



Ngangu v Agricultural Finance Corporation & another (Civil Case E004 of 2022) [2024] KEHC 3418 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE E004 OF 2022
LM NJUGUNA, J
APRIL 11, 2024**

BETWEEN

JAMES MUNYI NGANGU PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

CLEVERLINE AUCTIONEERS 2ND DEFENDANT

RULING

1. The applicant has filed a notice of motion dated 24th November 2023 2022 seeking orders that:
 1. Spent;
 2. Spent;
 3. The Defendants whether by themselves, agents, servants, employees or otherwise howsoever be restrained from advertising, offering for sale, auctioning whether by private treaty or public auction, transferring, alienating, leasing, offering as security, entering upon, taking possession of or otherwise dealing with the property known as L.R. No. Mbeti/Gachuriri/1111 Mavirari Area, Rwika Location, Embu County pending hearing and determination of this suit;
 4. The 1st defendant be directed to render and deliver to the plaintiff true and correct accounts and the entire statements of accounts of the plaintiff's accounts operated by them in respect of the loan account;
 5. The costs of this application be provided for; and
 6. The Court be pleased to issue such other or further order and directions as may appear to it just and convenient.
2. The application is premised on the grounds set out on its face and in the supporting affidavit.



3. The applicant stated that the respondents are attempting to dispose of his property before ascertaining how much money he owes the 1st defendant/respondent. That the applicant has not been accorded an opportunity to repay the loan before the property is disposed of but even then, the property has not been subjected to a forced valuation to determine the value. That if the respondents are left to proceed, they will have abdicated the duty of care owed to the plaintiff to get the best possible price for the property. That there is a possibility that the respondents seek to unjustly enrich themselves through the sale and that the court should grant the orders sought to ensure good order and a just outcome.
4. It was the applicant's averment that the 1st respondent offered him a loan of Kshs.2,950,000/= for agricultural development and the suit property was charged as security for the loan. That he continued to repay the loan in accordance with the terms of the contract but on 31st August 2022, he was issued with a redemption notice requiring him to pay Kshs.4,359,361/= which amount he disputes. That his efforts to reach the 1st respondent for purposes of explaining the figures were futile and then the property was advertised for sale through a newspaper. That the applicant was not provided with the proper notice period, a copy of the contract and the forced sale valuation for the property.
5. The 1st respondent's Legal Officer filed a replying affidavit dated 03rd August 2023 wherein he deposed that the applicant had failed to service his loan and several demand letters were written to him over the matter. He produced copies of the demand notices that the 1st respondent wrote demanding the arrears and stating the interests accruing. He deposed that the 1st respondent issued a statutory notice dated 25th February 2021 and a subsequent one dated 07th June 2021 giving 40-days' notice but the applicant did not comply with either of them. That following the notices, the applicant wrote to the 1st respondent seeking time to repay the loan. That the 1st respondent had no choice but to commence the recovery process through the 2nd respondent. He produced a valuation report dated 24th March 2022 and the applicant was given a 45-days' notice of sale dated 31st August 2022. That the 2nd respondent, in compliance with the law, advertised the property for sale in the Standard Newspaper dated 14th November 2022. That the property had been offered as security and the 1st respondent is within its rights to sell the same to recover the loan which is still accruing interest.
6. The court directed that the application be canvassed by way of written submissions but none of the parties filed their submissions.
7. From a perusal of the application and the response thereof, the issues for determination are:
 1. Whether the threshold for issuance of temporary injunction has been met; and
 2. Whether the court is well placed to order for accounts to be produced by the respondent.
8. On the first issue, the pillars of granting of injunctions are that the applicant must:
 - (a) establish a prima facie case;
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) if the court is in doubt as to (b), grant the injunction on a balance of convenience.

These principles were laid down in the case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and used in the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*, CA No. 77 OF 2012.
9. The applicant argued that the 1st respondent did not notify him of the intended forced sale and the property was not subjected to valuation for that purpose. The first respondent produced a valuation report dated 24th March 2022 and a 45-days' notice dated 31st August 2022. I see no further affidavit on record, where the applicant has reacted to or controverted the evidence adduced by the 1st respondent.



10. If the sale proceeds, the applicant is likely to lose his property but this is not the kind of loss envisioned under these principles for issuance of injunctions. The 1st respondent has demonstrated that the applicant defaulted on servicing the loan and several demand letters were written to him over the same. The 45 days notice was also given to the applicant and he accepted service of the same. The applicant's character does not show that he was willing to engage the 1st respondent regarding the defaulted loan until the matter was taken to court. I do not think that he stands at a loss.
11. Since I remain in doubts as to whether or not to grant an injunction based on the first 2 elements, I shall look at the balance of convenience. I am guided by the case of *Bryan Chebi Kipkoech v Barnabas Tuitoek Bargarora & another* [2019] eKLR (as cited in the case of Margaret Njambi Kamau v John Mwatha Kamau & another [2019] eKLR) where the court held;

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it....”
12. Being an equitable relief, the same is not guaranteed as the court must consider all the prevailing circumstances. In the case of *Showind Industries v Guardian Bank Limited & Another* (2002) 1 EA 284 it was held thus:

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches”
13. In the present circumstances, it is my view that the applicant will lose his property to a sale by public auction but at the same time, the 1st respondent's business will suffer loss of its monies through the defaulted loan. However, as things stand, the loan is still accruing interest and if the property is eventually sold, the 1st respondent will recover the loan and interests accrued, regardless of the consequences of this action to the applicant.
14. In saying so, I take notice of the fact that the 1st respondent made several attempts to claim the money but the applicant did not make any effort to redeem the loan. The applicant is not being truthful in his averment that the 1st respondent abandoned procedure before putting the property on the market. It is also clear to me that the 1st respondent carried out valuation of the property and the same informed its asking price.
15. Under Order 40 Rule 1 of the *Civil Procedure Rules*, it is clear that injunctions are granted at the discretion of the court. It provides:

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.
16. An injunction is granted at the discretion of the court. In this case, the 1st respondent has demonstrated that it followed all due procedures before reaching the decision to sell the property to recover the loan. On the applicant's part, at the time when he started defaulting on the loan, he did not seem diligent in communicating with the 1st respondent until when he learned that the 1st respondent wanted to dispose of the property. Further, the loan amount and the interest accruing are properly documented and the increasing figures were communicated to the applicant throughout the arrears demand notices including the statutory demand notice dated 22nd May 2019.
17. The 1st respondent's statutory power of sale should not be curtailed through this application as has been held by other courts before. In the case of *Giro Commercial Bank Limited v Halid Hamad Mutesi* (2002) eKLR the court stated:

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.”

In the similar case of *Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others*, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see *Barmal Kanji Shah & Another Vs. Shah Depar Devji* (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and *Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others*, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

18. In the end, I find that the application lacks merit and it is hereby dismissed.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2024.

CORRECTED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF APRIL, 2024

L. NJUGUNA

JUDGE

.....**for the Applicant**



.....for the 1st Respondent

.....for the 2nd Respondent

