



Tides Freighters Limited v NCBA Bank Kenya PLC & another (Commercial Suit E034 of 2023) [2024] KEHC 1477 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E034 OF 2023
JWW MONG'ARE, J
FEBRUARY 19, 2024**

BETWEEN

TIDES FREIGHTERS LIMITED PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The application before this court for ruling is a Notice of Motion application by the Plaintiff dated 31st January, 2023 which seeks, pending the hearing and determination of the application and the suit, a temporary order of injunction be issued against the Defendants themselves, their agents and/or assigns restraining them from selling, transferring, or otherwise interfering with the Title Number Ruiru Kiu Block 2 (Nairobi/Githunguri)/3139. The application also seeks that the Defendants bear the costs of this application.
2. The Application is supported by the affidavit sworn by Peter Njoroge Mwangi, the Applicant's director, on the even date, and is based on the averments that the Applicant approached the 1st Defendant for some financial accommodation of Kshs.106,367,526.87/= which was to be dispersed as Term 1 Loan of Kshs.68,864,000/= to finance the construction, Term loan 2 facility of Kshs.23,492,320.21/= to purchase plot No. L.R. Ruiru Kiu Block 2 Githunguri/3139, overdraft facility of Kshs.10,000,000/= as the working capital, and a Hire purchase loan facility of Kshs.4,011,206/= to purchase Motor vehicle xxxx.
3. The Plaintiff alleges that in breach of the terms of the loan agreement, the 1st Defendant dispersed the loan facility less Kshs.10,400,000/= as a consequence it constrained the Plaintiff ability to finance the project and as a result it failed to generate the projected income occasioning the Plaintiff to default in



repayment thereto. The Plaintiff averred that as of 8th December, 2022 it was in arrears plus interest of Kshs.93,185,244.43/=.

4. The Plaintiff claimed that the 1st Defendant intended to sell the charged property being the property known as Land Reference Ruiru Kiu Block 2 Githunguri/3139. The Applicant contended the actions of the 1st Defendant violated Section 96(3) (h) and 97(2) of the *Land Act* for failure to issue the necessary statutory notices prior to its move to exercise its statutory power of sale. The Plaintiff further accused the 1st Defendant of failure to conduct a forced sale valuation as required thereto.
5. The 1st Defendant opposed the instant application by way of a replying affidavit sworn on 7th March 2023 by Jackson Nyaga, the 1st Defendant's legal counsel. The 1st Defendant's case was that the Plaintiff was advanced a loan facility of Kshs.106,367,526.87/= which was categorised into 4 loan facilities which had different payment plans. These loans were however consolidated and that the Plaintiff defaulted in the consolidated loan repayment plan and in September, 2021 the 1st Defendant issued the Plaintiff with Statutory Notices which it failed to remedy, subsequently a debt notice was issued to the guarantors on 30th September 2021 and a further notice of intention to sell on 14th January 2022 but the Plaintiff failed to repay the loan thus prompting the 1st Defendant to exercise its statutory power of sale.
6. By the directions of this court the application was canvassed vide oral and written submissions. The Plaintiff's submissions are dated 2nd October 2023, while the 1st Defendant submissions are dated 6th November, 2023. Mr. Kabugu, learned counsel for the Plaintiff, submitted that the Replying affidavit by the Respondent ought to be expunged from the record as it is commissioned by the same advocate that drafted the same in violation of the law. He argued that an interim order of injunction ought to be granted to restrain the Defendants and or its agents from selling Ruiru/Kiu Block /2 Githunguri/3139 since it had demonstrated the 1st Defendant failed to dispatch the entire loan amount in a timely fashion as agreed in the loan agreements, thereby breaching the terms of the loan agreement. Counsel further submitted that the statutory notices were not served on the guarantors and that the 1st Defendant failed to conduct a forced valuation of the parcel of land before moving to exercise its statutory power of sale as required under the law. Counsel argued that the Plaintiff's right of redemption was clogged by the 1st Defendant's actions and if the order of injunction is not granted, the Plaintiff will suffer a colossal loss as it financed the project and it is about to lose the equipment acquired for the business.
7. Counsel further submitted that the balance of convenience should tilt in favour of the Plaintiff as the loan was dispatched in 2018 and the Plaintiff was not in a position to ascertain what has been paid to date, in the absence of a proper audit of the loan accounts.
8. In Reply, Mr. Ombura, the Respondent's counsel opposed the application and submitted that the issue of the affidavit was a technicality and urged the court to rely on Order 19 Rule 7 which allows the court to consider affidavits with defects. The Respondent argues that it was not disputed that Plaintiff took out a loan from the 1st Defendant which Plaintiff defaulted in its repayment and the same is in arrears of Kshs.96,300,147.93/= as at 3rd February 2023, and that the amount continued to accrue interest at the rate of 13% p.a. The Defendant averred that the Plaintiff has failed to prove it had a *prima facie* case to warrant the grant of the orders sought.
9. The Defendant further submitted that no loss will be suffered by the Plaintiff if the injunction is not granted as it had defaulted in the loan repayment. The Defendant argued that despite the Plaintiff having been granted a temporary relief on payment of Five Million shillings (Kshs.5,000,000/=) as a condition for staying the sale, the Plaintiff had failed to do so.



Analysis And Determination

10. I have considered carefully the application as well as the Respondent's reply, the written and oral submissions by counsels as well as the authorities cited. To my mind there arises two issues for determination:-
- i. whether the replying affidavit by the Respondent should be expunged from the record for failure to comply with the law?
 - ii. Whether the application has merit.

AS to whether the replying affidavit by the Respondent should be should be expunged from the record for failure to comply with the law?

11. The plaintiff avers the replying affidavit sworn on 7th March 2023 is incurable defective as it violates Section 4(1) of the *Oaths and Statutory Declaration Act*. This is because the annexures to the said affidavit have been commissioned by the advocate who drafted the affidavit and accordingly, are null and void as they violate the law. In response, Counsel for the Defendant maintained that the Replying affidavit as filed is properly drawn as the same has been properly commissioned the issue of annexures is not fatal to the administration of substantive justice. Counsel urges the court to be guided by Order 19 Rule 7 of the *Civil Procedure Rules*, 2010 which calls upon the court to receive affidavits sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of parties or otherwise in title or other irregularity in the form thereof or on any technicality.
12. Article 165 of *the Constitution* calls upon the court to consider substantive justice as opposed to procedural technicalities. The Replying affidavit as filed is not defective the only issue is on the annexures being commissioned by the advocate who drafted the affidavit, this cannot be said to amount to confusion in understanding what is being relied on. The annexures as marked can easily be identified and relied upon by the parties and I find therefore that no injustice will be occasioned if the annexures certified by the Advocate who drew the affidavit as filed that would deter the litigants from pursuing their rights in court. In view of my finding on this issue, I shall allow the Affidavit as filed to remain as part of the pleadings and will not expunge the same.

Whether the application has merit?

13. The court derives its discretionary powers to grant or decline the granting of temporary orders from Order 40 (1) (a) and (b) of the *Civil Procedure Rules*, 2010 which states as follows:-

“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.”



14. An application for granting temporary orders of injunction ought to be measured against 3 limbs as outlined in the celebrated case of *Giella v Cassman Brown Co. Ltd* 1973 E.A 358 where the court held that:-

An Applicant must establish a *prima facie* case with a probability of success, the Applicant will suffer irreparable harm which would not be adequately compensated by way of damages and the balance of convenience tilts in favour of the Applicant.

As to the first limb “on a prima facie case”

15. What constitutes a *prima facie* case was determined by the Court of Appeal in the case of *Mrao Limited v First American Bank of Kenya and 2 Others* (2003) eKLR as follows:-

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”

16. 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 instant application it is not disputed that the Plaintiff sought some financial accommodation from the 1st Defendant to finance various projects and defaulted in the loan repayment. The issue in contention is that Plaintiff blames the 1st Defendant for breaching the terms of the loan facility by dispatching the loan amount less Kshs.10,400,000/= a move that crippled the project and the project failed to commence and thus there was no income generated to repay the loan amount. The Plaintiff avers the Defendant has failed to address the issue of its breach and therefore the issue remains undefended.
17. On the other hand, the 1st Defendant avers that the Plaintiff is undeserving of the orders as it failed to repay the loan disbursed despite being accommodated for too long which has prompted the 1st Defendant to proceed in exercising its statutory power of sale in an attempt to recover the amount loaned to the Plaintiff.
18. From the testimony of Peter Njoroge, the director of the Plaintiff, the plaintiff does not dispute that there is default on its part in its repayment of the loans advanced to it by the 1st Defendant. The Plaintiff having benefited from the loan advanced by the 1st Defendant was under a duty to honour the loan terms and repay the loan amount as agreed with the defendant, failure to which the bank is within its rights to proceed and exercise its exercising its statutory power of sale and cannot therefore be estopped from doing so.
19. The 1st Defendant has availed to this court in evidence all the statutory notices issued and sent through post to the guarantors and the Plaintiff prior to it taking the current action which culminated in the intended sale of the property. The notices were sent out using the last known postal address belonging to the Plaintiff. This was done in compliance with the law and therefore cannot be said to violate the duty of care owed to the Plaintiff.
20. The Court notes that no sufficient reasons have been advanced by the Plaintiff for its failure to honour the loan repayment agreement which culminated in the loan accruing huge interest and arrears, the default is also not disputed. The Plaintiff has had since September 2021 to make repayments to the



loan amount but none has been done. The Court notes that even as the Plaintiff has moved this court, there is no cogent plans by it to settle or repay the loan and no proposal put forward for consideration. It is therefore not in the interest of justice for this court to make orders that will deny the 1st Defendant from mitigating its loss by moving to exercise its statutory power of sale, after following the due process, as set out under the various statutory provisions that govern the relationship between the Plaintiff and the 1st Defendant. I am satisfied that the Plaintiff has not made out a prima facie case with a likelihood of success to warrant the grant of the orders sought.

21. Having found that the Plaintiff has failed to establish a prima facie case which is the first limb as set out in the Giella case(*supra*) and as held by the Court of Appeal in the *Nguruman Limited v Jan Bonde Nielsen* [2020] eKLR, that three limbs must be determined sequentially and if the first one fails, the court need not consider the other two, I will therefore not consider the other 2 limbs upon which it is necessary to warrant a grant of orders of injunction.
22. In the end the result of my finding is that the Plaintiff's application dated 31st January, 2023 lacks merit. The same is dismissed with costs to the Defendants.

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:-

1. Mr. Kabugu for the Plaintiff.
2. Mr. Obura for the 1st Defendant.
3. Amos - Court Assistant

