



REPUBLIC OF KENYA



KENYA LAW
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**Kinuthia v Kam Gas Limited & 2 others (Civil Case E010 of 2022)
[2023] KEHC 1009 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E010 OF 2022
RB NGETICH, J
FEBRUARY 16, 2023**

BETWEEN

SERAH WANJIKU KINUTHIA PLAINTIFF

AND

KAM GAS LIMITED 1ST DEFENDANT

JOHN KINUTHIA 2ND DEFENDANT

SUMAC MICROFINANCE BANK LIMITED 3RD DEFENDANT

RULING

1. This is a ruling on application dated August 31, 2022 seeking the following orders: -
 - a. Spent
 - b. An injunction to restrain the Defendants, their servants, workmen, licensees, agents or any other person acting on their own behalf or on behalf of the defendants howsoever from trespassing, entering, evicting, encroaching, remaining in, advertising, selling, subdividing, taking over, dispossessing, alienating, reclaiming, fencing, cultivating, charging or further charging and encumbering in any way or harassing the Plaintiff or interfering with her peaceful entitlement and possession of Kabete /Karura/1024 pending the hearing of the application and the suit.
 - c. An order of inhibition restraining any dealings of any nature on Kabete/ Karura/1024 without the express approval of the Plaintiff pending the hearing of the application and the suit.
 - d. The OCS- Kabete Police Station to assist in the enforcement of the orders.
2. The grounds on the application are that the 1st Defendant took out a loan facility of Kshs 15,000,000/= from the 3rd Respondent and offered title deed for Kabete/Karura/1024 as the Security. The plaintiff



has never been informed of the charge of the property in favour of the 3rd Respondent and the 3rd Respondent has illegally and unlawfully purported to sell the property which is valued over 30 million and is apprehensive that the property may be sold at a throw away price.

3. The application is supported by the annexed affidavit of Serah Wanjiku Kinuthia who reiterates the grounds of the application.
4. In response, the 3rd Respondent filed Replying affidavit sworn by Jeremy Mutugi, Senior Collection and Recoveries Officer on September 19, 2022. He disposes that the Plaintiff and the 2nd Respondent approached the 3rd Defendant for a loan of Kshs 15,000,000/= and issued title for LR Kabete/Karura/1024 as security.
5. He further stated that the Plaintiff and the 2nd Defendant being joint owners executed the charge. A letter of offer was thereafter issued to the 1st Respondent and executed by the plaintiff and the 2nd defendant. The 1st Defendant company was mandated to repay the loan in three (3) monthly instalments of Kshs 5,750,000/= but it defaulted on the repayment. The 3rd Respondent served upon the 1st Defendant company the statutory notices but it failed to adhere to the notice.
6. The 3rd Respondent's argument is that the application is unmerited; it is aimed at misleading the court and the same ought to be dismissed.
7. The application was canvassed through submissions, only the 3rd Respondent's submissions were filed.

3rd Respondent's Submissions

8. Counsel for the 3rd respondent submitted that the application is marred with gross misrepresentation and misleads the court to unjustly forestalling the 3rd Defendant from acting on its legal and contractual remedy and the Applicant is undeserving the orders as he failed to ensure the 1st Defendant meets its obligation of repayment of the loan facility.
9. Counsel further submitted that the interim orders in place have hindered the 3rd Respondent from valuing the suit property and issuing final notices and urged this court to find that the application has not met the threshold required for granting injunctions as the plaintiff has failed to prove a prima facie case and will suffer no prejudice if the orders are not issued.
10. Counsel further submitted that the documents adduced before the court prove that the Plaintiff and the 1st Defendant have always been aware of the loan facility and urged this court to dismiss the unsubstantiated allegations by the Plaintiff and uphold the sanctity of willful and lawful commercial transactions by refraining from aiding a party who deliberately seeks to mislead the court.
11. Counsel submitted that the bank stands to suffer irreparable loss if it is precluded from exercising its statutory power of sale and urged the court to vacate the interim injunctive reliefs issued to Plaintiff on September 8, 2022.

Analysis And Determination

12. I have considered grounds of the application, averments in affidavits herein and the submissions filed by the 3rd Respondent. The issue for determination is whether the Plaintiff is entitled to the reliefs sought.
13. Record show that the 1st Defendant took a loan facility from the 3rd Defendant and offered the title of Kabete/Karura/1024 as security. The signatories of the letter of offer were the Plaintiff and the 2nd Defendant as the Directors of the 1st Defendant Company.



14. The charge document was executed by Plaintiff and the 2nd Defendant herein. The signature of the Plaintiff in the charge document and the letter of offer are similar.
15. The Plaintiff averred that he was not aware of the transaction and accused the bank of illegally and unlawfully purporting to sell the property known as Kabete/Karura/1024.
16. From documents filed, it is clear that the Plaintiff has not come to court with unclean hands; he has not been truthful to the court. He alleged he was not involved in the transaction yet he has not made any efforts to explain how his signature appeared in the letter of offer. If there were any allegations of fraud against the 2nd Defendant, he should have taken steps to lodge a complaint for investigation by the relevant authority.
17. Record show that the Plaintiff and the 2nd Defendant approached the 3rd Defendant as Directors of the 1st Defendant seeking a loan facility of Kshs 15,000,000/= which was to be paid in three (3) monthly instalments of Kshs 5,750,000/=; they defaulted on the repayment of the loan facility which has accrued interest.
18. It is the 3rd Defendant 's assertion that the only amount paid to the 3rd Defendant with respect to the loan is Kshs 13,350/= and in view of the default in payment of the loan, the 3rd Defendant proceeded to take out notices of intention to sell the property which was served upon Plaintiff and the 1st and 2nd Defendant. On the basis of the said notices, that the plaintiff rushed to court for injunctive relief.
19. The 3rd Defendant's right to the statutory power of sale cannot be denied where the Chargor fails to repay the loan and where requisite notices were served on the Appellants.
20. The principles of granting injunctive reliefs are well settled in the case of *Giella vs Cassman Brown* [1973] EA 358 where the court stated as follows: -

“The conditions for grant of an interlocutory injunction are now 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 an 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.”
21. In view of the above, I find that the Plaintiff has failed to demonstrate that his rights will be infringed if the injunctive reliefs are not granted. The Plaintiff and the 2nd Defendant failed to ensure that the 1st Defendant repays the loan advanced to it. The amount of Kshs 13,350/= paid by the 1st Defendant is so minimal painting a picture of lack of seriousness or commitment of payment of the loan advanced.
22. The applicant has misrepresented information before the court and failed to show the prejudice they will suffer if the 3rd Defendant is allowed to proceed to recover the amount due which has not been disputed by Plaintiff.
23. The loan amount continues to attract interest. The parties have executed a charge and offered as security the title deed of Kabete/Karura/1024; they did consent to the sale of the property in default of the repayment of the loan. In my view, the bank should not be precluded from realizing its monies from the Plaintiff, 1st and 2nd Defendant.
24. I also note the Plaintiff did not file his submissions to the application, he also did not appear in court during the hearing of the application, a clear indication that the Plaintiff is not desirous of prosecuting the application.



25. From the foregoing, I find that the application herein lacks merit and the same is dismissed.

26. Final orders: -

1. Application dated August 31, 2022 is hereby dismissed.
2. Costs to the Respondents.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16TH DAY OF FEBRUARY, 2023

RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr. Kirimi for Plaintiff/Applicant

No appearance for Defendants

