



**Brainstorm Management Consultants Limited v Consolidated
Bank of Kenya Limited (Commercial Case E482 of 2022)
[2023] KEHC 2450 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E482 OF 2022
DAS MAJANJA, J
MARCH 22, 2023**

BETWEEN

BRAINSTORM MANAGEMENT CONSULTANTS LIMITED PLAINTIFF

AND

CONSOLIDATED BANK OF KENYA LIMITED DEFENDANT

RULING

1. In its notice of motion dated December 6, 2022, the plaintiff has invoked order 40 of the [Civil Procedure Rules](#) and sections 3 and 3A of the [Civil Procedure Act](#) (chapter 21 of the Laws of Kenya) seeking to restrain the defendant (“the bank”) from selling and/or advertising for sell the plaintiff’s flat No 29 and flat No 30 erected on LR No 37/369 (IR No 159998/1) Nairobi (“the suit properties”).
2. The application is grounded on the supporting affidavit and further affidavit by George Onyango Misinjro, the plaintiff’s director, sworn on December 6, 2022 and January 19, 2023 respectively. It is opposed by the Bank through the replying affidavit of its Debt Recoveries Officer, Lilian Ntongai, sworn on December 21, 2022. The parties have also supplemented their arguments by filing written submissions.
3. The facts giving rise to the instant application are common ground and can be gleaned from the parties’ pleadings on record. On October 23, 2018, the plaintiff executed two sale agreements for the purchase of the suit properties. On February 9, 2019 and on the application of the plaintiff, a first charge was registered over the suit properties to secure a mortgage loan of Kshs 46,400,000.00. On June 17, 2021
4. The plaintiff’s loan account has fallen into arrears and the bank has evinced its intention to realize the securities. To forestall the sale, the plaintiff has filed suit together with the instant application. It accuses the bank of misleading it in the purchase of the suit properties through the law firm of Mbaluka &



Company Advocates in that the plaintiff got a raw deal from the transaction as the suit properties are hazardous and not fit or safe for human occupation. The plaintiff laments that it has been completely unable to take effective occupation thereof and to conduct business despite registering and investing very heavily in expensive equipment and instruments for an administration and management training institute fully equipped with a computer laboratory and thereby incurring massive loss of business and financial losses and diminishing the plaintiff's hope of repaying the said loan as stipulated and scheduled in the charge.

5. The plaintiff contends that the said advances of Kshs 4,144,431.21 were, nonetheless, neither credited to its accounts nor forwarded to the plaintiff by the bank to carry out repairs despite the fact that the plaintiff had been forced to execute the said further legal charge. The plaintiff states that it has been served with the statutory notices and notifications of sale for the suit properties despite the fact that the same have not been repaired and have thus not been made fit and safe for occupation by the plaintiff's students meriting the intervention of the court.
6. The bank opposes the application for injunction and urges the court to dismiss it. It does not deny that on November 29, 2018, it instructed the firm of Mbaluka & Company Advocates to register the securities in name of the Bank. It further does not deny that on May 3, 2019, the plaintiff wrote to the bank informing it that the suit properties had a leaking roof slab and invited the bank to visit it to see the defects. That on July 5, 2019, the plaintiff instructed Mbaluka & Company Advocates to write to Muratab Ali Sheikh, who the plaintiff alleged was a proprietor of Woodlands Business Park situated on LR No 37/369, demanding that he repair the damages on the suit properties.
7. The bank contends that at the time of finalizing of registration of the further charge, the plaintiff's loan balance had grown beyond the approved limit due to the accrual of interest hence it was unable to advance any top up amount. That on September 13, 2021, the plaintiff made an application for a second further charge and on November 19, 2021, the bank offered the plaintiff an additional facility leading to a total mortgage facility raising the sanctioned mortgage limit to Kshs 56,702,105.00. The facility would partly be utilized to pay off its current mortgage facility with an outstanding balance of Kshs 53,144,837.00 and the balance to finance renovation of the suit properties. The bank avers that it was to disburse the mortgage facility in two tranches; The first drawdown was to be made upon confirmation that the customer had injected their equity contribution of Kshs 889,317.00 towards renovation works to be done within 30 days of receipt of the letter of offer. The subsequent disbursement was to be made upon confirmation of successful utilization of the previous disbursement.
8. The bank explains that the plaintiff did not inject its equity contribution of Kshs 889,317.00 towards the renovation works prompting the Bank to initiate the recovery process for the amount owed to it. The bank states that the plaintiff now owes Kshs 58,686,092.52 as at November 30, 2022 which amount continues to accrue interest.
9. The bank submits that the plaintiff has not made out a case for an interlocutory injunction. That the plaintiff has not proved that the bank made an unconscionable inducement for it to buy the suit properties and that the plaintiff's assertion that the charge in favour of the bank registered against the suit properties be lifted because it does not like the suit properties it bought freely is ill-conceived and ought to be disregarded. As regards the defects on the structure, the bank submits that it would be inequitable to extend to it the responsibility for any defects on the structure and deprive it of its right to exercise a statutory power of sale in satisfaction of its charges on the suit properties to recover the outstanding amount.



10. The main issue for determination is whether the plaintiff has made out a case for grant of an order of injunctive relief so that the bank can be restrained from selling or advertising for sale the suit properties. A plaintiff who seeks an interlocutory injunctive relief must satisfy the requirements set out in *Giella v Cassman Brown* [1973] EA 348. It must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.
11. The bank is right to submit that the Court of Appeal, in *Nguruman Limited v Jane Bonde Nielsen and 2 others* Nrb CA civil appeal No. 77 of 2012 [2014] eKLR expounded on these requirements and clarified that they are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially. This means that if the plaintiff does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions. As to what constitutes a *prima facie* case, the bank has also rightly cited the decision of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003]eKLR which explained that 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 to call for an explanation or rebuttal from the latter.”
12. A *prima facie* case with a probability of success proceeds from what a party has pleaded in the plaint. In its plaint, the plaintiff avers that the bank, through its advocates, Mbaluka & Co Advocates, negotiated a favourable deal for itself with the vendors of the suit properties, only for it to leave the plaintiff hanging dry with a raw deal as the suit properties are unfit for human occupation, making it difficult for the plaintiff to repay the loan. That the unlawful participation of the law firm of Mbaluka & Co Advocates in the said sale agreements dated October 23, 2018, in the transfer of both leases and in the legal charge over both leases on behalf of the bank had the legal effect of transforming the bank as a chargor in the said charge dated February 4, 2019 and in the further charge dated June 15, 2021 and thereby invalidating the said instruments. The plaintiff further avers that the bank contravened its implied and express obligations as a banker owed to its customer, the plaintiff herein.
13. In short, the plaintiff accuses the bank of unfair inducement and/or undue influence in acquiring the suit properties and conflict of interest by its advocates. Let me restate that at this point, the court can only make a *prima facie* determination as a conclusive determination will only be made after the hearing of the suit. I have thus gone through the material presented by the parties and I am unable to find any evidence that points towards any such inducement or undue influence by the bank to the plaintiff in acquiring the suit properties. If anything, the bank has annexed correspondence by the plaintiff to the bank after acquiring the suit properties which is in relation to a request for a mortgage top up for repairs and renovations of the suit properties. In the said letter, the plaintiff never laments or protests that the said defects in the suit properties are to be blamed on the bank and it never regrets having purchased the suit properties as a result of the bank’s inducement or influence. This leads me to conclude that the plaintiff’s assertion that it was unduly influenced or given the short end of the stick in this transaction by the bank is nothing more than an afterthought.
14. There is also no evidence that the bank’s advocates acted in a manner that conflicted the parties in the purchase of the suit properties. I further find that there is nothing in law that prevents an advocate from acting for both a purchaser and a chargee in a transaction as long as the parties consented to the same. There is also nothing to suggest that the plaintiff objected to the firm of Mbaluka & Co Advocates, who acted for it in the purchase of the suit properties, from also drawing the first charge. Moreover, the two letters of offer that initiated the lending transactions dated November 16, 2018 and November



- 19, 2021 were executed by the plaintiff's directors and attested by a different advocate. There is no allegation that the letters of offer were the result of unfair inducement and undue influence. This also leads me to conclude that the plaintiff's reservations about the firm of Mbaluka & Co Advocates participating in the parties' transactions is nothing more than an afterthought.
15. What is undisputed is that the plaintiff is indebted to the bank and this indebtedness is admitted. The plaintiff has also admitted to being served with the requisite statutory notices to rectify the debt but the debt is yet to be repaid. Thus, the bank's statutory power of sale over the suit properties has crystalized and it is entitled to exercise the same without interference by the court.
 16. For the foregoing reasons, I find and hold that the plaintiff has failed to demonstrate a *prima facie* case with a probability of success. Having failed to surmount the primary consideration for the grant of injunction, the inquiry ends in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 other* (Supra).
 17. The plaintiff's application dated December 6, 2022 lacks merit. It is dismissed with costs. The interim orders in place be and are hereby discharged.

DATED and DELIVERED at NAIROBI this 22nd day of MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ngoge nstructed by O. P. Ngoge and Associates Advocates for the Plaintiff.

Mr Muturi instructed by Kiptiness and Odhiambo Associates LLP Advocates for the Defendant

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