



Airwave Properties Limited & another v Letshego Kenya Limited & another (Civil Case E197 of 2023) [2024] KEHC 11032 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E197 OF 2023
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

AIRWAVE PROPERTIES LIMITED 1ST PLAINTIFF

ELIJAH NJORE NJOROGE 2ND PLAINTIFF

AND

LETSHEGO KENYA LIMITED 1ST DEFENDANT

REGENT AUCTIONEERS 2ND DEFENDANT

RULING

1. Before the court is the Plaintiffs' Notice of Motion application dated 9/5/2023 filed pursuant to section 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#) and order 40 rules 1,2,3(1) and 4(1) of the [Civil Procedure Rules](#).
2. The Plaintiffs seeks for a temporary injunction, pending determination of this suit, restraining the Defendants and/or their agents from dealing in any manner with the property known as LR No. Ngenda/kimunya/2582 Kimunya, Kiambu County. Further the Plaintiffs seeks for an order to have the interest rates and penalties charged by the 1st Defendant on the loan account of the 1st Plaintiff declared illegal and an order for the taking of accounts between the parties herein.
3. The application is supported by the grounds that pursuant to a charge executed over LR No. Ngenda/kimunya/2582 Kimunya, Kiambu County (the suit property) by the 2nd Plaintiff, as guarantor to the 1st Plaintiff, the 1st Defendant agree to offer the Plaintiff banking facilities of Kshs.10,000,000/=.
4. The Plaintiffs contend that the loan account fell into a few months' arrears pursuant to which the parties agreed to a mode of regularising the account which the 1st Plaintiff adhered to and that



- unbeknown to the Plaintiffs, the Defendants took steps to dispose of the suit property by public auction on 10/5/2023.
5. The Plaintiffs stated that they were not served with the statutory notice under section 90(1) of the *Land Act* 2012 nor the 40 days' notice to sell under section 96(2) of the *Land Act* 2012 and that they only found out about the sale from a stranger who informed them.
 6. Further that the 1st Defendant levied illegal and arbitrary levies, penalties and interest on the loan account of the Plaintiff; that the 1st Defendant has on various occasions, assured the 1st Plaintiff that the loan will be restructured and conceded that the interest rates charged were contrary to the law. That consequently the Defendant is barred by the doctrine of estoppel from going back on its express representations to the Plaintiffs.
 7. In opposition to the application, the 1st Defendant filed a replying affidavit sworn on 24/5/2023 by Stella Nganga, its legal officer.
 8. She averred that on 28/5/2021, the 1st Defendant advanced a loan of Kshs.11,475,000/= to the 1st Plaintiff and the Plaintiffs agreed the advancement of the loan by execution of a Memoranda of Acceptance on 13/5/2021.
 9. Ms Nganga averred that the 1st Defendant instructed Prestige Management Valuers Limited to value the suit property and thereafter instructed the 2nd Defendants who issued the Plaintiffs with a 45 days' redemption notice but the same was ignored by the Plaintiffs.
 10. That the 2nd Defendant consequently published an advertisement for a public auction of the suit property on 24/4/2023 for an auction slated for 10/5/2023.
 11. It was contended that the 1st Defendant intended to exercise its power of sale over the suit property since the Plaintiff defaulted in its obligations to service the loan advanced to it and that the Defendants have followed all the due process in exercising their statutory power of sale.
 12. Ms. Nganga swore a supplementary affidavit on 8/7/2023 in which she averred that the Plaintiffs are misleading the court by stating that at the time the charge documents were executed the suit property was valued at Kshs.20,000,000/= with a forced sale value of Kshs.22,500,000/= while the market was actually Kshs.18,000,000/= with a forced sale value of Kshs.13,500,000/=.
 13. That the Plaintiffs have not produced any evidence to support the assertion that the Plaintiffs agreed to restructure the loan and that the Plaintiffs did not raise any objection to the interest rate and penalties in the charge documents.

Analysis and Determination:

14. The Plaintiffs filed written submissions dated 10/10/2023 while the Defendant filed submissions dated 4/7/2023 which the court has considered the pleadings and submissions filed in this matter.
15. From the record, I note that a loan facility of Kshs.11,475,000/= was advanced to the 1st Defendant pursuant to a letter of offer dated 11/5/2021. The letter of offer also provided that the interest to be charged would be 15% per annum and would be secured by a legal charge over the suit property, registered in the name of the 2nd Plaintiff. The letter of offer was accepted by the 1st Plaintiff through a Memorandum of Acceptance signed by its director and the 2nd Defendant. Consequently, a charge was registered against the suit property in favour of the 1st Defendant to secure the loan amount. The letter of offer, memorandum of acceptance and charge instrument are marked as 'SN-1', 'SN-2' and 'SN-4a' in the 1st Defendant's replying affidavit.



16. It is not in dispute that the 1st Plaintiff defaulted in making loan repayments and its loan account fell into arrears. This led the 1st Defendant to begin the process of exercising its statutory power of sale.
17. What is before the court is an interlocutory injunction application seeking to restrain the Defendants from selling the suit property in exercise of their statutory power of sale pending the determination of this suit.
18. In the celebrated locus classica case of *Giella v Cassman Brown* [1973] EA 358 the principles to be considered before granting an interim injunction have been established as follows; (i) the Applicant must prove a prima facie case with a probability of success (ii) the Applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted (iii) If the court is in doubt, it will determine the matter on a balance of convenience.
19. The court will consider the first limb on whether the Plaintiffs have illustrated that they have a prima facie case with a probability of success.
20. In the case of *Mrao Ltd v First American Bank Of Kenya Ltd & 2 Others*; Civil Appeal No 39 Of 2002 the court described a prima facie case as follows:-

“... a prima facie case 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 to call for an explanation or rebuttal from the latter.”
21. The Plaintiffs submitted that the statutory notices were not served upon them. On their part the Defendants asserted that they served the requisite notices to the Plaintiffs.
22. The 1st Defendant attached in its replying affidavit, a demand letter, a statutory notice dated 7/9/2022 under section 90 of the *Land Act*, a 40 days’ notice to sell dated 28/12/2022 and a 45-day redemption notice dated 3/3/2023 sent to each of the Plaintiffs via registered post. Further the 2nd Plaintiff was served with the notices through WhatsApp as evidenced in the annexure ‘SN-12’ in the replying affidavit. A receipt of the registered mail was also annexed to prove that the notices were served through registered mail.
23. The Plaintiffs alleged that the 1st Defendant agreed to restructure the loan facility to remove the illegal interest levied on the account. However, I note that no evidence of such an agreement was availed by the Plaintiffs to the court as proof of such agreement. I am persuaded that the same remains unsubstantiated allegation and cannot come to the aid of the Plaintiff.
24. The Plaintiff’s further alleged that the 1st Defendant levied exorbitant interest rates on the loan amount. Yet again the Plaintiffs failed to avail evidence to buttress this allegation and similarly the said allegation remains such, an allegation with no evidential value.
25. Having made the observations above and keeping in mind that the Plaintiffs did not deny defaulting in the loan repayment nor of the existence the charge created over the suit property, I find that the Plaintiffs have failed to illustrate that their rights have been infringed by the Defendants so as to call for an explanation or rebuttal from the latter; the Plaintiffs have therefore failed the first test in that they have not established a prima facie case as stipulated in the Mrao case (supra).
26. The conditions set out in *Giella* (supra) are sequential. Since the Plaintiffs have failed to establish a prima facie case there is no need to consider the other limbs before granting the interim injunction.



This is as was held in the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where it was stated:

“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.” (Emphasis added).”

27. In conclusion, the upshot of the foregoing, is that the court holds and finds that the instant application lacks merit and the same is hereby dismissed with costs awarded to the Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mutuku for the Plaintiff/Applicant.

Mr. Ontita for the Defendant/Respondent.

Amos - Court Assistant

