



**Kariuki v Paramount Bank Limited (Civil Case E581 of 2021)
[2024] KEHC 2288 (KLR) (Commercial and Tax) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E581 OF 2021
JWW MONG'ARE, J
MARCH 5, 2024**

BETWEEN

ALICE WANJIRU KARIUKI PLAINTIFF

AND

PARAMOUNT BANK LIMITED DEFENDANT

RULING

1. For determination is the Plaintiff's Notice of Motion application dated 19/5/2021 filed pursuant to Section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) and Order 40 Rule 1 and 4 and order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
2. The Applicant prayed for an injunction restraining the Defendant and/or its agents from advertising for sale, selling, trespassing, evicting the Plaintiff or dealing in any way with the properties known as Title Number Nairobi/Block/96/15, Title Number Nairobi/Block/96/20 and L.R Number 1870/111/538 (the suit properties), pending determination of this suit.
3. The application is based on the grounds that the Plaintiff was indebted to the Defendant due to loans taken and the suit properties were part of the securities to the said loans; that the Plaintiff and Defendant entered into a settlement agreement on 23/11/2021. The salient features of the agreement included that the Plaintiff was to facilitate the sale of the suit properties belonging to the Plaintiff to a third-party purchaser who was to be identified by the Plaintiff within 90 days from the date of the agreement and pursuant to that sale, the Defendant was to be entitled to Kshs.30,000,000/= being proceeds of the sale.
4. The Plaintiff contended that pursuant to the said agreement, she obtained a third-party purchaser by the name Grace Waithera Manyagi who agreed to purchase the three properties at the consideration of Kshs.35,000,000/= which was above the Kshs.30,000,000 that the Defendant was entitled to. That



- consequently, the said Grace Waithera Manyagi (hereinafter the purchaser) paid Kshs.3,500,000/= as 10% of the purchase price to the Defendant where the same is held to date.
5. The Plaintiff stated that the sale agreement was to be completed within 90 days, the last day ending on 20/05/2021, by which day the Defendant ought to have received a total of Kshs.30,000,000/=. However, due to various reasons, the purchaser was not able to avail the balance of the purchase price within the stipulated timeline and she sought for an extension of the completion time by 45 days which the Defendant rejected.
 6. It was contended that the purchaser who was under pressure to meet the completion time, approached Mwananchi Credit Kenya and requested for an advancement of such amounts; that Mwananchi Credit Kenya approved the application and would release the funds to the Defendant on condition that the Defendant would release the title documents and a discharge of charge to it.
 7. The Plaintiff averred that the Defendant declined to issue the undertaking stating that they would not engage in any form of correspondence before receiving the entire sum of Kshs.30,000,000/=. That the sale transaction was therefore frustrated by the Defendant who refused to facilitate the release of the amount to Mwananchi Credit Kenya and the suit properties were now at risk of being sold.
 8. It was contended that if the court does not issue an injunction the Defendant would dispose of the suit properties and this suit would be rendered nugatory.
 9. The Defendant opposed the application through a replying affidavit sworn on 20/9/2021 by Timothy Kimani, its legal consultant who was duly authorized by the Defendant's Board of Directors to do so.
 10. He averred that the Defendant issued bank facilities to the Plaintiff and her business associate which were secured by the registration of charges on the suit properties. That the Plaintiff defaulted on repayment of the said facilities therefore the bank initiated the recovery process by exercising its statutory power of sale pursuant to the Land Act.
 11. Further those negotiations ensued and a settlement agreement was entered into between the Plaintiff, her associate and the Defendant however the Plaintiff failed to repay the outstanding amounts vide the agreed monthly instalments under the settlement.
 12. Mr. Kimani contended that the parties later entered into another settlement agreement whereby the Plaintiff entered into an agreement with a third party to sell the suit property for Kshs.30,000,000/= however the Defendant rescinded the sale agreement due to the delay by the purchaser in completing the sale and that the Defendant was not privy to any undertaking concerning the sale of the suit properties to the third party as alleged by the Plaintiff.
 13. Further that the Plaintiff acknowledged her indebtedness to the Defendant bank and that the suit properties had already been sold to a third party therefore injunction orders cannot be issued without hearing the said party.
 14. It was the Defendant's case that the Plaintiff is guilty of deliberate misrepresentation of facts to this court by alleging that the Defendant has been involved in deliberately frustrating the sale of the suit properties by third parties and that it has been trying to recover the accrued arrears from the year 2016 but has been unable due to continued failure by the Plaintiff in settling the same.
 15. Summarily, the Defendant's legal consultant contended that the Plaintiff was undeserving of the injunctive reliefs for lack of a prima facie case and urged the court to dismiss the instant application.
 16. In a rejoinder to the Defendant's replying affidavit, the Plaintiff filed a further affidavit sworn on 29/5/2023 by herself.



17. She contended that the suit properties had not been sold as at 20/9/2021 when the replying affidavit was sworn as alleged by the Defendant but were still under her possession where she has rent paying tenants; that the deponent only deployed an auctioneer to the said properties on 10/5/2023 seeking to have the tenants redirect their rent payments to an entity purported to have bought the property 3 years ago on 20/11/2020 and that it is not possible for an entity which is alleged to have bought the properties to take three years to take over possession of the same, therefore the claim that the suit properties were sold in 2020 or at any time for the matter are false and only intended to create the impression that the application has been overtaken by events.
18. The Plaintiff averred that the credit facilities detailed in the replying affidavit as well as in the settlement agreement are a fabrication in that the said loans were never disbursed to her nor were they utilized by her; that she could not have taken out loans detailed in the replying affidavit on 23/4/2013 as purported in the fraudulent charge documents annexed to the replying affidavit as the properties in issue Nairobi/Block/96/15 and Nairobi/Block/96/20 alleged to be the subject of the impugned charges were still charged to I & M Bank from the year 2006 until the discharges of charges were executed in 20/3/2015.
19. Further the Plaintiff asserted that she has not acknowledged being indebted to the Defendant and that any question as to her indebtedness is the subject of proceedings in HCCC No. E690/2021 and cannot be the subject of this suit and that there is an application pending determination to consolidate the instant suit with HCCC No. E690/2021 and HCCC E148 of 2021. That even if she did obtain the loan facilities as alleged by the Defendant, the said loan aggregated to Kshs.94,000,000/= and it is not possible that the said sums could have escalated to Kshs.320,000,000/= as it violates Section 44 of the [Banking Act](#).
20. In response to the Plaintiff's further affidavit, the Defendant filed and swore a further affidavit sworn on 26/6/2023 by Timothy Kimani.
21. He averred that the instant application is a non-starter and ought to be struck out as the prayer for an interlocutory injunction is not anchored in the main suit as a substantive prayer in the form of a permanent injunction. That the Plaintiff muddled up facts to mislead the court to believe that the properties were charged to I&M Bank during the duration that they were charged to the Defendant.
22. It was reiterated that the settlement agreement is valid and remains binding on the parties unless the same is vitiated on the grounds of fraud and that vide the settlement agreement the Plaintiff made an admission of debt of Kshs.576,180,499.92/= to the Defendant which amount had accrued as at 31/10/2020.
23. The Defendant asserted that in accordance with the settlement agreement, the Plaintiff identified a purchaser-Aleso Kenya Limited- and thereafter the suit properties were sold to the third party who acquired the titles for a value of Kshs.30,000,000/=.
24. That the Defendant bank is a stranger to the agreement dated 19/2/2021 between the Plaintiff and one Grace Waithera that purported to sell the suit properties after the conclusion of a valid sale agreement dated 23/11/2020 and that the Plaintiff misled a third party into believing that the suit properties were still available for sale and to further expect the Defendant to issue a professional undertaking for a non-existent title.

Analysis And Determination

25. The Plaintiff filed written submissions dated 8/6/2023 and supplementary submissions dated 27/10/2023. On its part, the Defendant filed written submissions dated 21/7/2023.



26. The court has considered the entire record, the annexures thereto and the submissions filed by the parties and has identified two issues for determination. The first issue for determination is whether the instant application is misconceived and incurably defective.
27. The Defendant submitted that a prayer for an interlocutory injunction must be anchored in the main suit as a substantive prayer in the form of a permanent injunction to warrant the court's consideration; that the instant application offends the said rule by failing to anchor the prayer for temporary injunction in the main suit as a substantive prayer of a permanent injunction contrary to the provisions of Order 40 Rule 1 of the *Civil Procedure Rules 2010*.
28. The Plaintiff did not submit on the issue.
29. Order 40 rule 1 of the *Civil Procedure Rules 2010* provides that an interim injunction may be granted by the court in order to preserve any property in dispute pending the disposal of the suit or further orders.
30. In the case of *Yang Guang Property Design & Manufacturing Limited v China Wu Yi Company (K) Limited* [2021] eKLR, the court held:-

“..it is now well settled that for a litigant to seek a temporary injunction as an interim relief, the Applicant must have included a substantive prayer for permanent injunction or similar relief in the plaint.”

The court went on to seek guidance in the case of *John Kubai M'eringa v Fredrick Ntongai M'eringa* [2009] eKLR, where it was held:-

“Considering those words in the case of *Winstone v Winstone* [1959]3 ALL ER 580 Winn J. said:-

‘ in my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made’

Simpson J as he then adopted the same reasoning in *Shah v Shah* [1981] K.L.R 374. In this case, as shown above, there is no relationship between the prayer in the Chamber Summons (the interlocutory pleading) and the Plaint (the principal pleading). The summons breaches both Order VI rule 6 (1) and Order XXXIX Rule 1 of the *Civil Procedure Rules*. It is incurably defective. It has no basis. For those reasons the same does not lie and is dismissed with costs to the Defendant/Respondent. It is so ordered.”

The court continued to state the following:-

“It is manifest then, that, by parity of reasoning, it is imperative that an interlocutory prayer for an order for audit be anchored in the Plaint itself, failing which such an order would be untenable. There being no such anchoring in the instant matter, it follows that the interlocutory prayer for audit amounts to a complete departure from the Plaintiff's claim as set out in its Plaint; and is therefore barred by Order 2 Rule 6(1) of the *Civil Procedure Rules*.”

31. I concur with the authority above. It is a settled legal principle that an interlocutory prayer ought to be anchored in a claim as set out in the plaint itself.



32. In the instant application, the Plaintiff seeks to restrain the Defendant through a temporary injunction from interfering and dealing in the suit property. In the plaint dated 19/5/2021, the Plaintiff prayed for judgement against the Defendant for:-

- “a) a) A declaration that by securing Grace Waithera Manyagi within the 90 days’ period, the Plaintiff complied with Clause 5.2 of the Settlement Agreement and is therefore entitled to continue and dispose the said properties known as title number Nairobi/Block/96/15, title number Nairobi/Block/96/20 and L.R. Number 1870/111/538 in accordance with clause 5.2 of the Settlement Agreement dated 23/11/2020 and the Sale Agreement as executed.
- b) An order of Mandatory Injunction/Specific performance be issued against the Defendant compelling it to immediately issue to the said Mwananchi Credit Kenya a competent undertaking as shall be necessary to facilitate the disbursement of the funds and completion of the said sale transaction.
- c) General damages
- d) Interest on (c) above.
- e) The costs of this suit.”

33. A look at the plaint reveals that no prayer for a permanent injunction barring any dealing in the suit properties is sought thereto. The interlocutory injunction is not anchored in the substantive prayers sought in the plaint. There is therefore no relationship established between the interlocutory pleadings and the substantive pleadings as required by the law and as such the application as filed is indeed fatally defective.

34. The upshot of the above deliberations is that the application is fatally defective and suffers the fate of being struck out in limine with costs awarded to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

.....
J.W.W. MONG’ARE

JUDGE

In The Presence of:-

- 1. N/A for the Applicant.**
- 2. Mr. Nyanjwa holding brief for Mr. Mauwa for the Respondent.**
- 3. Amos - Court Assistant**

