



**Ndiritu v Kenya Commercial Bank Limited (Civil Suit
E052 of 2021) [2023] KEHC 80 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 80 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E052 OF 2021
OA SEWE, J
JANUARY 18, 2023**

BETWEEN

JAMES KARIBU NDIRITU PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. The notice of motion dated May 13, 2021 was filed by the plaintiff pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the laws of Kenya as well as order 40 rules 1, 2, 3 and 4 of the *Civil Procedure Rules, 2010*. The plaintiff thereby seeks the following orders:
 - (a) Spent.
 - (b) Spent.
 - (c) That pending the hearing and determination of this suit, the defendant by itself, its servants and/or agents, particularly M/s Mistan Auctioneers, be restrained by a temporary injunction from alienating, selling, advertising or in any other way dealing with the plaintiff's property known as Title No Kwale/Diani/726.
 - (d) That the costs of the application be provided for.
2. The application was premised on the grounds that the plaintiff was and still in the registered owner of all that property known as title No Kwale/Diani/726 (hereinafter, "the suit property") with an approximate value of Kshs 70,000,000/=. The plaintiff averred that he has been carrying on hospitality and/or hotel business on the suit property in the name of "The Bright Star Resort Diani" and that he applied for and obtained a loan facility in the sum of Kshs 10,800,000/= from the defendant for which he used the suit property as security. The plaintiff further deposed that he had been repaying the loan



- diligently until January 2020 when he started falling into arrears due to financial constraints brought about by the adverse effects of the global Covid-19 pandemic on the tourism industry in Kenya.
3. The plaintiff further stated that, to ameliorate his situation, he applied for a moratorium and a restructuring of the loan facility; and that when he visited the defendant to find out the outcome of his application, he was served with a letter dated June 2, 2020 informing him that his request had been turned down because he was in default. Thereafter, his pleas for the defendant to reconsider its stand received no favourable response. The plaintiff added that, ultimately on May 11, 2021, Ms Rita Wanjiku t/a Mistan Auctioneers visited the suit property ostensibly in preparation for an impending auction; and yet he had not been served with any statutory notice. It was therefore the contention of the plaintiff that the intended sale of the suit property was tainted with grave illegalities; and therefore that it is in the interest of justice to stop it pending the hearing and determination of this suit.
 4. The defendant opposed the application; to which end, it filed a Replying Affidavit sworn on July 5, 2021 by its Recovery Manager, Mortgage Section Andrew Cheruiyot Bore. The defendant confirmed that it accorded the plaintiff a mortgage facility in the sum of Kshs 10,800,000/=, which was to be repaid over a period of 10 years in monthly instalments of Kshs 195,381. He further confirmed that the facility was secured by a Charge over the property known as Title No Kwale/Diani/726. Mr Bore also averred that the plaintiff only made minimal repayments, and thereafter halted servicing the facility altogether; such that by June 4, 2021 his loan account was in arrears to the tune of Kshs 6,981,010.19.
 5. Thus, at paragraphs 13 to 18 of the Replying Affidavit, Mr Bore averred that, on account of the plaintiff's default, the defendant proceeded to serve him with the requisite notices under section 90 and 96 of the *Land Act, 2012* before giving instructions to Mistan Auctioneers to sell the charged property by public auction. He added that the plaintiff was also served with the Redemption Notice under rule 15(d) of the *Auctioneers Rules, 1997*; and therefore that, at all material times, the actions of the defendant were lawful, in good faith and in compliance with the contractual rights that had accrued under the mortgage facility as well as the Charge. Thus, Mr Bore asserted that the plaintiff has failed to make out a prima facie case to warrant the issuance of the orders sought by him.
 6. The application was canvassed by way of written submissions pursuant to the directions given herein on July 8, 2021. Accordingly, Mr Mwanzia for the plaintiff filed his written submissions on October 14, 2021. He cited the case of *Giella v Cassman Brown & Company Limited* [1973] 358 for the guiding principles of *prima facie* case, irreparable harm and balance of convenience. Counsel reiterated the plaintiff's contention that he was never served with the requisite statutory notices as the same were posted to the wrong address. He relied on *Nyagilo Ochieng & another v Fanuel B Ochieng & 2 others* [1996] eKLR and *Kwale Cement Factory Limited & another v Bank of Africa Kenya Limited* [2018] eKLR in urging the court to find that the plaintiff has established a *prima facie* case by demonstrating that he was not served with the requisite statutory notices.
 7. It was further the submission of Mr Mwanzia that the suit property was not valued for purposes of section 97 of the *Land Act*. In this regard, counsel relied on *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR, among other authorities, to augment the argument that the burden of proof was on the defendant to prove that valuation had been done prior to the intended sale, which burden has not been discharged herein by the defendant.
 8. On whether the plaintiff will suffer irreparable harm not capable of adequate compensation by an award of damages, Mr Mwanzia submitted that any sale that goes against the dictates of the law would, by that very fact, occasion irreparable loss. He relied on *Thomson Smith Aikman, Alan Malloy & others v Muchoki & others* [1982] eKLR for the proposition that flagrant breach of the law should not be condoned.



9. As for the balance of convenience, Mr Mwanzia urged the court to find that the interest of justice would favour the grant of the orders sought by the plaintiff with a view of preserving the suit property until the suit is heard and determined on the merits; or until the defendant shall have served the requisite notices under rule 15(d) of the [Auctioneers Rules](#). Accordingly, he prayed that the plaintiff's application dated May 13, 2021 be allowed as prayed.
10. Ms Baraza for the defendant relied on her written submissions dated November 24, 2021. She likewise relied on *Giella v Cassman Brown (supra)* but for the principle that an injunction ought to be granted very sparingly; and only in exceptional circumstances; especially as where the applicant's case is very strong. She further submitted that an injunction may be denied where the applicant's conduct does not meet the approval of a court of equity, or where the applicant's equity has been defeated by laches.
11. Thus, counsel reiterated the defendant's assertion that the plaintiff was not eligible for a moratorium, granted his habitual default. Counsel further submitted that all the requisite notices were served and proof thereof given by the defendant. On the authority of [Yusuf Abdi Ali Co Ltd v Family Bank \[2015\] eKLR](#), she urged the court to find that, having admitted to being indebted to the defendant, the plaintiff has no prima facie case with a probability of success at the trial.
12. On whether the plaintiff will suffer irreparable loss that cannot be adequately compensated by an award of damages, Ms Baraza relied on [Nguruman Limited v Jan Bonde Nielsen & 2 others](#), Civil Appeal No 77 of 2012 and submitted that since no prima facie case has been shown by the plaintiff, irreparable injury and balance of convenience need no consideration. She further submitted that, in any case, no attempt at all was made by the plaintiff to demonstrate irreparable loss; and that, on the whole, the balance of convenience tilts in favour of the defendant for the reason that the parties are bound by the terms of their contract.
13. In the light of the foregoing, the only issue for determination is whether the plaintiff has made out a good case to warrant the issuance of a temporary injunction pending the hearing and determination of this suit. In this regard, order 40 rule 1 of the [Civil Procedure Rules](#) provides that:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
14. Since the relief is discretionary, enduring principles have been developed to guide the courts in the exercise of such discretion. Accordingly, in *Giella v Cassman Brown & Co Ltd (supra)*, it was held that:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”



15. In the premises, the first question to pose is whether the plaintiff has established a *prima facie* case. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123 a *prima facie* case was defined thus:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. 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 as to call for an explanation or rebuttal from the latter.”

16. It is trite that, in considering whether or not a *prima facie* case has been made out, the court need not go into an exhaustive evaluation of the merits of the plaintiff's case. This caution was aptly expressed by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR thus:

“... 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. 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. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

17. It is common ground that the plaintiff applied for and was granted a facility by the defendant in the sum of Kshs 10,800,000/=. He annexed the Letter of Offer as Annexure “JKN-3” to his Supporting Affidavit. The parties are further in agreement that the plaintiff defaulted in meeting his obligations under the contract for which he blamed the global Covid-19 pandemic. He nevertheless contended that the defendant's statutory power of sale was yet to crystalize by the time the suit property was advertised for sale. He presented a two-pronged argument; firstly, that since the defendant had given it a moratorium for one year, it could not, at the same time purport to exercise its statutory power of sale; and secondly, that the requisite statutory notices had not been served.
18. The plaintiff explained, at paragraphs 6 and 7 of his Supporting Affidavit that, although the defendant initially denied his request for a moratorium, he asked for reconsideration vide his letter dated 1 June 8, 2020 by which he explained his situation. He added that when he visited the bank thereafter, one of the defendant's officials informed him that the moratorium had been reconsidered and allowed. On the other hand, the defendant maintained its stance that since the plaintiff was a defaulter, he was not eligible for a moratorium.
19. In the circumstances the burden of proof was on the plaintiff to prove his assertions; and there appears to be no proof thus far that he was given a moratorium as alleged by him. It is noteworthy that whereas the plaintiff annexed his letter for reconsideration dated June 18, 2020 to his Supporting Affidavit (Annexure “JKN-5”), no similar communication was presented by the plaintiff to support the alleged reconsideration by the defendant. Given the stance adopted by the defendant, I am not persuaded that the plaintiff has demonstrated a *prima facie* case in this regard.
20. The next question to pose is whether the plaintiff was served with the requisite statutory notices for purposes of section 90 and 96(2) of the *Land Act*. Section 90 provides that:



- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 - (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
 - (3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--
 - (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land.
21. The defendant countered the plaintiff's allegations of non-service by drawing the attention of the court to clause 24 of the Mortgage Facility Agreement by which the parties agreed that every notice be sent to P O Box 4709-01002, Thika. Thus, Mr Bore averred that the 90 days' statutory notice was duly served through the address aforementioned as per Annexures "AB-5" and "AB-7" to his Replying Affidavit. A perusal of the Mortgage Facility Agreement and the Charge indicates that the correct address was used for purposes of service of the notice aforementioned.
22. Similarly, it was the contention of the defendant it complied with the provisions of section 96 of the *Land Act*. That provision requires that:
- (1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.



- (2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
23. The defendant exhibited the 40 days' Notice to Sell issued under the aforementioned provision of the Land Act, as Annexure "AB-6" as well as proof of postage (Annexure "AB-8"), which go to show compliance with section 96(2) of the Land Act. Accordingly, it was upon the plaintiff to demonstrate, albeit on a *prima facie* basis, that he did not and could not have received the said notices. In Nyagilo Ochieng & another v Phaniel B Ochieng & 2 others [1996] eKLR, the Court of Appeal pronounced itself on this point thus:
- Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, cap 2, laws of Kenya.
24. And, section 3(5) of the Interpretation and General Provisions Act, provides that:
- "Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."
25. In the premises, it cannot be said that a *prima facie* case has been made out by the plaintiff on the ground of lack of service of the section 90 and section 96(2) notices; and I so find.
26. As to whether the 45 days' redemption notice was served by the Mistan Auctioneers, it is noteworthy that the same was sent to P O Box 540-00600 Nairobi; and therefore that the plaintiff has a genuine cause for complaint. It is also noteworthy that, although the open market value as well as the reserve price of the suit property are indicated in the schedule attached to the Redemption Notice, no valuation report was exhibited by the defendant to demonstrate compliance with section 97 of the Land Act. That provision requires that:
- (1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
 - (2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.
 - (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-
 - (a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and



- (b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

27. I am therefore satisfied that a valid concern has been raised by the plaintiff as to whether or not the defendant complied with Section 97 of the *Land Act*. That notwithstanding, I am not persuaded that the circumstances warrant the issuance of a temporary injunction pending the hearing and determination of the suit; especially in the absence of good will on the part of the plaintiff, by way of commensurate loan repayment. In this connection, I am in agreement with the position taken in *Olkasai Limited v Equity Bank Limited* [2015] eKLR that:

“...an injunction which is granted on the ground that the notices issued are not proper or none was issued at all, is not an absolute prohibition; such injunction will only subsist for as long as the Bank has not issued a proper Notice. It follows, therefore, that immediately the Bank herein issues a proper Notice of not less than 40 days under section 96(2) of the *Land Act*, nothing prevents it from giving instructions to the auctioneer who shall upon those instructions issue the Redemption Notice and Notification of Sale as per rule 15 of the Auctioneers Act, and proceed to sell and conclude a contract of sale of the charged property...”

28. I hasten to add that, in this instance, the statutory notices were duly served. I am therefore far from convinced that a prima facie case has been made out by the plaintiff to warrant the issuance of the orders sought in his application dated May 13, 2021. In the premises, there would be no need to consider the question as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* (*supra*) the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. 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)

29. In the premises, the plaintiff’s notice of motion dated May 13, 2021 fails and is hereby dismissed with costs. It is further ordered, for the avoidance of doubt, that:

- (a) The defendant is at liberty to exercise its statutory power of sale upon obtaining a current valuation of the suit property and upon compliance with rule 15 of the Auctioneers Rules by serving the redemption notice through the agreed address.
- (b) Costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JANUARY 2023.

OLGA SEWE

JUDGE

