



REPUBLIC OF KENYA



**Augustine Ogola t/a Diri Enterprises v NCBA Bank Limited (Civil Case E014 of 2023) [2024] KEHC 7539 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7539 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E014 OF 2023  
RE ABURILI, J  
JUNE 19, 2024**

**BETWEEN**

**AUGUSTINE OGOLA T/A DIRI ENTERPRISES ..... PLAINTIFF**

**AND**

**NCBA BANK LIMITED ..... DEFENDANT**

**RULING**

1. In the Notice of Motion dated 30<sup>th</sup> October, 2023, the Plaintiff/Applicant Augustine Ogola T/A Diri Enterprises seeks orders of a temporary injunction to issue, restraining the Defendant NCBA Bank by itself, its agents, servants, employees, personal representatives and any other person from selling land parcel No. Kisumu/Municipality/Block 8/10 within Milimani Estate pending the hearing and full determination of the suit.
2. The Plaintiff also prayed for an injunction to stop the Defendant Bank from exercising its statutory power of sale of the land described above and a stay of sale of the said land. He also prayed for costs of the application.
3. The application is predicated on 8 grounds and a supporting affidavit sworn by the Plaintiff. The application was filed alongside the Plaint dated 30<sup>th</sup> October 2023 seeking for similar orders.
4. In the supporting affidavit, which only annexes copy of title document to the suit land, the Plaintiff/Deponent, it is deposed that he was advanced a loan of Kshs.30,000,000 for stock keeping and a further Kshs.8,000,000 loan to be utilized to boost his business, Diri Enterprises and the security was a legal charge over land parcel No. Kisumu Municipality/Block 8/105.
5. That the interest on the said loan was 13% p.a. That the loan was repayable in tranches designated as being percentages of the whole amount.



6. That despite the harsh economic times pursuant to Covid-19 pandemic, he nonetheless made payments due as per the terms agreed upon.
7. The Plaintiff asserts that the Defendant's purported exercise of its statutory power of sale of the suit property is premature and untenable because the Defendant did not issue it with a demand of the loan as by law stipulated; that no Statutory Notice was issued to him pursuant to Section 90 of the Land Act; that there is no recent valuation of the charged property as stipulated in Section 97 of the Land Act; and that therefore the 45 days redemption Notice from the auctioneer and the Notification of Sale are of no consequence owing to the failure by the Defendant to issue the requisite notice.
8. The Plaintiff further deposes that the property is where him and his entire family depon on, his business generates income from there and that they shall be rendered homeless and destitute and suffer irreparable if the property is sold.
9. Finally, that it is in the interest of justice for the orders of injunction sought to be granted as prayed.
10. Opposing the application, the Defendant Bank filed a replying affidavit sworn by Jackson Nyaga, its legal counsel annexing the letter of offer dated 6<sup>th</sup> May 2021 and charge dated 10<sup>th</sup> September 2021 on the suit property. He also annexed a letter of confirmation and variation and Review of Bank facility dated 23<sup>rd</sup> November 2021.
11. He also annexed a mandatory 90 days Statutory Notice issued pursuant to Section 90 of the Land Act, on 30<sup>th</sup> May 2023 via registered mail to the Postal address given by the Plaintiff in his letter of offer.
12. The Defendant further annexed a mandatory 40 days Statutory Notice to sell under Section 96(2) of the Land Act. It is dated 29<sup>th</sup> August 2023.
13. Further, that valuation had not been done because the Mandatory 40 days statutory Notice to sell had not lapsed hence this application and the suit were premature and that the Defendant was yet to instruct Auctioneers to issue the 45 redemption Notice.
14. It was further deposed that on 28<sup>th</sup> September 2023, the Plaintiff engaged the defendant Bank indicating that he had another property to sell and apply its proceeds towards regularising the loan default, which arrangement the Defendant Bank had no objection to save that the Bank would only be amenable to the suit property being sold by private treaty, with a duly executed Agreement for sale before lapse of the Mandatory 40 days Statutory Notice to sell dated 29<sup>th</sup> August 2023.
15. That the Plaintiff failed to supply the Defendant with the said executed sale agreement before 20<sup>th</sup> October 2023 and instead, he rushed to this court. Copies of the email correspondence are annexed.
16. The Defendant has also annexed copies of loan statements showing the loan balance to be Kshs.29,632,368.76. That the charged property became available as a commodity for sale hence in the event of default, the Defendant would exercise its Statutory power of sale as stipulated in Section 90 and 96 of the Land Act, 2012 hence, the Plaintiff cannot restrain the defendant where the plaintiff has defaulted in its obligation to the Bank.
17. That this court cannot unilaterally change the terms of the contract, as that would be contrary to Public Policy and an abuse of court process.
18. That there is no dispute over the Statutory Notices having been issued or indebtedness of the Plaintiff hence the orders sought should be denied as no prima facie case has been established and there is no proof that that an amount of damages cannot adequately compensate the Plaintiff.



19. In their oral submissions, the parties respective counsel reiterated the pleadings and affidavits in support of and in opposition to the application. I shall therefore not reproduce those submissions here.

### **Determination**

20. Having considered the pleadings, the affidavit evidence, and oral submissions by both counsel for the parties hereto, the question is whether the Plaintiff/applicant met the threshold to be granted an interlocutory injunction as was stipulated in the celebrated case of *Giella v Cassman Brown* (1973) EA 360 wherein it was held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

21. Before I delve into the specific conditions for grant of the interlocutory injunction and whether they have been met. I must make some observations. The plaintiff admits being indebted to the Defendant. In his affidavit in support of the application for the interlocutory injunction, he withheld all information relating to the loan facility by failing to annex the letter of offer which he voluntarily signed for the two loans. he never annexed any statement of the loan account to show that he ever repaid any part of the loans advanced to him. He even lied on oath that the loan was advanced and repayable at the interest rate of 13% per annum yet the letter of offer as annexed by the defendant, which was not disputed, shows that the interest rate was 14% per annum. The plaintiff further never annexed evidence of the alleged threat to sell his suit property to recover the defaulted loan plus interest accrued.
22. The defendant in its replying affidavit annexed not only the letter of offer and its terms and conditions which the plaintiff failed to honour, but also annexed all the mandatory statutory Notices issued to the plaintiff as well as the statement of the plaintiff's loan account which had been defaulted and the correspondence entered into between the two parties on the proposed sale of an alternative property and the charged property by private treaty to settle the loan account.
23. The question is whether the plaintiff has made out any prima facie case with a probability of success at trial.
24. The applicant is not disputing his indebtedness. I find that on account of the applicants continued indebtedness, the Banks' right to sell the charged property to recover the outstanding sums had crystallized.
25. I further find that the Defendant/Respondent has followed due process and issued all the requisite notices and which were due as at the time this suit and application were instituted; and that the defendant had not reached the stage of issuing notification of sale and or conducting valuation of the charged property in compliance with the *Land Act*.
26. Nonetheless, the defendant herein is at liberty to exercise its statutory power of sale, upon complying with the mandatory statutory requirements under sections 90, 96 and 97 of the *Land Act* which right cannot be fettered, and sell the suit parcels of land provided that it fully complies with the strict provisions of the law and with Section 97 of the *Land Act*, which stipulates that a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care.



27. The said section provides:

“ 1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

28. As the plaintiff/ applicant has not demonstrated that he has any prima facie case with a probability of success, I need not delve into whether the other conditions for grant of interlocutory injunction are met as it will be a waste of judicial time.

29. Accordingly, I find the application by way of Notice of Motion dated 30<sup>th</sup> October, 2023 devoid of any merit. It is hereby dismissed with costs to the Defendant/ Respondent to be assessed in the main suit which shall be set down for hearing expeditiously, should the plaintiff still wish to prosecute the said suit to its logical conclusion.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF JUNE, 2024**

**R. E. ABURILI**

**JUDGE**

