



**Muiru v Equity Bank (Kenya) Limited (Civil Case E319 of 2023)  
[2024] KEHC 1049 (KLR) (Commercial and Tax) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E319 OF 2023  
PM MULWA, J  
FEBRUARY 8, 2024**

**BETWEEN**

**PETER KARANJA MUIRU ..... PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

1. Before the court is the plaintiff's notice of motion application dated 20/7/2023 brought under Article 40 of *the Constitution* of Kenya 2010; sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* 2010; Order 40 Rules 1 and 2 of the Civil Procedure Rules; Section 89, 90(1)(2)(3)(e), Section 96(2)(3) and Section 97 of the *Land Act* 2012.
2. The plaintiff prayed for a temporary injunction, pending determination of this suit, to restrain the defendant or its agents from advertising for sale, alienating, selling, offering for sale, leasing, entering into occupation or any interference with the plaintiff's right, title and interests in the plaintiff's property known as L.R Number 36/VII/161 Eastleigh (hereinafter the suit property).
3. The grounds of the application are that the plaintiff obtained a loan facility from the defendant on or about April 2021 and the suit property was charged to the defendant to secure a principal amount of Kshs.46,700,000. A further charge dated 28/3/2022 was registered against the suit property as security to secure the sum of Kshs.25,100,000/-.
4. The plaintiff averred that he entered into a Deed of Assignment with the defendant whereby rental income from the suit property would be paid to the bank. That the defendant had been collecting Kshs.280,000/- per month from the suit property and the plaintiff had been religiously making payments towards settlement of the loan facility.



5. The plaintiff contended however that despite his best efforts, he fell short in certain instances in payment of the monthly instalments due to various reasons.
6. That on or about 10/2/2023 the defendant issued a 3 months' notice to the defendant stating that he was in arrears of Ksh.4,676,327 in payments. The plaintiff argued that the 3-months' notice was defective as the amount claimed was not due and owing for a period of one month as required before issuing a statutory notice under the *Land Act*. That despite the defective notice, he paid a sum of Kshs.5,501,415.00/- towards the demanded amounts in good faith and also continued making payments towards settlement of the amount.
7. The plaintiff averred that despite making the above payments, the defendant issued 40 days' notice to sell the suit property dated 14/6/2023 which stated that the plaintiff was in arrears of Kshs.3,222,101.96 and that the notice to sell was defective as the plaintiff had rectified the default. The plaintiff's case was that the defendant did not abide by the law in issuing the statutory notices and that it was the intention of the defendant to sell his property without adherence to the law.
8. In opposition to the application, the defendant filed a replying affidavit sworn on 2/10/2023 by Kariuki King'ori, its manager of legal services.
9. He contended that the plaintiff was inconsistent in servicing the facility and as at 7/2/2023 he was in arrears of Kshs.4,676,327.70; that the plaintiff admitted to being in default and as such the defendant has a right under the loan agreements, the charge instruments and the law to demand for payment of any amount that is due and owing.
10. That the defendant issued the requisite statutory notices under the *Land Act* and if the orders sought in the application are granted, the defendant would be deprived of an opportunity to exercise its legally protected and guaranteed right to payment of its debts to the plaintiff.
11. Furthermore, the defendant averred that it has remained willing to negotiate to reach an amicable settlement but the plaintiff has failed to meet its promises.

### **Analysis and determination.**

12. The parties filed written submissions to canvas their respective arguments which the court has duly considered.
13. This is an injunction application whereby the plaintiff seeks an injunction, pending determination of this suit, to restrain the defendants and/or their agents from advertising for sale, alienating, selling, offering for sale, leasing, entering into occupation or any interference with the plaintiff's right, title and interests in the suit property.
14. In the locus classicus 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:

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

- (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.”



15. 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.
16. 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.”
17. The plaintiff submitted that it has a prima facie case as the 3-months’ statutory notice was defective and premature as the plaintiff had not been in default for a period of 1 month prior to issuing it. Further that the plaintiff, in good faith, rectified the alleged default as demanded by the defendant by the payment of the sum of Kshs.5,501,415.00/- therefore the notice to sell was defective.
18. On the other hand, the defendant submitted that the plaintiff has not discharged the burden of establishing a prima facie case.
19. It is undisputed that the plaintiff took out a loan facility from the defendant and that the suit property was charged and further charged to secure its payment. In his pleadings, the plaintiff admitted to falling short of making the monthly instalments in view of the COVID-19 pandemic among other reasons.
20. Due to the default, the defendant issued the 3-months’ statutory notice informing the plaintiff that it had failed to fulfil its obligations under the loan agreement by defaulting in repayment of the loan, that he was in arrears of Kshs.4,676,327.70 and that the total outstanding amount as of 7/2/2023 was Kshs.73,055,512.70. Further that unless the default was rectified within 3 months from the date of service of the notice, the defendant would exercise its statutory right to sell the charged property. The notice is found on pages 102-103 of the annexures in the plaintiff’s supporting affidavit sworn on 19/7/2023.
21. Section 90(1) of the *Land Act* states:

“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.”
22. My understanding of the provision above is that the use of the word “may” in the issuance of a one-month default notice is an option to the chargee and is not a mandatory prerequisite before the chargee may exercise its statutory power of sale.
23. Therefore, in this case, even though the defendant did not issue the plaintiff with such a notice, its 3-months’ statutory notice was still valid and within the confines of the law.
24. The plaintiff averred that he paid Kshs.5,501,415.00/- of the demanded amount in compliance with the 3 months statutory notice.



25. Section 96(1) of the *Land Act* states:

“Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.”

26. Pages 104-105 of the plaintiff’s annexures in its supporting affidavit show that indeed the plaintiff paid the sum of Kshs.5,501,415.00/- by 6/4/2023. Therefore, by the time the 3 months’ notice expired, the amount therein had been paid in full.

27. This means that the 40 days notification to sell issued by the defendant was defective as it was based on a statutory notice that was already rectified. The notification to sell was not issued in accordance with the law and on that basis, the plaintiff has proved his case on a prima facie level.

28. On the second consideration which is irreparable loss, the court in Peter Kimani Nene v Kenya Commercial Bank Limited [2016] eKLR held:

“There was therefore no compliance both with the provisions of Sections 90 (1) and 96 (2) of the *Land Act*. That failure to comply with the law entitles the applicant to the intervention of this Court by granting an interlocutory injunction pending the hearing of this suit. On the issue of irreparable injury that cannot be compensated by an award of damages, this court is guided by the Court of Appeal decision in Muiruri vs Bank of Baroda (kenya) Ltd where it was held: - “disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.”

29. I concur with the finding above. In this case, the court has found that the 40 days notification of sale was defective as it was based on a default in a statutory notice that had already been rectified therefore the plaintiff is entitled to injunctive relief. Further it is foreseeable that the plaintiff would suffer irreparable losses if the injunction is not granted as damages would not adequately compensate him for the loss. Unless the orders are granted, the plaintiff would lose his property on the basis of an unlawful notice to sell. The loss of property would be a violation of the law and amount to irreparable injury.

30. The defendant is entitled to exercise its statutory power of sale where a chargee has been in default of its loan obligations; however, it has to be exercised in accordance with the procedures set out in the *Land Act*.

31. Based on the foregoing, the court grants an interlocutory injunction halting the sale of the suit property until and/or unless the defendant issues fresh notifications of sale as stipulated under section 91 and 96 of the *Land Act*.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**P. MULWA**

**JUDGE**

**In the presence of:**

Mr. Richu for the Appellant/Applicant



N/A for the Respondent

Court Assistant: Carlos

