



**Mboya v National Bank of Kenya & another (Civil Case  
E001 of 2024) [2024] KEHC 5786 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL CASE E001 OF 2024  
JR KARANJA, J  
MAY 16, 2024**

**BETWEEN**

**HADSON MBOYA ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**COLINET AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This suit pits the Plaintiff/Applicant, Hadson Mboya, against the first Defendant/ Respondent National Bank of Kenya Limited and the Second Defendant/ Respondent, Colinet Auctioneers and was provoked by the Second Defendant's News Paper Advertisement placed on the 15<sup>th</sup> February 2024 to the effect that the Plaintiffs parcel of land described as No Nandi/Ngechek/82 which was charged to the first Defendant would be sold by Public Auction on 5<sup>th</sup> march 2024 in exercise of the First Defendant's Statutory Power of Sale.
2. The suit was filed on the 22<sup>nd</sup> February 2024 together with the present application vide the Notice of Motion dated 21<sup>st</sup> February 2024 in which the Plaintiff primarily seeks a temporary injunction order against both Defendants pending the hearing and determination of the suit. This court did on the 4<sup>th</sup> March 2024 order that the status quo "existing between the parties" be maintained pending hearing of the application inter-parties.
3. The Plaintiff's contention is that the exercise of the statutory power of sale by the First Defendant is improper for want of the pre-requisite statutory notice under Section 90 and Section 96 (2) of the [Land Act](#) and for failure to carry out valuation of the suit property:

Consequently, the Plaintiff prays for a declaratory order that the Defendant's exercise of the statutory power of sale was unlawful and an order that the First Defendant whether by itself or its servants and/or agents be permanently restrained from alienating, advertising for sale, offering for sale, selling,



taking possession of leasing, transferring or otherwise disposing off the whole of the suit property. This application seeks a temporary injunction to that effect.

4. The application is premised on Sections 1A, 1B, 3A and 63 of the of the Civil Procedure Act, Section 90 and 104 (2) of the Land Act and Order 40 of Civil Procedure Rules the supporting grounds are set out in the Notice of Motion and fortified by the Plaintiff's averments contained in this supporting affidavit deponed by himself on 21<sup>st</sup> February 2024. The grounds are that: -

- i. The Plaintiff is the registered owner of Land Parcel No Nandi/Ngachek/82.
- ii. The said parcels is the matrimonial home for the Plaintiff together with his young family.
- iii. The Plaintiff has a *prima facie* case with probability of success.
- iv. The Plaintiff will suffer irreparable loss and damage unless an order of injunction is issued.
- v. The balance of convenience tilts in favour of the Plaintiff.
- vi. The Defendant shall not suffer any prejudice.

5. It is on the basis of the foregoing grounds that the Plaintiff prays for a temporary injunction order against the Defendants and in the alternative, for a suspension and/or postponement of the First Defendant's exercise of the statutory power of sale for a period of twenty four (24) months to enable him redeem the suit property. The alternative prayer was unnecessary in view of the main prayer and may be regarded as being pedestrian in nature.

Nonetheless, the application is opposed by the Defendants on the basis of the averments and grounds contained in the replying affidavit dated 7<sup>th</sup> March 2024 deponed by the Defendant's Remedial Analyst, Morris. S. Tiema.

The hearing thereof was by written submissions which were filed by both the Plaintiff and the Defendants through Warigi and Company Advocates and Omwenga and Company Advocates, respectively.

6. Having given due consideration to the application and its supporting grounds as well as the rival submissions it was clear to this court that the basic issue for determination was whether the Plaintiff/Applicant provided sufficient and satisfactory evidence and/or material in his quest to demonstrate that he is deserving of the court's exercise of discretion in his favour and indeed to establish and prove any of the ingredients necessary for grant of a temporary injunction as set out in the leading case of *Giella v Cassman Brown* (1973) EA 358 as follows: -

1. An Applicant must show a *prima facie* case with a probability of success.
2. An Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
3. If the court is in doubt, it will decide an application on the balance of convenience.

7. With regard to the first ingredient, the term "*prima facie*" case was defined in *Mrao Limited v First American Bank of Kenya* (2003) KLR 125 in the following terms: -

"A *prima facie* case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."



8. It was in the same case stated that: -

“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 success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

The burden of proving a “*prima facie*” case would invariably lie on the Applicant. In that regard, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen and 2 others* (2014) eKLR, proclaimed that: -

“the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

9. The court went further to proclaim that: -

“we reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a minitrial 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.”

10. Again, the Court of Appeal proceeded to also proclaim that: -

“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.”

11. In the present case there exists no dispute that the suit property belongs to the applicant and that it was offered as security for the repayment of loans applied for and given to the Applicant/ Plaintiff either directly or indirectly by the first Defendant bank upon terms and conditions specified in the material charge instruments which were executed by the Plaintiff.

Also not disputed is the fact that the Plaintiff defaulted in the repayment of the loan thereby giving the First Defendant the right to realize the security in the manner provided by the applicable law and pursuant to the contractual relationship which evolved between the Plaintiff and the First Defendant. Thus, the First Defendant was entitled to exercise its statutory power of sale in terms of the operating charge instrument and while in the process of doing so, the present suit was instituted by the Plaintiff.

12. The major complaint by the Plaintiff as may be deciphered from the pleadings in the plaint and the material notice of motion is that he was never served with the pre-requisite statutory notice as provided for under Sections 90 and 96(2) of the *Land Act*. He also raises issue with the First Defendant alleged non-compliance with Section 97(2) of the *Land Act* which requires a forced sale valuation to be undertaken by a valuer.

The validity of the charge is also put into question by the Plaintiff. However, the Plaintiff’s foregoing complaint and/or allegations against the First Defendant, have been formidably resisted by necessarily



documentary evidence provided herein by the first Defendant. This effectively raises serious doubt as to whether the Plaintiff has demonstrated a *prima facie* case with a probability of success on account of non-service upon himself of the statutory notice.

It may therefore be safely stated that other than raising issues with a propensity to creating an arguable case, the Plaintiff has not provided sufficient evidence to establish an infringement of any of his rights under the material contract.

13. It would therefore follow that the Plaintiff has failed to fulfill the first condition for grant of a temporary injunction against the Defendants.

With regard to the second condition It was held in the *Nguruman Limited Case (supra)*, that: -

“.....the court must further be satisfied that the injury the Respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the Applicant’s claim may appear at that stage.”

14. Herein, the Plaintiff submitted and implied that his rights cannot be adequately protected by an award of damages and that he would be greatly prejudiced since he would lose his property and suffer anxiety, mental anguish and stress on account of land matters being emotive. All these do not however, demonstrate that the Plaintiff would suffer damage or loss incapable of being compensated by an award of damages. The First Defendant being a bank is financially endowed and would be capable of compensating the Plaintiff in damages should he ultimately emerge victorious in this case.

Besides, the suit property is still registered in the name of the Plaintiff. He is not in immediate danger of losing his title to the property and he is indeed in a position to preserve and maintain his ownership of the property by simply repaying the outstanding loan balance to the First Defendant.

The Plaintiff has thus also failed to fulfil the second condition for grant of a temporary injunction.

15. With regard to the third condition, given that the Plaintiff voluntarily and without coercion entered into a contractual obligation with the First Defendant with full knowledge of the consequences of non-compliance with the terms and conditions of the contract and the risk it posed to his ownership and possession of the suit property and also given that he has had more than adequate opportunity to repay the loan amount or part thereof courtesy of the Defendant, the balance of convenience cannot surely tilt in his favour. This is fortified by the fact that despite several promises made by him to the First Defendant to repay part of the loan amount in order to forestall the imminent exercise of the statutory power of sale by the First Defendant, he failed to keep any of the promises. Instead he brought his suit against the First Defendant thereby implying that he has come to this court for an equitable remedy with unclean hands. He would in the circumstances not be deserving of this court’s exercise of discretion in his favour. His attempt to fulfill the third condition for grant of a temporary injunction therefore fails.

16. In sum, the present application is devoid of merit and is hereby dismissed with costs to the First Defendant/ Respondent. The Second Defendant/ Respondent did not effectively participate in this application and is not entitled to any costs.

Ordered accordingly.

**DELIVERED AND DATED THIS 16<sup>TH</sup> DAY OF MAY, 2024**

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**J. R. KARANJAH,  
JUDGE**

