



**Kawaken Holding Limited v Cooperative Bank of Kenya & another (Civil Suit E248 of 2022)  
[2024] KEHC 1492 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E248 OF 2022  
JWW MONG'ARE, J  
FEBRUARY 19, 2024**

**BETWEEN**

**KAWAKEN HOLDING LIMITED ..... PLAINTIFF**

**AND**

**COOPERATIVE BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**METROCOSMO LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination is the Plaintiff's Notice of Motion application dated 1<sup>st</sup> July 2022 brought under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules 2010, Article 40 and 159 of the Constitution and Part II, V and VIII of the Insolvency Act 2015.
2. The Plaintiff seeks an order of injunction, pending determination of this suit, to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and/or their agents from disposing off, alienating and in any way realising by administration the apartments known as Maryland Apartments erected on LR No.5/156 (hereinafter the suit property) belonging to the Plaintiff.
3. The Application is supported by the grounds set on its face and the supporting affidavit and a supplementary affidavit sworn by Mary Wamaitha KaittanY on 1<sup>st</sup> July 2022 and 11<sup>th</sup> October 2022 respectively. The application is opposed and the 1<sup>st</sup> Respondent has filed a replying affidavit sworn on 28<sup>th</sup> February 2023 by Grace Mwikali Mutinda, the 1<sup>st</sup> Defendant's Relations Manager.

**Applicant Case**

4. On 1<sup>st</sup> July 2022 the Plaintiff through a plaint filed thereto moved to court seeking to restrain the 1<sup>st</sup> Defendant from taking over the apartments known as Maryland Apartments on LR No.



5/156, Nairobi County. While acknowledging that it had developed the said property through a loan advanced to it by the 1<sup>st</sup> Defendant, the Plaintiff averred that it had repaid the loan in full and the same was not in arrears to warrant a take-over of the unsold apartments by the 1<sup>st</sup> Defendant. The Plaintiff accused the 1<sup>st</sup> Defendant of moving to appoint a rent receiving agent for the property without following the laid down procedures and accused the Defendant of failing to issue it with the requisite statutory notices as required by the law.

5. Further, the Plaintiff accused the 1<sup>st</sup> Plaintiff of irregularly inflating the loan and deliberately miscalculating the loan balances and that the 1<sup>st</sup> Defendant has failed and/or neglected to furnish the Plaintiff with properly audited statements of account as is required by law to demonstrate how the arrears being demanded were arrived at. The Plaintiff further accused the 1<sup>st</sup> Defendant of violating the Duplum Rule set out under Section 40 of the *Banking Act* by arguing that the loan granted by the Defendant and the repayment so far had exceeded the two times rule set thereunder. The Plaintiff asserted that it had paid more than double the amount loaned to it by the 1<sup>st</sup> Defendant and efforts to have the 1<sup>st</sup> Defendant provide it with statement of accounts proved futile.
6. The Plaintiff accused the 1<sup>st</sup> Defendant bank of acting with malicious intent with the aim of depriving it of its property. The Plaintiff asserted that the appointment of the 2<sup>nd</sup> Defendant for management of the Plaintiff's parcel of land and apartments is irregular, illegal and fraudulent in the absence of proper, procedural and legal notifications of demand as required by the law.
7. The Plaintiff prayed that this honourable court do restrain the 1<sup>st</sup> Defendant from proceeding with the appointment of the 2<sup>nd</sup> Defendant as a rent receiving agent as provided by the charge and deed of rental income and argued that the said actions would greatly prejudice it. The Plaintiff further informed the court that it had always been ready and willing to clear the loan balances, if any, once the proper accounts and statements were made available to it by the 1<sup>st</sup> Defendant as requested on several occasions.
8. The Plaintiff further averred that the Respondents will not suffer any prejudice if the application is allowed and that it will be in the interest of justice if this application is allowed.

### **The Defendant's Case**

9. In its response and opposition to the application by the Plaintiff, the 1<sup>st</sup> Defendant filed a replying affidavit sworn on 8<sup>th</sup> September 2022 by Grace Mwikali, the 1<sup>st</sup> Defendant's Relations Manager.
10. The 1<sup>st</sup> Defendant stated that since the Plaintiff did not dispute its indebtedness to the 1<sup>st</sup> Defendant nor deny that the loan advanced has been in default at various instances, this was a clear demonstration that its actions in appointment of a rent receiving agent under the Charge and Deed of Assignment was justifiable and legal.
11. That the 1<sup>st</sup> Defendant had granted the Plaintiff extensive financial accommodation but despite that, the Plaintiff continued to be in default of the facility. That as at 7<sup>th</sup> September 2022 the amount owing under the facility stood at Kshs.297,287,156.92/= comprising a principal amount of Kshs.198,120,134.49/= and Kshs.99,167,022.52/= in penalties and accrued interest and denied being in violation of the Duplum rule under the Central Bank Act.
12. The 1<sup>st</sup> Defendant's case was that it notified the Plaintiff three times of its intention to appoint a rent receiving agent to the property to ensure proper utility of the proceeds from the income of the apartments pursuant to the Charge and Deed of Assignment of Sale Proceeds over the said apartments; that the 1<sup>st</sup> Defendant did not require leave of court to appoint a receiver as Section 92(1) and (2) of the



Land Act provided for the remedy of appointment of receiver of income over charged land and does not contemplate seeking leave of court beforehand.

13. That despite being in arrears of the charge and deed of assignment of proceeds of sale, the Plaintiff sold two more apartments being A2 and A4 and has deliberately failed to inform the 1<sup>st</sup> Defendant of the said sales and further failed to remit the proceeds of the sale to the 1<sup>st</sup> Defendant who has priority over the proceeds to offset the loan obligation.
14. The 1<sup>st</sup> Defendant further asserted that the Plaintiff has not established a prima facie case due to warrant grant of the orders sought as it has been in default and has often times disregarded its obligations under the Charge and Deed of Assignment of Proceeds of Sale in which it was obligated to forward all monies realised from any sales of the apartments to the 1<sup>st</sup> Defendant to repay the loan arrears.
15. The 1<sup>st</sup> Defendant argued that the Plaintiff has failed to demonstrate that its stands to suffer any prejudice if the rent receiving agent is appointed. The Defendant further argues that the Plaintiff had not demonstrated that it stood to suffer loss that could not be compensated by way of damages if the 1<sup>st</sup> Defendant proceeded to appoint the rent receiving agent to stop further loss of the income from the property occasioned by the actions of the Plaintiff. The 1<sup>st</sup> Defendant asserted that on its part, the continued failure by the Plaintiff to meet part of its bargain, the 1<sup>st</sup> Defendant stands to be hugely prejudiced by the continued default by the Plaintiff and the disposal of the apartments by the Plaintiff to third parties without honouring its contractual obligations to remit the proceeds towards servicing the debt owing.
16. Based on the foregoing the 1<sup>st</sup> Defendant averred that the subject application is baseless, unmerited and misleading and urged the court to dismiss the same with costs to the Defendants.

### **Analysis and Determination**

17. I have carefully considered the pleadings by both parties and the rival submissions filed herein. I note that this is an application for order of injunction whereby the Plaintiff seeks to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and/or their agents from disposing off, alienating and in any way realising by administration the suit property belonging to the Plaintiff.
18. In the locus classicus case of *Giella v Cassman Brown Company limited*, (1973) EA 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:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements:-

  - (a) a) Establish his case only at a prima facie level,
  - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) If any doubts as to (b) show that the balance of convenience is in his favour.”
19. In order for a grant of an order of injunction to be issued, 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, it was held:-

“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."

20. The Plaintiff submitted that it has a prima facie case as pleaded in their supporting and supplementary affidavit. To deserve the protection of this court the applicant must demonstrate that there is a property that is in the verge of wasting away, damaged or being alienated. In the present case, the 1<sup>st</sup> Defendant invoked their rights to recover the balance of the loan facility advanced to the Plaintiff illegally and arbitrarily through appointing the 2<sup>nd</sup> Defendant herein as an administrator of the Plaintiff's affairs. That the payable amount is in dispute as the interest charged on the principal amount in the subject loan is highly exaggerated and against the duplum rule.
21. The Plaintiff further submitted that the 1st Defendant illegally and/or un-procedurally restructured the loan facility over nine times as pleaded in their supplementary affidavit which has seen the principal change from time to time leaving the Plaintiff to service a never-ending loan.
22. On its part, the Defendant submitted that the Plaintiff has no genuine and arguable case as they have no rights which are being threatened with infringement by the Defendant.
23. The Plaintiff obtained a loan facility of Kshs.232,000,000/- from the 1<sup>st</sup> Defendant as evidenced by the offer letter dated 18<sup>th</sup> March 2011 (annexed as KHL-2 in the Plaintiff's supporting affidavit). The terms in the offer letter included that the applicable interest rates were 14% per annum and the suit property was charged as security for the facility among other securities such as personal guarantee from directors of the Plaintiff and a Deed of Assignment of Sales Receivable.
24. Challenges arose on the repayments of the facility by the Plaintiff which led the Plaintiff to seek a restructure of the loan on various occasions. For example, the letters (annexed as 'GM5' in the 1<sup>st</sup> Defendant's replying affidavit) from the Plaintiff to the 1st Defendant dated 3<sup>rd</sup> November 2021 and 11<sup>th</sup> June 2022 whereby the Plaintiff acknowledged being indebted to the 1<sup>st</sup> Defendant and requested for a restructure of the loan.
25. The fact that the Plaintiff was in default is buttressed by the statutory notices issued by the Defendant to the Plaintiff, the first one dated 9<sup>th</sup> November 2017, second one dated 10<sup>th</sup> June 2020 and found on page 65 and 66 of the Plaintiff's annexures in its supplementary affidavit. The notices above indicate that there was a default and that the 1<sup>st</sup> Defendant notified the Plaintiff of its intention to pursue its statutory remedies under the Land Act.
26. Further I note that the 1st Defendant adequately notified the Plaintiff of its intention to appoint a receiver of income of the suit property vide the letters dated 14<sup>th</sup> October 2021, 17<sup>th</sup> December 2021 and 8<sup>th</sup> February 2022 whereby the Plaintiff was notified that a rental and market agent would be appointed to collect rent and market the unsold units of the development. The aforementioned letters are marked as GM7 in the 1<sup>st</sup> Defendant's Replying Affidavit.
27. Under Section 90 (3) of the Land Act, a chargee may exercise any of the remedies stipulated therein including appointing a receiver of the income of the charged property and to sell the charged property. The said section provides as follows:-
  1. 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 in 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.



2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—
  - a. the nature and extent of the default by the chargor;
  - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
  - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
  - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
  - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
  - (a) sue the chargor for any money due and owing under the charge;
  - (b) appoint a receiver of the income of the charged land;
  - (c) lease the charged land, or if the charge is of a lease, sublease the land;
  - (d) enter into possession of the charged land; or
  - (e) sell the charged land;
- (4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—
  - (a) appoint a receiver of the income of the charged land;
  - (b) apply to the court for an order to—
    - (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;
    - (ii) sell the charged land to any person or group of persons referred to in the law relating to community land.
- (5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.



28. While the Plaintiff acknowledges defaulting in loan repayments, it contests the loan amount demanded by the 1st Defendant. In the Court of Appeal case on *Giro Commercial Bank Limited v Halid Hamad Mutesi* 2002 eKLR it was held:-

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.”

29. Similarly in the case of *Beakim Limited & 2 others v Kenya Women Microfinance Bank Plc & another* [2022] eKLR the court had this to say:-

“The last issue raised by counsel is the dispute about the amount owing. The Plaintiffs complained about unwarranted penalty interest being loaded on their account by the 1st Defendant. Their concern may be a valid one. It is however trite that neither a dispute on the value of the charged property nor on the sums due would warrant the issuance of a temporary injunction to restrain a chargee whose statutory power of sale has crystallized. Hence, in *Halsbury’s Laws of England*, Vol. 32 (4th Edition) paragraph 725 it is opined that:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

30. The authorities above highlight settled jurisprudence that a court does not normally grant an injunction to restrain a chargee from exercising its statutory remedies solely on the grounds that there is a dispute as to the amount due under the charge.

31. In the present case, it is evident from the submissions by the parties that the Plaintiff has acknowledged being in default on loan payments and has sought the indulgence of the 1<sup>st</sup> Defendant to have the loan restructured on numerous occasions. The Defendant notified the Plaintiff of its intention to exercise its statutory remedies and that it would appoint the 2<sup>nd</sup> Defendant to collect income from the rented premises. Based on the sequence of events it is clear that the 1st Defendant’s statutory rights had crystallised and that it has followed the legal procedure in notifying the Plaintiff.

32. Although the amount owed is contested, it is my considered opinion and in line with precedents set by the courts in like cases that this is not enough to bar the Defendant bank from exercising its rights under the *Land Act*.

33. I find therefore that the Plaintiff has not established a prima facie case as it has failed to illustrate to the court that it has a right which has been infringed by the 1<sup>st</sup> Defendant which calls for a rebuttal. Having established that the Plaintiff has not established a prima facie case and therefore failed to satisfy the 1<sup>st</sup> test set out by the decision in *Giella*(supra), and as held by the Court of Appeal in the *Nguruman Limited v Jan Bonde Nielsen* (2020) eKLR that the three test case be applied sequentially and where the 1<sup>st</sup> test of a prima facie case fails, the court need not consider the other two test, I will therefore not proceed to interrogate the other two tests necessary to warrant a grant of an order of injunction as sought herein by the Plaintiff.



34. As a result, I find and hold that the application by the Plaintiff lacks merit. The court will therefore not interfere with the 1<sup>st</sup> Defendant's right to appoint the 2<sup>nd</sup> Defendant to receive income of the charged property.
35. Having allowed the 1<sup>st</sup> Defendant to proceed with the appointment of a rent receiving agent for the charged property, being the unsold apartments at Maryland Apartments, I direct that the 1<sup>st</sup> Defendant shall render proper statements of accounts on the loan accounts from when the same was issued to date. In addition, the 2<sup>nd</sup> Defendant is equally enjoined to provide a detailed account to the Plaintiff of its applications of the rental income so collected and demonstrate clearly how it has been utilised towards reducing the outstanding loan debt on a monthly basis.
36. Costs follow the event. The Plaintiff's application has been defeated. The 1<sup>st</sup> Defendant having been allowed to proceed and appoint the 2<sup>nd</sup> Defendant has benefitted from this application. It is therefore only fair in the interest of justice to have each party bear its own costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Mungai for the Plaintiff/Applicant.

Mr. Kiptoo for the Interested Party.

Amos - Court Assistant

