Mutisya v Letshego Kenya Limited & another (Commercial Case E001 of 2023) [2024] KEHC 934 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

COMMERCIAL CASE E001 OF 2023

FR OLEL, J

FEBRUARY 7, 2024

BETWEEN

MARTIN KIMUYU MUTISYA ..... PLAINTIFF

AND

LETSHEGO KENYA LIMITED ..... 1ST DEFENDANT

WESTMINSTER COMMERCIAL AUCTIONEERSAUCTIONEERS .... 2ND DEFENDANT

RULING

A. Introduction

1. The Application before this court is the Amended Notice of Motion Application dated 10th March, 2023 brought under Section 1A, 1B, 3 & 3(A) and 63 (e) of the *Civil Procedure Act* and Order 10 Rule 11, Order 22 Rules 1,3,25, Order 36 rules 2,4,7, Order 50 Rule 6 and order 51 Rule 1 of the *Civil Procedure rules*,2010.

   Prayer 1 and 2 are spent and the main prayers sought are 3 and 4 that seek to have a temporary injunction to issue to restraining the Respondents either by themselves, their employees, servants and or agents from conducting a public auction on the parcels of land registration numbers Iveti/ Mungala/ 1840, L.R No. Athi River/ ATHI river 1/4108 & LR No Athi River/ Athi River Block 1/4502 (hereinafter referred to as the suit parcels of land) and that costs be awarded to the Plaintiff/ Applicant.

2. The Application is supported by the Supporting Affidavit of Martin Kimuyu Mutisya sworn on 10th March 2023 in which he contends that on or about 30th July 2021, he took out a loan facility worth Kshs.12,000,000/= from the 1st respondent, which loan he has so far serviced to the tune of Kshs.3,325,211/=, but was surprised when in December 2022, he did received a 40 days' notice to sell the suit parcels of land from the 1st Respondent and a notice for him to redeem his charged properties.

Later the 2nd Respondent proceeded to advertise the suit properties for sale via public auction. He was apprehensive that unless this court intervenes and grants the orders sought, he would loose all his properties and suffer irreparable loss and damage.

3. The Respondent opposed this Application by way of a replying Affidavit sworn by PESIAN KETERE, its recovery lead officer, dated on 31st May 2023, wherein he deposed that the Applicant took a facility of Kshs.12,000,000/= and charged his properties Iveti/Mungala/ 1840, L.R No. Athi River/ ATHI river 1/4108 & LR No Athi River/ Athi River Block 1/4502 as security to secure the said loan.

4. The applicant was to pay monthly instalments of Ksh. 323,246.13/= which he has defaulted and fell in arrears. They were therefore compelled to issue the applicant with the 90 days statutory notice in respect of the three properties charged. The said statutory notices were all dated 30th March 2022 and were sent to the plaintiff/applicant by registered post being P.O. Box 118-90100.After expiry of the 90 days, the plaintiff/applicant had still had not redeemed his account and they were further instructed Prestige Management valuers Ltd to prepare current valuation reports, with regard to the properties in question.

5. The 1st respondent, then instructed 2nd Respondent to issue the 45 days redemption notice, notifying him that the charged properties would be sold in the event that he did not make payments to regularize his loan accounts. The plaintiff/applicant still failed to observe his obligations under the loan contract and eventually the suit properties were rightfully advertised for sale scheduled for on 22nd February 2023.

6. The respondent did further contend that the Applicant had not provided any evidence of payment and continued to be in default, yet it was within his knowledge that once he offered his property as security, they became commodities/Assets, which could be sold to recover sums owed in event of default. The applicant had come to court with unclean hands in equity and for the sole purpose to defeat the statutory right of sale rightfully commenced by the respondents. The respondents therefore asked that the Application be dismissed and they be allowed to proceed with the sale of the suit properties to recover amounts due and owing.

7. The Application was disposed of by way of written submissions. The Applicant and the respondent filed submissions on 15th of June 2023 and 11th August 2023 respectively.

B. Submissions

The Plaintiff/Applicant Submissions

8. The plaintiff/applicant submitted that he indeed charged the suit properties for an aggregate sum of Kshs.12,000,000/= advanced to him by the 1st respondent and had met his end of the bargain by paying Kshs.3,325,211/= towards settling the loan, despite the financial challenges and bad economy prevalent in the country. He was therefore shocked to be served with a forty (40) days' notice to sell his charged properties by the 1st Defendant/respondent who had breached terms of the contract by purposing to sell the said properties yet the duration within which to repay the loan had not yet lapsed.

9. The 1st Defendant/respondent was further faulted for not undertaking the current valuation of the suit parcels and was purposing to sell them at a throw away price, which would expose him to irreparable loss and damage. He had therefore established a prima facie case and prayed for the orders sought to be granted.

The 1st Defendant/Respondents Submissions

10. The 1st Defendant/Respondent submitted that the facts herein where not in contention, as the plaintiff/applicant had admitted to being granted a facility of Ksh.12,000,000/=, and also having received the statutory notices sent to him. They had proved by the pleading filed that due process was followed and therefore were right to advertise the suit properties for sale. The plaintiff/applicant had premised his application on the wrong provisions of the law, which were irrelevant to the orders being sought and that made the application wholly defective and ripe for striking out. Reliance was made on the case of *Wekesa Sinino Vs Mark Kusienya sinin*o (2007) eKLR.

11. The 1st respondent further submitted that the plaintiff/applicant had failed to establish a prima facie case as he was in default. From the bank statements they had annexed, it was clear that the plaintiff/applicant was making sporadic payments and in other months never made any payments towards settling him monthly loan deductions. The recovery process was duly followed before his properties were advertised for sale and the plaintiff/applicant was therefore not justified in seeking for injunctive orders. Equity also demanded that the plaintiff/applicant comes to equity with clean hands and that was not the case based on the established facts herein.

12. As regards the issue of the plaintiff/applicant suffering irreparable loss, The 1st respondent submitted that since the suit properties were offered as security and the plaintiff/applicant knew they would be sold if he did not settle the loan advanced, he could not complain of any loss he was likely to suffer. In the unlikely event that the plaintiff/applicant was successful he could be compensated by way of damages. Reliance was placed on Kitur Vs Standard Chartered Bank & 2 others (2002) 1klr, where it was held that once a chargor had let loose his property as security for a loan, that security thenceforth became a commodity for sale, with prior consent of the chargor, he could then not complain of likelihood of suffering financial loss or injury incapable of compensation by an award of damages.

13. Finally, on balance of convivence, the respondent relied on the citation of *Paul Gitonga Wanjau Vs Gathuthis Tea Factory company Ltd & 2 others* (2016) eKLR, where it was held that the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. The applicant had to show that he/she had a strong case on its merits or there exists significant irreparable harm if orders sought were not granted. The plaintiff/Applicant had failed to do so in this instance. The 1st Defendant/respondent thus prayed that this application be dismissed with costs.

C. Analysis & Determination

14. I have carefully considered the Notice of Motion Application, the Supporting Affidavit, the Respondent's Replying Affidavit as well as the submissions of both parties and discern that the only issue which arise for determination is whether this court should grant an order of injunction stopping the sale of the suit properties by the Respondents via auction as prayed for.

15. Temporary injunctions are governed by Order 40 Rule 1 of the *Civil Procedure Rules* 2010 provides that;

> Where in any suit it is proved by affidavit or otherwise—
>
> (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the

defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

16. The principles of granting injunctions are governed by the locus classicus case of *Giella vs Casman Brown* [1973] 358, the said principles were restated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, as follows: -

> "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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

17. What constitutes prima facie was discussed by the Court of Appeal in the case of *Mrao Ltd vs First American Bank of Kenya Ltd* [2003] eKLR, where the court stated as follows:-"

> "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it is 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."

18. In *Nguruman limited Vs Jan Bonde Nielsen & 2 others* (supra), the court of Appeal agreed with the definition of a prima facie case as stated in Marao case and stated

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and

> unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

19. In the current case, it is not in dispute that the Plaintiff/Applicant obtained a loan facility from the 1st defendant/Respondent which loan he has not completed repaying and/or is not up to date in monthly repayments. The Plaintiff/Applicant averred that he had so far paid Kshs.3,325,211/= which was disputed by the 1st Respondent who stated that the Plaintiff/ Applicant has not attached receipts to show the amount already paid.

20. It was their contention that the plaintiff/applicant had failed to pay the monthly instalments of Kshs.323,246 as per the contractual agreement and his outstanding debt plus interest was Kshs.12,232,818.24/=. Further they had adhered to the law when issuing statutory notices as provided for in law, and thus were right to have the suit properties advertised for sale by public Auction.

21. All that the court at this stage is expected to adjudge is if on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Unfortunately, the plaintiff/applicants pleadings do not bring out any breach of his rights or any threat thereto when considered in light of his contractual obligations. The Defendant/Respondent did follow to the letter, the prerequisite requirement in law as provided for under Section 56(2) and Section 90 of the *land Registration Act*, while issuing statutory notices after which a valuation was done by Prestige Management Valuers Ltd and notice to sell issued as provided for under section 96(2) of the *land Act*. The suit properties were thereafter advertised for sale.

22. The plaintiff/applicant did admit receiving the statutory notices and further did not file further affidavit to attach receipts in proof of payment nor did he dispute the outstanding loan amount of Kshs.12,232,818.24/= as alleged by the 1st Defendant/Respondent. Under the circumstances it is clear that no prima facie case has been made out.

23. As regards proof of irreparable injury, *Halsbury's Laws of England, 3rd Edition* Volume 21, Paragraph 739 page 352 defines irreparable injury as;

> 'injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.'

24. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the court further did discuss the issue of irreparable damage and held that:

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

25. That the Court of Appeal further held that:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

26. The Applicant contends that he will suffer loss if the orders sought are not granted as the suit properties will be auctioned. The 1st Defendant/Respondent on the other hand content that it is evident that they have complied with the law and were entitled to recover the sums owned to the Bank. The plaintiff/applicant was fully aware of the consequences of offering his property as security and knew that the said properties would be sold if he defaulted in repaying sums owed.

27. The 1st Defendant/Respondent contention is correct. By charging the suit properties, the applicant constituted the said properties as commodities in the Market, which the 1st respondent could sell to recover the sums owed. The applicant thus in absence of any breach identified in this process of sale cannot be heard to allege that he would suffer irreparable loss as a result of the same. In any event the value of the properties charged are determinable and if at the end of trial, the court finds in favour of the applicant he can be adequately compensated.

28. This position too was upheld in of *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR, where the Court stated the following;

> "Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As 1 have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."

29. On a balance of convenience, I am guided by the decision of *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai* [2018] eKLR where it was held as follows:

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

30. In the case of *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another* [2019] eKLR, it was held that:

> " the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed."

31. I find that the balance of convenience in this case tilts in favour of the 1st Respondent. The parties are tied on the hip by their contractual obligations and under the circumstances herein, it has been shown that the applicant had failed to adhere to the terms of the said contract. The 1st Defendant/ respondent runs a financial institution which lends out money and the sums unpaid will continue to accrue to their loss and detriment. The inconvenience caused to them would be greater than that caused to the plaintiff/applicant, if an injunction is granted and suit is ultimately dismissed as the outlay of the outstanding loan will definitely grow. In any event the 1st Defendant/Respondent too is in a strong position to compensate the plaintiff/Applicant by way of damages in the event the case is determined in his favour.

Disposition

32. For the foregoing reasons, I find that the Applicant has not demonstrated and/or met any of the pre-requisite condition necessary to grant the injunctive orders in his favour and proceed to find that the amended notice of motion application dated 10th March 2023 is without merit and is accordingly dismissed with costs to the 1st Respondent.

33. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7TH DAY OF FEBRUARY, 2024

In the presence of: -

No appearance for Plaintiff

No appearance for Defendant

Sam - Court Assistant