



Chania Gardens Limited & another v Kingdom Bank Limited & another (Civil Case E072 of 2022) [2023] KEHC 1812 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E072 OF 2022
A MSHILA, J
MARCH 10, 2023**

BETWEEN

**CHANIA GARDENS LIMITED 1ST PLAINTIFF
GWEKA LIMITED 2ND PLAINTIFF**

AND

**KINGDOM BANK LIMITED 1ST DEFENDANT
AL-HILAM AUCTIONEERS 2ND DEFENDANT**

RULING

Background

1. The Notice of Motion dated March 7, 2022 was brought under Order 40 Rules 1(a), 2 & 4(1), Order 51 Rule 1 of the *Civil Procedure Rules*, Section 103(1), 103(3), 104(2)(a) (b), 105(1), 106(1)(b) of the *Land Act* and Section 1A, 1B & 3A of the *Civil Procedure Act*. The Application was supported by the sworn Affidavit of Christopher G. Gacheru and sought the following orders;
 - a. A temporary injunction restraining the 1st and 2nd Defendants whether by themselves, their servants, employees and/or agents or whomsoever from advertising, selling, transferring, interfering, alienating, disposing and/or in any other manner dealing with the suit property being all that property known as Land Reference Number 10884/4 off Thika-Gatanga Road, Muranga County of the Republic of Kenya pending the hearing and determination of this Application.
 - b. A temporary injunction restraining the 1st and 2nd Defendants whether by themselves, their servants, employees and/or agents or whomsoever from advertising, selling, transferring, interfering, alienating, disposing and/or in any other manner dealing the suit property being all



that property known as Land Reference Number 10884/4 off Thika-Gatanga Road, Muranga County of the Republic of Kenya pending the hearing and determination of this Suit.

- c. The costs of this Application be provided for.

Applicants' Case

2. It was the Applicant's case that by a Charge dated September 16, 2013 and by a Further Charge dated August 6, 2015, the 2nd Plaintiff as the registered proprietor charged the suit premises to secure loan facilities accorded to the 1st Plaintiff by the 1st Defendant. The 1st Defendant claiming default on the part of the 1st Plaintiff and through Antique Auctions Agencies issued a 45-day Redemption Notice dated February 13, 2019 demanding the sum of Kshs. 245,403,593.14 as due and owing to the 1st Defendant.
3. The 1st Plaintiff complained to the 1st Defendant of an overcharge of interest against its loan account and the parties exchanged correspondence and held several meetings regarding the issue.
4. Pursuant to the aforesaid negotiations and by a letter dated September 4, 2019, the 1st Defendant informed the 1st Plaintiff that following the 1st Plaintiff's request on the interest overcharge, the 1st Defendant was agreeable to a rebate amounting to Kshs 56,005,122.33 as at August 31, 2019. Further, that after the rebate, the amount due and payable on the loan stood at Kshs 86,610,462.33 as at August 31, 2019, which amount would continue attracting interest at contractual rates (being 13%) until payment in full.
5. By a letter dated June 30, 2020, the 1st Defendant revisited the issue and informed the Plaintiff the rebate entry of Kshs 56,005,122.33 will only be made after receipt of the agreed amount in full. After the rebate, the amount due and payable on the loan stood at Kshs 66,610,462.33 as at June 30, 2020, which amount would continue attracting interest at contractual rates (being 13%) until payment in full.
6. It was the Applicant's submission that there are several triable issues that require to be heard at the main trial and that warrant the grant of a temporary injunction so as to preserve the subject matter pending the hearing and determination of those issues.
7. For the 1st Defendant to issue a valid Statutory Notice under Section 90 of the Act, the 1st Plaintiff must have been in default or failure to pay interest or any other payment due under the contractual terms contained in the Charge. It was thus the Applicant's position that the rebate in the context of the negotiations held and the correspondence exchanged by the parties was for all intents and purposes a reversal of overcharged interest and/or interest charged by the 1st Defendant over and above the contractual rates agreed upon by the parties. It also represented interest that was not legally or contractually due to the 1st Defendant under the agreed terms of the Charge.
8. The Applicant submitted that in this context, the definition of 'overcharge' refers to a charge in excess of what was previously agreed upon by the parties under the Charge/Further Charge. Once the said overcharged interest was assessed and quantified by the 1st Defendant to amount to the sum of Kshs 56,005,122.33, that amount immediately became irrecoverable and ought to have been fully credited or deducted from the outstanding loan.
9. At this interlocutory stage, the Court is not required to make any conclusive findings regarding the issue. The Plaintiffs have submitted prima facie and credible evidence leading to a genuine triable issue as to whether the 1st Plaintiff is in default of the loan at all and so as to entitle the 1st Defendant to exercise its statutory power of sale.



10. As to whether the 1st Defendant tendered to the 1st Plaintiff an account statement that is legally binding and enforceable and whether the 1st Defendant ought to be estopped from renegeing or shifting from its clearly stated position and representations is a genuine issue that ought to be heard and determined by the Court at the main hearing.
11. The Applicant added that the Defendants' failure to serve the 2nd Plaintiff with valid Statutory Notices, namely the 90-day Statutory Demand, the 40-day Notification of Sale and the 45-day Redemption Notice is fatal to the purported exercise of its statutory power of sale having offended the mandatory provisions of the [Land Act](#) and the Auctioneers Rules.

Respondents' Case

12. The Respondents submitted that the overriding principle in considering whether or not to grant an injunction, which is an equitable remedy, is that the Court will look into the circumstances of the case, including the conduct of the parties. The Plaintiffs are not entitled to any injunctive orders for the following reasons:
13. The Plaintiffs have not met the threshold for a prima facie case. The Plaintiffs defaulted on the facilities secured by the suit property and have to date failed to settle the same. This fact can be ascertained from the Statements of Account for the Plaintiffs' facilities, all of which indicate that the Plaintiff has not paid any monies to service its aforesaid facilities since October 25, 2021. Furthermore, as the Statement of Account demonstrates, payment of the said facility was sporadic and intermittent, with the Borrower routinely failing to clear the entire instalment amounts payable monthly under the said facilities.
14. The Plaintiffs have merely denied that the borrower is still indebted to the Bank and simply sought to impugn the amount claimed on the basis that it does not understand how the amount claimed by the Bank was arrived at. The Respondents argued that it cannot be disputed that the Bank's right to exercise its Statutory Power of Sale has arisen and cannot be impeached in the manner that the Plaintiffs are attempting to do. Further, there exists no basis for the granting of an injunction to prevent a mortgagee from exercising its Statutory Power of Sale unless the sum due to the mortgagee is paid in court.
15. It was the Respondent's position that the Plaintiffs were issued with the requisite Statutory Notice and Notification of Sale under section 90(1) and (2)(b) of the [Land Act](#) 2012. The allegations by the Chargee that no Statutory Notice was served upon it are indeed unmeritorious since the same was clearly served on it through physical service on its director, through registered post and through certificate of posting.
16. The Respondents opined that there was no prejudice occasioned on the Plaintiffs by dint of the misnomer in the Chargor's name since both parties acknowledge that the property was charged to the Bank by the Chargee. This is evident from the fact that upon receipt of the Notification of Sale, the Plaintiffs took no action until towards the end of the 45 days period when they maliciously rushed to court to stop the intended advertisement and subsequent auction of the charged property.
17. On whether damages are an adequate remedy, the Respondents contended that Plaintiffs' claim that it will suffer irreparable harm because the charged property has a value of over Kshs 1 Billion cannot hold water. The Properties were offered as security for a specific amount of money and the Plaintiff has not even provided a valuation report to confirm the alleged value. In any event, the Bank is a financially stable financial institution capable of meeting any award of damages.



18. The balance of convenience in this case tilts in favour of the Defendants for reasons that the Bank is prejudiced by the fact that it cannot recover the sums due and owing from the Plaintiffs under the currently subsisting facilities, noting that the Plaintiffs have never paid any money to the Bank since October 25, 2021, and are currently emboldened in his default by the status quo order granted on March 16, 2022.
19. The Respondents added that to date, the said outstanding amount continues to accrue interest and the total amount due will eventually balloon to an enormous figure if the status quo orders remain in place. This development will permanently hinder the Bank' s ability to fully recover the debt owed to it by the Plaintiffs.

Issues For Determination

20. Having considered the Application and the written submissions, the court frames only one issue for determination;
 - a. Whether the applicant's application meets the threshold for grant of an temporary injunction?

Analysis

21. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd (1973) EA* as follows:
 - a) The Applicant must first establish a prima facie case with a probability of success.
 - b) The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
 - c) Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.
22. Similarly, in the case of [*Nguruman Limited v Jan Bonde Nielsen & 2 Others \[2014\] eKLR*](#) the Court of Appeal held that:

' In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favour.'
23. It was the Applicants' argument that there are several triable issues that require to be heard and thus a temporary injunction is necessary to preserve the subject matter pending the hearing and determination of those issues.
24. The import of Order 40 Rule 1 of the Civil Procedure Rules is that the Applicant needs to avail proof that the property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the Respondent threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts.
25. In the present Application the Applicants stated that there was an overcharge and the said overcharged interest was assessed and quantified by the 1st Defendant to amount to the sum of Kshs 56,005,122.33, that amount immediately became irrecoverable and ought to have been fully credited or deducted from the outstanding loan.



26. The Respondent in its Replying Affidavit acknowledged that there had been an amount of Kshs 41, 133, 082.48 which had been erroneously debited from the said accounts as interest charged over and above the contractual rate.

27. In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, the court defined what a prima facie case is: -

' So what is a prima facie case? I would say that in civil cases 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 a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.'

28. In light of the above, the Court is satisfied that the Applicant has established a prima facie case since there is a difference in amount which the Applicant disputes.

29. On the second condition on irreparable harm, the Court of Appeal stated as follows in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR*: -

' On the second factor, that the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'

30. It was the Applicant's contention that it will be occasioned irreparable harm, loss and damage that cannot be easily compensated in damages. Further that a forced sale of the suit premises would occasion loss of business and going concern which is not easily measurable.

31. The Respondent on the other hand argued that the Applicant offered the suit property as security and also that it is a reputable bank capable of compensating financially stable financial institution capable of meeting any award of damages.

32. It is the court's considered view that any loss suffered by the Applicant can be compensated by an award of damages as loss of business can be quantified to determine how much is lost.

33. Where does the balance of convenience lie? As regards the issue of balance of convenience, the court reiterates the decision in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR* where it was held as follows:

' The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show



that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.'

34. The Respondent argued that the Bank is prejudiced by the fact that it cannot recover the sums due and owing from the Plaintiffs under the currently subsisting facilities. It is the court's considered view that, the Respondent will suffer no harm if the injunction is granted, as in the event that it is successful in the main suit, and as it still has the Applicant's security, (the suit property), it will be at liberty to exercise its statutory power of sale. However, the Applicant is at risk of losing the charged property thus the balance of convenience tilts in favour of the Applicant.
35. This court is satisfied that the applicant's application meets the threshold for grant of an temporary injunction.

Findings And Determination

36. For the foregoing reasons this court makes the following findings and determinations;
- i. This court finds the application to have merit and it is hereby allowed.
 - ii. A temporary injunction do hereby issue restraining the 1st and 2nd Defendants whether by themselves, their servants, employees and/or agents or whomsoever from advertising, selling, transferring, interfering, alienating, disposing and/or in any other manner dealing the suit property being all that property known as Land Reference Number 10884/4 off Thika-Gatanga Road, Muranga County of the Republic of Kenya pending the hearing and determination of this Suit.
 - iii. The costs of the application to be borne by the Applicants.
 - iv. Mention before the Deputy Registrar on March 14, 2023 for case management.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Kuloba for the Defendants/Respondents

Gachanja holding brief for Kathumbi for the plaintiffs/Applicants

