Kangethe & another v Access Bank (Kenya) PLC & 3 others (Civil Suit E349 of 2022) [2024] KEHC 2022 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E349 OF 2022

FG MUGAMBI, J

MARCH 1, 2024

BETWEEN

CHARLES KEPHAR KANGETHE ..... 1ST PLAINTIFF

SAMUEL GESIRE MONGARE ..... 2ND PLAINTIFF

AND

ACCESS BANK (KENYA) PLC ..... 1ST DEFENDANT

WATTS AUCTIONEERS ..... 2ND DEFENDANT

CLASSIX AT FOURWAYS LTD ..... 3RD DEFENDANT

SURAYA SALES LIMITED ..... 4TH DEFENDANT

RULING

Background

1. This ruling determines the application dated 14th September 2022. It is brought under Article 40 and 159(2)(d) of n the *Constitution* of Kenya, sections 1A, 1B and 3A and 63(c) of the *Civil Procedure Act* Cap 21, Order 40 rules 1 and 2 *Civil Procedure Rules*, 2010 and section 96 (3) of the *Land Act*.

2. The applicants seek injunctive orders against the respondents from the sale and disposal of LR No. 28223/ 33/ T.5A (the suit property), pending the hearing and determination of the suit herein. The facts surrounding the dispute herein are that the applicants paid Kshs. 3,000,000/= or thereabouts as deposit for purchase of two 2-bedroom apartments being apartment numbers SPG/29/Bl/LP4/ L005 and SPG/29/B1/LP4/LO36 on off-plan arrangement. The said apartments were meant to be developed on the suit property.

3. The applicants subsequently learnt in September 2022 that the suit property had in fact been charged to the 1st defendant to secure a facility advanced to the 3rd defendant and that the entire suit property was therefore scheduled for auction on 15th September 2022. This information had been kept away from them by 3rd and 4th respondents. The applicants argue that the 1st respondent, despite knowing that there are third parties who had purchased the apartments never notified them of the intended sale of the property.

4. The application is opposed by way of a replying affidavit sworn on behalf of the 1st and 2nd respondentson 26th September 2022. The 3rd and 4th respondents have not participated in these proceedings. The respondents acknowledge that they advanced a facility to the 3rd respondent to the tune of Kshs. 67,000,000/=. The facility was secured by a charge over the suit property. The 3rd respondent defaulted in repayment of the facility, triggering the 1st respondent's statutory power of sale. A consent was entered into, which the 3rd respondent failed to honor and the 1st respondent then advertised the property for sale, triggering the present proceedings.

Analysis

5. I have carefully considered the pleadings, the evidence and submissions filed by opposing parties. The main issue is whether the applicant has met the threshold for granting an injunction to restrain the respondent from exercising its statutory power of sale.

6. The consideration for grant of injunctions as set out under Order 40(1) (a) and (b) of the Civil Procedure Rules, 2010 are now well settled beginning from the celebrated case of *Giella v Cassman Brown & Co Ltd*, (1973) E.A 385, at page 360 where Spry J. held that"

> " The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience." (emphasis mine)

7. The first question that this Court must answer is whether the applicants have shown that they have a prima facie case with a probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125, the Court defined a prima facie case as follows:

> " ... 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...a prima facie case 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 the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

8. The applicants' case is premised on their rights as purchasers of 2 apartments in the suit property. The applicants claim to have an enforceable purchaser's lien over the apartmentsmaking them secured creditors who should be protected.

9. The 1st and 2nd respondents argue that no legal title passed to the applicants as they had not paid the full purchase price for the apartments. They cannot therefore assert a right entitling them to statutory notice under section 96(3) of the *Land Act*.

10. Quite clearly, the dispute that the Court is faced with in this matter is to determine the priority of rights as between the applicants and the respondents. I am satisfied in this regard that a prima facie case has been made out by the applicants. I am certainly conscious of the boundaries of my enquiry at this point as was laid out in the Court of Appeal decision of *Nguruman Ltd v Jan Bonde Nielsen 8 2 Others*, [2014] eKLR. The Court warned 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."

11. The second consideration for grant of an injunction is whether the applicants have shown that they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others*, [2016] eKLR referred to the Halsbury's Laws of England on what irreparable loss is and stated that:

> "By the term irreparable injury is meant 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 injunction, if his rights cannot be adequately protected or vindicated by damages."

12. The applicants aver that their proprietary right as protected under Article the 40 of n the Constitution of Kenya cannot be limited on account of any damages. It is the applicant's case that they will otherwise suffer irreparable loss yet they have a proprietary interest in the suit property.

13. On this point, I concur with the finding of the Court, M.A. Warsame in *Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 Others*, [2008] eKLR to the extent that:

> "Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

14. Having found that the applicants have established a prima facie case with triable issues, I am of the view that they would suffer irreparable loss if an injunction is refused, for purposes of preserving the suit property until the issues between the parties are determined. Lastly on the balance of convenience, I think the same tilts in favour of the applicants.

Determination and orders

15. In conclusion, the application dated 14th September 2022 is allowed as prayed, save to add that the costs of the application shall await the outcome of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS1ST DAY OF MARCH 2024.

F. MUGAMBI

JUDGE