



**Bayside Limited v DIB Bank Kenya Ltd (Commercial Case E483 of 2023)
[2024] KEHC 125 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E483 OF 2023
JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

BAYSIDE LIMITED PLAINTIFF

AND

DIB BANK KENYA LTD DEFENDANT

RULING

1. Pursuant to Order 40 of the *Civil Procedures Rules*, 2010 and Section 1A, 1B and 3A of the *Civil Procedure Act*, 2010, the Plaintiff filed this application seeking a temporary order of injunction to restrain the Respondents and/or their respective agents from interfering in any way with property known as Land Reference Number 1/761 (original number 1/560/3) Nairobi (the suit property) or in any way interfering with the quiet possession by the Plaintiff of the said property.
2. In the alternative and without prejudice to the foregoing, the Plaintiff sought an order to maintain status quo in terms of possession and use, over the suit property.
3. The application is premised on grounds that the Plaintiff obtained a facility from the Defendant for Kshs.150,000,000/= (the facility) in 2019 which was secured by a first legal charge dated 8th July 2019 over the suit property registered in the name of the Plaintiff and the joint, several and personal guarantees issued by the directors of the Plaintiff.
4. The Plaintiff did not immediately commence the repayment of the loan facility and the same fell into arrears which led the Defendant to serve upon it a statutory notice on 26th May 2023 demanding payment of the outstanding amount of Kshs.171,695,958.54/=.



5. The Plaintiff averred there were various negotiations that ensued between the parties with the Respondent acquiescing to its payment plan dated 27th July 2023 which proposed monthly payments of Kshs.10,000,000/= up to December 2024; that however, contrary to its previous representation, the Respondent issued the Applicant with an illegal 40-day Notice of Intention to Sell dated 14th September 2023.
6. The Plaintiff is thus apprehensive that the Respondent will be moving with speed to actualize their illegal conduct by selling the suit property.
7. The Plaintiff asserted that the construction project which the facility was granted for would upon completion be valued at Kshs.2,227,500,000/- therefore the Applicant thus stands to suffer irreparable harm should the orders sought not be granted.
8. In opposition to the application, the Respondent filed a replying affidavit sworn on 26th October 2023 by Benson Wakaba its Head of Risk and Compliance. In the said replying affidavit, the Respondent averred that the Plaintiff defaulted on the facility soon after it was disbursed to it and despite the indulgence given by the Bank, the Plaintiff did not regularize the loan and by a letter dated 8th September 2022, the bank demanded Kshs.171,695,958.54/= from the Plaintiff.
9. The Respondent contended that it proceeded to issue a statutory demand on 26th May 2023 and upon receipt of it, the Plaintiff's directors requested for additional time however the Bank did not agree to any of the proposals. Instead, on 14th September 2023, the bank's lawyers issued a second statutory demand for Kshs.171,695,958.54/= and the Plaintiff's directors once again sought the indulgence of the Defendant and the Bank offered a payment plan on the outstanding amount.
10. That the Plaintiff offered a counter proposal but before it could be considered by the Bank, the Plaintiff proceeded to file the present suit. That in view of the persistent default of the facility, the Plaintiff's account now attracts default damages of 5% per annum payable under the provisions of the Charge.
11. The Respondent argues that the Plaintiff is undeserving of equitable relief for withholding material information to this court of the existence of the case HCC No.313 of 2023 which is a suit filed by third party purchasers of the suit property who are alleging fraud against the Plaintiff for secretly charging the suit property to the Bank without disclosing the interest of the 3rd parties.
12. In its response to the Defendant's replying affidavit the Plaintiff filed a supplementary affidavit sworn on 9/11/2023 sworn by Fathudin Ali Mohammed, a director of the Plaintiff. The Plaintiff stated that it had proceeded in good faith in settling the outstanding loan by paying a substantive payments towards redeeming the loan during the pendency of this suit and by 30th October 2023 had reduced the loan from the sum demanded of Kshs.171,695,958.54/= to Kshs.129,999,000.54/= . That the Plaintiff was desirous of repaying the loan and further by making a counter proposal to settle the arrears by April 2024.
13. The Plaintiff asserted that the pleadings in HCC E313 of 2023 Anthony Oluoch & another v.DIB Bank Kenya Ltd & Others were unrelated to the suit herein and thus the non-disclosure of the same is immaterial.

Analysis and Determination

14. I have carefully considered the Application as filed by the Plaintiff and the grounds therein and the supporting affidavit and supplementary affidavits thereto. I have equally considered the grounds of



opposition and the replying affidavit sworn in opposition thereto by the Defendant. I note that the principal orders being sought are orders of injunction stopping the Defendant herein from exercising their statutory power of sale pursuant to their statutory power of sale granted to them by the instrument of charge between the Plaintiff and the respondent. This is an injunction application. This Court therefore needs to consider whether the Plaintiff has met the threshold to warrant this court to interfere with the Respondents rights under the Charge to exercise its statutory power of sale by allowing the application for injunction.

15. In the Locus Classica case of *Giella v Cassman Brown Company limited*, (1973) E.A at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited v. Jan Bode Nielsen & 2 others*, (2014) eKLR, the court stated that “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.”

16. I have considered the facts of this case and in order for a grant of an order of injunction to issue, the facts of this case must be put through the three-step test set out above. The first step is to establish whether a prima facie case has been established. In the case of *Mrao Limited vs. First American Bank & 2 others* (2003) eKLR, Justice Bosire observed as follows:-

“So what is a prima facie case? I would say in Civil cases, it is a case which on 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 a rebuttal from the latter... The evidence must be that of an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly the standard, which is higher than an arguable case.”

17. The Plaintiff in its submissions has given an elaborate background and provided all the necessary documentation to show that it has an equitable and legal right worth protection. That it has shown that it has a prima facie case with a probability of success since it raises major issues.

18. It is not disputed that the Plaintiff was advanced a loan of Kshs facility of Kshs.150,000,000/= by the Defendant as per the offer letter dated 13th May 2019. This facility was to partly finance the Plaintiff’s construction of a fifteen floor office block complex on the suit property and the same was secured by a 1st legal charge dated 8th July 2019 on the suit property which is registered in the Plaintiff’s name, being Land Reference Number 1/761.

19. It is also not in dispute that the Plaintiff defaulted in the payment of the facility due to various reasons highlighted in its supporting affidavit. The record shows that the Plaintiff acknowledged being indebted but went ahead to make proposals of how it intended to repay the loan. While the Defendant appeared to have accepted the proposal, the Defendant commenced the exercise of its statutory power of sale by issuing the statutory notices under the *Land Act* through its lawyers. This was despite the fact the Defendant although initially in default, had commenced payments of the proposed Kshs.10,000,000/= monthly. Fearful of losing both its money and property, the Plaintiff moved to this court with the current application to stop the intended exercise by the Defendant of the Sale of the Charged property. To date, the Plaintiff has been able to reduce the outstanding loan from a sum of Kshs.171,695,958.54/= to Kshs.129,999,000.54/=. The Plaintiff proposes to redeem the loan in its entirety by April 2024, which proposal the Defendant has not yet accepted. Arising from the above set



of facts, I am satisfied that the Plaintiff has established that it has a prima facie case with a likelihood of success.

20. The second parameter the court needs to consider before granting an order for injunction is whether the Plaintiff stands to suffer irreparable loss if the order is not granted. In *JM v. SMK & 4 others (2022)* eKLR, Justice Odunga defined irreparable loss as follows:-

“The equitable remedy of temporary injunction is issued 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 mount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never adequately remedy”.

In the matter before me the Plaintiff has placed material before this court to demonstrate that despite not commencing payment of the loan it has all the intention to repay the loan. The Plaintiff argues that it rescued the loan by Kshs.50,000,000/- from the time the first demand was made with some of the payments being done during the pendency of this suit. While a Chargee has every right to exercise its statutory power of sale under a charge, where there is default, it is only prudent for a court to allow a party who has demonstrated willingness to meet its obligations without interference. The Plaintiff having commenced the repayment of the loan stands to suffer irreparably if the Injunction is not granted as it will lose both the money so far paid towards redeeming the loan and its secured property upon which it has invested enormous funds to develop. I am therefore satisfied that to deny the Applicant the Orders of injunction will greatly prejudice him and as stated by Justice Odunga in the case cited above, damages will not be sufficient as the Plaintiff will have suffered a double loss of both its property and the money so far paid to the Defendant. To my mind, the Plaintiff has demonstrated that it has met the second principle in the Giella case(Supra).

21. The Court have established that the Application by the Plaintiff has satisfied the first two principles for a grant of injunction is expected to “allay any doubts as to (b) by showing that the balance of convenience is in his favour.” I am persuaded that the balance of convenience tilts in favour of the Plaintiff since the Defendant, holding a valid legal Charge over the suit property being Land reference no. 1/761(original Number 1/560/3), will suffer no prejudice if the Plaintiff defaults in the repayment of the loan balance, it retains the power to sell the property in exercise its statutory power of sale.
22. In conclusion therefore, I find and hold that the application herein has merit and I shall allow it with in the following terms:-
- a. That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Defendant/respondent, their respective agents, servants, employees, assigns and/or personal representatives from or in way harassing, evicting the applicant, encroaching into, selling, auctioning, transferring, or alienating over all that property known as Land Reference Number 1/761(Original number 1/560/3) Nairobi or in any way dealing with or interfering with the quiet possession and enjoyment by the Applicant of the said property.
 - b. That the above order shall be in force for a period of twelve (12) Months from the date hereof. Thereafter, if the Applicant has not fully regularized the loan or repaid it in totality, the Defendant shall be at liberty to take the necessary action and pursue the enforcement of its rights under the charge in exercise of its statutory power of sale.
 - c. Costs follow the event. However, despite the Applicant being successful in the application herein, the facts demonstrate that the current state of affairs was occasioned by its initial delay



in meeting its obligations in the first place and is therefore undeserving of an award of costs.
Each party will therefore bear their own costs.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JANUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Maranga holding brief for Mr. Amin for the Plaintiff/Applicant.

Mr. Awuor Thatcher for the Defendant/Respondent.

AMOS - COURT ASSISTANT

