



**Kabogo & another v KCB Bank Kenya Limited & another (Civil Suit E218 of 2023)  
[2024] KEHC 10571 (KLR) (Commercial and Tax) (10 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E218 OF 2023  
A MABEYA, J  
SEPTEMBER 10, 2024**

**BETWEEN**

**JOHN NGUGI KABOGO ..... 1<sup>ST</sup> PLAINTIFF**

**DORIS NAMAYI ORIKO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KCB BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING  
SERVICE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before court is the application dated October 11, 2023 brought under section 90(1) and (2), 96(2) and section 104(1)(b),(2)(b) and (c) of the *Land Act* 2012, rule 15 of the *Auctioneer rules* 1997, section 56(1) of the *Consumer Protection Act*, section 3 and 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya and order 40 rule 1(a) and (b), rule 2(2) and (2), rule 10(1)(a) of the *Civil Procedure Rules* 2010.
2. The applicants sought an injunction to restrain the respondent from selling or advertising for sale, either by auction or private treaty, the property known as L.R. NO 4894/218, Garden City/Area, Nairobi, comprising a 5-bedroom double-storey house (“the suit property”). In the alternative, they sought a preservation order over the said property pending the determination of the suit.
3. The application was supported by the grounds set out on the face of the Motion and the supporting affidavit of John Ngugi Kabogo sworn on 11/10/2023. He stated that he owned the suit property. That by a letter of offer dated 2/10/2014, he was granted a loan facility of Kshs. 40,000,000/- by the 1st respondent on the security of the property. On 20/3/2023, he was served with a notification of



- sale demanding a sum of Kshs 67,177,690.84. The property was advertised for sale by public auction, prompting him to seek an injunction which was granted.
4. That subsequently, the 1<sup>st</sup> respondent once again instructed the 2<sup>nd</sup> respondent to issue a notification for sale by public auction to recover Kshs 71,990,392.20. That the 2<sup>nd</sup> applicant was not served with the 40-day statutory notice as required under section 96(2) and (3) of the Land Act, despite having given spousal consent. He contended that the notification of sale was illegal due to lack of proper service.
  5. He further contended that there was a risk the property being sold for less than its true value, as the 1<sup>st</sup> respondent's valuation placed the market value thereof at Kshs. 57,750,000/- and forced sale value at Kshs. 43,350,000/-. That the valuation report did not accurately reflect the property's true worth. He further accused the 1<sup>st</sup> respondent of breaching its duty of care by attempting to sell the property in violation of section 97 of the Land Act and rule 11(b)(x) of the Auctioneer Rules.
  6. It was claimed that the applicants hired an independent firm, which revealed that the 1st respondent had failed to apply the varied interest rates set by the Central Bank of Kenya (CBK), resulting in an overcharge of Kshs 16,611.70. The applicants contended that the 1<sup>st</sup> respondent was only entitled to demand interest accrued at the time of demand and not for the entire term of the loan. That therefore, the demand for Kshs 71,990,392.20 as interest was erroneous, unlawful, and illegal.
  7. In opposition to the application the 1<sup>st</sup> respondent filed a replying affidavit sworn by its recoveries manager Justus Wambua on 25/10/2023. He stated that, in accordance with the court's ruling delivered on 30/6/2023, the 1<sup>st</sup> respondent engaged a court process server to serve the 40-day notice to the 2<sup>nd</sup> applicant which was duly served and accepted by her. That the applicant was given another opportunity to redeem the property after being informed of the sale but chose not to take any action.
  8. It was averred that the applicants had attempted to introduce issues that should be addressed in the main suit. Furthermore, that the running balances reflected only the principal amount, excluding interest or penalties. That any dispute regarding the interest charged was not sufficient to restrain the chargee from exercising its statutory power of sale. Additionally, it was stated that the 1<sup>st</sup> applicant owed a substantial amount to the 1st respondent and as a result, the 1<sup>st</sup> respondent could not be prevented from exercising its statutory power of sale.
  9. The application was canvassed by way of written submissions which I have considered. The applicants submitted that the 2<sup>nd</sup> applicant was not served with the 40-day statutory notice as required under section 96(2) and (3) of the Land Act. That the respondents failed to serve the 45-day statutory notice mandated by rule 15(d) of the Auctioneer Rules. That the auction was illegal due to the lack of service of these mandatory notices.
  10. Counsel for the applicants submitted that the valuation report relied upon by the respondents did not accurately reflect the true value of the property, particularly in light of certain improvements that had been made. That the respondents were attempting to deprive the applicants of their right to discharge the property. It was also argued that the applicants would suffer irreparable harm if the 1<sup>st</sup> respondent was not restrained from exercising its statutory power of sale.
  11. On the part of the respondents, it was submitted that the 2<sup>nd</sup> applicant was served with a copy of the 40days notice through a duly authorized process server in line with section 96(2) of the Land Act. That according to the court's ruling dated of 30/6/2023, there was no need to issue additional notices as the bank had already provided all the required statutory notices. That to grant the orders sought would result in a miscarriage of justice, as the respondents had fully complied with sections 90, 96, and 97 of the Land Act.



12. It was further submitted that, to challenge the valuation report, the applicants should have provided evidence demonstrating its flaws. That the applicants had failed to establish a prima facie case with any probability of success. That, in any event, they would not suffer any irreparable damage as the suit property had been given as security and thereby became a commodity for sale in the event of default.
13. I have considered the pleadings and the submissions on record. The primary issue at hand is whether the applicants have met the threshold for granting an interlocutory injunction pending the determination of the suit. In *Giella of Giella –versus- Cassman Brown and Company Limited* (1973) E.A 385, it was held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, 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.”
14. In *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, it was held that a prima facie case in a civil case is a case 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. It is more than an arguable case. That 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.
15. In the present case, it is not in dispute that the 1<sup>st</sup> respondent granted the 1<sup>st</sup> applicant a loan facility of Kshs. 40,000,000/-. The same was secured by the suit property. While the applicants acknowledged defaulting on repayment, they attributed the same to difficulties caused by the COVID-19 pandemic. In establishing a prima facie case, the applicants raised three key issues: the alleged non-service of the notification of sale, the interest rate applied to the loan and the valuation of the property.
16. On the alleged non-service, the applicants argued that the 2<sup>nd</sup> applicant, who is the spouse of the 1<sup>st</sup> applicant, was not served with the notification of sale as required by section 96(2) and (3) of the *Land Act*. That in the premises, the Notice of Sale dated 26/9/2023 should be regarded as illegal, invalid and void. On the valuation report prepared by Mwaka Musau Consultants, the applicants alleged that it was flawed and failed to meet the duty of care, resulting in an undervaluation of the property. They also alleged that the interest charged on the loan was excessive and unlawful.
17. In response, the 1<sup>st</sup> respondent contended that the alleged notice had been properly served, that the interest rate applied was in accordance with legal limits and that the valuation report had no flaws whatsoever.
18. Section 96(2) of the *Land Act* provides as follows: -

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.
19. In their application dated 19/5/2023, the applicants had sought an injunction against the respondents which was granted by Majanja J. The court found that the 2<sup>nd</sup> applicant had not been served with the 40day notice.



20. In view thereof, the burden lied with the 1<sup>st</sup> respondent to demonstrate that service had been effected. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal ruled that it is not the responsibility of the chargor to prove that they did not receive the statutory notice. Instead, if the chargor claims that he did not get the notice, the burden shifts to the chargee to prove that the notice was indeed served.
21. I have reviewed the materials submitted by the 1<sup>st</sup> respondent. There is a an affidavit by Harrison Mwaniki Njeru sworn on 10/7/2023. He stated that he was a process server. He detailed how he was instructed to and how he served the 2<sup>nd</sup> applicant with the 40day notice dated 14/4/2020 upon the 2<sup>nd</sup> applicant on 8/7/2023 at Bamboo Cast Lounge Grill.
22. That deposition was not denied. The only thing that was raised by the applicant on the notice itself was that the same was not addressed to her but that she nevertheless received it because the ruling dated 30/6/2023 attached thereto directed as much. Having received the notice, the 2<sup>nd</sup> applicant was given the opportunity to remedy the default and prevent further action on the property.
23. In this regard, the Court finds that the notice cannot be said to be invalid simply because it did not include the 2<sup>nd</sup> applicant's name. She understood its import as it was accompanied with the ruling of this court dated 30/6/2023. As such, the court finds that the 1<sup>st</sup> respondent had demonstrated that proper service was made upon the 2<sup>nd</sup> applicant.
24. On valuation and interest, I find that these were previously addressed by the court in its ruling of 30/6/2023. They do not fall for consideration here. Addressing them would be akin to reviewing what the court has already ruled on. That wont do. In the premises, I find that the applicants have not established a prima facie case with probability of success.
25. On the second principle, it has to be established that the applicants would suffer loss that cannot not be compensated. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held that: -

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant 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 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.

...

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, 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.”



26. The purpose of the security was to enable the bank to recover the owed amounts in the event of default. As a financial institution, the 1<sup>st</sup> respondent is capable of compensating the applicants if the suit is successful. The value of the charged property can be determined, so I am not convinced that the applicant would suffer irreparable harm.
27. On the balance of convenience, this favors the 1<sup>st</sup> respondent, who holds a valid charge over the suit property, to recoup on its outlay.
28. In the upshot, the Court finds that the application is without merit and the same is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

