



Carnation Properties Limited & another v Diamond Trust Bank Kenya Limited (Commercial Case 001 of 2024) [2024] KEHC 11939 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 001 OF 2024
PM MULWA, J
OCTOBER 3, 2024**

BETWEEN

CARNATION PROPERTIES LIMITED 1ST PLAINTIFF

ASHIFA ALIBHAI 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. For determination is the plaintiffs' application dated December 20, 2023 filed pursuant to Section 3A of the Civil Procedure Act; Order 37 rule 4 of the Civil Procedure Rules and Section 103 and 104 of the Land Act.
2. The plaintiffs sought for a temporary injunction to restrain the defendant and/or its agents from exercising any of the chargee's remedies under Section 90 of the Land Act pending the determination of this suit. They further prayed for an order to pause the tolling of time with regard to the statutory notice dated September 26, 2023 issued by the defendant to the plaintiffs pending determination of this suit.
3. The application is anchored on the grounds that the defendant issued loan facilities to the 1st plaintiff and as a result two charges were registered over the property LR No.1870/IX/189. The plaintiffs contended that despite their best efforts to service the loan, the defendant increased the principal sums which in effect increased their interest payments.
4. The plaintiffs asserted that the defendant was unwilling to share information on the loan accounts and that the defendant's main intention was to force a sale of the charged property and that is why the defendant sent auctioneers to the suit property before issuing the requisite statutory notices.



5. Further that the defendant served the plaintiffs with a statutory notice dated September 26, 2023 under Section 90 of the Land Act 2012 whereby it made clear its intention to sell the charged property and that the defendant served on the plaintiffs a notice of intention to enforce a purported deed of assignment of rent dated June 20, 2016 whose purpose is to collect rent from the suit premises.
6. It was the plaintiffs' case that the defendant's intention was to pressurize the plaintiffs and force a sale of the suit premises or enforce a deed of rental assignment irrespective of the plaintiffs' history of servicing the loan.
7. In opposition, the defendant filed a replying affidavit sworn on January 22, 2024 by Faith Ndonga, its Debt Recovery Officer. She averred that the defendant extended various banking facilities to the plaintiff specifically a term loan facility of Usd 503,906.76 which was secured by two charges and a deed of assignment of rent over the suit properties.
8. Further that the 1st plaintiff failed to make payment of the loan facility as and when the same fell due causing the amalgamated loan facility to be in arrears of Usd 15,714.02 as of September 26, 2023. This led the defendant to issue a statutory notice to the plaintiff dated September 26, 2023 informing the plaintiff that it would exercise its power of sale if the said default is not remedied within three months from the date of service.
9. That despite the notice, the plaintiff failed to remedy the default hence the defendant issued a notification of intention to enforce the deed of assignment dated December 20, 2023 and upon expiry of the period stipulated in the notification, the defendant appointed auctioneers to act as their agents for the purpose of collection of rent from the tenants on the suit property.
10. The defendant's debt recovery officer contended that the plaintiff was served with all the requisite notices required in law however the plaintiff has still defaulted in repaying the term loan facility which is still in arrears. Further that the plaintiff's application lacks merit as there is no *prima facie case* and it is only meant to prevent the bank from enforcing its legal right to collect rent and benefits pursuant to the deed of settlement.

Analysis and determination

11. The plaintiffs filed written submissions dated February 25, 2024 while the defendant filed submissions dated May 3, 2024. I have considered these alongside the pleadings by the parties.
12. The record indicates that the defendant extended various banking facilities to the plaintiff pursuant to various letters of offer amounting to a sum of Usd 503,906.76. The facilities were secured inter alia by a first and further legal charge over the suit property and a deed of assignment of rent from the suit property.
13. The 1st plaintiff breached the terms of the facility by defaulting in payment of the loan which led the defendant to issue a statutory notice of sale dated September 26, 2023 pursuant to Section 90 of the Land Act. Thereafter, a notification of intention to enforce the deed of assignment dated December 20, 2023 was served.
14. What is before the court is an interlocutory injunction application seeking to restrain the defendant from exercising any of the chargee's remedies under Section 90 of the Land Act pending the determination of this suit.
15. In the celebrated case of *Giella v Cassman Brown* [1973] EA 358 the principles to be considered before granting an interim injunction are set out 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, and (iii) if the court is in doubt, it will determine the matter on a balance of convenience.

16. What is considered a *prima facie case* with a probability of success was illustrated in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* - Civil Appeal No 39 of 2002, thus:

“...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.”

17. The 1st plaintiff neither denied defaulting in loan repayments nor that two charges were registered against the suit property and a deed of assignment of rent was part of the bank’s security for the loan facility extended. Under clause 5 of the deed of assignment, produced as ‘FN 5’ in the defendant’s replying affidavit, it was agreed that any rent collected by the defendant would be applied towards the satisfaction of any outstanding debt.

18. Having made the observations above and keeping in mind that the plaintiffs were duly served with a notification of intention to enforce the deed of assignment dated December 20, 2023 and a statutory notice of sale, 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 not established a *prima facie case*.

19. The conditions set out in *Giella (supra)* are sequential. And since a *prima facie case* has not been established, I find no need to consider the other limbs before granting the interim injunction. This was holding 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).”

20. Consequently, the application dated December 20, 2023 lacks merit and is dismissed with costs to the defendant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Onguti for plaintiffs

Mr. Kisinga for Defendant

Court Assistant: Carlos

