Bore v Equity Bank Limited (Civil Suit E004 of 2024)
[2024] KEHC 4503 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL SUIT E004 OF 2024

AC MRIMA, J

APRIL 12, 2024

BETWEEN

EDNA CHERONO BORE ..... APPLICANT

AND

EQUITY BANK LIMITED ..... RESPONDENT

RULING

1. This ruling relates to an application by way of a Notice of Motion dated 27th March, 2024. The application was taken out by the Plaintiff in her capacity as the Chargor in respect of the property known as LR. No. 2116/1050 (IR No. 52527) within Trans Nzoia County.

2. The application was brought under Sections 1A, 1B, 3A, 4, 5, 63(e) of the *Civil Procedure Act*, Order 40 Rules 1, 4(1) and (2), Order 51 Rule 1 of the *Civil Procedure Rules* and any other enabling provisions of the law.

3. The following reliefs were sought: -

    1. Spent.

    2. Spent.

    3. Pending the hearing and determination of the suit, a temporary injunction be issued to restrain the Defendant/Respondent by itself, agents and/or employees or whomsoever is acting on its behalf from trespassing into, continuing with auction due on 12th April 2024, selling, transferring or disposing off Land known as LR NO.2116/1050 (IR NO.52527).

    4. Costs of this application be awarded to the Plaintiff/Applicant.

5. The grounds upon which the above orders were mainly four. They were that the assignment of the charge from Equatorial Commercial Bank to Spire Bank and then to Equity Bank was unlawful, that

the loan was not advanced and utilized in accordance with the terms of the Letter of Offer, that no statutory notice was served and that the property was being sold at a gross undervalue.

6. In support of the application, the Applicant filed a Supporting Affidavit and a List of Authorities. She, through Counsel, also tendered oral submissions and referred to several decisions in calling upon this Court to allow the application.

7. The application was vehemently opposed through the Respondent's Replying Affidavit sworn by one Kariuki King'ori on 9th April, 2024, Grounds of Opposition and a List of Authorities. The Respondent also tendered oral submissions and cited several decisions in urging this Court to disallow the application.

8. The Respondent contended that the application and the entire suit were res judicata various prior litigations and also amounted to abuse of the Court process.

9. This Court has carefully considered the application, the Affidavits and annexures thereto as well as the submissions on record and the law. The Court is grateful to Counsel for the various relevant decisions referred to and to the on-point submissions.

10. Being a matter on whether an injunctive relief ought to issue, the Court remains alive to the law governing such arena in civil disputes, being Order 40, Rule 1 and 2 of the *Civil Procedure Rules* and the settled judicial principles.

11. It is undeniable that the principles for consideration in injunctive reliefs are well settled courtesy of the much-celebrated case in *Giella v Cassman Brown* (1973) EA. 358. The case developed the following three principles: -

    a. The Applicant to demonstrate a prima facie case with probability of success;

    b. The Applicant to show that will suffer irreparable loss or damage that will not be adequately compensated by an award of damages;

    c. If in doubt on the above two requirements, the Court to decide the matter on the balance of convenience.

12. Going forward, a consideration of the requirements will now follow.

A Prima Facie case:

13. A prima facie case was defined by the Court of Appeal in Civil Appeal No. 77 of 2012, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR as under: -

> 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."

14. In *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 a prima facie case was defined to mean:

> .... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case 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 later.

15. In *David Ndii & others v Attorney General & others* [2021] eKLR, the Court had the following to say about a prima-facie case: -

> 45. The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and, in this case, arguable constitutional issues.

16. What constitutes a prima-facie case was further dealt with by the Court of Appeal in *Mirugi Kariuki v Attorney General* Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).

17. In *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings on the main matter, the scope of the remedy sought, the grounds and the possible principles of law involved.

18. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR while dealing with what a prima facie case is, referred to Lord Diplock in *American Cyanamid v Ethicon Limited* (1975) AC 396, when the Judge stated thus: -

> If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

19. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law.

20. Returning to the matter at hand, there is no doubt that the Applicant charged her property to secure a loan advanced by Equatorial Commercial Bank Limited to a borrower. It is also not in dispute that the borrower defaulted in the repayment of the loan way back in 2015.

21. It has further not been denied that Equatorial Commercial Bank Limited changed its name to Spire Bank Limited. That is evidenced by the pleadings in this suit and the various suits which the Applicant filed against Equatorial Commercial Bank Limited and/or Spire Bank Limited. It is on that basis that the Respondent raised the issue that the application was res judicata.

22. Out of the four grounds in support of the application, this Court has no hesitation in readily finding that that the contention that the loan was not advanced and utilized in accordance with the terms of the Letter of Offer was previously litigated upon. However, that issue may not be so relevant as this point in time since it was mainly between the Lender and the Borrower.

23. The grounds that no statutory notice was served and that the property was being sold at a gross undervalue are issues which are also relevant when a Court is considering whether or not to grant an injunctive relief at an interlocutory stage.

24. There is then the germane issue of assignment of the charge. The Respondent admitted that the borrowing which the Applicant guaranteed was one of the liabilities that the Respondent acquired from Spire Bank. To that end, the Respondent annexed a copy of the Borrower's Statement of Loan Account as at 9th April 2024.

25. Notably, the Deed of Assignment, if any, was not introduced despite the issue being the most central one in this matter. Therefore, in light of the contention that there was no assignment or at all and given that the Respondent did not tender any preliminary evidence of the assignment, the issue cannot be wished away.

26. In finding as much, this Court is alive to the fact that the doctrine of res judicata cannot apply to the application since the issue as to whether there was any assignment of the charge from either Equatorial Commercial Bank Limited and/or Spire Bank Limited to Equity Bank Limited has never been litigated in any of the previous suits. This case, therefore, presents a totally different litigation platform whose issues are unlike those raised in previous suits.

27. Further, the Applicant contended that the Respondent was a stranger to her since there have never been any dealings between Equity Bank Limited and herself.

28. On a cautious consideration of this matter, the totality of the issues involved leads this Court to, and is hereby satisfied and without any shred of doubt, that the Applicant has successfully demonstrated a prima facie case in the unique circumstances of this case.

29. The first requirement is, hence, satisfied.

Irreparable loss:

30. On this principle, the Court of Appeal in *Nguruman Limited case (supra)* expressed itself as hereunder: -

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, 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.

31. In this matter, the Applicant is apprehensive that if no injunctive orders are issued, her property is likely to be sold in a public auction.

32. The loss is real. The charged property has already been put up in an advertisement and the public auction is scheduled to take place just a couple of hours from now.

33. The Applicant's contention is that she stands to lose her property despite the fact that if any monies are due, then such ought to be shouldered by the borrower and not herself. Since the Lender still has the option of recovering the debt from the Borrower, at this point in time, the Applicant stands to suffer loss if the property is disposed of without a substantive consideration of the salient issues raised.

34. The Court, hence, finds that the second requirement tilts in favour of the Applicant.

Balance of convenience:

35. Applicants must also, ordinarily, demonstrate that the balance of convenience tilts in their favour just in case the Court finds itself in doubt on the first two principles.

36. In P*ius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the concept of balance of convenience was defined as follows: -

> The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the suit is ultimately decided in favour 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting.

37. The Court in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, also dealt with the issue of balance of convenience and expressed itself thus: -

> Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.

38. Further, the Court in *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR had the following to say about "balance of convenience": -

> The Court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.

39. Lastly, in *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another* [2019) eKLR, the Court in dealing with an application for an injunction vouched as follows: -

> .... circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the Court is in such situation enjoined to a grant a temporary injunction to restrain such acts...

40. In this matter, since it is yet to be determined if the Respondent's assignment of the charge was lawful and noting that the Applicant was not the borrower, but only a Guarantor, then this Court finds that the balance of convenience tilts in favour of the Applicant.

41. This is a matter in which social justice under Article 10(2)(b) of the *Constitution* calls for some restraint on the part of the Bank as to accord the Court an opportunity to determine the issues in dispute on merit.

42. As a result, this Court finds that the balance of convenience favours the Applicant.

Disposition:

43. As the Court comes to the end of this discussion, it remains alive to the truism that this matter, being a commercial one, has an impact on the rating of the country's ease of doing business in the world ranking. Therefore, having decided to issue the restraining orders, deliberate steps must be taken to ensure its expeditious disposition. To that end, this Court will endeavour to hear and determine the main matter within some timelines.

44. Consequently, the following final orders do hereby issue: -

    a. Pending the hearing and determination of this case, an order of temporary injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its servants and/or agents from selling, transferring, disposing off and/or continuing with the auction scheduled for 12th April 2024 or any other date in respect to the parcel of land known as LR. No. 2116/1050 (IR No. 52527) within the Kitale Municipality of the Trans Nzoia County.

    b. The Defendant shall file and serve its Statement of Defence within the next 7 days of this order.

    c. Once served, the Plaintiff shall, if need be, file a Reply to Defence within 7 days of service.

    d. The parties shall thereafter comply with Order 11 of the *Civil Procedure Rules* within 14 days of (c) above.

    e. This matter shall be fixed for Pre-Trial Conferencing and for hearing of the main case on dates to issue today.

    f. Time is of essence and any defaulting party shall suffer the consequences.

g. Costs of the application shall be in the main suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Munyao for Mr. Wandabwa, Counsel for the Applicant/Plaintiff.

Mr. Cheruiyot for Mr. Kongere, Counsel for the Respondent/Defendant.

Chemosop/Duke – Court Assistants.