



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kibe v Equity Bank (Kenya) Limited & another (Commercial Case
7 of 2023) [2024] KEHC 13485 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE 7 OF 2023
DO CHEPKWONY, J
OCTOBER 4, 2024**

BETWEEN

DUNCAN GITONGA KIBE APPLICANT

AND

EQUITY BANK (KENYA) LIMITED 1ST RESPONDENT

SUNLIGHT AUCTIONEERS 2ND RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion application dated 5th June, 2023 which has been filed pursuant to Section 3A of the *Civil Procedure Act*, Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules and Articles 48, 64 and 159 (2) (a), (b) and (d), all of *the Constitution* of Kenya, Section 44 (a) of the *Banking Act* and Section 39 (1) of the Central Bank of Kenya (Amendment Act, 2000). The Application seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court do issue an Order of permanent injunction against the 1st and 2nd Respondents /their agents restraining and or gagging them from selling or exercising the redemption notice and/or power of the notification of sale over all that developed property comprising of six storeys in the parcel known as Juja/Kalimoni Block 22/1668 (Witethie Estate) pending the hearing and determination of this suit.
 - d. That the 1st Defendant is hereby ordered by this Honourable court to provide the Applicant herein with true and certified copies of the loan agreement, charge document, statement of account numbers 1550578512539 and 0260190258034 from 10th January, 2019 to date pending the hearing and determination of the main suit.



- e. That the Plaintiff is hereby granted leave to appoint /hire an independent certified & professional/certified accountant/auditor to reconcile and table accounts of the above loan accounts before this Honourable court.
 - f. That this Honourable court be pleased to grant any other orders it finds fit/expedient to grant under the circumstances suo moto and or by way of oral application by the Applicant's Counsel.
 - g. That the costs of this application be borne by the Respondents herein.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Duncan Gitonga Kibe sworn on the instant date. It is the Applicant's case that he is the sole owner of the subject parcel of land which he had developed upto four floors. He applied and obtained a credit facility which was secured with the subject property and the same was granted in bits and he began servicing it at monthly instalments of Kshs. 300,000/=. The Applicant holds that due to the Covid-19 outbreak construction could not be completed and he thus defaulted the loan repayment to a tune of Kshs. 1,800,000/= . That he applied for a further loan of Kshs 6,500,000/= which he was granted.
 3. According to the Applicant, the Respondents greatly undervalued his property, that it would be unfair for the property to be auctioned considering the arrears are only for Kshs. 1,800,000/=. The Applicant holds that on 22nd March, 2022, the 1st Respondent served him with a 45 days redemption notice claiming Kshs. 24,456,539.90 and on 23rd May, 2023, the 2nd Respondent caused an advert to be placed in Daily Nation Newspaper.
 4. The Applicant argues that due process was not followed as the Demand Notice and Proclamation Notices were not issued. He further states that the Respondent continues to charge illegal and unlawful interest rates, penalties and hidden charges which are unconscionable in law. The Applicant urges the court to instruct a professional accountant to reconcile his bank account as he is apprehensive that the 1st Respondent has breached the in-duplum rule. He therefore prays that the court allows his application and stop the Respondents from selling the suit property.
 5. The Respondent opposed the application through the Replying Affidavit of Samuel N. Wamaitha sworn on 26th June, 2023. On its part, the 1st Respondent states that on 24th May, 2018 the Applicant applied for a loan facility of Kshs. 18,000,000/= for purpose of completing a six storey rental block. That the 1st Respondent approved the loan and issued a Letter of Offer dated 26th July, 2018 to be executed by the parties. The charge document was prepared and registered against L.R.No.Juja Kalimoni Block 22/1688 on 5th November, 2018 further, a deed of assignment of rental income was registered over the suit property.
 6. The 1st Respondent holds that terms of the offer were that the funds were to be disbursed as per the architect's certificates and upon site visits by the bank officials, the borrower was to ensure adequate funds were on the account to meet the loan repayment as they fall due and that the loan would attract a loan application and credit evaluation fee (LACE) of 4 % of the approved amount which was Kshs 900,000/= subject to excise duty of 10% which was Kshs. 90,000/=. The 1st Respondent has stated that the first loan amount of Kshs.100,000.000/= was disbursed pm 14th January, 2019. The 1st Respondent further states that the Applicant applied for a further loan of Kshs 6,500,000/= and a further charge was duly registered on 21st September, 2022.
 7. It is the 1st Respondent's contention that the Applicant began defaulting in the loan repayments and it proceeded to issue a 90-days Statutory Notice via Registered Post on 22nd February, 2022. Thereafter, it issued a 40-days Statutory Notice dated 24th June, 2022 as indicated in the certificate of positing. The



- 1st Respondent goes on to state that upon lapse of the time, it instructed the 2nd Respondent to sell the suit property via Public Auction and a 45-days Redemption Notice was issued but the Applicant did not comply, upon which the 2nd Respondent proceeded to advertise the suit property for sale on 9th June, 2023.
8. The 1st Respondent also holds that it instructed Pinnacle Valuers Limited to conduct a valuation of the suit property and it assessed the current market value of the same at Kshs. 33,500,000/= with a Forced Sale Value of Kshs. 25,200,000/=. The 1st Respondent states that the allegation by the Applicant that he was not served with the requisite notices is baseless given that the Notices were sent to them via Registered Post on P.O. Box 538-00621, Kiserian which was the same address indicated in the Letter of Offer and Charge Instruments issued to him and which have never been returned unclaimed.
 9. The 1st Respondent avers that the Applicant is still in arrears of Kshs. 3,198,495.82 with an outstanding balance of Kshs. 25,655,723.98 as at 26th June, 2023. It holds that it complied with all the rules as set out by law to exercise its power of sale.
 10. The 1st Respondent has urged that the application lacks merits for the reasons that it issued all the Statutory Notices as required by law and therefore an injunctive order cannot issue where the Plaintiff is in arrears. He contends that the Applicant has come to court with unclean hands and its tight to exercise its Statutory Power of Sale has crystallised and what the Applicant seeks is only to frustrate its efforts. The 1st Respondent therefore prays that the court dismisses the application with costs.
 11. On 26th July, 2023, the court directed the parties to dispose of the application by way of written submissions and on 4th October, 2023, it was confirmed both parties had complied and filed their respective submissions.

Analysis and Determination

12. Having considered the application, the affidavits file in support and in rebuttal thereof, together with the written submissions filed by either party, this Court finds the following issues arising for determination:
 - a. Whether an order of permanent injunction can issue against the 1st and 2nd Respondents and their agents restraining and or gagging them from selling or exercising the redemption Notice and/or Power of Notification of Sale over all that developed property comprising of six storeys in the parcel known as Juja/Kalimoni LOCK 22/1608, (Witeithie Estate) pending the hearing and determination of the suit.
 - b. Whether the court should order the 1st Defendant to provide the Applicant herein with true and certified copies of the loan agreement, charge document, statement of accounts Number 1550578512539 and 02260190258034 from 10th January, 2010 to date pending the hearing and determination of the main suit.
 - c. Whether the Plaintiff should be granted leave to appoint or hire an Independent Certified and Professional Certified Accountant or auditor to reconcile and table accounts of the above loan accounts before this Honourable Court.



13. Concerning the issue of whether an order for permanent injunction can issue in the instant case, reliance is placed on the holding in the case of Kenya Power and Lighting Company Limited –vs- Sherrif Molane Habib [2018]eKLR, where it was held inter alia as follows:-

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. (emphasis is mine). It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/ interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

14. Courts are usually reluctant to grant mandatory injunction particularly at interlocutory stage, save in clear cut cases. This was also the position taken by the court in the case of Lucy Wangui Gachara –vs- Minudi Okemba Lore [2015]eKLR, the court rendered itself thus:-

“.... the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing. Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In Bharat Petroleum Corp Ltd –vs- Haro Chand Sachdeva, Air 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

15. In the instant case, the court has been called upon to issue a permanent injunction so as to restrain or gag the 1st Respondent and or its agents from selling or exercising the Redemption Notice and or power of Notification of Sale over all the developed property comprising of six (6) storeys on the suit property. The question to be established is whether the Applicant has established a prima-facie case to urge for this right.

16. In the case of Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003]KLR 125, the Court of Appeal in considered similar issue, had this to say on what constitutes as a prima-facie case:-

“In civil cases, a prima facie case 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. To determine whether the court has established a prima-facie case on a balance of probability, the issues for determination are:-



- a. Whether there was a registered charge?
 - b. Whether the bank, 1st Respondent herein issued any Statutory Notices
 - c. Whether there was any Valuation done on the suit properties.
18. In regard to the first issue, it is not in dispute that the 1st Respondent granted the applicant herein a credit facility in bits in the sum of Kshs.24,500,000.00 in total and which facility was secured by the suit property being LR. No.Juja Kalimoni Block 22/1688 on the 5th November, 2018 vide a charge document registered on 5th November, 2018 and deed of assignment of rental income over the suit property.
 19. On the second issue of whether the 1st Respondent issued any Statutory Notices upon the Applicant, the Applicant argues that he was not served with any Statutory Notices as required when a party defaults in payment in such instances as is the issue in this case. Therefore, the burden of proof is upon the respondents to prove that they issued the said Notices as they alleged.
 20. Having read through the pleadings and annexures attached thereto by the parties herein, this Court notes that the 1st Respondent issued a three (3) months Statutory Notice dated 22nd February, 2023 and thereafter a forty (40) days Notice dated 24th June, 2022, both of which were sent to the Applicant by way of registered post as evidences by the duly attached Certificate of postage marked as SW-6, 7 and 8 and vide a letter dated 14th March, 2023, the 1st Respondent instructed Sunlight Auctioneers and they proceeded to issue a forty-five (45) days Redemption Notice dated 16th March, 2023. This was followed by a Notice of Intention to sell dated 17th March, 2023 which was also sent vide registered post and a Certificate of postage to confirm the same is attached to their Replying affidavit dated 26th June, 2023 as evidence.
 21. This has not been rebutted by the Respondent and hence, the burden of proof shifts back to the Applicant to confirm that they did not receive the said Notices sent by registered post. In the case of Mombasa HCCC No.31 of 2013, Fredrick Makumbi –vs- Kenya Commercial Bank Ltd, the court relying on the case of Maithya –vs- Housing Finance Corporation of Kenya, HCCC No.1129 of 2002 held as follows:-

“It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”

Clearly, in this case, the Applicant has not discharged his burden of proof to confirm that the was not served with the Notice.

22. The third issue relates to whether Valuation was done on the subject property. Having read through he pleadings and the submissions by either party, this Court finds a letter dated 19th April, 2023 which was addressed to Pinnacle Valuers Ltd from the 1st Respondent requesting for Valuation of the subject properties. It has been evidenced that Pinnacle Valuers Ltd valued the property and prepared a report dated 27th April, 2023 wherein it gave the current market value of the said property as



Kshs.33,500,000/= with an estimated forced value of Kshs.25,200,000/= and recommended insurance value for improvement as Kshs.32,000,000/=.

23. In view of the aforesaid, it is clear that the 1st Respondent complied with all the requisite procedures in the transaction between itself and the Applicant. On his part, the applicant has not satisfactorily demonstrated that he has repaid the full loan amount. He has also not shown that the 1st Respondent's right of exercising its Statutory Power of Sale was not ripe or rebutted the evidence that he was served with the said Notices. On this, the court is guided by the Court of Appeal decision in the case of Giro Commercial Bank Limited –vs- Halid Hamad Mutesi[2002]eKLR that:-

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.”

24. Having found that the Applicant has failed to establish a prima-facie case to warrant grant of injunctive orders against the respondents, this Court finds no need of addressing the other two conditions that were set out in the case of Giella –vs- Cassman Brown. In the case of Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86 cited by Gitumbi, J with approval in the case of Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR, the Court observed:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

25. However, on the 2nd and 3rd grounds for consideration, the court is of the view that the Applicant's indebtedness to the 1st Respondent is not in dispute. What appears to be in dispute is the amount of debt and interest rates being charged, hence the prayers for the 1st Respondent to provide him with certified copies of accounts and for an independent certified and professional Accountant and or Auditor to be appointed/hired to reconcile the said accounts.

26. It is trite that the court cannot grant an injunction for the sole reason that the amount of debt is in dispute. In Nairobi Civil Application No.227 of 1995 (108/55 V.R) (Unreported) Priscillah Krobought Grant –vs- Kenya Commercial Finance Co. Ltd and 2 Others, the Court of Appeal had this to say:-

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage...”

It is therefore the Court's view that for the dispute to be resolved, it will have to go through a full trial for the amount paid, outstanding balance due and interest rates to be determined.

27. In the circumstances, the following orders issue:-

- a. The Notice of Motion application dated 5th June, 2023 is allowed in part as follows:-
 - i. The prayer for permanent injunction be and is hereby declined and interim orders in place discharged.



- ii. The 1st Respondent to provide the Applicant with true and certified copies of the Statement of Accounts Numbers 1550578512539 and 020019025034 for 10th January, 2019 to date for purposes of the main trial.
- iii. Mention on 30th October, 2024 for Pre-trial Conference before the Hon. Deputy Registrar.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF OCTOBER , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:-

No appearance for and by Applicant/Plaintiff

M/S Kamau holding brief for M/S Karanu counsel for Defendant

Court Assistant - Martin

