**Otieno v Premier Bank Kenya Limited & 2 others (Civil Suit E004 of 2024) [2024] KEHC 6832 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6832 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL SUIT E004 OF 2024**

**RE ABURILI, J**

**JUNE 10, 2024**

**BETWEEN**

**ROSE AKOTH OTIENO ..... APPLICANT**

**AND**

**PREMIER BANK KENYA LIMITED ..... 1ST RESPONDENT**

**UGAMBE COMPANY LIMITED ..... 2ND RESPONDENT**

**KEYSIAN AUCTIONEERS ..... 3RD RESPONDENT**

## RULING

1. Before me for determination is the Notice of Motion dated 3rd April 2024 in which the Plaintiff/ Applicant seeks orders of a temporary injunction restraining the 1st and 3rd Defendant/Respondents and or their agents and/or servant(s) and/or employee(s) be restrained by way of a temporary injunction from selling and/or auctioning the suit parcel of land known as Kisumu Municipality/ Block 12/232. The Application is brought under Sections 40 Rule (1), (2) and (4) and Order 40 Rule 1 of the *Civil Procedure Rules*, Section 63(c) and Section 3A of the *Civil Procedure Act* cap 21 and Section 90 and 96 of the *Land Act* No. 6 of 2012.

2. The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Rose Akoth Otieno sworn on 3rd April 2024 as well as the supplementary affidavit sworn on the 16th May 2024 wherein she stated that she was the registered proprietor of the suit premises which she had used to secure a loan facility from Spire Bank, Kisumu sometime in the year 2019 and which loan she had already cleared.

3. The applicant deposed that upon successful repayment of the said loan facility, she visited the said Bank, which had since been acquired by Equity Bank, and found that the title document had been used by the 2nd respondent herein to secure a loan facility with the 1st respondent.

4. It was her case that she has no connection with the 2nd respondent and as such, did not consent to her title being used as collateral and that subsequently, she has made various attempts to seek documents and information concerning the said loan facility from the 1st and 2nd respondents to no avail.

5. The applicant averred that on the 13th February 2024, she was served with a notification of sale from the 3rd respondent advertising the suit property for sale by public auction on the 7th May 2024 and that despite making frantic efforts to engage the 1st respondent to investigate the criminal activity, the 1st respondent is adamant on proceeding with the scheduled sale.

6. The applicant reiterated that the charging of the suit property is fraudulent, void and has no legal basis and further that the suit property has three residential houses which have been a source of livelihood to her and her family especially in light of her spinal injury that have rendered her paralysed in bed.

7. The applicant avers that unless the orders sought are granted, there is a real danger that the suit property shall be unlawfully sold exposing her to loss of her means of earning her livelihood.

8. Ms. Nyagol counsel for the applicant submitted that the applicant only became aware of the charge over the suit property when she read a replying affidavit of one Claris Ogombo sworn on the 14th May 2024 opposing the instant application and further that the signature on the exhibits annexed by the respondent, i.e. the letter of offer, guarantor acceptance for the loan, discharge of charge and the charge, are not hers.

9. It was further submitted on behalf of the applicant that she sustained spinal complications in the year 2020 and thus has not moved out of Kisumu since then thus it was impossible for the applicant to have proceeded to Nairobi or Ruiru to execute the said instruments.

10. It was submitted that the spousal consent annexed to the charge allegedly sworn by the applicant alleges that the applicant is single whereas the applicant is married to one John Otieno Malowa who is still alive.

11. It was submitted that the applicant did not sign the discharge of charge on completion of her loan with Spire Bank and further that she did not report the fraudulent activity to the police as she was not aware that her title was used as security to advance a loan to the 2nd respondent.

12. It is the applicant's submission that the balance of convenience tilts in her favour and that the respondents will not suffer any prejudice if the orders sought are granted.

13. In response, the 1st respondent filed a replying affidavit sworn by Claris Ogombo on the 14th May 2024 in which she deposed that the 2nd Defendant applied for a working capital facility from the 1st respondent and by way of a Letter of Offer dated 29th December 2020, the 1st Defendant offered to provide to the 2nd respondent a working capital facility, in the sum of Kenya Shillings Sixteen Million (Kshs. 16,000,000.00)

14. It was deposed that the said facility was secured by a first legal charge in favour of the 1st respondent over all that property known as Title No. Kisumu Municipality/Block 12/232 as well as a Deed of Guarantee and Indemnity dated 29th January 2021 for Kshs. 16,000,000.00 duly executed by the applicant and that subsequent thereto, further to another application made by the Borrower, the 1st respondent issued to the 2nd respondent a Letter of Offer dated 22nd March 2021 for a second facility in the sum of Kenya Shillings Three Million Seven Hundred and Twenty-Five Thousand (Kshs. 3,725,000.00)

15. The 1st respondent deposed that at the material time, the applicant represented and warranted to the 1st respondent that she was single and that the Suit Property belonged to her and does not form part of any matrimonial property, and that she further consented to the making of the Charge.

16. It was deposed that the 2nd respondent then defaulted on the terms of the various financing obligations owed to the 1st respondent on the payment of the sum of Kenya Shillings Twenty-Three Million Three Hundred Ninety-Five Thousand One Hundred Sixty-One Cents Twenty-Three (Kshs. 23,395,161.23) as at 17th August 2023, leading to it issuing a ninety (90) day statutory notice to the Applicant-Chargor under section 56 (2) of the *Land Registration Act*, 2012, and, sections 90 and 96 of the *Land Act*, 2012, requiring the Applicant to remedy the default and that the Applicant-Chargor and or the 2nd respondent-Borrower again failed to rectify the breach and consequently causing it, the Bank, to issue instructions to the 3rd respondent vide a letter dated 6th February 2024, to proceed to sell the property by way public auction.

17. The 1st respondent deposed that by way of letters dated 12th and 21st February 2024, the 3rd respondent informed the 1st respondent that they had served the applicant with the requisite forty-five (45) day redemption notice as well as notification of sale issued to the applicant-chargor.

18. It was deposed that the applicant has failed to sufficiently satisfy the conditions for grant of interim injunctive relief as enunciated in the case of *Giella v Cassman-Brown*.

19. Mr. Busiady for the 1st respondent submitted that the allegations made by the applicant are unsupported by cogent evidence and further that there was no evidence to show that the applicant made any efforts in establishing the manner of the release of title from Spire Bank.

20. It was further submitted that a bank does not advance before ensuring the property is secured and further that there was no evidence of fraudulent execution of the charge and no report to the police was made.

21. Mr. Busiady further submitted that the applicant was served with requisite statutory notices under the *Land Act* and *Land Registration Act*, that due process was followed and that the 1st respondent would suffer prejudice if it is hindered from exercising the statutory power of sale as the guaranteed loan has not been repaid to date.

**Analysis and Determination**

22. I have considered the application the grounds, supporting affidavit as well as the annextures. I have given equal consideration to the replying affidavit and the annextures thereto. I have also considered the oral submissions by both counsel for the respective parties and the applicable law and principles for granting of interlocutory injunctions.

23. The issue for determination is whether the applicant has met the conditions for grant of the orders sought.

24. The principles guiding the grant of interlocutory injunctions are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

> "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) ally 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. Afraha 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

25. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

> "...these are the three pillars on which rest 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... 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 are 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."

26. Earlier on, while reiterating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 warned that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517 of 2014 – *Lucy Nungari Ngigi & 4 Others v National Bank of Kenya Limited & Anor* (eKLR) where it was stated:

> "....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the

2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein..."

27. However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. It was therefore held by Ringera, J (as he then was) in *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd. Nairobi* (Milimani) HCCC No. 360 of 2001 that:

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

28. In *Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No. 69 of 1991, the Court of Appeal stated that:

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

29. Therefore, although at an interlocutory stage the Court is not required and is indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.

30. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

31. What then constitutes a prima facie case? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held stated that:

> " The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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."

32. Adopting the above position, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR added 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial 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. 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."

33. In this case, the applicant alleges that the suit property was fraudulently used to secure a loan from the 1st respondent. This allegation is denied by the 1st respondent. The Plaintiff has averred on oath that upon completion of her loan with the Spire Bank, she went to collect her title and was unsuccessful. She further deposed that she could not have executed the charge documents relied on by the 1st respondent as she was paralyzed and in bed at the time and could not travel out of Kisumu; that she has a husband who is still alive and who did not give his consent for execution of the charge documents in favour of the 1st respondent. It is also the applicant's case that the suit property is her family's only source of livelihood.

34. Based on the material placed before the Court, I find that the applicant has established on a prima facie basis, that she was not aware that the suit property was used to secure a loan from the 1st respondent. However, a final determination of the matter must await the hearing of the suit. A Prima Facie case, it should be noted, is not necessarily one that must succeed.

35. Having considered the issues raised by the applicant, I find that she has established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the applicant will succeed. What it means is that there is a basis upon which this Court can restrain the respondents from disposing of the said properties.

36. However, as was held in the case of *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA (quoted in the Nguruman Limited case (supra), the triple requirements in an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and 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.

37. As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in Nguruman Limited case (*supra*) expressed itself as hereunder:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by

which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

38. In the instant case the applicant averred that the suit property that contains residential properties is hers and the families only source of livelihood especially considering that she has been bedridden since 2020 and that she will be exposed to irreparable loss in case the suit property is sold. Accordingly, I agree that the applicant has surmounted the second condition.

39. As regards the issue of balance of convenience, I associate myself with the decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was held as follows:

> " 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."

40. In light of my findings above, I am satisfied that the applicant has satisfied the conditions necessary for the grant of the injunctory orders sought. I allow the application dated 3rd April, 2024 and grant an interlocutory injunction restraining the defendants herein, their agents, servants or any other persons claiming through them from selling or advertising for sale the plaintiff's property namely Kisumu Municipality/Block 12/232 until this suit is heard and determined.

41. To ensure that the applicant does not go to slumber upon obtaining the injunction herein, I order that the plaintiff files all documents necessary for readying this suit for hearing within 21 days of today upon which the defendants have 21 days within which to comply. Mention on 23rd September, 2024 to fix a hearing date and the injunction herein issued shall not last for more than six months of today, unless extended by the court.

42. Costs shall be in the main suit.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF JUNE, 2024**

**R.E. ABURILI**

**JUDGE**