



REPUBLIC OF KENYA



KENYA LAW
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**Kinyanjui v NCBA Bank Kenya Limited & another (Civil Appeal
E094 of 2022) [2023] KEHC 1007 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E094 OF 2022
RB NGETICH, J
FEBRUARY 16, 2023**

BETWEEN

NJOROGE KINYANJUI APPELLANT

AND

NCBA BANK KENYA LIMITED 1ST RESPONDENT

**JOSEPH GIKONYO T/A GARAM INVESTMENT AUCTIONEERS 2ND
RESPONDENT**

RULING

1. This is a ruling on application dated May 17, 2022 seeking temporary injunction to restrain the Respondents, their servants and or agents from alienating, disposing of, selling by public auction or private treaty LR No Dagoretti/Thogotho/T.649 and an order for the stay of further proceedings or execution of the orders in Kikuyu PMCC No E082 of 2021.
2. The application is premised on the grounds that the secured amount in the sum of USD 46, 884 owed to the 1st Respondent has been cleared; the Appellant intends to appeal against the orders of the trial court challenging the lower court's decision of deciding the entire suit at an interlocutory stage and the 1st Respondent intends to sell through public auction property LR No Dagoretti/Thogotho T.649.
3. The application is supported by the annexed affidavit sworn by Njoroge Kinyanjui on May 17, 2022. He deposes that the entire mortgage amount was paid on November 22, 2021 but the trial Magistrate ignored the fact that the mortgage amount had been paid and proceeded to determine the entire suit at the interlocutory stage and the property was thereafter advertised for sale by the 2nd Respondent.
4. The Applicant urged this court to stop the sale and order that proper accounts be rendered and a factual valuation on the suit property be done to facilitate a proper determination.



5. In his further affidavit, he deposes that his intention is not to frustrate the 1st Respondent as he has already cleared the mortgage and the application was served upon the Respondent's counsel on May 20, 2022 together with the Memorandum of Appeal and the issue of contention is the consolidation of the two loan facilities and charging interest unchecked. He deposes the assertion that the 1st Respondent always appraised the applicant is false.
6. In response to the application, the respondent filed replying affidavit sworn by Stephen Atenya on behalf of the 1st Respondent on June 7, 2022. He deposes that the applicant has not served the Memorandum of Appeal and the Motion is therefore defective; and in the event the court finds the sale of the property is illegal, the 1st Respondent will compensate the applicant; that the applicant has not demonstrated he will suffer substantial loss if the orders of stay are not granted; that the applicant remains indebted to the 1st Respondent to date and the balance of convenience therefore shifts in favor of the 1st Respondent and the application does not therefore meet the threshold of granting equitable reliefs.
7. The Application proceeded by way of written submissions.

Applicant's Submissions

8. Counsel for the Applicant filed submissions on September 20, 2022 and submitted in two folds: -
 - i. Whether the injunctive orders should be granted.
 - ii. Whether a stay of proceedings and execution should be granted.
9. On whether a *prima facie* case has been established, counsel submitted that consolidation of the two loan facilities ought to have been done before statutory notices were issued and added that the 1st Respondent did not raise the claim for the unsecured loan in the trial court.
10. Counsel submitted that if the orders are not granted, the Applicant will suffer great prejudice that will not be compensated by an award of damages as the property in question is a matrimonial home and if the Respondents are allowed to proceed, the Applicant and his family will be rendered homeless. Counsel Submitted that notwithstanding the applicant has paid the mortgage loan in full.
11. Counsel further submitted that the balance of convenience tilts in favor of the applicant as he stands to suffer much as opposed to the Respondent.
12. On the issue of stay of proceedings, the applicant urged this court to find that he has complied with the conditions set in Order 42 Rule 6(1) of the [Civil Procedure Rules](#). Counsel submitted that the Applicant has demonstrated to the court that he will suffer prejudice if a stay is not granted and the grounds of appeal raised by the applicant are arguable and if a stay of execution in the trial court is not granted, the appeal will be rendered nugatory and urged the court to allow the application as prayed.

1st Respondent submissions

13. Counsel filed submissions on September 27, 2022 and submitted that the applicant has not met the threshold for granting the orders sought; that the applicant has not denied being indebted to the 1st Respondent and the 1st Respondent is a leading financial institution with a huge asset base hence fully and adequately capable of compensating the Appellant/Applicant should the appeal succeed.
14. Counsel further submitted that the Applicant has failed to demonstrate the 1st Respondent is capable of Repaying the decretal amount and has not therefore demonstrated the loss he stands to lose if the orders are not granted.



15. Counsel further submitted that the move by the Applicant to appeal against the decision of the trial court is premature as he has never disputed being in breach of his obligations; further that the Ruling of the trial court was a negative order incapable of being stayed and the intended exercise of the statutory power of sale by the 1st Respondent was not an order emanating from the court for execution but it was a right that would crystalize if the applicant defaulted in repaying the loan advanced by the 1st Respondent.
16. In conclusion, counsel urged this court to find that the applicant has not met the threshold for granting the orders sought and dismiss the application with costs to the Respondents.

Analysis and Determination

17. I have considered averments and submissions herein and what is in issue is whether the applicant has established the conditions for the granting of an injunction/did the trial Magistrate erred in dismissing the application by the applicants seeking injunctive relief.
18. The conditions for granting a stay were laid down in the case of *Giella Vs Cassman Brown* [1973] EA 358 where the court stated as follows: -

“The conditions for the 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 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.”
19. The burden lies with the applicant to demonstrate the existence of the prerequisites set above. The applicant has not disputed being in default of the loan amount and contend that the loan amount has been fully repaid and the issue of contention is on the consolidation of the two loan facilities and the continuous charging of interest by the 1st Respondent.
20. In *Kenya Commercial Bank Ltd Vs Pamela Akinyi Ochien’g* Civil Appeal No 114 of 1991, the Court of Appeal held as follows; -

“Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in Section 74(1) of the [Registered Land Act](#) Cap 300. For instance, they must serve on the Chargor three months’ written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behavior by banks in realizing their securities over land, which often forms the only home of the Chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family....The circumstances in which a Chargee exercising its statutory power of sale can be restrained from doing so have been set out. 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; but 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; but where he was, at the time of the mortgage, the mortgagor’s solicitor, the court will fix a sum probably sufficient to cover his claim...The



Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage.”

21. The applicant contends that the issue in contention is on the unsecured loan account which was consolidated with the secured loan account. He proceeds to state that the secured loan which was the subject of the trial court has been liquidated. He submitted that the issue of the unsecured loan was not raised in the trial court.
22. On the other hand, the Respondent submitted that the applicant failed to comply with the terms of the charge and as such the 1st Respondent should not be barred from recovering its money.
23. The Applicant’s contention is that he has already cleared his secured loan though not admitted by the 1st Respondent. According to the applicant, what is in dispute is the amount in the unsecured loan. The 1st Respondent’s still insists on proceeding with the sale of the mortgaged property to recover the unsecured loan; they have not demonstrated to the court why the charged property should be sold to recover the unsecured loan. In my view, the Applicant has demonstrated a *prima facie* case.
24. On the issue of irreparable injury, the applicant has informed the court that the mortgaged property is his family’s home and he stand to be rendered homeless if the injunctive orders are not granted. In view of the finding that the secured loan amount has already been paid in full, I find that the applicant will suffer irreparable loss if the 1st Respondent is allowed to proceed with the statutory sale. The assertion by the applicant that the prejudice to be suffered will be compensated by an award of damages, will not be applicable at this point.
25. On the issue of balance of convenience, after considering the fact that the secured loan amount has been repaid. I find the balance of convenience tilts in favour of the applicant.
26. From the foregoing, the applicant has demonstrated the three prerequisites for grant of the interlocutory injunction.
- 27.

Final Orders: -

1. I hereby temporary issue injunction to restrain the Respondents, their servants and or agents from alienating, disposing off, selling by public auction or private treaty LR No Dagoretti/Thogotho T.649.
2. Proceedings or execution of the orders in Kikuyu PMCC No E082 of 2021 are hereby stayed pending hearing and determination of this appeal.
3. Costs of this application to abide by the outcome of this appeal.

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. Mongeri for the Appellant/Applicant

No appearance for Respondent

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