



**Mango v Stanbic Bank Kenya & another (Civil Case E466 of 2023)  
[2024] KEHC 11027 (KLR) (Commercial and Tax) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E466 OF 2023  
JWW MONG'ARE, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**ALFRED OGALO MANGO ..... PLAINTIFF**

**AND**

**STANBIC BANK KENYA ..... 1<sup>ST</sup> DEFENDANT**

**AMINA MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. There are two Applications before the Court. The first Application is a Notice of Motion dated 21<sup>st</sup> September 2023 filed by the Plaintiff seeking a temporary injunction against the Defendants restraining them from interfering with the Plaintiff's occupation and ownership of the suit property being Apartment No. 5, on the 3<sup>rd</sup> Floor, Block B erected on Land Reference Number 2/713 (Original Land Reference Number 2/708). The first Application was heard ex parte in the first instance and the Court granted interim orders in terms of prayer 2 of the Application. When the matter came up for inter-partes hearing of the Application on 22<sup>nd</sup> November 2023, the Plaintiff sought more time to establish the authenticity of certain documents including the Stamp Duty payment slip from i-tax portal and KCB Capital Hill Branch deposit slip. The Court subsequently extended the interim orders.
2. This triggered the second Application dated 28<sup>th</sup> November 2023 by the 2<sup>nd</sup> Defendant seeking the vacation of the interim orders or their conditional extension.

**The first Application**

3. The Application is supported by the annexed and further affidavits sworn by the plaintiff Alfred Ogalo Mango on 21<sup>st</sup> September 2023 and 12<sup>th</sup> March 2024 respectively. It is also supported by primary and supplementary written submissions dated 20<sup>th</sup> November 2023 and 13<sup>th</sup> March 2024 respectively.



4. The Plaintiff's case is that he is the registered owner and occupant of the suit property and that he received a letter from the 2<sup>nd</sup> Defendant's advocates instructing him to vacate the property because the 2<sup>nd</sup> Defendant was the new owner. However, the Plaintiff's position is that he was unaware of the purported sale by auction and subsequent transfer of the suit property to the 2<sup>nd</sup> Defendant. Therefore, the Plaintiff terms the purported sale and transfer as irregular and illegal for failure to follow due process. The Plaintiff contends that he stands to suffer irreparable loss and damage if the Application is not allowed as he will be evicted.
5. In opposing the Application, the 1<sup>st</sup> Defendant filed a replying affidavit sworn by its manager, recoveries and rehabilitation, Amos Mugambi on 13<sup>th</sup> October 2023. It is the Defendant's case that the Plaintiff has not come to Court in good faith as he is concealing material facts and therefore undeserving of equitable relief. The Defendant asserted that it advanced the Plaintiff a loan of Kshs. 14,294,634.00/=, which was secured by a Charge dated 9<sup>th</sup> May 2018 and a Further Charge dated 7<sup>th</sup> June 2019 over the suit property.
6. The Defendant argues that it was a term of the agreement that the Plaintiff had an obligation to offset the loan through monthly instalments and it would be entitled to realize the security in the event of default. The Defendant pointed to the court the Plaintiff's admission of default in repayment of its loan obligations which resulted in the filing of ELC Case No. E060 of 2023-Alfred Ogalo Mango v Stanbic Bank Kenya Ltd.
7. The 1<sup>st</sup> Defendant also asserted that it issued the Plaintiff with the Three Months' Statutory Notice of Sale dated 16<sup>th</sup> June 2022. Upon the Plaintiff's failure to regularize the loan, it issued the Plaintiff the 40 days' Notice dated 21<sup>st</sup> October 2022 through his registered post, email, WhatsApp and physically. Following the Plaintiff's non-compliance, it instructed Garam Investment Auctioneers to issue a redemption notice and proceed with realization of the security and advertised the property for sale. The Auctioneer then issued 45 days' Redemption Notice and a Notification of Sale both dated 20<sup>th</sup> December 2022 (indicating the date of the Public Auction as 21<sup>st</sup> February 2023) which were served upon the Plaintiff on 22<sup>nd</sup> December 2022.
8. The Plaintiff did not comply but instead filed ELC Case No. E060 of 2023-Alfred Ogalo Mango v Stanbic Bank Kenya Ltd seeking injunctive reliefs. Through a ruling of 29<sup>th</sup> March 2023, the Court found that it had no jurisdiction and transferred the case, which remains unprosecuted, to the Commercial and Tax Division. The 1<sup>st</sup> Defendant thus faulted the Plaintiff for abuse of the court process by instituting a fresh suit and the previous suit over the same subject matter and failing to prosecute the latter.
9. The 1<sup>st</sup> Defendant re-instructed the Auctioneer to proceed with the sale, and a 14 days' notice of sale for the auction slated for 25<sup>th</sup> April 2023 was issued to the Plaintiff. The Defendant argues that the public auction took place and hence the property sold to the 2<sup>nd</sup> Defendant. It was submitted that the Plaintiff's rights were extinguished at the fall of the hammer and that if there is any remedy, it can only lie in damages.
10. As regards the valuation, the 1<sup>st</sup> Defendant pointed out that it ensured that valuation of the property was conducted by qualified and licensed valuers as required by the law.
11. On her part, the 2<sup>nd</sup> Defendant filed a replying affidavit sworn on 17<sup>th</sup> November 2023 and written submissions dated 21<sup>st</sup> November 2023. Her case was that on 17<sup>th</sup> April 2022, she came across an advertisement for sale of the suit property in the local dailies. She then instructed her advocates to conduct due diligence. Upon doing so, the Advocates established that the Plaintiff had charged the



property to the 1<sup>st</sup> Defendant. She proceeded to attend the auction on 25<sup>th</sup> April 2023 and emerged the highest bidder at a consideration of Kshs. 15,000,000/-. She paid a deposit of Kshs. 1,500,000/- and the balance of Kshs. 13,500,000 on 24<sup>th</sup> July 2023. The transfer of the property was lodged for valuation for Stamp Duty on 23<sup>rd</sup> August 2023 and booked under booking number 2400 and an entry of the said registration was made on the title. The Transfer was effected on 24<sup>th</sup> August 2023 and an entry of the said registration was made on the title. A post-registration search confirmed that she was the current registered proprietor of the suit property.

12. The 2<sup>nd</sup> Defendant further averred that afterwards, she instructed her advocates to obtain vacant possession of the suit property and they issued a notice vide a letter dated 5<sup>th</sup> September 2023 to the Plaintiff demanding the same. She further stated that in response, they received a letter from the Plaintiff's advocates alleging that the Plaintiff was the registered owner of the suit property. She contended that the allegation of fraud, criminal in nature, must be strictly proved beyond reasonable doubt. She urged the Court to find that the Plaintiff had failed to satisfy the conditions necessary for grant of an interlocutory injunction and dismiss the Application with costs.

### **The second Application**

13. The second Application was filed by the 2<sup>nd</sup> Defendant. The said Application was supported by the annexed and further affidavits sworn by the 2<sup>nd</sup> Defendant, Amina Mohamed, on 28<sup>th</sup> November 2023 and 8<sup>th</sup> March 2024. The Application was also supported by the grounds that the issue raised by the Plaintiff was not about the transfer of the property but the payment of stamp duty which was made for the Transfer of the property to the 2<sup>nd</sup> Defendant and once it was established that there was no issue emanating from the Registrar and or Collector of Stamp Duty that the payment was not done; the Plaintiff has neither denied owing the 1<sup>st</sup> Defendant nor demonstrated how he intended to repay the debt. The 2<sup>nd</sup> Defendant argued that the Plaintiff had not demonstrated the capability to pay the costs if interim injunctive orders are not vacated and that if the Plaintiff has a case against the 1<sup>st</sup> Defendant, the same having arisen out of a contractual relationship, damages would be a sufficient and adequate remedy if breach was established on the part of the 1<sup>st</sup> defendant.
14. In response to the 2<sup>nd</sup> Application the Plaintiff filed a replying affidavit sworn on 9<sup>th</sup> January 2023, opposing the said application.

### **Analysis and Determination**

15. I have carefully considered the pleadings and the respective affidavits in support and opposition to the two application and the rival written submissions and list of authorities provided to the court by the parties. I note that the issue that arise for determination is “whether the two Applications are merited.”
16. The first Application seeks a grant of an order of Injunction. Order 40 Rules 1 and 2 of the Civil Procedure Rules provides: -

“ [Order 40. rule 1] Cases in which temporary injunction may be granted.

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 by being 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.

[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.

2. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
  - (1) or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
  - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

17. In addition to the above statutory provisions it is important to point out that the principles for the grant of an interlocutory injunction were set out by Spry, V.P. in the locus classicus case of *Giella v Cassman Brown*(1973) E.A. 358 at page 360E, 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 the case on the balance of convenience.”

18. Therefore, before a court can grant an injunctive relief, it must satisfy itself first that the Plaintiff has established a prima facie case with a probability of success. The Court of Appeal in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, in defining what a prima facie case was observed 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.”

19. The Plaintiff argued that he has established a prima facie case in that the sale of the suit property was illegal and irregular as the 1<sup>st</sup> Defendant did not address the issues raised by him in ELC No. E060 of 2023 and without adherence to the procedure set out in the *Land Act*. The Plaintiff contended that the purported sale of the suit property is tainted with fraud and illegality and is null and void ab initio because the 1<sup>st</sup> Defendant failed to serve him with the relevant Statutory Notices; proceeded to instruct



an Auctioneer to carry out an illegal and irregular sale, proceeded to conduct an Auction without carrying out a valuation and proceeded to transfer the property to the 2<sup>nd</sup> Defendant without valuation for stamp duty and payment of stamp duty and transferring the property to the 2<sup>nd</sup> Defendant without properly booking the documents, while knowing that the register was already closed following gazettelement of the Head Title for conversion.

20. From the record, I note that the 1<sup>st</sup> Defendant produced copies of the loan Application form, the instruments of the legal Charge and further Charge showing that the Plaintiff applied and was issued with the loan and that the said loan was secured by a Charge over the suit property. The 1<sup>st</sup> Defendant also produced an Application filed in ELC Case No. E060 of 2023 wherein the Plaintiff admitted that he defaulted in repayment of the loan to it.
21. In addition, the 1<sup>st</sup> Defendant exhibited copies of the 90 days' statutory Notice dated 16<sup>th</sup> June 2022, the 40 days' Notice dated 21<sup>st</sup> October 2022, the 45 days' Redemption Notice and notification of sale together with evidence of service upon the Plaintiff. It further produced the copy of the Memorandum of Sale and Valuation Report showing that a valuation of the property was undertaken on 17<sup>th</sup> August 2022.
22. The Plaintiff further claimed the sale was fraudulent due to non-payment of stamp duty and failure to book the Transfer for registration. The Plaintiff highlighted the discrepancy in the stamp duty payment slip from KRA i-tax portal and KCB Capital Hill Branch deposit slip. However, the 2<sup>nd</sup> Defendant produced the Transfer by Chargee registration booking form no. 2400 and the valuation for stamp duty form. She also produced a KRA payment slip and a screenshot of her KRA i-tax portal evidencing payment of stamp duty for the transfer of the property.
23. In *Mrao Limited v First American Bank of Kenya Ltd & others* (supra) the Court of Appeal observed that: -

“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 being 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.”
24. In the present case, I note that it is not disputed that the Plaintiff obtained a loan facility of Kshs. 14,294,634.00/-, from the 1<sup>st</sup> Defendant and that he charged his property being Apartment No. 5, located on the 3<sup>rd</sup> Floor, Block B, erected on Land Reference Number 2/713 (Original Land Reference Number 2/708) as security for the said loan. It is also not disputed that the Applicant defaulted on the loan repayments leading the 1<sup>st</sup> Defendant to exercise its statutory power of sale of the suit property.
25. Despite stating that he strenuously endeavoured to repay the loan as required, citing challenges associated with the economic meltdown caused by the Covid 19 Pandemic, the Plaintiff did not avail any evidence to confirm that he was servicing the loan. Flowing from the above set of facts and material presented by the two defendants before the Court, I am, therefore, not persuaded that the Plaintiff has demonstrated a prima facie case to warrant an order of interim injunction from this court.
26. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR held that “If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.” Having found therefore that the Plaintiff has not



demonstrated that he has a prima facie case, I am therefore persuaded that I need not look into the two other conditions as they are to be considered separately and sequentially.

27. In conclusion I find that the Plaintiff's Application dated 21<sup>st</sup> September 2023 is without merit and the same is hereby dismissed with costs for to the Defendants. Subsequently, the 2<sup>nd</sup> Application dated 28<sup>th</sup> November 2023 by the 2<sup>nd</sup> Defendant is allowed in the following terms:-

1. Interim orders in terms of prayer 2 of the Plaintiff's Application dated 21<sup>st</sup> September 2023 are hereby vacated.
2. The Plaintiff shall bear the costs of the Application dated 28<sup>th</sup> November 2023.

Orders accordingly.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 16<sup>th</sup> DAY of SEPTEMBER, 2024.**

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**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

1. Mr. Osumba for the Plaintiff/ Applicant.
2. Mr. Maondo for the 1<sup>st</sup> Defendant/Respondent.
3. Ms. Sylvia Musa holding brief for Mr. Saad for the 2<sup>nd</sup> Defendant/Respondent.
4. Amos - Court Assistant

