



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Absa Bank Kenya PLC & 2 others (Civil Case E020 of 2023)
[2024] KEHC 1045 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E020 OF 2023
RN NYAKUNDI, J
FEBRUARY 8, 2024**

BETWEEN

JOSEPH MUTWA MUTUA APPLICANT

AND

ABSA BANK KENYA PLC 1ST RESPONDENT

LEGACY AUCTIONEERS 2ND RESPONDENT

JOSE TYRES LIMITED 3RD RESPONDENT

RULING

Representation: Mohammend Muigai LLP

Limo R.K & Co. Advocates

1. The Applicant approached this court vide an application dated 31st October 2023 seeking the following orders;
 1. Spent
 2. Spent
 3. That pending hearing and determination of the main suit, an order of temporary injunction be issued restraining the defendants/ Respondents by themselves or through their agents, servants, officers or otherwise from selling, disposing off, advertising, transferring, alienating or dealing whatsoever with that property known as Eldoret Municipality Block 8/709.
 4. That pending the hearing and determination of this suit the 1st defendant/respondent be ordered to furnish the plaintiff/applicant with bank statements from the date of charge to date.
 5. That costs of this application be provided for.



The application is premised on the grounds set out therein and the contents of the affidavit in support of the application.

2. The brief background underlying the present suit is that the applicant was a guarantor for a loan facility issued to the 3rd defendant by the 1st defendant for Kshs. 30,000,000/-. The facility was secured by a charge over the property known as Eldoret Municipality Block 8/709 belonging to the 1st defendant. On 30th October 2021, the 1st defendant instructed the 2nd defendant to sell the suit property in exercise of its statutory power of sale, which the applicant disputes, denying having been served with any notices and maintaining that the exercise of the same was a nullity. As a result, the applicant filed a plaint dated 31st October 2023 together with the present application.

Applicant's case

3. The applicant acknowledged that the 1st defendant advanced the 3rd defendant a loan of Kshs. 30,000,000/= on 19th June, 2015, wherein the applicant was a guarantor and further, that as security, he charged the title of the suit property with the 1st defendant and deposited the title as security. It is the applicant's contention that that he has substantially repaid the aforesaid loan facility but his numerous attempts to be supplied with bank statement detailing extent of repayment have all been in vain. Upon learning of the impending auction, the applicant visited the offices of the 1st respondent in Eldoret seeking audience with the manager who issued him with advertisement of sale of the suit property. He then proceeded to institute the present suit.
4. The applicant's case is that the required mandatory statutory notices, Redemption notice and notification of sale have never been issued or served upon him which confirms that the respondents never issued or served any statutory notice upon him. The 1st respondent deliberately omitted to serve the applicant's spouse with the statutory notices despite the fact that the suit property constitutes her matrimonial home in violation of section 96 (3) of the Land Act. Equally the principal debtor being the 3rd respondent has never been served with any statutory notices.
5. Counsel urged that the 1st respondent is obligated by law to issue three months statutory notice upon the applicant, his spouse and the principal debtor. The said statutory notice ought to indicate the amount of arrears required to remedy the default by the applicant but the same has never been issued or served and therefore, he has never had the opportunity to rectify the default. He relied on the case of Nairobi Civil No. 112 of 2014, Alfred Osanya vs Giro Commercial Bank Ltd & Garam Investments in support of this submission.
6. Counsel cited Section 96(2) of the Land Act, urging that it demanded that the 1st respondent issues a further 40 days' notice separate from 45 days by the auctioneer but the same was never been issued or served. Further, he urged that the 2nd Respondent equally never issued a 45 days Redemption notice and notification of sale as required by the Auctioneers Act.
7. It is the applicant's case that no current valuation report over the suit land has been conducted by the respondents which is in contravention of section 97(1)(2) of the Land Act. Further, that section 11 (1) (b) of the Auctioneers Act provides that valuation report which is not more than 12 months prior to the sale is a proper valuation report for purposes of determining the reserve price. He urged that the 2nd respondent, while advertising the suit property for sale, stated that the property is located next to Rupas Mall within Eldoret City with monthly rental income of Kshs. 80,000/= and that its demand is very high, a clear indicator and admission that the value of the suit property is high.
8. It is the applicant's case that the conduct of the 1st respondent is an affront to article 40 of the Constitution entitling the applicant to own property. Additionally, that the 1st respondent owes a duty



of care to the applicant to ensure that the best price is obtained. He relied on the decision of Justice S.M Kibunja in Busia Environment And Land Case NO. 66 OF 2014, *Timothy =v= Family Bank Co. Ltd* in support of this submission. Additionally, he cited Nairobi Civil Suit No.527 of 2013, *Palmy Company Limitede -vs- Consolidated Bank Of Kenya*

9. The applicant maintained that despite the fact that there was no service, the principal debtor has substantially repaid the loan and it is clearly premature to realize the security since the statutory power of sale is yet to arise. That there is no justification whatsoever why the 1st respondent has failed to avail before the Honourable Court the bank statement detailing extent of repayment. He urged that he has established a prima facie case with high chances of success and if suit property is sold, these proceedings shall be rendered nugatory and applicant shall occasion irreparable loss that cannot be compensated by way of damages.

Respondent's case

10. Learned counsel for the respondent submitted that it is common grounds that the conditions to be satisfied upon which injunctive orders are to be issued is established in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358. Additionally, that on what is considered a *prima facie* case, the Court of Appeal in *Mrao Limited v First American Bank of Kenya Limited & 2 Others* (2003) KLR125 set out the same clearly.
11. The respondent urged that the Applicant has failed to establish that he has a prima facie case with high chances of success. He does not dispute that the 1st Respondent advanced various loan facilities to him and that he has defaulted on repayment of the loan. He alleges that he has substantially repaid the loan facility but fails to corroborate with evidence. He further alleges that his attempts to be supplied by his Bank statements have been in vain, but once again fails to provide evidence in support of the allegation. It is the respondent's case that the Applicant has not denied executing the Charge and Debentures to secure the loan advanced to the 3rd Respondent. Nor has he disputed that he has defaulted on repayment. However, he has sought to contest the outstanding amount and the validity of the Statutory Notices.
12. The Applicant alleges that no demand was issued prior to the issuance of the 90-day Statutory Notice as required by sections 56 (2) of the *Land Act* Your Ladyship, which is far from accurate as the 1st Respondent issued a demand letter dated 29th March 2021. The demand letter was issued to the 3rd Respondent's three directors, which included the Applicant. In the demand letter, the 1st Respondent notified the Applicant and the 3rd Respondent of the nature of default and the extent of the default. The demand specifically set out the outstanding amount and the period within which the Applicant should rectify the default. Upon failure to rectify the default after issuance of a demand letter, the 1st Respondent, through its Advocates, issues a Statutory Notice dated 28th February 2023 pursuant to section 90 of the *Land Act*. The Statutory Notice was addressed to the Applicant. In the Notice, the Applicant was informed of the nature of default, the extent of default and was informed of the statutory period of three (3) months to rectify his default, failure to which the 1st Respondent would exercise its right of statutory sale as stipulated in section 90(3) (e) of the *Land Act*. The Applicant's failure to rectify the default necessitated the 1st Respondent to issue a Statutory Notice to Sale pursuant to section 96 of the *Land Act* to. The Notice stated the amount of the default by the Applicant, and that they ought to pay the outstanding amount within a period of forty (40) days failure to which the 1st Respondent would sell the charged property. Contrary to the Applicant's assertion that the Statutory Notices issued were defective for want of conformity to the provisions of the *Land Act*, counsel reiterated that the 1st Respondent followed due procedures and issued Notices that were compliant with the provisions of the *Land Act*.



13. Counsel submitted that having established that the Applicant and 3rd Respondent were in breach of their contractual obligation, and having consented to the effect of sections 90 of the Land Act, the 1st Respondent is left with no recourse but to the charged property to recover the outstanding amount. The Respondent thereafter gave instructions to a firm of valuers who valued the property as follows: Market value as Kshs. 22,000,000/-; Mortgage value as Kshs. 17,600,000/- and forced sale value as Kshs. 16,500,000/-. Following the valuation, the 1st Respondent instructed Legacy Auctioneer Limited, the 2nd Respondent who advertised the property for sale.
14. Counsel stated that the Applicant executed the security documents, which in essence constituted a contract as between him and the 1st Respondent. The Applicant was at all times aware that he was bound by the terms which he executed willingly. The Applicant has not established a case which has chances of success as the 1st Respondent wholly complied with the provisions of the law in issuing all the statutory notices as provided by the law and as affirmed in the case of Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR.
15. On whether the Applicant is going to suffer irreparable harm, counsel urged that the Applicant has failed to illustrate and/or demonstrate what irreparable loss he will suffer in the event the application is not allowed by this Court. Further that any harm that he may suffer that cannot be compensated by way of monetary damages. It is the respondent's case that the value of the suit property is ascertainable through valuation and the Applicant has not shown that the 1st Respondent would be unable to meet the damages in the event he succeeds in the main suit. In any event, such loss can be compensated in damages as the Applicant is protected by Section 99 (4) of the Land Act 2012. Counsel cited the case of Mary Wanjiku Mwaniki & Another v Dream Credit Limited [2017] eKLR in support of this submission.
16. On the balance of convenience, the 1st respondent maintained that it tilts in its favour. The Applicant was well aware of the consequence of default. It is evident that the Applicant and 3rd Respondent were in default. Further, that the default amount is no meagre sum and the issuance of an injunction will only exacerbate the default amount. The 1st Respondent is a reputable financial facility with the capacity to meet the damages in the event the Applicant succeeds in the main suit. He cited the case of Mrao Limited -vs- First American Bank of Kenya Limited. [2003] KLR125 in support of this submission.
17. According to the respondent, it is a trite maxim of equity that a court of equity cannot and should not aid a person whose default is the very reason why a statutory power of sale is being exercised. It is settled that a party cannot derive benefit from his own wrong. The 1st Respondent would be greatly prejudiced should this Court grant an injunction as opposed to the mere inconvenience that would be suffered by the Applicant.
18. Counsel urged the court to dismiss the application with costs.

Analysis & Determination

19. In my view, the following issues arise for determination;
 1. Whether the order for a temporary injunction should issue
 2. Whether the order directing the 1st respondent to furnish bank statements should issue



Whether the order for a temporary injunction should issue

20. From the prayers sought, it is discernible that he seeks a temporary injunction against the exercise of statutory power of sale over the property known as Eldoret Municipality Block8/709 pending the determination of the suit.
21. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. Restating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 set them out as follows:
- (i) a prima facie case with a probability of success at the trial;
 - (ii) if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
 - (iii) the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
 - (iv) the conduct of the applicant meets the approval of the Court of equity.

Whether the applicant has a prima facie case with a probability of success at the trial

22. A prima facie case was defined in the case of *Mrao Limited V First American Bank Limited & 2 Others*, [2003] KLR 125 to mean:-

'... a case in which on the 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 rebuttal from the latter.

...

But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case"

23. The nature of the application requires the court to delve into the probability of success of the main suit at the interlocutory stage. However, by filing the present application, the applicant has bound himself to the outcome of such an assessment. The applicant's claim is premised on the exercise of statutory power of sale by the 1st respondent. There is no dispute as to the existence of the charge on the suit property as security for the loan advanced to the applicant.
24. The 1st respondent annexed as MM5 a formal demand letter that was issued to the applicant with regards to the arrears owing to wit; Kshs. 36,985,110.50 as at 29th March 2021. The 1st respondent also annexed as MM6, a Statutory Notice under Section 90 of the *Land Act* dated 29th June 2022.
25. Section 90(1) of the *Land Act*, 2012 provides that:

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 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.



26. I note that the notice is alleged to have been served ‘by registered post’ and ‘by email’ on the notice itself. The 90-day notice is a prerequisite for the exercise of the chargee’s remedies including the power of sale. It must be served on the chargor in order to give him or her the opportunity to remedy the breach or otherwise redeem the property as security. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden of showing that the statutory notice has been served is on the chargee. Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such a notice was in fact served. In this instance, the Bank has the burden of showing that it served the defendant with the notice under section 90 of the [Land Act](#). In [Moses Kibiego Yator v Eco Bank Kenya Limited](#) NKU E& L No. 426 of 2013 [2014] eKLR the court held that:
27. In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.
26. Other than the indications on the notice that the same were served by registered post and email, the respondent has not attached any evidence that the notice was in fact served. By virtue of this breach of the procedural requirements with regards to the statutory notices, it follows that any other notices issued in the process would not suffice. Further, an examination of the other requisite notices reveals that the 1st respondent has not provided any evidence that the notice under section 96 of the [Land Act](#) and the auctioneers’ notices were indeed served. Such evidence would have been in the form of a certificate of postage or sufficient material to demonstrate that the document was duly dispatched to the chargee.
27. It is my considered view that the 1st respondent failed to prove that it served the requisite notices on the applicant and as such, the applicant has a *prima facie* case with a chance of success.

Whether the applicant stands to suffer irreparable injury that cannot be compensated by damages

28. The amounts claimed by the respondent are colossal to say the least. If the application is not allowed, the applicant stands to have its property auctioned to recover the arrears which property can be compensated by way of damages. The property has a forced sale value of Kshs. 16,500,000/-. It is my considered view that it is more convenient to have the suit proceed to full hearing to determine the prima facie case than to have the same sold under statutory power of sale that was improperly exercised. Further, the respondent has not shown that the applicant has approached this court with unclean hands and as such the court shall exercise its discretion accordingly.

Whether the order directing the 1st respondent to furnish bank statements should issue

29. I note that this prayer has not been addressed by any of the parties including the applicant who sought the same. However, as the applicant’s case is that payments have been made towards satisfying the outstanding arrears, the evidence of such payments is squarely in his hands. The nature of bank deposits, especially of such colossal sums, is that the debtor will have documentary evidence of any deposits it has made. All that the applicant would require to prove that the arrears have been settled is to produce documentary evidence that it has made deposits amounting to the arrears claimed. In that regard, I decline to grant orders with regards to the furnishing of bank statements.



30. Before granting the orders, the court notes that it is common practice for parties to drag their feet when prosecuting claims seeking to stop statutory power of sale upon obtaining interlocutory orders. The plaintiff is directed to expedite the hearing of the main suit in order to settle the matter in good time and in the interests of justice.
31. In the premises, I order as follows;
- i. Pending the hearing and determination of the main suit, an order of temporary injunction is hereby issued restraining the defendants/ Respondents by themselves or through their agents, servants, officers or otherwise from selling, disposing off, advertising, transferring, alienating or dealing whatsoever with that property known as Eldoret Municipality Block 8/709.
 - ii. Costs of the application to the applicant

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8TH DAY OF FEBRUARY 2024

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R. NYAKUNDI

JUDGE

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