



Jacob Muting’A Kioko & others t/a Kauti Academy v Equity Bank Kenya Limited & 2 others (Civil Suit E14 of 2021) [2024] KEHC 441 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEHC 441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E14 OF 2021
SN MUTUKU, J
JANUARY 18, 2024**

BETWEEN

JACOB MUTING’A KIOKO & OTHERS T/A KAUTI ACADEMY ... APPLICANT

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

**GEORGE NJOROGI MWITURI T/A PHILIPS INTERNATIONAL
AUCTIONEERS 2ND RESPONDENT**

**KELVIN NJUIRI MWAURA T/A KENTRACK AUCTIONEERS 3RD
RESPONDENT**

RULING

1. This Ruling relates to a Notice of Motion application dated 30th August 2023. The application is based on various provisions of the law as shown on the face of it. The application seeks the following prayers:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application, the Respondents by themselves, agents, servants, and/or anyone acting on their behalf be restrained from attaching, selling, leasing, transferring or in any manner dealing with the Applicant’s properties.
 - d. That for avoidance of doubt, status quo be maintained pending the hearing and determination of this application.
 - e. That pending the hearing and determination of this suit, the Respondents by themselves, agents, servants, and/or anyone acting on their behalf be restrained from attaching, selling, leasing, transferring or in any manner dealing with the Applicant’s properties.



- f. That the Officer Commanding Kitengela Police Station be directed to oversee and or assist in the implementation of orders herein, if granted.
 - g. That costs of this Application be provided for.
2. The application is supported by the grounds that the 1st Respondent has illegally and irregularly threatened to attach and or cart away the belongings of the Applicant in the pretext of an existing loan between the parties which loan is not in arrears; that the 1st Respondent has engaged the 2nd Respondent who is in possession the Applicant's school bus registration number KBY 565K, which attachment has negatively affected the Applicant's business and infringed on the rights of the children to education; that the Applicant has hired the services of the 3rd Respondent to attach and sell by auction the Applicant's school which sale has been advertised vide the Nation Newspaper for Monday 28th August 2023; that the sale will be irregular and will affect the rights of the Applicant and the learners in the school.
 3. It is stated, further, that the sale is based on estimates as the property has not been valued; that the alleged debt, the basis of which the intended sale is based is highly contested and is the subject of this suit and that if the sale proceeds, it will render this suit an academic exercise; that without prejudice, the contested debt can easily be settled through the sale of the bus in possession of the 2nd Respondent and that the Applicant will suffer irreparable damage if the prayers sought are not granted.
 4. The application is opposed by the 1st Respondent through a Replying Affidavit sworn by Samuel Wamaitha, the Assistant Manager, Legal Services of the 1st Respondent on 17th November 2023. It is deposed that the Applicant applied for a loan with the 1st Respondent initially in the sum of Kshs 18,130,000 which was later varied on several occasions at the request of the Applicant and acceptance by the 1st Respondent. That the Applicant offered parcels numbers Kajiado/Kitengela/6930, Kajiado/Kaputiei-North/54501 and 54502 as security with charges being registered against these properties. That the Applicant further offered as securities motor vehicles registration numbers KCD 102Q, KBY 565K and KAU 671A.
 5. It is deposed that the Applicant defaulted in repaying the loans necessitating the 1st Respondent to seek to enforce its statutory power of sale over the charged properties, but the Applicant sought court orders to restrain the 1st Respondent which orders were not granted through a ruling delivered on 22nd June 2023 for reasons that the Applicant has failed to prove any payment of the loan. That the Applicant is using court process to assist him in not repaying the loan while continuing to operate his business and repeating profits.
 6. It is deposed that the Applicant has not made any loan repayments in the recent past and therefore its allegation that it is able and willing to pay the loan is an attempt to hoodwink the court into granting the application. That the Applicant had ample time to repay the loan but has failed to do so and therefore it is in the best interest of justice that the 1st Respondent should be allowed to recover the outstanding amounts since its right of sale has crystallized and that the loan amount continues to accrue interest and penalties.

Submissions

7. This court directed parties on 5th October 2023 to file submissions to this application and allocated 14 days each to file and serve written submissions. I placed the matter for mention on 23rd November 2023 to confirm filing of submissions and to give a ruling date. On that date (5th October 2023) only Mr. Odhiambo was present for the Applicant. Mr. Chege for the 1st Respondent was absent. On



- 23rd November 2023, Mr. Chege for the 1st Respondent was present but not Mr. Odhiambo for the Applicant. I noted that none of the parties had files submissions as directed. I fixed the ruling date for 18th January 2024 and directed that parties should place the submissions on the court file.
8. At the time of writing this ruling, last days of December 2023, the only submissions in the court file are those by the 1st Respondent. The Applicant has not placed its submissions in the court file.
 9. The 1st Respondent in its submissions dated 21st November 2023 has submitted that the Applicant has not demonstrated any prima facie case with a probability of success as defined in the case of *Mr Rao Ltd v First American Bank of Kenya Ltd* (2003) eKLR and *Nguruman Limited v. Jan Bonde Nielsen & 2 others* CA No. 77 of 2012. It was submitted that the Applicant has made several unsubstantiated claims regarding the proposed loan and has not supported those claims with any proof; that the Applicant has admitted applying for loan and receiving proceeds, but it has not shown any proof of repayment of the loan on the due date or at all.
 10. It is submitted that the mere allegation or claim of gross undervaluation cannot persuade the court to grant an injunctive order as was held in *Zum Investment Ltd v Habib Bank Ltd* (2014) eKLR where the court stated that:

“.....it is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”
 11. It is submitted that it is not in dispute that the Applicant applied for a loan facility and offered their properties as security for the loans taken and therefore the Applicant cannot go back and purport to seek orders to stop the sale of the same properties; that the application has no probability of success and that it does not meet the threshold of granting of an injunction and ought to be dismissed with costs.

Determination

12. To put the determination of this application into perspective, it is important to give the background of this matter. A Plaintiff was filed in this matter on the 25th June 2021. Contemporaneously, the Applicant filed Notice of Motion dated June 22, 2021 seeking injunctive orders against the 1st and 2nd Respondents to restrain them from selling two school buses registration numbers KBR 976Z and KCD 102Q pending the hearing and determination of that application and the main suit.
13. That application was heard and dismissed by this court for reasons advanced in the ruling delivered on 22nd June 2022, and mainly because that application did not meet the threshold for grant of an injunction. Before that application was determined, parties took time, from 18th October 2021 when I took over the conduct of this matter to 9th May 2022 when the said application was canvassed orally due to parties' intention to negotiate the matter, which negotiations failed.
14. Soon after delivering that ruling on 22nd June 2022, the Applicants filed Notice of Motion dated 12th July 2022 seeking mainly to stay any attachment of the school property pending the hearing of the suit. This application was filed under certificate of urgency. I directed that the same be served on the Respondents and parties to appear before me on the 21st July 2022 for directions on that application. There was no appearance on 21st July 2022. I directed that parties be notified of the new date, being 6th October 2022. The parties did not attend court on 6th October 2022. Again, I fixed another mention date for mention, being 14th February 2023 and directed that the parties be served. Given the nature



of the application and the manner in which the Applicant approached the court through a certificate of urgency, it was expected that the Applicant would be vigilant to follow up with the court on that pending application and the main suit. But this was not the case.

15. On 6th February 2023, and before 14th February 2023, the Applicant filed another application dated 24th January 2023 and filed on 30th January 2023. That application majorly sought injunctive orders against the Respondents from, inter alia, attaching and selling the Applicants properties pending hearing and determination of the application and suit. I directed the Applicant to serve the application and parties to attend court on 16th March 2023 for directions. I also cautioned that directions of the court in respect to the application dated 12th July 2022 had not been complied with and that the parties did not attend court as directed by the court.
16. On 16th March 2023, I was not sitting due to a medical procedure I was undergoing. The matter was placed for mention before me on 11th December 2023. In the meantime, on 4th September 2023 during High Court Vacation, the Applicant filed the current application before the vacation duty judge. The application sought leave to be admitted during court vacation and certification that it was urgent among the prayers I have indicated above in this ruling. The application was certified urgent and was admitted for a hearing during High Court Vacation. The court granted stay of the sale of school bus number KBY 565K for 21 days.
17. The vacation duty judge ordered that the matter should be mentioned on 25th September 2023 before the judge in Kitui. On 5th September 2023, the matter was mentioned again before the same judge who varied his earlier orders to have the matter mentioned in Kitui and directed instead that the matter be mentioned in Kajiado High Court. The matter was placed before me on the 25th September 2023 and proceeded as shown in this ruling.
18. I have indicated that the Applicant has not filed submissions as at the time of writing this ruling, as stated elsewhere in this ruling. This application is not prosecuted by the Applicant who has failed to argue the same.
19. I have enumerated the pending applications in this matter, all brought by the Applicant. All these applications are similar in nature. They seek to stop the 1st Respondent from attaching the properties held by the Applicant and selling the same to recover the loan advanced to the Applicant. The Applicant has defaulted in servicing the loan facility and the 1st Respondent is trying to recover the monies loaned to the Applicant by exercising the statutory power of sale. I have not found grounds to the effect that the circumstances obtaining in respect of this matter have changed from what they were when this court pronounced itself on this issue in the ruling delivered on 22nd July 2022.
20. The record of the court shows two other pending applications pending with no indication of when the Applicant plans to prosecute them given the history of this case as shown in this ruling. I cannot help but think that the Applicant is abusing the process of this court. After this court delivered its ruling on 22nd June 2022, the Applicant ought to have taken steps to repay the loan. If the Applicant has done so, there is no evidence that he has done so.
21. For the reasons that the Applicant has failed to adduce evidence to demonstrate that they deserve the orders sought, this court will not hesitate to make a finding, which I hereby do, that the Applicant is abusing the process of this court. Consequently, the Notice of Motion dated 30th August 2023 is hereby dismissed with costs to the 1st Respondent.
22. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JANUARY 2024.



S. N. MUTUKU
JUDGE

