



**Ngunjiri v Standard Chartered Bank Kenya Limited & another (Civil Suit E598 of 2023)
[2024] KEHC 11793 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E598 OF 2023
FG MUGAMBI, J
OCTOBER 4, 2024**

BETWEEN

JAMES KARIUKI NGUNJIRI APPLICANT

AND

STANDARD CHARTERED BANK KENYA LIMITED 1ST DEFENDANT

LEGACY AUCTIONEERS SERVICES 2ND DEFENDANT

RULING

Introduction to background

1. This ruling determines two applications both filed by the plaintiff. The first one is dated 5/12/2023. It is brought under Article 40 and 159 (2) (d) of *the Constitution* of Kenya, Sections 1A, 1B, and 3A and 63 (c) of the *Civil Procedure Act*, Order 40 rules 1 and 2 of the *Civil Procedure Rules 2010* and Sections 96(2) (3) and 103(4) of the *Land Act*.
2. The applicant seeks injunctive relief against the 1st defendant (the Bank) from exercising its statutory power of sale with respect to LR 12146/29 (original No 12146/23/2 new LR No Nairobi Block 149/1841) (the suit property). It also seeks an order to compel the Bank to avail a copy of the insurance policy/mortgage protection cover insurance policy executed on 13/4/2015.
3. The application is supported by the affidavit of James Kariuki sworn on 5/12/2023. The plaintiff contends that the suit property is jointly registered with his deceased wife, Lucy Wanjiru. The property was used as security in respect to the charge dated 13/4/2015 and further charge dated 9/9/2019 to secure a loan facility from the Bank. It is his case that upon the demise of his wife on 20/10/2021, the loan balance at that time ought to have been cleared as per the Insurance Cover. He faults the Bank for claiming the said outstanding amounts.



4. The plaintiff further contends that he was not served with statutory notices by the Bank as per the provisions of Sections 90(2) (3) and 96 (2) of the Land Act, 2012.
5. The Bank opposes the application through a replying affidavit sworn on 13/12/2023, by Boniface Machuki, Manager, Collection and Recoveries Unit. It is the Bank's case that the plaintiff defaulted in the repayment of the loan facility and despite indulgence by the Bank, the loan fell into arrears which prompted the Bank to exercise its statutory power of sale. The Bank contends that the requisite demands and statutory notices were issued to the plaintiff. According to the Bank, the plaintiff has no *prima facie* case as he is heavily indebted to it, to a sum of Kshs 40,216,719.50 as of 11/12/2023 which amount continues to accrue interest.
6. The second application is dated 1/3/2024. It is brought under Order 51 Rule 1, Order 50 Rule 5 of the Civil Procedure Rules and Sections 1B, 3A of the Civil Procedure Act. It seeks an enlargement of time by a further 14 days for compliance with the directions of the court issued on 14/12/2023. The same is with respect to extension of the interim orders which were issued on condition that the plaintiff deposits a sum of Kshs 2,000,000/= in a joint interest-earning account in the names of the advocates representing the parties. The application further seeks injunctive relief in the same manner as the Motion dated 5/12/2023.
7. The thrust of the second application is that due to the hard-economic times, the plaintiff was unable to raise the amount of Kshs 2,000,000/= within the 14-day timelines set by the court but having secured the amounts now he is willing to deposit the same as security. He alleges that in the absence of an interim order of stay the defendants will proceed to dispose of the suit property. The applicant denies having an overdraft facility with the respondent.
8. This application is also opposed by the Bank through a replying affidavit sworn by Boniface Machuki on 19/3/2024. He avers that the applicant is undeserving of the orders sought as no interim orders are subsisting, that the application has not been brought timely, and no reasonable cause has been adduced for the delay. He argues that as a show of good faith, the plaintiff should first have deposited the amount in his possession since there is no evidence that he has the money.
9. Further, he states that allowing the application would fetter the Bank's exercise of its crystallised power of sale, making it impossible to recover the loan facility which has an outstanding balance of Kshs 72,031,718.71 comprised of a mortgage loan of Kshs 49,611,521.01/= and the overdraft facility of Kshs 22,420,197.70/=.

Analysis and determination

10. The applications were canvassed by way of written submissions which I have considered alongside the pleadings, evidence and authorities filed by the parties.
11. Even though the two applications are reciprocally connected, I am of the view that the outcome of the application dated 5/12/2023 will determine the direction for the application dated 1/3/2024. As such, I will first consider the application dated 5/12/2023 in which the primary issue is whether the applicant has met the threshold for grant of temporary injunctions sought.
12. Order 40 Rule 1 of the Civil Procedure Rules 2010 sets out the circumstances under which a temporary injunction can be granted by the Court. The conditions that guide the Court in granting such orders are also well crystalized from the decision in *Giella v Cassman Brown & Co Ltd*, (1973) E.A 385, at page 360 where Spry J. The principles are that:
 - i. A party must show that they have a *prima facie* case with a probability of success;



- ii. That they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if the order is not granted; and
 - iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
13. On the first condition, this court is called upon to ascertain whether the applicants have shown a *prima facie* case following the threshold laid out in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, [2003] KLR 125. The Court defined a *prima facie* case as:
- “... 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
14. In determining whether a *prima facie* case has been demonstrated, I am in turn cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 others*, [2014] eKLR observed 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, which has been or is threatened with violation.”
15. The plaintiff's case is that upon the demise of his wife on 20/10/2021, the loan balance at that time ought to have been cleared as per the existing insurance cover. I have reviewed the evidence filed in court. It is evident that the Bank extended to the plaintiff and the deceased Lucy Wanjiru Githaiga a re-mortgage loan facility of Kshs 33,800,000/= for a period of 240 months at an interest rate of 12.9% p.a. vide a letter of offer dated 2/3/2015.
16. A second top up loan facility of Kshs 45,000,000/= was extended by a second letter of offer dated 21/6/2019. Noticeably, this letter of offer was addressed to and signed in acceptance by the plaintiff alone, unlike the first offer which was joint. The purpose of the second facility was to take over and settle the existing loan facilities with the Bank and to advance further sums to the plaintiff.
17. I have also reviewed the charge document dated 13/4/2015, executed by the plaintiff and his deceased wife, with respect to the facility of Kshs 33,000,000/=. The plaintiff and the deceased offered the suit property as security by way of a further charge, for purposes of securing the 2nd facility as well, in addition to a guarantee dated 29/7/2019, which was executed by the deceased. The relevant further charge and guarantee have also been produced as evidence.
18. The letters of offer for both facilities provided for a Life Mortgage Protection Cover. Having confirmed that the 2nd facility took over the 1st facility and that the latter facility was only offered to and accepted by the plaintiff, it follows that the life cover taken in respect of the deceased ceased to exist as soon as the 2nd facility was agreed upon.
19. The Bank attached a Group Mortgage Insurance Certificate in which the insured is the plaintiff. The policy covers the period 01/01/2019 to 31/12/2019. The plaintiff has not provided any evidence to show that he was jointly insured together with the deceased at the material time of default and demand



for the facility. He has not equally disputed the amount claimed by the Bank as reflected in the bank statements produced.

20. The second ground that the plaintiff advances is that he did not receive the requisite statutory notices. The evidence on record confirms that a 3 months' statutory notice dated 15/3/2023 was sent to the plaintiff through registered post. The statutory notice demanded payment of the amount of Kshs 38,542,113.98. Subsequently a 40 days' statutory notice dated 11/7/2023 was also sent to the plaintiff, again through registered post. Finally, a 45 days' redemption notice dated 9/10/2023 was served on the plaintiff by the 2nd defendant as evidenced by the Certificate of Service dated 25/10/2023.
21. On the face of it, the evidence in totality proves that the loan facility fell into arrears, that the bank demanded settlement of the same and issued notices and that at this time, the life cover was not in existence. It has long been settled that the role of this court is not to introduce terms to a contract between parties where the parties have agreed to negotiated terms. The role of this court is to enforce those terms unless the same can be said to be unconscionable.
22. By the applicant having charged his property to secure the loan facilities, and having in fact benefitted from the said facilities, the suit property became available for sale in case of default to repay the facility.
23. The applicant submits his home is situated on the suit property which he stands to lose if an injunction is not granted. It is trite law that a matrimonial house, which is offered as security for loan/overdraft is made with an understanding that the same stands the risk of being sold by the lender in case of default. The fact that the suit property consists of the applicant's home is not sufficient cause to grant an injunctive relief.
24. The totality of the foregoing is that I am not persuaded that the applicant has established a *prima facie* case for granting of injunctive reliefs. Following suit in *Nguruman Limited v Jane Bonde Nielsen & 2 others*, [2014] eKLR, the court stated that if a plaintiff is unable to satisfy this first condition, the issue as to whether damages are sufficient to compensate the plaintiff in the event the suit succeeds as well as the balance of convenience and where that lies, does not arise.
25. Additionally, having found that the application dated 5/12/2023 is devoid of merit, I find no basis for allowing the application dated 1/3/2024 which would contradict the finding in the previous application.

Disposition

26. Accordingly, the applications dated 5/12/2023 and 1/3/2024 are both devoid of merit. The applications are dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

