



REPUBLIC OF KENYA



KENYA LAW
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**Gaceru v Family Bank Limited (Commercial Suit E480 of 2023)
[2024] KEHC 8898 (KLR) (Civ) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
COMMERCIAL SUIT E480 OF 2023
PM MULWA, J
JULY 18, 2024**

BETWEEN

SIMON KARIUKI GACERU PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. Before the court is the application dated 2nd October 2023 brought under the provisions of sections 1A, 1 B, 3A and 63(e) of the [Civil Procedure Act](#) and order 40 rule 1 of the [Civil Procedure Rules](#). The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That an order for temporary injunction do issue restraining the Defendant/Respondent, either by itself, its agents, servants, representatives and or any other person claiming under them from enforcing the statutory notice dated June 29, 2023 by offering for sale, selling, auctioning and or in any other enforcing the said statutory notice pending the determination of this suit.
 - iv. Costs of this application be provided for.
2. The application was based on the grounds stated therein, supporting affidavit and further affidavit of Simon Kariuki Gaceru sworn on October 2, 2023 and March 28, 2024 respectively and submissions dated 28th March 2024. The applicant's case is that on September 4, 2019 he executed a charge document with respect to L.R. Ruiru/Ruiru East Block 2/28637 to secure a loan facility for the sum of Kshs 2,700,000/= on behalf of the borrower Mercy Njoki Kamau. He contends the loan was cleared in December 2022.



3. The applicant's bone of contention is the second loan facility of Kshs 3,500,000/= advanced by the respondent to the borrower vide a letter of offer dated January 14, 2022 on the strength of the first charge and without his knowledge. The applicant faults the respondent for issuing the statutory notice dated June 29, 2023 on the strength of the charge document dated September 4, 2019 whose loan amount had been settled.
4. The applicant further faults the respondent for creating a continuing security for the borrower with his property without his consent. He contends that the statutory notice is illegal, unlawful and unenforceable. On the charged property stands his home and he will suffer immeasurably.
5. The application was opposed by a Replying Affidavit sworn by Sylvia Wambani on November 27, 2023 and submissions dated April 5, 2024. The respondent contends the security created on September 4, 2019 was not only limited to the first loan but to any other subsequent loan to be taken by the borrower. The respondent states that it was not in contention that the first loan was fully paid. But the applicant's action of failing to discharge the title signified an understanding of the continuing security.
6. According to the respondent, the applicant signed the loan letter dated January 4, 2022 and the amount was disbursed to the borrower's account which fell into arrears and as of November 30, 2023 the outstanding amount was Kshs. 2,683,731.16. The respondent further contends it was not duty-bound to notify the applicant of any subsequent loan facility advanced to the borrower.
7. It was submitted for the respondent that the applicant has not demonstrated he has a prima facie case with probability of success and was not likely to suffer irreparable harm. That the applicant duly signed the offer letter dated January 14, 2022 and he failed to prove to the required standard the allegation of forgery and that there is insufficient proof that the OB number provided relates to the issues in this case.

Analysis

8. I have considered the application, the affidavits and the submissions on record. The main issue for consideration is whether the applicant has met the threshold for granting an injunction to restrain the respondent from exercising its statutory power of sale.
9. The law governing the grant of injunction is order 40 (1) (a) and (b) of the *Civil Procedure Rules*. The proof 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 that the defendant threatens or intends to remove or dispose of the property, are crucial factors to consider before granting a temporary injunction.
10. The conditions for granting injunctions have been clearly set out in the case of *Giella v Cassman Brown & Co. Ltd* (1973) E.A. 385 where the court stated as follows:

“The conditions for the grant of an interlocutory injunction are now 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.”



11. The applicant must establish it has a *prima facie* case. The Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others* (2014) defined *prima facie* as one that;

“...includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. The applicant has moved the court to issue a temporary injunction for the reasons that he did not consent to the issuance of the second loan facility and the signature in the loan offer is a forgery. He submits the suit property is matrimonial property and that he stands to suffer loss and damage if the injunction is not granted.

13. The applicant also raises the allegation of fraud, contending that the signature in the second charge is a forgery. This court is alive to the fact that fraud is a serious allegation that needs to be proved beyond a balance of probabilities. As was held in the case of *RG Patel v Lalji Makanji* (1957) EA 314;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

Determination

14. In the instant case, I am not persuaded that the applicant being the guarantor of the borrower has demonstrated beyond reasonable doubt the issue of fraud. It is not disputed that the borrower defaulted on the repayment of the loan facility. The allegation that the loan was dispersed without his consent and that he stands to lose the matrimonial property has not been adequately proved. To the mind of the Court, the applicant has failed to demonstrate the reasons why he failed to discharge the title after the full repayment of the first loan.

15. In the case of *Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)* HCCC No. 82 of 2006 the court held that;

“...Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured.”

16. The respondent has a duty to recover the amounts advanced, in exercise of its statutory right after issuing the requisite notices to both the borrower and the guarantor. It is important to note that once a charge is created it always remains a charge and the Chargee has the right to sell the same in instances of default by the borrower, and the assertion that the property is matrimonial property cannot be used as a shield to bar the exercising of this right.

17. The applicant has failed to establish a *prima facie* case to warrant the granting of the orders of injunction. Having so found, I do not find it necessary to delve into considering the issue of whether damages are sufficient to compensate the applicant in the event the suit succeeds and the balance of convenience. All the three conditions ought to be satisfied before considering granting an injunction (*Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012 (2014) KLR).

18. In the end, I find the application has no merit and it is hereby dismissed with costs.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2024.



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P. MULWA

JUDGE

In the presence of:

Mr. Mwangi Kigotho for plaintiff/applicant

Mr. Elijah Mwangi h/b for Mr. Juma for defendant/respondent

**Court Assistant - Carlos

