**Mbeya v Consolidated Bank of Kenya & another (Civil Case E397 of 2022)**
**[2024] KEHC 5201 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5201 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL CASE E397 OF 2022**

**A MABEYA, J**

**APRIL 19, 2024**

**BETWEEN**

**GEORGE MUGOYE MBEYA ..... PLAINTIFF**

**AND**

**CONSOLIDATED BANK OF KENYA ..... 1ST DEFENDANT**

**PETER M GACHIE T/A REGENT AUCTIONEERS ..... 2ND DEFENDANT**

**RULING**

1. The Motion for determination is dated 6/10/2022 by the plaintiff. It is brought under Article 40 of the *Constitution*, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* and Order 40 of the *Civil Procedure Rules*.

2. It sought restraining orders against the 1st defendant from dealing with the property known as Apartment No. 9 Block C LR No. 330/683 pending the determination of the suit.

3. It was supported by the plaintiff's affidavits of 5th and 6th October, 2022. His case was that he was the registered owner of the property known as Apartment No. 9 Block C on LR No. 330/683 ("the suit property"). He purchased the same for Kshs. 18M having been financed by the 1st defendant with Kshs. 14M vide a charge dated 4/2/2013.

4. That the suit property was his matrimonial home and his wife had given a spousal consent thereby becoming a guarantor. That he serviced the loan but the 1st defendant gave him a statutory notice in January, 2018 claiming arrears of Kshs. 13,134,219/43. That he made a lumpsum payment of Kshs. 5M on 28/4/2018 leaving a balance of Kshs. 8,134,219/43.

5. That the 1st defendant rescheduled the loan on 28/5/2018 for him to make monthly instalments of Kshs. 137,127/=. That on 6/8/2021, he made a payment of Kshs. 1,505,928/21 but the balance

still remained Kshs. 8,137,670/73. He gave notice of early redemption but the 1st defendant failed to discharge the suit property claiming the principal sum. That he had paid the 1st defendant a sum of Kshs. 19,618,068/= as at 30/7/2021. That on 4/8/2022, the 1st defendant issued him with a statutory notice for Kshs. 8,717,755/99.

6. He contended that the suit property was valued at Kshs. 25m yet the reserve price had been placed at Kshs. 15m. That since his wife had not been served with the statutory notice and no current valuation had been undertaken the intended auction was null and void. That the bank had applied different punitive rates of interest and penalties. That he had over-paid the bank by over Kshs. 19.5m. That the intended sale was contrary to the *Banking Act* and the in *duplum rule*.

7. The application was opposed vide the replying affidavit of Catherine Muthiani sworn on 13/3/2023. It was contended that the 1st defendant advanced the plaintiff Kshs. 14m vide a charge dated 4/2/2013. That the suit property was given as a continuing security. The plaintiff also executed a Deed of Assignment assigning rental income from the suit property.

8. It was admitted that the plaintiff did pay a lump sum of Kshs. 5m in 2018 leaving a balance of Kshs. 8,639,880/42. That the said balance was restructured for a period of 10 years at the then prevailing rate of interest of 13.5% p.a repayable at a monthly instalment of Kshs. 137,127/=.

9. That the plaintiff failed to repay the amount as agreed whereby the bank issued the statutory notice on 14/3/2022 and a 40-day redemption notice on 13/6/2022, respectively. That as at that time, the outstanding amount was Kshs. 8,515,336/99. The bank denied that the plaintiff had overpaid the loan.

10. The bank denied that the suit property was matrimonial home. It contended that a current valuation was undertaken and availed to the plaintiff. That there was no contradicting valuation. That in any event, the plaintiff will not suffer any irreparable loss and damage.

11. The Court has considered the rival averments and the submissions on record.

12. This is an injunction application. The principles applicable are that an applicant must demonstrate a prima facie case with a probability of success, that if the order is not granted, the applicant will suffer loss that cannot be compensated by an award of damages and that in the event the court has doubt, the application is to be determined on a balance of convenience. See *Giella v Cassman Brown* 1973 EA 169.

13. Prima facie case 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 been infringed by the opposite party thereby calling for an explanation or rebuttal. See *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR.

14. On prima facie, the plaintiffs case is simple. He is the registered owner of the suit property. He took a loan from the bank of Kshs. 14m to partly finance the purchase of the suit property. That he had religiously paid the loan and overpaid in excess of Kshs. 19.5m. That there was no service of statutory notice and any notices issued were a nullity. That the claim by the bank was in breach of the *Banking Act* and in *duplum rule*.

15. Firstly, there is no dispute on the lending. A sum of Kshs. 14m was advanced and the suit property offered as security. From the record, it is clear that contrary to the plaintiff's averments, the loan was not regularly repaid thereby attracting interest and penalty interest. This must have increased the amount due.

16. There was no evidence of overpayment of Kshs. 19.5m as alleged by the plaintiff. To the contrary, the evidence on record showed that the plaintiff was erratic in his repayments. That he applied for and

the facility was rescheduled in 2018 whereby the then outstanding sum in excess of Kshs. 8.1m was to be repaid in monthly instalments of Kshs. 137,127/= for 10 years. That he never kept on to this reschedulement.

17. It is clear from the record that the dispute is purely on the amount due. The bank exhibited statements of accounts. The same were not seriously challenged. Further, a dispute as to the amount due and/or accounts is no basis for restraining a charge from exercising its statutory power of sale.

18. On the alleged illegality on the exercise of the statutory power of sale, I find that no illegality was demonstrated. There was no proof that any of the provisions of the *Banking Act* were breached.

19. On the in duplum rule, its application and the spirit of Section 44A of the *Banking Act* was well stated by the Court of Appeal in *Kenya Hotels Ltd v Oriental Commercial Bank Ltd* [2019] eKLR as follows:-

> " In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See *Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another* [2016] eKLR, *Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation* [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.
>
> The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

20. What the rule means is that a lender is not to recover more than double the principal sum. Or, that upon default when the loan becomes unserviceable, the lender is not to recover more than double what was outstanding was as at the date of the unserviceability of a loan.

21. In the present case, when the loan became unserviceable in 2018, the parties entered into a restructuring arrangement. It was rescheduled to a 10-year period on an agreed interest rate. In this regard, if it became unserviceable later, the in *duplum rule* will apply on the amount outstanding as at the time of unserviceability.

22. In this case, the plaintiff did not identify the date of unserviceability. He never demonstrated how much was due as at that date and that he had repaid double that amount. The claim of breach of the in duplum rule therefore fails.

23. On the issue of landlord/tenant relationship, the same was not established. It was a red herring only raised to co-obfuscate the issues.

24. In this regard, I hold that the plaintiff has not established a prima facie case with any probability of success.

25. On irreparable loss, there was no evidence produced to demonstrate that the plaintiff will suffer such loss. The property was purchased using the funds availed by the bank. The suit property was offered as security. It became a commercial commodity for sale in the event of default. That default has occurred. Accordingly, no irreparable loss and damage will be suffered.

26. On the balance of convenience, taking into consideration the time length the facility has taken to be serviced, the balance of convenience lies in permitting the bank to recoup its outlay before the amount exceeds the value of the security.

27. Accordingly, the court finds that the application is without merit and dismisses the same with costs to the 1st defendant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**