



**Furnicon Limited v Middle East Bank Kenya Limited (Civil Case E382 of 2022)
[2024] KEHC 1499 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E382 OF 2022
JWW MONG'ARE, J
FEBRUARY 19, 2024**

BETWEEN

FURNICON LIMITED PLAINTIFF

AND

MIDDLE EAST BANK KENYA LIMITED DEFENDANT

RULING

1. By this ruling this Honourable Court shall determine the various application filed by the Plaintiff against the Defendant herein. The present suit was filed on 3rd October 2022. Subsequently on 22nd November 2022 the Defendant filed its defence. On 5th December 2022, the first application by the Plaintiff was filed. In the said application the Plaintiff sought the following orders:-
 1. Spent
 2. That pending the hearing of this application inter-partes, an Injunction do issue restraining the Defendant, by itself, its servants, auctioneers, receivers agents, or advocates or any of them, specifically Garam Investments Auctioneers from further advertising for public auction or offering for sale by public auction, or purporting to sell by public auction or offering for sale by any other manner, the Plaintiff's parcel of land being Land Reference Number 15941(I.R.No. 65593) located within Kasarani Subcounty, Nairobi County.
 3. That pending the hearing and final determination of this suit, an Injunction do issue restraining the Defendant, by itself, its servants, auctioneers, receivers agents, or advocates or any of them, specifically Garam Investments Auctioneers from further advertising for public auction or offering for sale by public auction, or purporting to sell by public auction or offering for sale by any other manner, the Plaintiff's parcel of land being Land Reference Number 15941(I.R.No. 65593) located within Kasarani Subcounty, Nairobi County.



4. That pending the hearing and final determination of this Application and/or suit, the Defendant be compelled to provide a current loan statement for the facilities to inform a court mandated independent audit and determination of the Plaintiff's true level of indebtedness by an Auditor jointly appointed by the Parties or the Honourable Court.
 5. That pending the hearing and final determination of this Application and/ or suit, a court mandated independent valuation of the suit property be conducted by a registered valuer jointly appointed by the parties or the Honourable Court.
 6. That the costs of this Application be provided for.
2. The application was supported by the grounds set on its face and the supporting affidavit of Mr. Solomon Kiore sworn on 5th December 2022. The Defendant upon been served with the Application filed 10 grounds of opposition dated 13th December 2023. The Defendant also filed a Replying affidavit sworn on 24th May 2023 by Elizabeth Ong'are, its credit manager. The grounds of opposition were as follows:-
- i. This Honourable Court does not have any jurisdiction to hear and determine the Plaintiff's purported claim made in the plaint:
 1. For an injunction restraining the Defendant from exercising its power of sale pursuant to a charge in its favour dated 23rd July 2015 over Land Reference number 15941;
 2. Nor the claim seeking a declaration in respect of its powers under the said charge;
 3. Nor to order the Defendant to discharge the charge
 - ii. Under the provisions of the Article 162(2)(b) and (c) and (3) of the Constitution, section 13(2) of the Environment and Land Court, Section 101 of the Land Registration Act, and Section 150 of the Land Act, the Environment and Land Court has the sole and exclusive jurisdiction to hear and determine the claim.
 - iii. Alternatively, the Plaintiff has made against the Defendant, the same claim for an injunction, and the same claim for alleged damages for negligence, in a previously instituted case in the Environment & Land Court being No. E310 of 2022. The said case is pending hearing, and hence this suit and the application for injunction, should be stayed under Section 6 of the Civil Procedure Act, or principles of lis pendes, until the hearing and determination of ELC E310 of 2022.
 - iv. The only complaints in the Plaint for issue of an injunction are in paragraph 13 thereof to the effect that the Defendant has issued a statutory notice knowing the Plaintiff has a claim for damages for negligence against the Defendant which also wants to sale the Plaintiff's property worth KES 120 million to recover a debt of KES 7 million.
 - v. The grounds now relied upon in the said application for grant of an injunction, and the other orders sought therein are completely at variance with these "claims" made in the plaint to it;
 - vi. Under section 99(4) of the Land Act, the Plaintiff's remedy for its alleged complaints is to claim damages against the Defendant.



- vii. This Honourable Court does not have any jurisdiction to make either of the orders sought in paragraphs 2,3,4 and 5 of the said application.
 - viii. Rule 15(d) of the Auctioneer’s Rule, is in any event, null and void, being a clog on the Defendant’s right to exercise its power of sale in accordance with section 97 of the Land Act.
 - ix. The temporary injunction has been obtained by advancing false and fraudulent contentions, and is based on perjured evidence, and;
 - x. The Facts contained in the affidavit herein of Elizabeth O’ngare filed in opposition to the application for an injunction and other remedies therein specified.
3. On 5th December 2022, this Honourable Court granted temporary relief by allowing in the interim the orders sought under prayer 2 of the application. Subsequently and on 25th January 2023, the Applicant filed yet another application against the Defendant seeking among others orders for extension of the interim injunctive orders of 5th December 2022 and an order to compel the Defendant to provide a detailed statement to allow the Kenya Commercial Bank take over the entire loan facility.
 4. Again, on the 5th of June 2023, the Applicant filed yet another application seeking among other orders to have the Defendant lift the negative Credit Reference Bureaus to enable the takeover of the Loan facility by another financial institution. The Defendant did not file any responses to the two applications but was always in court when the matter came up for hearing and/ or directions. On several occasions when the matter was listed, the Applicant sought for time to negotiate the matter with the Defendant and/or obtain a different institution to take over the loan. In the end, the matter was not settled and parties were directed to file their submissions to have the court consider the various applications in the matter.

Analysis and Determination

5. Although there are three substantive applications filed by the Plaintiff in this matter between December 2022 and June 2023, a perusal of the pleadings brings out only two issues for determination; to wit, “whether the Plaintiff/ applicant has satisfied the criteria set out in the locus classica case of *Giella vs. Casman Brown* (1973) EA 358 on grant of orders of injunction.” The Defendant, also raised in its grounds of opposition that the court lacked the necessary jurisdiction to hear and determine the suit and the Application by virtue of Article 162 of the Constitution that has reserved jurisdiction to matters relating to land disputes to the specialised court of equal status, being the Land and Environment Court.
6. The Court will therefore seek to determine the issue on jurisdiction first before moving to consider the arguments as to whether the applicant is deserving of an order of injunction as prayed for in the first application filed herein.
7. Justice Madan in the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989): “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”. It is therefore paramount for this court to determine if it is clothed with the requisite power to determine the application and the suit before it.
8. It is trite law that jurisdiction emanates either from the Constitution or statute. Under article 162(3) of the Constitution, the Land and Environment Court was created and clothed with powers to determine



matters relating to title and ownership of land. The High Court, on the other hand, established under Article 165 of the Constitution has original and unlimited jurisdiction in all civil and criminal matters save those reserved for the specialized courts of equal status.

9. The matter before this court relates a dispute as to payment of a loan advanced to the Plaintiff and secured by a legal charge over the Plaintiff's property. It is settled law that the High Court is the proper court that has the power to determine disputes of a commercial nature even where there is a land question.
10. The Court of Appeal pronounced itself in the case Co-operative Bank Limited Vs. Patrick Kangethe Njuguna & 5 Others (2017) eKLR on the matter of which court has jurisdiction to hear disputes relating to mortgages and accounting. The court held that the jurisdiction on such disputes lies before the High Court. This is what the Court of Appeal had to say: -

“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court...

the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia, that:-

- ‘1. subject to clause (5), the High Court shall have -
 - a. unlimited original jurisdiction in criminal and civil matters...’ (Emphasis mine).

Categorically, this court finds and holds that it has the requisite jurisdiction to determine the present case.

11. Turning to the second issue for determination as to whether the Plaintiff has satisfied the criteria for grant of an order of injunction this court is guided by the established principles as set out 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.”

12. 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.”

12. In determining this issue, I must state that this matter was before me for a total of nine times in 2023. At all material times the Plaintiff never denied the existence of the debt by the Defendant and nor was the validity of the charge over the suit property challenged. The Plaintiff’s case has always been that the Defendant should allow it time to either restructure the loan balance and extend the repayment period or allow it to engage a different lender to take over the loan facility and pay the Defendant. The Plaintiff alleges that between the period the loan was called up by the Defendant, it has managed to reduce the loan balance from Kshs.7,044,616.31/= to Kshs.2,915,703/=. These facts were not rebutted or controverted by the Defendants. It is not clear, however, how this was achieved as no material was placed before this court to demonstrate if the Plaintiff made payments or the same was achieved through discounts and other adjustments undertaken by the Defendant internally.
13. The Plaintiff has also taken issue with the Defendant on the valuation of the charged property. The Plaintiff argues that the suit property has a value of Kshs.140,000,000/=. The loan in question is now arguably at the sum of Kshs.2,915,703.28/=. It is the position taken by the Plaintiff that given time it can pay off this loan without resulting to disposing of its property, as the Defendant has attempted to do previously, triggering the present suit. The Plaintiff argues that the sale would occasion it irreparable harm in which damages will not be adequate compensation.
14. On the question of the balance of convenience, the Plaintiff has argued that the same tilts in its favour, noting that the Defendant holds a legal charge over the suit premises and will suffer no prejudice if the orders sought herein are granted.
15. I have weighed the arguments put forth by the Plaintiff. I note from the pleadings filed herein the Defendant only raised the issue of the court’s jurisdiction which I have addressed earlier and did not, in its grounds of opposition or submissions, put forth any arguments to rebut or controvert the issues raised by the Plaintiff. I note, however, that the Plaintiff does not deny being indebted to the Defendant nor does it challenge the validity of the legal charge, subject matter of the dispute. In its argument, the Plaintiff has not put forward a cogent proposal on how it intends to clear the loan balance save for the argument that Kenya Commercial Bank had offered to take over the loan facility. I note that the Plaintiff filed the present application in 2022 and did appear before me, as indicated earlier, a total of nine (9) times seeking time to settle the matter with the Defendant. The same was not achieved necessitating the writing of this decision by the court.



16. Taking into considerations the tenets set out in the *Mrao's case*(*Supra*) on what constitutes a prima facie case, I am persuaded that the Plaintiff has not met the threshold of establishing a prima facie case with a likelihood of success. In the decision of the Court of Appeal in the case of *Nguruman Limited v. Jan Bode Nielsen & 2 others*, (2014) eKLR, the court held that the three principles necessary for a grant of order of injunction as set out in Giella(*supra*) are sequential and only when the first one is met does the court need to consider the other two. Having therefore found that the Plaintiff has not established a prima facie case with a likelihood of success, I shall therefore not move to consider the other two principles therein.
17. In conclusion therefore I find and hold that the application by the Plaintiff filed on 5th December 2022 is not merited. Subsequently, the other two application filed on 25th January 2023 and 5th June 2023 being a spill over from the original application fail. The said applications are hereby dismissed with costs to the Defendant.

It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mukuha holding brief for Mr. Bwire for the Plaintiff/Applicant.

Mr. Karanja holding brief for Esmail for the Defendant.

Amos - Court Assistant

