



Charles Githinji Keiru t/a Kelyn General Services v Standard Chartered Bank Ltd (Commercial Case E586 of 2023) [2024] KEHC 9101 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E586 OF 2023**

MN MWANGI, J

JULY 19, 2024

BETWEEN

CHARLES GITHINJI KEIRU T/A KELYN GENERAL SERVICES ... APPLICANT

AND

STANDARD CHARTERED BANK LTD RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 28th November, 2023 pursuant to the provisions of Rules 1, 2 & 3 of the [Civil Procedure Rules 2010](#), Sections 1A, 1B & 3A of the [Civil Procedure Act](#), and all enabling provisions of the law, seeking an order of injunction against the defendant/respondent, their servants, agents or employees, restraining them from proceeding with the sale of all that property known as L.R. No. 21976/49, pending the hearing of this suit. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 28th November, 2023 and 19th January, 2024 by Charles Githinji Keiru, the plaintiff herein.
2. The plaintiff claims ownership of a parcel of land known as L.R No. 21976/49. The facts are that on 2nd October, 2019, he took a mortgage facility of Kshs. 47,027,460.00 from Kenya Commercial Bank, which facility was later taken over by the defendant, who charged all that parcel of land known as L.R No. 21976/49 as security. On 25th October, 2019, he obtained a second financial facility of Kshs.15,000,000.00 from the defendant in the form of a bank guarantee for his petroleum business under Vivo Energy. On 3rd March, 2023, Vivo Energy called the guarantee demanding payment of Kshs.10,503,510.00 which the defendant paid, leaving a balance of Kshs.4,496,490.00.
3. The plaintiff averred that he has repaid Kshs.19,315,649.93 out of the Kshs. 46,119,470.00 disbursed to it by the defendant. However, on 22nd June, 2023 the defendant issued him with a statutory notice incorrectly claiming an overdraft of Kshs. 20,000,000.00. That on the elapse of the statutory notice,



- the defendant issued him with a 40-day notice of statutory power of sale on 18th October, 2023, which notice also contained incorrect amounts. The plaintiff argues that the suit parcel of land is his matrimonial home and that it is at the risk of being sold by way of public auction, potentially rendering his family homeless, thus causing him irreparable harm that cannot be compensated by an award of damages.
4. The defendant opposed the instant application vide a replying affidavit sworn on 10th December, 2023 by Boniface Machuki, a Manager in the defendant's Legal Collections and Recoveries Unit. He averred that the plaintiff applied for a mortgage and an overdraft facility from Kenya Commercial Bank, both secured by the suit property, and that in June 2019, the plaintiff sought financial facilities from the defendant to take over the said Kenya Commercial Bank facilities. That after evaluating the request, the defendant agreed to take over both the mortgage and the overdraft from Kenya Commercial Bank. Mr. Machuki averred that the defendant approved the plaintiff's mortgage facility as a term loan of Kshs. 47,027,460.00, as indicated in their offer letter dated 5th May, 2021, while the overdraft facility was retained under Account No. 0102017254600, as reflected in the offer letter of the same date.
 5. Mr. Machuki further averred that Clause 2 of the overdraft facility specified the inclusion of an overdraft of Kshs.5,000,000/= and a Bond and Guarantee facility of Kshs.15,000,000/= taken over from Kenya Commercial Bank, for issuing bonds and guarantees for the plaintiff's business with Vivo Energy for a duration of 365 days. He stated that the mortgage and overdraft facilities were secured by a legal charge created over the suit property in favor of the defendant on 2nd October, 2019, for Kshs. 66,119,470.00. He further stated that these facilities were subsequently amended by supplemental letters of offer on 9th May, 2022, and the bank guarantee to Vivo Energy was extended on 7th August, 2022 to run until 7th August, 2023.
 6. It was deposed that despite these amendments, the plaintiff has not made any payments toward the mortgage facility since 15th January, 2023, and he has not repaid the bank guarantee. The defendant asserted that the plaintiff's failure to meet his repayment obligations constitutes a breach of the financial facility agreements. Consequently, on 8th May, 2023 the plaintiff was issued a 14-day demand letter to settle his loan arrears together with the accrued interest, but he did not comply. As a result, the defendant commenced the recovery process by issuing a three-month statutory notice on 22nd June, 2023 as provided for under Section 90 of the Land Act. That the said notice elicited no response from the plaintiff, thus on 18th October, 2023, the defendant issued the plaintiff with a 40-day statutory notice under Section 96(2) of the Land Act, which notice also elicited no response.
 7. Mr. Machuki averred that as at 4th December, 2023, the plaintiff owed the defendant over Kshs.67,102,857.00 being Kshs.47,683,421.28 for the mortgage facility and Kshs.20,419,435.45 for the overdraft facility. The defendant argued that the plaintiff had not demonstrated that he would suffer irreparable loss if the orders sought were not granted.
 8. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed on 19th January, 2024 by the law firm of Mogeni & Company Advocates, while the defendant's submissions were filed by the law firm of Muthomi & Karanja Advocates on 17th January, 2024.
 9. Mr. Makori, learned Counsel for the plaintiff relied on the case of Hezron Kamau Gichuru v Kianioya Enterprises Ltd & another [2022] eKLR and submitted that the statutory notices issued to the plaintiff are defective as the amounts indicated therein are not due and owing from the plaintiff to the defendant. He argued that the said notices do not conform to the law, and were only meant to clog the plaintiff's equity of redemption provided for under Section 89 of the Land Act. He further submitted that if the orders sought are not granted, the plaintiff stands to lose his family home, which loss cannot be compensated by an award of damages, as the home holds a sentimental value to the plaintiff and his



family. Counsel referred to the case of *Paul Gitonga Waniau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR, and contended that given the said circumstances the balance of convenience tilts in favour of the plaintiff.

10. Mr. Karanja, learned Counsel for the defendant relied on the case of *Giella v Cassman Brown and Company Limited* [1973] EA 358 and the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR and submitted that the instant application does not disclose a prima facie case with a probability of success since the plaintiff admits that the loan facilities advanced to him by the defendant are in arrears, and that he was served with all the requisite statutory notices. He referred to the case of *Chege v Mayfair Bank Ltd & another* [2022] KEHC 15060 (KLR) and further submitted that a dispute in the amount of the arrears is not enough for this Court to exercise its discretion in favour of the plaintiff and grant him an order of injunction.
11. In submitting that a mortgaged matrimonial property transforms into a commodity for sale in the event of default in payment of the secured debt such as is the case herein, and no sentimental value to the mortgaged property would operate against the exercise of the mortgagee's statutory power of sale, learned Counsel cited the Court of Appeal case of *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR. He referred to the provisions of Section 99(4) of the *Land Act* and stated that in any event, damages if any in this case are quantifiable, thus the plaintiff does not stand to suffer any irreparable damage. Further, that the defendant is more than capable of compensating the plaintiff for any harm or loss it may suffer as a result of the sale of the suit property, if the plaintiff's suit succeeds. Mr. Karanja asserted that in view of the foregoing, the balance of convenience tilts in favour of the defendant.

Analysis And Determination.

12. I have considered the instant application, the grounds on the face of the Motion and the affidavits filed in support thereof. I have also considered the replying affidavit by the defendant together with the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for temporary injunction should issue against the defendant.

Whether an order for temporary injunction should issue against the defendant.

13. Temporary injunctions are provided for under Order 40 Rule 1 of the *Civil Procedure Rules, 2010* which states that -

“Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



14. The test for granting of an interlocutory injunction was considered by the Court in the case of *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504, where three elements were noted to be of great importance namely-
- i. There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy, and
 - iii. The balance of convenience lies in favour of granting or refusing the application.
15. The plaintiff was advanced two financial facilities by the defendant, in the form of a takeover of financial facilities advanced to the plaintiff by the Kenya Commercial Bank. The said facilities were a mortgage facility which was converted to a term loan of Kshs.47,027,460.00, and a facility of Kshs. 20,000,000/= comprising an overdraft facility of Kshs.5,000,000/= and a Bond and Guarantee facility of Kshs.15,000,000/= meant for issuance of bonds and guarantees for the plaintiff's business with Vivo Energy as is evident from the respective letters of offer dated 5th May, 2021 annexed to the defendant's replying affidavit. The said facilities were both secured by a charge created on 2nd October, 2019 over the suit property for the sum of Kshs.66,119,470.00 in favour of the defendant.
16. It is not disputed that out of the Kshs.20,000,000/= comprising an overdraft facility of Kshs.5,000,000/= and a Bond and Guarantee facility of Kshs. 15,000,000/=, Kshs. 10,503,510.00 was paid to Vivo Energy on 3rd March, 2023 from the Bond and Guarantee facility of Kshs.15,000,000/= . The defendant contends that since 15th January, 2023, the plaintiff has neither made any payments toward the mortgage facility, nor has he repaid the bank guarantee paid to Vivo Energy, thus breaching the financial facility agreements.
17. The defendant asserted that as a result of the foregoing, the plaintiff was issued with a 14-day demand letter to settle his loan arrears together with the accrued interest on 8th May, 2023, a three-month statutory notice on 22nd June, 2023, and a 40-day statutory notice on 18th October, 2023, but the said letter and notices elicited no response from the plaintiff.
18. It is evident from the pleadings filed by the plaintiff that he does not dispute that the financial facilities advanced to him by the defendant are in arrears, that he has not settled the said arrears, and that he has not fully repaid the said facilities to the defendant. When parties appeared before this Court on 18th January, 2024, Ms. Makori, learned Counsel for the plaintiff indicated that the plaintiff owed the defendant Kshs.26,803,861.00. Further, the plaintiff confirmed that he was issued with a 14-day demand letter on 8th May, 2023, a three-month statutory notice on 22nd June, 2023, and a 40-day statutory notice on 18th October, 2023, but averred that the amounts contained therein are incorrect. The defendant on the other hand asserted that as at 4th December, 2023, the plaintiff owed the defendant over Kshs. 67,102,857.00 being Kshs.47,683,421.28 for the mortgage facility and Kshs. 20,419,435.45 for the overdraft facility.
19. In the case of *Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited* [2019] eKLR the Court held that as follows –
- “I wish set it clear that in accordance with the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a charge from exercising its statutory power of sale. In the case of *Priscillah Krobought Grant v Kenya Commercial Finance Co. Ltd. and 2 Others*, Court of Appeal



at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R.) (unreported), the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see *Barmal Kanji Shah & Another v Shah Depar Devji* (1965) E. A. 91, 32 *Halsbury’s Laws of England* (4th Edition) paragraph 725 and *Uhuru Highways Development Ltd. v Central Bank Kenya and 2 Others*, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

20. The Court went further to quote the *Halsbury’s Laws of England* Vol. 32 (4th Edition) paragraph 725 which states the circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale as hereunder –

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

21. When parties appeared before this Court on 18th January, 2024, the plaintiff through his Counsel admitted that he owed the defendant Kshs.26,805,861.00. The Court then set aside the status quo orders that were in place and granted the plaintiff an interim injunction on condition that he deposits the sum of Kshs. 7,297,286.00 into his loan account within seven (7) days from 18th January, 2024. The plaintiff did not comply with the aforesaid order, thus the interim injunction granted by this Court on 18th January, 2024 elapsed on 24th January, 2024. Other than disputing the actual amount owed to the defendant, the plaintiff has not laid any other basis as to why this Court should restrain the defendant from exercising its statutory power of sale over the suit parcel of land.

22. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, considered what constitutes a prima facie case and held that -

“So, what is a prima facie case” I would say that in civil cases it 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 as 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.”

23. In the premise, I am not persuaded that the plaintiff has established a prima facie case with a probability of success to warrant being granted the orders sought herein.

24. It is now well settled that a property offered as security becomes a commodity for sale in the event of default. See the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2013] eKLR, where the Court of Appeal agreed with the High Court’s finding that damages could be an adequate compensation as the appellant’s guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent. In this case, the value of the suit parcel of land can be easily ascertained from a valuation of the land. Further, the defendant is a financial institution which



has the financial muscle to easily compensate the plaintiff in the event that this suit is determined in the plaintiff's favour.

25. This Court finds that the plaintiff does not stand to suffer any irreparable loss and/or damage that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed
26. In view of the foregoing, the balance of convenience tilts in favour of the defendant.
27. In the result, this Court finds that the instant application is not merited. It is hereby dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr Chacha h/b for Ms Makori for the plaintiff/applicant

Mr. Njoroge h/b for Mr. Karanja for the defendant/respondent

Ms B. Wokabi – Court Assistant.

