



Easy Properties Limited & another v Diamond Trust Bank Kenya Ltd (Civil Suit 39 of 2019) [2024] KEHC 6941 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 39 OF 2019
FG MUGAMBI, J
JUNE 7, 2024**

BETWEEN

EASY PROPERTIES LIMITED 1ST PLAINTIFF

BROWSE INTERNET ACCESS LTD 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. This ruling determines the application dated 7th November 2022 which seeks a mandatory injunction against the plaintiffs in the main suit, compelling them to return back the Original title to land Reference Number 12715/552 namely Grant Number I.R. 45452 (hereinafter the suit property) to the defendant (hereinafter the bank).
2. The bank's case is based on multiple charges registered over the suit property, through which it advanced a total of Kshs 200,000,000 to the plaintiffs. The bank agreed to release the original title to the suit property on the undertaking from the 1st plaintiff that it shall be used for the purposes of registration of various leases of apartments constructed and sold on the said suit property.
3. This arrangement continued and was executed for several apartments between 2013 up to 2017 even though according to the bank, a full discharge on the property has never been issued. Subsequently, through a letter dated 2nd October 2017, the bank through its Advocates requested for the original title back. The bank claims that the plaintiffs are yet to comply, in breach of their undertaking.
4. Additionally, the plaintiffs failed to make the scheduled monthly payments punctually, falling into arrears. The bank issued the necessary statutory notices required to exercise its power of sale, which the



plaintiffs sought to restrain. This court, in two separate rulings, declined to grant the injunction. The bank confirms that the amounts due as of 29th September 2021, were Kshs. 475,448,748.38.

5. Due to the continuing default, the bank confirms its eagerness to exercise its statutory power of sale over the suit property, but this is not possible as the respondents are improperly holding the original title.
6. The application is opposed by the defendants vide a replying affidavit sworn by Pamela Bwari Buruchara, a co-director of the respondents. The respondents do not deny having benefited from the facility and neither is the charge over the suit property denied. They assert that upon selling the apartments on the suit property, the bank discharged the title, and the parent title was surrendered to the lands office by the respondents.
7. They argue that granting the mandatory injunction would be in vain as the parent title is with the lands office.
8. The respondents further argue that arising from the notices of sale, the third parties filed a suit in MCCOMMSU E832/2021 challenging the sale of their properties, and successfully applied for injunctive orders against the bank. The said orders are according to the respondents still in force as the suit was still ongoing.
9. Pursuant to the directions of this Honourable Court the application was canvassed by way of written submissions which I have considered together with the pleadings and evidence presented by the parties.

Analysis and determination

10. The issue for determination is whether the bank is entitled to the prayers sought in the application. As to what this court should consider in such an application, the Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe*, [2015] eKLR stated as follows:

“The test for granting a mandatory injunction is different from that enunciated in the *Giella V Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the Court of Appeal in the case of “*Kenya Breweries Limited v Washington Okeyo*, [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a mandatory injunction. This was as in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

11. I therefore proceed from a well guided position that the grant of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted.



12. Upon reviewing the evidence, the facility advanced to the respondents and the registration of a charge over the suit property are undisputed. The default is also undisputed, although the respondents argue that the sale of apartments on the suit property led to a full settlement of the facility.
13. This court, in a ruling dated 7th February 2020, noted that the respondents failed to provide proof of full repayment and stated as follows:

“If the applicants (the respondent’s herein) had fully re paid the facility as they insist, then nothing would have been easier than for them to tender proof of this fact by availing copies of credit slips etc to cover the entire sum being claimed. No proof of such payment has been placed before the court.”
14. Even now, the respondents have not proven that there was a sale of properties leading to a full and final settlement of the facility. The respondents’ argument that the original title was released to them for registering partial discharges and leases is clear as evidenced in the letter of 25th June 2018. However, they have not substantiated that the partial discharges led to a full discharge of the charge. No such documentation has been placed before this court.
15. What is however clear from the evidence before court is that the undertaking by the respondents, the basis of which the mother title was released to them by the bank, vide the letter dated 19th August 2013 was for purposes of registering the partial discharge of charges and registering leases in favour of respective purchasers.
16. In this regard, each of the letters of undertaking states clearly the undertaking by the respondents that:

“...we shall use the Title Documents solely for purposes of registering the Partial Discharge of Charge, the Lease of the property in favour of the Purchaser and the securities (if any) in favour of the Purchaser’s financier and any other documents relevant to this transaction.”
17. The evidence of advertisements of the properties for sale with no supporting evidence to corroborate that the bank executed a discharge of charge over the suit property on the whole does not prove that the default by the respondents was made good. The submission that there was a full discharge therefore falls to the cracks.
18. Finally, the submission by the respondents that there is an ongoing suit which is MCOMMSU E832/2021 with injunction orders in place against the bank has not been substantiated. I would agree with the bank’s submission that indeed, the return of the title is a direct and summary act and no prejudice will be occasioned to the respondents, should they be able to prove that the debt has been settled.
19. I say so noting that this court has already pronounced itself on the injunctive reliefs sought by the respondents, in favour of the bank.

Disposition

20. From the totality of all that I have stated, the application dated 7th November 2022 is successful. The same is allowed. The bank shall have the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI



JUDGE

