



Kimani v Co-operative Bank of Kenya Ltd & another (Civil Suit E023 of 2022) [2023] KEHC 711 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E023 OF 2022
HK CHEMITEI, J
FEBRUARY 9, 2023**

BETWEEN

JOHN NJUGUNA KIMANI APPLICANT

AND

CO-OPERATIVE BANK OF KENYA LTD 1ST RESPONDENT

WHITE SILVER AUCTIONEERS 2ND RESPONDENT

RULING

1. The notice of motion by the applicant dated August 26, 2022 prays for the following reliefs;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of this suit this honourable court be pleased to issue an order of temporary injunction restraining the defendant/respondents & Interested Parties by themselves, their agents, servants and/or anybody claiming under them from selling, transferring Nakuru Municipality Block29/1905 and/or interfering with the applicants' occupation and possession of the suit property.
 - e. That costs of this application be borne by the defendants /respondents
2. The application is premised on the grounds on the face of it and the affidavit of the applicant sworn on even date as well a further affidavit filed on October 17, 2022. He deponed that he was a customer of the 1st respondent wherein he took a mortgage financial facility to the tune of Kenyan Shillings Sixteen Million Three Hundred and Twenty Thousand Four Hundred and Forty-two shillings (Kshs 16,320,442/-) that was to be paid within a period of 120 months. The said monies were put to use



- in developing his property known as Nakuru/municipality Block 29/1905 but unfortunately the occupancy levels of the same had yet to hit the 100 % mark. He deponed further that as a result of the same he faced financial distress that was further aggravated by the financial downturn caused by the recent pandemic and he failed to service the financial facility as was intended. That as a result, the respondent instructed the 2nd respondent to auction the said property to recover the financial facility.
3. The applicant deponed that the said property on August 17, 2022 was sold by the fall of the hammer for Kenyan Shillings Thirteen Million Five Hundred Thousand (Kshs 13,500,000/=) which to date was yet to be paid. That due to the above the contract formed at the fall of the hammer was indeed voidable as the consideration was yet to be paid. Further, that the actions of the respondents were detrimental to his interests as the amount at which the property was auctioned was extremely meagre and lower than twenty-five percentile of the market price and indeed in clear breach of section 75 (1) & (3)(a) of the Land Act.
 4. The applicant deponed further that he was likely to suffer irreparable loss and damage if this honourable court does not intervene as the respondents continued with the sale/auction of the said property. That he had indeed offered to clear the loan via restructuring the same and/or sale the said property at a more lucrative price as he already has customers in order to clear the balance.
 5. Further, that to aid the restructuring of the said loan he did deposit Kenyan Shillings Four Hundred and Twenty Thousand (Kshs 420,000/=) on August 17, 2022 and upon returning with a further one million seven hundred thousand (Kshs 1,700,000/=) in cash but he was unfortunately turned down. He prayed that this honourable court do grant the prayers as sought in his application.
 6. The respondents vide the replying affidavit of Brigid Sanguta a business banker working with the 1st respondent sworn on September 19, 2022 opposed the said application on the grounds that the same was inept, incompetent, frivolous, vexatious, malafide and a subterfuge to deny the 1st respondent its funds. She averred that the aggregate charge debt amount secured by the first charge, further charge, 2nd further charge, 3rd further charge and the 4th further charge was Kshs 16,400,000/=. That the applicant fell behind on payments when he started defaulting on repayment of the loan and despite numerous reminders on the same refused, ignored and neglected to honour the terms of repayment thereby necessitating the initialization of the security realization process.
 7. She averred further, that the 1st respondent issued a rectification notice pursuant to the provisions of Section 90 of the Land Act, 2012 on August 6, 2021 to the applicant herein and a subsequent Notice of Intention to sale in accordance with Section 96 of the Land Act, 2012 on November 15, 2021. That the 2nd respondent whilst acting under the 1st respondent's instructions did give a Redemption notice to the applicant herein dated June 17, 2022, informing him of the impending sale of the charged property. They also served a courtesy notice dated June 17, 2022 informing the applicant of the intended sale of the charged property by public auction scheduled for the August 17, 2022.
 8. She went on to aver that the 2nd respondent duly put up an advertisement for the sale of the suit property which together with the buildings and improvements thereon was sold by way of public action on August 17, 2022 to one Sammy Ndungu Mungai for a sum of Kshs 13,500,000.00/= to which he paid Kshs 3, 500,000/= being 25% of the purchase price and the balance was agreed to be paid on or before November 18, 2022 which memorandum of sale was received by the 1st respondent bank on August 30, 2022. That the applicant did not make good use of the statutory moratorium period accorded to him upon receipt of the statutory notices and the applicant's right to redemption was extinguished at the fall of the hammer on 17th August 2022 and being the suit property was already sold the present application was overtaken by events.



9. When the matter came up for directions the court directed the parties to file written submissions which they have done.

Applicant's Submission

10. The applicant identified two issues for determination by this court namely whether he had fulfilled the conditions set for granting injunction sought in his application dated June 8, 2022 and costs.
11. On the first issue, the applicant submitted on the principles for granting an injunction as enumerated in the case of *Giella vs Cassman Brown* which are prima facie case, irreparable loss and balance of convenience. The applicant submitted that he had demonstrated his willingness to repay the bank facility as required and he had no intention of depriving the bank of its funds. That therefore he had demonstrated a prima facie and transparent case whose agreeability was clear with the sufficiency required by this court to grant injunctive orders as prayed. He draws the courts attention to the case of [*Magnate Venture Limited v Eng Kenya Limited*](#) (2009) eKLR 538 and [*Mrao v First American Bank of Kenya Limited & 2 others*](#) which quoted the case of [*Maloba Petrol Station Limited & 3 others*](#) [2015] eKLR.
12. The applicant submitted further that greater injustice will be occasioned to him should the orders sought were not granted because the same would affect the quite enjoyment of the subject land allowing the respondents to dispose the said land at way under its value. That as a result he would suffer grave injury or loss and the same could not be adequately compensated by an award of damages.
13. Further that having placed adequate material before this court on the same, then there was no need to consider the balance of convenience. He draws the court's attention to the cases of [*Films Rover International Ltd & others v Common Films Sales Ltd*](#) [1986] EAER 772 and [*Mandan Pictures Ltd v Art Pictures ltd & others*](#) AIR 1956 Cal 428 as quoted in [*Lucy Wangui Gachara v Minudi Okemba Love*](#).
14. On last issue of costs, the applicant while placing reliance in the case of [*Joseph Oduor Anode v Kenya Red Cross Society*](#), Nairobi High Court Civil Suit No 66 of 2009; [2012] eKLR, submitted that costs should follow event. He prayed that his application be allowed with costs in his favour.

Respondents Submissions

15. The respondents on their part raised only one issue for determination that is whether the applicant had met the conditions for grant of an order of temporary injunction. The respondent submitted in the negative, that is the applicant had not met the said conditions which entailed establishing his case at a prima facie level, demonstrating irreparable injury if a temporary injunction was not granted and ally any doubt as to the irreparable injury if temporary injunction is not granted by showing that the balance of convenience was in his favour.
16. The respondents submitted further that in the present case there was no infringed right as it was not disputed that the applicant obtained a loan from the 1st respondent and fell into arrears. That 1st respondent had complied with the issuance of statutory notices as prescribed under section 90 of the [*Land Act, 2012*](#) and the applicant did not deny receiving the same. While placing reliance in the case of [*Muga Developers Limited v Equity Bank of Kenya Limited & 4 others*](#) [2020] eKLR, submitted that the 1st respondent's power of sale crystalized after the lapse of the 3-months period specified in the rectification notice dated August 6, 2021 within which the applicant was to rectify the default.
17. Additionally, the respondent placed reliance on the case of [*Simon Njoroge Mburu v Consolidated Bank of Kenya Limited*](#) [2014] eKLR and submitted that the applicant's lost his right to redeem the



suit property at the fall of the hammer at the public auction held on August 17, 2022. That the 1st respondent did exercise the duty of care required of it and ensured that the reserved price at the auction was the best price reasonably obtainable at the time of sale. Further, that the projected improvements had not been completed and the reserve price of Kshs 13, 500,000/= was way more than the price of Kshs 12,600,000/= quoted by the valuer at the time of valuation.

18. The respondents went on to submit that the applicant had not demonstrated the irreparable injury he would suffer that could not be adequately compensated by way of damages. That he had neither alluded in his pleadings of the same nor demonstrated by way of any evidence.
19. In addition, that the suit property had already been sold and the 1st respondent being a financial institution was quite capable of paying any damages that may be ordered by the court. The respondents urged the court to find the applicant had not met both the second and third conditions for granting a temporary injunction. They also submitted that it would be inequitable to keep the bona fide purchaser away from his property since he had already paid the deposit of the forced value.
20. In conclusion, the respondents prayed that this court disallows the applicant's application with costs in their favour.

Analysis and Determination

21. I have perused carefully the application, the affidavits and submissions by both parties and the only one issue arises for determination namely whether the applicant's application is merited.

22. This court is alive to the fact that the injunctive orders sought are equitable reliefs which are granted at the discretion of the court. However, the said discretion must be exercised judicially as enumerated in the case of *Giella vs Cassman Brown & Co Ltd* 1973 EA 358, where the court held that;

“The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it is shown that the discretion has not been exercised judicially.”

23. In deciding whether to grant or not to grant the sought orders by the applicant, this court will be guided by the well settled principles for grant of injunction orders as stated in the *Giella vs Cassman Brown* case (*supra*) as relied upon by both parties herein where the court held that”-

“The conditions for grant of an interlocutory injunction are well settled in East Africa. First an Applicant must show a prima facie case with 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. See *East Africa Industries vs Trufood* (1972) EA 420.”

24. However, this court is aware that this matter is at its interlocutory stage, thus it should not deal conclusively with the disputed facts or issues based on the affidavit evidence by the parties. Such issues will be effectively dealt with after calling of evidence and testing the same through cross-examination. See *Agip (K) Ltd vs Mahesh Chandra Himatlal Vora & Others*, Civil Appeal No 213 of 1999, where the court held that;

“In an application for injunction, the court should not delve in substantive issues and make final concluded views of the dispute before hearing oral evidence.”



25. In the instant suit, it is not disputed that the applicant obtained a loan facility from the 1st respondent bank and offered his property Nakuru Municipality Block 29/1905 as security. It is also evident that the applicant was in default and the respondents argued that the applicant was served with the relevant statutory notices which are annexed on their replying affidavit but still not make good his debt.
26. The applicant on his part argued that the suit property was auctioned at an extremely meagre and lower price less than twenty-five percentile of the market price well below property of the same character and indeed in clear breach of section 75 (1) & (3)(a) of the *Land Act*. That the same was occasioned by failing to carry a valuation of the charged property before selling the same. Further, that sale by public auction was indeed voidable as the consideration was yet to be paid. The 1st respondent has vehemently denied the said allegations.
27. The 1st respondent has alleged that the suit property has already been sold to one Samuel Ndung'u Mungai. Indeed, this court has seen a Memorandum of Sale annexed in the 1st respondent's replying affidavit between the 1st respondent and the said purchaser dated August 17, 2022. This application was filed on August 26, 2022 when the sale by 1st respondent had already taken place. Injunctions are granted to prevent a future event but not an event that has already occurred. The logic herein is that the purpose of injunction is to preserve the status quo and it is issued when there is an immediate danger to property by sale or other disposition. In *Noor Mohammed Jan Mohammed vs Kassman Ali Virji Madhani* [1953]20 LRK8 the court held that:

“The purpose of temporary injunction is to preserve the *status quo*.”

28. In the instant suit it is alleged that the suit property has already been sold to a 3rd party. The applicant has alleged that the said sale was voidable and that the respondents heedlessly proceeded to auction the suit property without following the laid down procedures. However, without tangible evidence, this court cannot at this juncture hold that the said sale was improper. In my view, if the sale has already taken place, then it would be an exercise in futility to injunct the 1st respondent from selling the same.
29. In the case of *Mavoloni Company Ltd v Standard Chartered Estate Management Ltd*, Civil Application no 266 of 1997, the Court of Appeal held that:

“An injunction cannot be granted once the event intended to be injuncted has been overtaken by events.”

30. Equally in this matter, the applicant has sought to restrain the 1st respondent from selling the suit property. The said property has allegedly been sold to a 3rd party who is not a party to this suit. Therefore, the intended event has been overtaken by events and the issues raised by the applicant would only be adequately determined with finality by calling evidence in the main trial. For now, this court finds that the applicant has failed to establish any of the threshold principle for grant of injunctive orders.
31. In the premises, the applicant's chamber summons filed on August 26, 2022 is dismissed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 9TH DAY OF FEBRUARY 2023.

H. K. CHEMITEL.
JUDGE

