



REPUBLIC OF KENYA



Registered Trustees of the National Council of Churches of Kenya v Sbm Bank Limited & another (Commercial Suit E001 of 2022) [2024] KEHC 10209 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL SUIT E001 OF 2022
DO CHEPKWONY, J
JULY 10, 2024**

BETWEEN

**THE REGISTERED TRUSTEES OF THE NATIONAL COUNCIL OF
CHURCHES OF KENYA APPLICANT**

AND

SBM BANK LIMITED 1ST RESPONDENT

KEYSIAN AUCTIONEERS 2ND RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion application dated 23rd September, 2022. The Application seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That an Order of Injunction do issue pending the hearing and determination of the suit herein restraining the Defendants, their agents and or assigns or any of them from trespassing into advertising for sale, disposing of, selling either by public auction or private treaty or otherwise interfering with the property known as Land Reference Number 12771 Limuru (Jumuia Conference and Country Home Limuru) registered in the name of the Registered Trustees of the National Council of Churches.
 - d. That costs of this application be paid by the Respondent.
2. The Application is based on the Affidavit of Pauline Mungai as the Property Manager of Jumuia Resorts at the Applicant's organisation sworn on 23rd September, 2022.
3. The Application is based on the following grounds:



- a. That the Plaintiff/Applicant obtained a term loan facility of Kshs. 259,209,965.07 from the 1st Defendant/Respondent only whose only purpose was to restructure the Applicant's existing loan facilities with the 1st Defendant/Respondent herein. It was agreed that the loan facility would be paid in monthly instalments of Kshs.3,870,283.17 at an interest rate of 13% per annum for a period of ten years and as at the time of this application, the Applicant had serviced the loan by paying a sum of Kshs.135,819,188.15.
 - b. According to the Plaintiff/Applicant due to financial difficulties brought about by Covid-19 Pandemic, its ability to meet its financial obligations with the 1st Defendant/Respondent was affected. This then caused the 1st Defendant/Respondent to commence the security realization process and through its agents, the 2nd Defendant/Respondent issued statutory Notices and a Notification for sale on 4th July, 2022 indicating that the suit property would be sold by public auction and proceeded to advertise the same.
 - c. That despite bonafide efforts/attempts to make good the loan repayment, including sending a proposal letter dated 6th June, 2022 an agreement for sale of a separate property to Superior Homes Kenya Limited to fully offset the loan was entered into by the Applicant on 3rd August, 2022, the Applicant deposited a sum of Kshs.20,000,000.00 to the 1st Respondent in an effort to liquidate the outstanding loan and on 20th September, 2022, it made several proposals on how to settle the outstanding loan facility as per attached letter marked as 'PM-1'.
 - d. According to the Applicant, in the event the orders are not granted, it stands to suffer great loss at Jumuia Conference and Country home which not only has a historical value to the Applicant, but is also the holiest shrine for protestant churches. The Applicant seeks that the venue hosted the founding father his detention by the British colonial government and has since hosted several meetings that culminated in the second liberation, reintroduction of multiparty democracy and therefore it cannot be compensated by monetary value if it is sold. It is for this reason that the Applicant holds that it stands to suffer irreparable loss and damage and has urged the court to allow the application.and first President of Kenya who held a meeting with the church after
4. The Application is opposed through Replying Affidavit of Beline Ochiel, the Debt Recovery Officer of the 1st Respondent sworn on 2nd November, 2022 wherein he has stated that the Applicant had a loan debt with the 1st Respondent which amounted to Kshs 286,721,292.22 as at 4th December, 2019 which was in arrears and the same was restructured and the loan amount as at 10th January, 2022 was Kshs 362,141,592.17 which the Applicant failed to pay.
 5. According to the 1st Respondent, it commenced the realisation process and issued a Statutory Notice dated 10th January, 2022 as provided for under Section 90 of the *Land Act*. Further, it issued a 40 days' notice dated 6th May, 2022. And upon receipt of the notice dated 6th May, 2022, the Applicant approached it with the aim of settling the amount which offer was rejected since the proposed monthly instalments were too low and the 1st Respondent advised that it would proceed with realisation of security. The 1st Respondent then issued the Auctioneers' 45 days Redemption Notice dated 4th July, 2022.
 6. The Respondent contends that the Applicant did not dispute the issuance of the notices as they were attached to the Supporting Affidavit. It holds that the Applicant made another offer through letter dated 1st August, 2022 which the 1st Respondent still rejected for being too low to cover the debt.



7. The 1st Respondent holds that the Applicant rushed to court seeking equitable reliefs after receiving all the Statutory Notices and having been given ample time to redeem itself, which it failed. On the other hand, the 1st Respondent goes on to state that it has complied with the law and should be allowed to complete the process of realising of the loan since the Applicant's loan account has for years been in arrears with the outstanding amount being Kshs. 358,084,857.67 as at 18th October, 2022 which is a huge amount that Applicant has failed to repay.
8. The 1st Respondent holds that the Applicant does not deserve the injunctive orders as it has failed to establish prima facie case since it has admitted the debt, has not disputed the statutory notices, has not disputed the process followed by 1st Respondent in exercising its power of sale, has lied under oath that it was not given an opportunity to redeem the loan and has thus failed to satisfy any of the conditions set out in the case of Giella –vs- Cassman Brown Co. Ltd. The 1st Respondent therefore has urged the court to dismiss the application.
9. The Applicant filed Further Affidavit which was sworn by the same Pauline Mungai sworn on 10th March, 2023. The Applicant holds that it entered into an agreement for sale of a separate property with Superior Homes Kenya Limited to offset the loan where a copy of the agreement was also delivered to the 1st Respondent as agreed on 18th October, 2022. It stated that it paid Kshs 5,000,000/= on the loan repayment account on 21st December, 2022 and further Kshs 10,000,000 on 24th February, 2023 and therefore the loan is no longer non performing.
10. The Applicant contends that it has made significant strides in negotiating on out of court settlement, has made efforts to repay the loan in good faith but the default was occasioned by factors such as Covid 19 Pandemic which impacted its business when at all times, they have made effort to fulfil he contractual obligations. It has urged the court to grant the prayers sought.
11. The court directed that the application be canvassed by way of written submissions whereby the Applicant's submissions were dated 17th May, 2023, while the 1st Respondent's submissions are dated 30th November, 2022. The court has duly taken note of the arguments therein and will factor them in the determination.

Analysis and Determination

12. Having read through the affidavits in support and in opposition of the application herein, this court finds the issue for determination being whether the application meets the threshold set for the grant of temporary orders of injunction.
13. Order 40 of the [Civil Procedure Rules](#) provides as follows:-
 1. 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 y g 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 principles governing mode of granting interlocutory injunctions were discussed by the Court of Appeal in the case of *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others* [2014] eKLR while relying on the principles established in the *Giella –vs- Cassman Brown & Co Ltd* [1973] EA 358 and held 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) allay 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.”

15. In this case, the court has been called upon to determine whether the rights of the Applicant have been infringed upon by the 1st Respondent in order to establish whether it has established a prima facie case or not. The Court of appeal in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 considered what constitutes a prima facie case and held that:-

“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”

16. It is common ground that the Applicant applied and was granted a loan facility which was restructured as per the terms of the 1st Respondent as per Clause 2 at prayer 1. In the executed letter of offer marked -1. Having been granted the loan, the Applicant was expected to repay the same within the stipulated terms and conditions. The Applicant has admitted defaulting the loan repayments but it attributes this to the Covid 19 which can no longer be used as an excuse for loan defaults. among other factors. What is in issue is whether the Applicant has been denied an opportunity to redeem its property. According to the Applicant, it had made numerous proposals and efforts to redeem their property but in vain, hence the property is at risk of being disposed off by 1st Respondent since it has issued the requisite notices with the intention of auctioning the land, which if left to happen, will violate or infringe on the Applicant’s rights as a registered proprietor of the same.

17. In response to this, the 1st Respondent dated and even attached email correspondences between it and the Plaintiff/Applicant to demonstrate to the contrary that it had allowed it numerous opportunities to redeem the suit property. (see annexures marked SNM-11). It is the 1st Respondent’s contention that despite this, still discussing settlement, the Applicant rushed to court to seek for equitable relief.

18. The Plaintiff/Applicant has not disputed the letter of offer which has been executed to court to demonstrate that there was a contract which terms and conditions are binding upon the parties and the same cannot be re-written by this court. The Applicant has not also disputed that it has breached the said terms and that the Respondent ought to recover its debt.

19. It therefore follows that the Applicant has not repaid the full loan which it admits owing the 1st Respondent’s right of exercising its statutory power of sale has ripened and its commencement a



realization of securities in its possession as established in the letter of offer. The court is guided by the Court of Appeal decision in the case of *Giro Commercial Bank Limited –vs- Halid Hamad Mutesi* [2002] eKLR which held:-

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.”

20. Also, having read through each party’s respective affidavits and submissions, the court finds that the Applicant has not disputed the issuance and service of the Statutory Notices which shows that the Respondents followed the requisite procedure in realization of its security since the statutory power of sale has crystallized.

21. The other issue raised by the Applicant is that it will suffer irreparable damage and or if the suit property which is Jumua Conference and County Home which hosts a series of meetings including the one cited when the first president of Kenya held the first meeting with the church after his detention by the British Colonial Government. For these reasons, the court has been urged to consider the historical and religious significance that the property and not being capable of being compensated by an award of damages. In this courts opinion by virtue of having been used as security, the property lost its monumental value and gained commercial value which the Applicant knows or ought to have known that it could be sold upon default in repayment. of the loan facility. In the case of *Andrew M. Wanjohi –vs- Equity Building Society & 7 Others* (2006) eKLR, the court held inter alia that:-

“.....by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.”

22. Based on the findings hereinabove, the Applicant has failed to established that it has a prima facie case and the court need not to address the other two requirements as this will amount to an academic exercise. In the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR, the court observed as follows: -

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

23. In the end, this court finds that:-

- a. The Notice of Motion application dated 23rd September, 2022 lacks merit and the same is hereby dismissed with costs.
- b. The interim injunctive orders in place are hereby discharged.
- c. Mention on 19th August, 2024 before the Deputy Registrar for purposes of pre-trial conference.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS ...
10TH DAY OF JULY , 2024.**



D. O. CHEPKWONY
JUDGE

