



Obiero v United Nations Sacco Limited & another (Civil Appeal E104 of 2023) [2024] KEHC 13716 (KLR) (17 September 2024) (Ruling)

Neutral citation: [2024] KEHC 13716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E104 OF 2023
SN MUTUKU, J
SEPTEMBER 17, 2024**

BETWEEN

CHARLES ONDUSO OBIERO APPLICANT

AND

UNITED NATIONS SACCO LIMITED 1ST RESPONDENT

FELINA COMMERCIAL AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant, Charles Onduso Obiero, has moved this Court through Notice of Motion application dated 19th December 2023 anchored on sections 1A, 1B, 3A, 80, 98, and 99 of the [Civil Procedure Act](#) and Order 42 Rule 6 and Order 51 Rule1 of the Civil Procedure Rules and all other enabling provisions of the law.
2. He seeks the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents whether by themselves, servants, employees, agents or any of them either individually or jointly or otherwise from doing the following acts or any of them, that is say, from interfering with the Appellant’s rights of ownership and possession, selling by public auction, advertising for sale by way of public auction, selling through private treaty or in any other manner whatsoever interfering with Title No. Kajiado/Kitengela/95229, Unit No. 139, The Riverine (hereinafter referred to as the “Suit Property”) pending the inter partes hearing of this application.
 - c. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents whether by themselves, servants, employees, agents or any of them either



individually or jointly or otherwise from doing the following acts or any of them, that is say, from interfering with the Appellant's rights of ownership and possession, selling by public auction, advertising for sale by way of public auction, selling through private treaty or in any other manner whatsoever interfering with Title No. Kajiado/Kitengela/95229, Unit No. 139, The Riverine (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application.

- d. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents whether by themselves, servants, employees, agents or any of them either individually or jointly or otherwise from doing the following acts or any of them, that is say, from interfering with the Appellant's rights of ownership and possession, selling by public auction, advertising for sale by way of public auction, selling through private treaty or in any other manner whatsoever interfering with Title No. Kajiado/Kitengela/95229, Unit No. 139, The Riverine (hereinafter referred to as the "Suit Property") pending the hearing and determination of this Appeal.
 - e. That costs of this application be in the cause.
3. The Applicant has advanced grounds in support of this application that he is the registered owner of the suit property; that he obtained a loan facility from the 1st Respondent; that he has been servicing the loan facility diligently but the 1st Respondent instructed the 2nd Respondent to auction the suit property on account of the Applicant's defaulting on the repayments of the loan facility; that the Applicant filed an application to restrain the selling of the suit property by public auction at the Co-operative Tribunal on account of failure to comply with the law by the Respondents but the said application was dismissed.
 4. He has stated that he had preferred an appeal to this Court to challenge the decision of the Tribunal in dismissing the application and that if the orders sought in this application are not granted, the substratum of the appeal is at risk of being sold off thereby rendering the appeal nugatory. He has stated that the appeal has high chances of success and that it is in the interest of justice that the orders sought herein be granted.

Replying Affidavit

5. The Application is opposed through a Replying Affidavit sworn on 29th January 2024 by Nebart Avutswa, the Executive Officer of the 1st Respondent. It is deposed that the Applicant has come to court with unclean hands for failure to disclose that he did not start at the Co-operative Tribunal but at Kajiado Chief Magistrate's Court in ELC Case No. E022 of 2023 which case was dismissed after the 1st Respondent raised a Preliminary Objection which was upheld by the Court.
6. It is deposed that the Applicant is frustrating the efforts of the 1st Respondent's efforts at realizing its security after persistent default on the part of the Applicant; that the Tribunal found that the 1st Respondents served all the requisite statutory notices under the Land Act and that the Applicant has not disclosed that he is the one in breach of the Loan Agreement for falling into arrears.
7. It is deposed that the Applicant offered the suit property as security for the repayment of the loan which property was charged in favour of the 1st Respondent; that the Applicant was served with all the statutory notices as shown under paragraph 12 of the Supporting Affidavit and therefore it is false for the Applicant to claim that the law and the statutory procedures were not complied with; that the Applicant obtained temporary injunctions from the Court to forestall the public auction of the suit



property and that it will be highly prejudicial if the orders sought are granted as the Applicant is in default. The 1st Respondent seeks to have this application dismissed with costs.

Submissions

8. The Applicant's submissions are dated 15th April 2024. He has submitted that he has met the requisite threshold for granting temporary injunction; that he has demonstrated a prima facie case with high chances of success; that he will suffer irreparable damage and that the balance of convenience tilts in his favour. He has submitted that the 1st Respondent has failed to serve him with the requisite statutory notices under sections 90 and 92(6) of the *Land Act*.
9. He has submitted that the Applicant and his family reside in the suit property and that the value of the suit property cannot be compensated by an award of damages and therefore the balance of convenience tilts in favour of the Applicant. He has relied on *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and *East Africa Venter Co. Ltd v Agricultural Finance Co-op Ltd & another* [2017] eKLR to support his submissions.
10. He has submitted that the Appeal will be rendered nugatory if the orders sought are not granted.
11. The 1st Respondent has submitted that it is not in disputed that the Applicant is in breach of his contractual obligations under the loan instrument that he signed to secure a loan of Kshs 14,000,000 and that it is not true that the Applicant has been diligently paying his monthly instalments to the account he holds with the 1st Respondent.
12. It was submitted that the Applicant took a loan Kshs 14,000,000 with the 1st Respondent and offered the suit property to secure that loan and that he has breached the terms and conditions in the Charge Instrument, which default is admitted by the Applicant and therefore the Applicant has not demonstrated a prima facie case with a probability of success.
13. The 1st Respondent relied on Nairobi Civil Appeal No. 114 of 2009 (UR 73/09) where the Court held that:

“The Applicant itself had offered the Property as security. No matter that the validity of the Charge is being challenged the conduct of the Applicant in charging the same made it a Commercial Property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is not gainsaying that it will be able to satisfy the loss.”
14. It was submitted that the balance of convenience tilts in favour of the 1st Respondent; that the 1st Respondent is able to repay whatever loss the Applicant may prove should his Appeal succeed.
15. It was submitted that the 1st Respondent served all the mandatory notices; that the Application ought to be dismissed with costs to the Respondents.

Determination

16. The facts of this case are clear. The Applicant obtained a loan facility from the 1st Respondent in the sum of Kshs 14,000,000. This amount has attracted interest. He offered the suit property as security for that loan facility and a charge was registered in respect thereof. He has defaulted in meeting his contractual obligations in repaying the loan. This has motivated the 1st Respondent to seek to recover its money. It instructed the 2nd Respondent to auction the suit property.



17. The Applicant moved to Court to obtain interim orders pending inter partes hearing of this application. This was granted by this court (Rayola Olel, J).
18. The principles governing grant of temporary injunctions are clearly stated in the law. A party seeking an injunction must demonstrate to the satisfaction of the court a prima facie case with a probability of success; that he will suffer irreparable injury and that the balance of convenience tilts in his favour. The Applicant has argued that he has demonstrated the above principles and seeks this court's intervention in granting him the orders he is seeking.
19. I have considered rival arguments. That the Applicant is in default is not in doubt. He has not proposed how he intends to settle the money owing to the 1st Respondent. He is claiming that he was not served with the requisite notices. I have noted that failure to serve the notices, as claimed by the Applicant is also the subject of the Appeal. This court has to tread carefully to avoid prejudicing any party should it make pronouncements that touch on the grounds of Appeal.
20. I have considered the matter carefully and make a finding that the Applicant has not met the threshold in granting the orders sought. He is in default. The 1st Respondent is in a position to compensate him by an award of damages should he succeed in his appeal. It is my view, as argued, that the property became commercial property when it was offered as security for the loan. For this court to determine this matter fully, it is prudent to proceed with the appeal.
21. It is my finding, and I so hold, that the Applicant has failed to persuade this court to grant the orders he is seeking. The balance of convenience tilts in favour of not granting the orders sought. The Notice of Motion dated 19th December 2023 stands dismissed with costs to the Respondents.
22. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

