comply, the defendant issued a 90 days statutory demand notice dated 18/1/2023 in respect of the charges over the suit properties which notice was served by email on 24/1/2023.

14. That the 1st plaintiff failed to comply with the 90 days' notice whereby, the defendant served a 40 days' notice of sale of the charged properties dated 6/5/2023. That further, both notices were served upon the occupiers of the suit properties.

15. That on 20/6/2023, the 1st plaintiff made an offer to pay the defendant Kshs. 70 million in full and final settlement of the outstanding and requested for recovery to be held for 21 days. The same was to be obtained from the sale of LR no 17/197. However, the 21 days passed and no sale agreement was submitted which prompted the defendant to instruct Josrick Merchant Auctioneers who issued a 45 days' redemption notice dated 23/8/2023 and subsequently, a notification of sale. Both notices were served by registered post and personally on the 2nd and 3rd plaintiffs on 24/8/2023.

16. The defendant deposed that despite several offers to settle the debt, the 1st plaintiff has only deposited Kshs. 4,000,000/- on 9/10/2023. That even when the parties agreed to have the plaintiffs sell two motor vehicles and have the purchase price deposited in the defendant's account in part repayment of the debt, the plaintiffs failed to deposit the recovered purchase price as agreed.

17. That plaintiffs had failed to disclose material information and to produce relevant evidence including statutory notices served upon them and deliberately misled the Court. They thus did not approach the Court with clean hands and ought not to be granted any equitable relief.

18. That the application was an abuse of the court process and was intended to impede or delay the lawful exercise of the defendant's power of sale. That there was no prima facie case and the plaintiffs will not suffer any loss that cannot be compensated by an award of damages. That the balance of convenience tilted in favour of allowing the defendant to proceed with its exercise of the power of sale.

19. I have considered the respective contestations, the submissions on record and the authorities cited.

20. This is an application for an interlocutory injunction. The applicable principles were settled in the case of *Giella v Casman Brown & Co. Ltd* [1973] 358. These are that; an applicant must establish a prima facie case with probabilities of success, must establish that he/she stands to suffer a loss irreparable by an award of damages if the injunction is denied and where the court is in doubt, a balance of the convenience as between the parties to apply.

21. In the case of *Salford Investment Limited v Nairobi City Water & Sewerage Co. Ltd* [2021] eKLR, the court quoted the case of *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC no 1234 of 2002 where the court reiterated the said principles as follows: -

    a. a prima facie case with a probability of success at the trial;

    b. if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;

    c. the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;

    d. the conduct of the applicant meets the approval of the Court of equity.

22. At the interlocutory stage, the Court is not to decide definitively the various contestations put forward by the parties. The remedy is to decline to exercise its discretion where it is established that the person seeking relief has committed an act which does not satisfy the approval of a Court of Justice.

23. 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 held thus: -

> "In civil cases a prima facie case 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 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."

24. In the present case, there was no dispute that the plaintiffs were in default of their financial obligations to the defendant. However, they contended that they were never served with the requisite statutory notices, that the properties which were of far much great value had not been valued as required by law and that the defendant had refused to release some free moveable properties for sale in order to redeem the securities. Simply put, that the plaintiffs' equity of redemption was being wrongfully impeded by the defendant.

25. On the various statutory notices, not only did the defendant swear that it had issued them, it produced all of them and offered an explanation on how they each had been served upon the plaintiffs and the occupants of the charged securities. There was no further affidavit on the part of the plaintiffs to deny or challenge the defendant's averments as to the issuance and service of those notices.

26. Having considered the record in its entirety, this Court finds that there was ample evidence that on numerous occasions, the plaintiffs were reminded of their default and asked to remedy the same, that the requisite statutory notices were served by the defendant and the auctioneers on the plaintiffs. It is also clear that after such service, the parties entered into negotiations for sale of some assets with the understanding that the resultant funds would be deposited in the defendant's account. This never happened.

27. In the premises, the Court finds that the bank had complied with sections 90(1) and 96(1) of the *Land Act* 2012. The exercise of the statutory power of sale had arisen. The plaintiffs therefore failed to establish a prima facie case with probability of success.

28. The second issue is whether the plaintiffs would suffer irreparable damage if the injunction is not granted. Time and again, courts have pronounced themselves that once a property has been charged to secure financial accommodation, it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated by an award in damages.

29. A Chargor who offers his property as security for financial accommodation, also clearly anticipates the sale of the property in the event that he fails to service the loan. The contract between the Chargor and the Chargee is that, in consideration of extending the subject financial accommodation, the Chargor offers his/her/it's property as security therefore. The parties contract that, in the event the Chargor is not able to repay the finances, the Chargee is at liberty to resort to that security to recover its/his outlay.

30. In this regard, the claim that the 2nd and 3rd plaintiffs would lose their residential homes and will be rendered destitute does not displace the fact that, the said properties had been offered as security. Of course, the properties may of a value that far much exceed half of what the bank is claiming. If one of them is disposed and the outstanding sum recovered, there would arise no reason to sell the latter property.

31. Of course, it is not expected in such circumstances that the bank would put up all the securities up for sale. That would be bad faith and would invite a claim for exemplary damages and not a claim for normal damages. It is not expected or foreseeable that, a borrower does put up his/her valuable properties as security so that the Lender dispose them for a song at the time of reckoning. The Lender owes the Chargor a duty of care to that end.

32. As a result of the above findings, this court's humble view is that the plaintiffs have failed to establish a prima facie case with a probability of success and that they would not suffer irreparable damages that would not be compensated by way of damages if the injunction is not granted and they are found to have been right.

33. In any event, the balance of convenience tilts in favour of the defendant to recoup its outlay.

34. Accordingly, I find that the application dated 2/11/2023 lacks merit and the same is for dismissal with costs as it is hereby so ordered.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE