Hadija t/a La Zone Enterprises v Equity Bank of Kenya Limited (Civil Case E284 of 2024) [2024] KEHC 12160 (KLR) (Commercial and Tax) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E284 OF 2024

FG MUGAMBI, J

OCTOBER 11, 2024

BETWEEN

ZAWADI HADIJA T/A LA ZONE ENTERPRISES ..... PLAINTIFF

AND

EQUITY BANK OF KENYA LIMITED ..... DEFENDANT

RULING

Introduction and Background

1. This Ruling determines the application dated 24/5/2024 which seeks injunctive orders against the respondent from interfering with the applicant's peaceful enjoyment and dealing with Apartment Unit No. 13 on LR No. 3xx/1xxx5 (I.R. No. 8xxx8) Krishna apartments situated at Lavington Nairobi (the suit property). The applicant also seeks to have the respondent compelled to avail updated and current accounts in respect to the applicant's loans, and that the suit property be valued afresh.

2. The application is supported by the applicant's affidavit of even date. The applicant's case is that statutory notices were never served upon her, that the suit property has been undervalued and that the respondent denied her the right to sell the property through a private treaty despite having secured a buyer who is willing to purchase the property at Kshs. 18,500,000/=.

3. The application is opposed through the replying affidavit of Mary Katoni, the Credit Manager at the respondent Bank sworn on 7/6/2024. The respondent's case is that the application is *res judicata* as all the prayers sought were adjudicated before this court in HCCOM No. E852 of 2021 between the same parties. The respondent further contends that they followed the due procedure in exercising their right to statutory sale by issuing all the relevant notices.

Analysis and Determination

4. After reviewing the pleadings, evidence as well as the submissions filed, two issues arise for determination. First is whether the application is *res judicata* and whether the applicant has met the threshold for granting the injunctive relief sought.

5. By way of background, the applicant was granted a facility of Kshs 16,800,000/= comprising of a mortgage and business loan which was secured using the suit property. The plaintiff defaulted in repayments and the loan fell into arrears leading the bank to begin the process of exercising its statutory right of sale.

6. The applicant moved the court vide HCCOM No. E852 of 2021 seeking injunctive orders against the respondent. The injunctive orders were granted in the interim but subsequently vacated on 3/11/2022 for want of prosecution. The suit was withdrawn on 14/5 2024 and the respondent advertised the property for sale. It was at this point that the applicant once again approached the court by the instant application of 24/5/2024 seeking injunctive orders similar to the previous.

7. The respondent argues that the application is *res judicata*. Section 7 of the *Civil Procedure Act* forbids the court from trying a matter in which 'the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court'.

8. I have reviewed the two applications and I agree that the orders sought are similar. The parties are litigating under the same title. I have however taken the liberty to also peruse the record with respect to HCCOM No. E852 of 2021, to ascertain the averments by the applicant. It is clear that the application dated 21/10/2021 was not heard on merit as required under section 7 of the *Civil Procedure Act*.

9. What I can discern from a cursory perusal of the record is that interim orders were issued pending the hearing of the suit. While enjoying the interim orders, the applicant went into slumber and failed to prosecute the application. As a result, the interim orders were vacated on 3/11/2022 and subsequently on 7/6/2022 the application was dismissed for want of prosecution. I therefore find that the application is not res judicata.

10. I shall now proceed to evaluate whether the applicant meets the threshold for granting injunctive orders as provided for under Order 40(1) (a) and (b) of the *Civil Procedure Rules*.

11. There is an abundance of judicial pronouncement including the celebrated *Giella v Cassman Brown & Co Ltd*, [1973] EA 358, which have which have crystallized the conditions for granting a temporary injunction.

12. The first of these conditions is that the applicant must demonstrate a *prima facie* case with a probability of success at the hearing. In determining whether a *prima facie* case has been established, the court is only required to assess whether the case raises issues that should be examined at trial, not whether the applicant is likely to succeed.

13. In *Nguruman Limited v Jan Bonde Nielsen*, CA No. 77 of 2020 the Court of Appeal stated as follows:

> " We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right

that has been or is threatened with a violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case."

14. In the matter at hand, the applicant does not dispute that she was advanced three facilities by the respondent, consisting of a mortgage and business loans. She does not also dispute that the accounts are in arrears as evidenced by numerous correspondence produced in evidence. At paragraph 6 of her plaint the applicant gives an account of her financial setbacks suffered in 2018. Paragraph 8 of her plaint is equally unequivocal and reads as follows:

> " The plaintiff avers that she is more than willing to clear the outstanding loan and has actually given the defendant a payment proposal in that regard."

15. It is therefore clear that there is no dispute that the account is in arrears. On her prayer to be provided with a statement of accounts for the facilities, I note that the respondents have filed the same with their replying affidavit to this application and as such the prayer is overtaken by events. In any case, even if the applicant were to challenge the amount stated as owing, the appropriate response can be found in paragraph 725 of the *Halsbury's Laws of England*, Vol 32 (4th Edition). It states:

> " 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."

16. Regarding the claim that the applicant was not served with the requisite statutory notices, I have thoroughly reviewed the evidence produced by the respondent. It is clear that the applicant was served with various notices as required. I refer to pages 46, 49, 51 and 45 of the respondent's bundle of documents for some of the notices. The submission by the applicant that she has not been served with any notices is therefore unfounded.

17. Having failed to establish a *prima facie* case, it is unnecessary to consider the other two requirements for granting an injunction. All three conditions must be satisfied before an injunction can be granted, as was held in the *Nguruman Limited* [*supra*].

Disposition

18. Accordingly, the application dated 24/5/2024 is bereft of merit. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE