



**Omingo v Rafiki Microfinance Bank Limited & another (Civil Suit 14 of 2023) [2024] KEHC 4702 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4702 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL SUIT 14 OF 2023  
SN MUTUKU, J  
MAY 7, 2024**

**BETWEEN**

**JUSTINE SURE OMINGO ..... PLAINTIFF**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RIGHT STONES ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling relates to a Notice of Motion Application dated 23<sup>rd</sup> August, 2023. It is brought under Section 3A and 63(c) and (e) of the *Civil Procedure Act* and Order 40 Rules 2 and 3, and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking the following orders:
  - a. Spent.
  - b. That the Honourable Court be pleased to issue temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent herein either by itself, servants and/or agents, invitees specifically Antique Auctions Agencies from selling by public auction or in any manner adversely dealing with the Plaintiff/Applicant's property known as Title No. Ngong/Ngong/20268 situated at Kajiado County pending the hearing and determination of this motion.
  - c. That the Honourable court be pleased to issue temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent herein either by itself, its agents, invitees and/or servants specifically Antique Auctions Agencies from selling by public auction or in any manner adversely dealing with the Plaintiff's /Applicant's property known as Title No. Ngong/Ngong/20268 situated at Kajiado County pending hearing and determination of this suit.
  - d. The costs of this application to abide the outcome of the suit.



2. The application is premised on the grounds listed on the face of the application and the annexed affidavit of the Applicant that he is the registered owner of the property Ngong/Ngong/20268 situated within Kajiado County; that his matrimonial home is situated on the said property and that he has lived there for a decade.
3. He has stated that on 22<sup>nd</sup> August, 2023 he saw a newspaper advert where the suit property was scheduled for auction on 6/9/2023; that he received a notification for sale via email on the same date and that he had never received any official communication or document on the subject matter prior to this date.
4. He has stated that the loan was advanced to the 2<sup>nd</sup> Defendant and that he merely offered his property as collateral sometime in 2020; that on conducting a search on his property after the newspaper advert he found a further charge registered in the suit property; that to the best of his understanding, no further loan facility was extended to the 2<sup>nd</sup> Defendant; that the 2<sup>nd</sup> Defendant is willing to dispose its assets towards clearing the outstanding loan; that he was not informed of the 2<sup>nd</sup> Defendant's default for him to take remedial steps to preserve his matrimonial home; that it would not be fair for his property to be attached while the 2<sup>nd</sup> Defendant has assets of its own which could be used to settle the amount owed and that he has never been served with notices required by law. He claims that he stands the risk of losing his home.

#### **The 1<sup>st</sup> Defendant's case**

5. The application is opposed by the Respondents through a Replying Affidavit sworn by the 1<sup>st</sup> Defendant dated 12<sup>th</sup> September, 2022. From what is deposed, the 2<sup>nd</sup> Defendant took a loan facility of Kshs 22,000,000 to be repaid in 48 months equal installments of Kshs 113,142/ which facility was disbursed on 1<sup>st</sup> January 2020. That the loan was secured by a 3<sup>rd</sup> party charge over the suit property with the Applicant being the charger.
6. The 2<sup>nd</sup> Defendant made an application to the 1<sup>st</sup> Defendant for another loan facility of Kshs, 1,800,000/- on 8<sup>th</sup> March 2021 which was secured by other means including the existing charge over the suit property. The 2<sup>nd</sup> Defendant defaulted in the repayment of the loan hence breaching the agreement. On 7<sup>th</sup> July 2021 the 1<sup>st</sup> Defendant issued a formal demand letter to the 2<sup>nd</sup> Defendant seeking repayment of the outstanding arrears amounting to Kshs 1,750,239.73 and Kshs 70,956.11 together with the accrued interest to be repaid within 14 days. That this letter was sent through registered post. That they also issued the 2<sup>nd</sup> Defendant with a notification of arrears dated 31<sup>st</sup> July 2021 showing arrears of Kshs 2,435,627.41 and Kshs 142,805 but the 2<sup>nd</sup> Defendant did not make any payment towards clearing the arrears, as a result of which they sent the first Statutory Notice to both the Applicant and the 2<sup>nd</sup> Defendant dated 24<sup>th</sup> August 2021 through registered post on 31<sup>st</sup> August 2021.
7. It is their case that on 29<sup>th</sup> November 2021, the 2<sup>nd</sup> Defendant applied for a loan restructure which was accepted by the 1<sup>st</sup> Defendant through their letter dated 28<sup>th</sup> December 2021 to the effect that the outstanding loan facility as at 24<sup>th</sup> December 2021 was Kshs 20,795,920.40 and Kshs 1,748,324.93. That the parties agreed to a further charge of Kshs 2,400,000 over the suit property that was to cover the aggregate sum of Kshs 22,400,000/-.
8. However, even after the loan restructuring the 2<sup>nd</sup> Defendant defaulted in the repayment, necessitating the issuance of a second statutory notice by the 1<sup>st</sup> Defendant to both the Applicant and the 2<sup>nd</sup> Defendant dated 25<sup>th</sup> July 2022. After failure to make any repayment, the 1<sup>st</sup> Defendant engaged the services of Antique Auctions Agencies via an instruction letter dated 17<sup>th</sup> January 2023.



9. It is stated that on 19<sup>th</sup> January 2023 the auctioneers served the Applicant with a 45-day Redemption Notice and a Notification of sale. There was no one present when the auctioneers went to serve the notices. Their agent John Irungu Mwangi fixed the notices on the gate as was confirmed by his sworn affidavit on service dated 24<sup>th</sup> January 2023. The 2<sup>nd</sup> Defendant was also served with a 45 days redemption notice via its director's WhatsApp mobile number 0722387469.
10. They stated that the auctioneers informed them of the intended auction of the suit property on 29<sup>th</sup> March 2023. That through their instructions, the property was valued by Dreamscape valuers Ltd and a valuation report dated 11<sup>th</sup> October 2022 was prepared showing the value of the property at 25,000,000/-.
11. It is the 1<sup>st</sup> Applicant's case that the Application by the Applicants is not made in good faith as he was aware of the borrower's default in repaying the loan through the issued notices.

### **Applicant's submissions**

12. The matter was canvassed through written submissions. The Applicant's submissions are dated 13<sup>th</sup> December, 2023. He has raised the following issues for determination:
  - a. Whether the Plaintiff/ Applicant has established a prima facie case with a probability of success at the trial.
  - b. Whether the Plaintiff/Applicant would suffer irreparable injury which would not adequately be compensated in damages.
  - c. Where the balance of convenience tilts.
13. On the first issue they relied on *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, where a prima facie case said to be '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 latter.'
14. The Applicant cited *David Ngugi Ngaari v Kenya Commercial Bank Limited* [2015]eKLR on the issue of notices issued to guarantors, where it was held that:

"There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in the form of a charge over the suit property. The law, the way I understand it, is that a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the *Land Act*. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the *Land Act*. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower. The Notice under section 90(1) of the *Land Act* was properly issued and liability on the guarantor attached. However, I understand the law to be that, after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the *Land Act* before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge



created on the suit land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation and I am content to cite some few cases, Albert Mario Cordeiro & another v Vishram Shamji [2015] e KLR.”

15. It is his submissions that he was not served with the requisite notices; that as regards the notice under section 96(2) of the Land Act, no certificate of postage has been produced; further, that the addresses indicated in the notices are varying; that the address indicated on the first and second statutory notices reads 10432-00100 while the one in the 45 days redemption notice reads 12639-00100 and that by dint of the questions surrounding the notices and their improper service raises a prima facie case warranting the grant of injunctive orders.
16. On the second issue, it is submitted that the suit property is a matrimonial home and hence he would suffer if orders sought are not granted.
17. On the third issue, he re-emphasized that the suit property is where he resides with his family and is therefore in occupation of the same. He relied on the case of *Alice Awino Okello v Trust Bank Ltd & Anor* LLR No. 625(CCK), cited in *Kisimani Holdings Ltd & Anor v Fidelity Bank* HCCC Number 744 of 2012 [2013] eKLR where the Court of Appeal stated thus:

“.....the balance of convenience is in favour of the Applicant as the sale of one’s property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances.”
18. He urged this court to be persuaded by the authority herein in finding that the balance of convenience tilts in his favour as he is in occupation of the suit property. He relied on *National Commercial Bank Ltd v Olint Corporation* 2009 IV/r 1405 where the Privy Council stated that the purpose of interlocutory injunction is to prove the chance of the court being able to do justice after a determination of the merits at the trial. He submitted that equitable considerations tilt in his favour and argued that he has raised equitable grounds on availability of the 2<sup>nd</sup> Defendant’s (borrower) alternative assets which are available and sufficient to settle the loan which fact has not been controverted by the 1<sup>st</sup> Defendant. He stated that should the 1<sup>st</sup> Defendant be unable to recover its debt, the option to realize the security will always be available.

### **1<sup>st</sup> Defendant’s submissions**

19. The 1<sup>st</sup> Defendant’s submissions are dated 5<sup>th</sup> December, 2023. The following issues have been raised for consideration:
  - a. Does the Plaintiff/Applicant meet the threshold for the issuance of a temporary injunction to stop the sale by public auction dated 6/9/2023?
20. Under this head, it is submitted the principles for temporary injunction are set out in *Giella v Cassman Brown and Company Limited* (1973) E A as follows:

“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 harm which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

21. On whether the Applicant has established a prima facie case with a probability of success. they relied on the case of *Mrao Ltd case* [supra] and submitted that the Applicant has not established a prima facie case in that he does not dispute the fact that the 2<sup>nd</sup> Defendant defaulted in the repayment of the loan. Further, that the Applicant was served with the requisite notices dated 24<sup>th</sup> August 2021 and 25<sup>th</sup> July 2022 and that all along the Applicant was aware of the breach in repayment of the loan by the borrower.
22. It was their submissions that having failed to establish a prima facie case, the other requirements need not be considered as per the case of *Kenya Commercial Finance Co v Afraba Education Society* (2001) vol 1 EA as was quoted in the case of *Mwangangi Mutula Mutua v Equity Bank Limited & 2 others*[2019] eKLR.
23. On the issue of irreparable damages they relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held that:

“If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied 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. The existence of a prima facie case does not permit leap frogging by the Applicant to injunction directly without crossing other hurdles in between.”
24. They further relied on the case of *Mureithi v City Council of Nairobi* (1979) eKLR where the Court of Appeal which relied on the position held in the case of *American Cynamid v Ethicon Ltd*(1975) AC 396, where it was held that:

“The object of interlocutory injunction is to protect the Plaintiff against injury or violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff’s claim appeared to be at that stage.....”
25. They submitted that the Applicant was aware of the eventualities of guaranteeing the borrower his loan facility by charging his property. That he knew in the event that there was default his charged property would be sold. That he was also aware that property he was charging is his matrimonial property. They relied on the case of *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2others* [2006] eKLR where the court held that;

“By offering the suit property as security the chargor was equating it to a commodity which the charge may dispose of, so as to recover his loan together with the interest thereon.”
26. They argued that the Applicant has not demonstrated that he is likely to suffer irreparable harm in the sense that there would be no basis or standard by which the loss could be measured with reasonable accuracy.



27. On the issue of balance of convenience, they relied on the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR and argued that they are a financial institution, and they are entitled to be repaid the loan sum owed to them; that the loan amount is currently at Kshs 31,493,538.43/- and it already exceeds the value of the property which is valued at Kshs 25,000,000/ and that by granting the orders sought they will be exposed to substantial irrecoverable loss.

### **Analysis and Determination**

28. I have considered the issues raised in the Application and the Replying Affidavit as well as the submissions. I will consider a singular issue, whether the Applicant has met the threshold for the grant of the orders he is seeking.
29. The applicable principles for granting injunctions are well settled. In keeping with the principles in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, all that this court is required to do, is to satisfy itself that the Applicant meets the threshold set out in the above case as follows:
- i. That he has demonstrated a prima facie case with a probability of success;
  - ii. That, if the injunctive orders sought are not granted, the Applicant stands to suffer irreparable harm for which damages would not be an adequate remedy;
  - iii. That, if the court is in doubt, this court has to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lies with the applicant or with the respondents.
30. Injunctions are equitable remedies that are granted by the court using its discretionary powers. The Court of Appeal in *Charter House Investments Ltd v Simon K. Sang and others*, Civil Appeal No. 315 of 2004 had this to say on injunctions:
- “Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the *Giella case (supra)* the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”
31. I have considered whether the Applicant has established a prima facie case as defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125. I have considered his arguments and the case he has presented to court. He guaranteed the 2<sup>nd</sup> Defendant a loan amount of Kshs 22 million and a charge was created over his property. He claims that the property charged is his matrimonial property. He claims that there was a further charge on his property which he was not aware of. It is his case that the 1<sup>st</sup> Defendant has other properties which could be sold to offset the amount owed instead of having his matrimonial property sold. It is the 1<sup>st</sup> Defendant case that they issued the requisite notices as required by the law and that the Applicant was aware of the default of the 2<sup>nd</sup> Defendant.
32. I take the view that the Applicant was aware that by using his property as security there was a clear risk that in case of default by the 2<sup>nd</sup> Defendant to service the facility, the charged property would be sold



to offset the loan. I have seen the notices sent by the 1<sup>st</sup> Defendant dated 24<sup>th</sup> August 2021 and 25<sup>th</sup> July, 2022 sent via registered post in accordance with Section 90(1) of the Land Act and section 96(2) of the Land Act respectively. The Auctioneers also sent the Notice of sale and the 45 days redemption notice both dated 19<sup>th</sup> January, 2023. I have noted that these notices were served upon the Applicants as demonstrated in the affidavit of service sworn by John Irungi Mwangi dated 24<sup>th</sup> January, 2023.

33. It is my considered view that from my own analysis, the Applicant has not established a prima facie case with chances of success as defined in Mrao case above and also in Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi & 5 others (2014) eKLR. There is no requirement for this court to delve into the other principles of injunction for the reasons that the Applicant has failed to establish a prima facie case as was held in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR where it was held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraba Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

34. The Applicant was aware at the time of offering his property as guarantee for the loan facility advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, that in the event that the 2<sup>nd</sup> Defendant fails to honour the agreement and defaults in repayments, then his property would become subject for sale. That is one fact he cannot play ignorant about. As submitted by the 1<sup>st</sup> Defendant, the Applicant has not disputed that the 2<sup>nd</sup> Defendant is in arrears of loan repayments.
35. But even if this court were to proceed and consider whether the Applicant has demonstrated that he will suffer irreparable harm that cannot be compensated by an award of damages, it is my view that he has not so demonstrated. It is my finding, and I so hold, that the Applicant has failed to establish a prima facie case to warrant the grant of the orders he is seeking. He has also failed to establish irreparable harm that cannot be compensated by an award in damages and that the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant.
36. Consequently, I hereby decline to grant the Notice of Motion dated 23<sup>rd</sup> August 2023, which I hereby dismiss with costs to the 1<sup>st</sup> Defendant. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MAY 2024.**

**S. N. MUTUKU**

**JUDGE**



In the presence of:

Ms Kerubo for the Applicant.

Ms Ndinda for the Respondent

