



Gulf African Bank Limited v Tron Enterprises Limited & 4 others (Civil Case E332 of 2022) [2023] KEHC 1761 (KLR) (Commercial and Tax) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E332 OF 2022
JWW MONG'ARE, J
MARCH 9, 2023**

BETWEEN

GULF AFRICAN BANK LIMITED PLAINTIFF

AND

TRON ENTERPRISES LIMITED 1ST DEFENDANT

BENSON SANDE NDETA 2ND DEFENDANT

YVONE KATUSIME NDETA 3RD DEFENDANT

STEPHEN OCHIENG MALLOWAH 4TH DEFENDANT

TRON LOGISTICS LIMITED 5TH DEFENDANT

RULING

1. Before the court is the 2nd defendant's notice of motion application dated February 9, 2023 brought under section 1A, 1B, 3, 3A and 63 of the [Civil Procedure Act](#) and order 40 rule 2, order 51 rule 1 of the [Civil Procedure Rules](#), seeking for an order of injunction against the plaintiff and/or its agents barring them from offering for sale, transferring, auctioning or interfering in any other way with LR No Kisumu/Nyahera/1381 (hereinafter the suit property).
2. A brief background to the application is that the plaintiff/ respondent advanced banking facilities to the defendants/ applicants and as part of security the property LR No Kisumu/Nyahera/1381 was charged to secure the borrowing among other securities. The property is registered in the 2nd and 4th defendants who together with the 3rd and 5th defendants issued personal and corporate guarantees to the plaintiff bank, to secure the borrowing by the 1st defendant. The plaintiff has brought this suits against the defendants jointly and severally seeking the sum of Kshs 244, 728,029.14.



Applicant's Case

3. The 2nd defendant/applicant has filed the current application seeking to restrain the plaintiff from offering for sale, transferring, auctioning or interfering in any other way with LR No Kisumu/Nyahera/1381. The 2nd defendant/ applicant argues that if the plaintiff is not restrained by the court he stands to suffer irreparable loss and damage as he will lose the property herein being LR No Kisumu/Nyahera/1381. He bases his argument on the fact no judgement has been entered against the 1st defendant to warrant the realization of the securities offered to the plaintiff as security for the loan and argues that the 1st defendant continues to service the loan and has made substantial payments towards the same.
4. The 2nd defendant further argues that if the sale of the suit property proceeds then the defence by the defendants would be defeated before the main suit is heard hence denying him the right to a fair hearing. It is the 2nd defendant's submissions that the property valuation by the plaintiff at Kshs 6.8 million is way below the market price and states that the property is worth Kshs 72,000,000 at the moment.

Respondent's Case

5. The application is opposed and in its grounds of opposition, the plaintiff/respondent submits that the application is bad in law as it offends the order 2 rule 6 of the *Civil Procedure* in that the 2nd defendant didn't raise the issues canvassed in the application in their statement of defence filed in the suit hence the application is brought in vacuo. The plaintiff states that the instant application is a non-starter as the 2nd defendant filed a statement of defence but did not file any counter claim and as such he cannot seek an injunction, without laying a foundation in his pleadings.
6. The plaintiff /respondents further argues that the failure by the 2nd defendant to file a counterclaim in the suit denies him the opportunity to bring the current notice of motion, as the same is tantamount to introducing new issues not canvassed in the pleadings and hence it is fatally defective as it offends order 2 rule 6 of the *Civil Procedure Rules 2010*.
7. In his submission the plaintiff/respondent states that the 2nd defendant/applicant does meet the three principles for granting an injunction as set out in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA .
8. The plaintiff further argues that a dispute on valuation of the security is not a ground to warrant a grant of injunction.

Analysis And Determination.

9. I have considered the entire record and evaluated the oral and written submissions by the parties to this suit and find that the issue for determination is:-

“Whether the 2nd defendant has met the threshold for the grant of a temporary injunction.”
10. Section 63 of the *Civil Procedure Act* provides that the court may, to prevent the ends of justice from being defeated, grant a temporary injunction and make such other interlocutory orders as may appear to the court to be just and convenient.
11. Order 40 rule 1 of the *Civil Procedure Rules* states:-

“Where in any suit it is proved by affidavit or otherwise—



- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or may be wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.
12. In the well-known case of *Giella v Cassman Brown* [1973] EA 358 the principles to be considered before granting an interim order for injunction are: (i) the applicant must prove a prima facie case with a probability of success (ii) the applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted (iii) if the court is in doubt, it will determine the matter on a balance of convenience. The conditions set out in *Giella* (supra) are sequential and must be applied as such so that where no *prima facie* case is established, the court need not bother to move to the second test or the third.
13. This was held in the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where it was stated:
- “If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
14. To determine the issue before it the court will consider whether the 2nd defendant has demonstrated that he has a prima facie case with a probability of success.
15. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002 the court described *prima facie* case to be:-
- “... 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 to call for an explanation or rebuttal from the latter.” Similarly, in the case of *Patrick Ngumbao Mweni v Hellen Jepkoskei Kiplagat & 2 others* eKLR the learned judge held:-
- “I totally agree with counsel for the plaintiff that an injunction order cannot be given in a vacuum. One must show that he has made a claim. It was imperative for the defendant/ applicant to show what their claim was.”
16. From the reading of the 2nd defendant defence to this suit the court notes that the 2nd defendant merely denied the claims in the defence and averred that the 1st defendant made consistent payments as per the terms of the said facilities advanced by the plaintiff and that the 1st defendant had paid off a substantial portion of the facility.
17. The court further notes that the 2nd defendant’s defence did not include a counterclaim for the suit property. The court notes that the failure to lay a basis for the prayers sought in the instant application



in its pleadings before the court, leaves the application for injunction application without a foundation to base it upon. Indeed the court concurs with the plaintiff that failure to lay a foundation for this application by specifically pleading in his defence or bringing a counterclaim in the main suit leaves the court with nothing against which to make orders for an injunction as prayed.

18. Further, the court notes that it is the 2nd defendant's argument that the valuation of the property at 6.8 million is at a variance with the current market value. In his support of his argument, he annexes a document indicating that the market value is indeed Kshs 72,000,000 and not Kshs 6.8 million. The court notes that contrary to arguments by the 2nd defendant that the said document is a proof of valuation of the suit property, that the same is a letter of offer from an entity calling itself username properties and not a valuation report by a qualified valuer. The court is therefore at a difficulty to rely on the said document to confirm the market value. In any event, as previously argued, a discrepancy in valuation of a charged property cannot be reason to stop a realization of the said property where a bank seeks to exercise its statutory power of sale. In any case, if it is found that the suit property has been undervalued, the 2nd defendant has a claim through damages.
19. This was established by the courts in the case of *Zum Investment Ltd v Habib Bank Ltd* (2014) eKLR, where it was held:

“...It is not sufficient for the applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The applicant must satisfactorily demonstrate why the valuation report the respondent intends to rely on in disposing the suit property does not give the best price obtainable at the material time.”
20. Similarly, in *Stephen Kipkiyeny Tarus v NCBA Bank Kenya & another* [2020] eKLR the court also stated;

“In the present case, the applicant did not deny that there was a valuation report on the suit property. The contest was that the property had been undervalued. Courts have however held that undervaluation per se cannot form a ground for the issuance of orders of injunction since breach by the chargee in selling the property at an undervalue can be remedied through a claim for damages.”
21. It is undisputed that there is an outstanding debt owed by the 1st defendant to the plaintiff and the 2nd defendant is a guarantor to the loan facilities and his property was charged as security. Courts have held that once a property is used as security to procure a facility it becomes property capable of being sold upon default.
22. Based on my assessment above, the absence of a counterclaim to lay a foundation for the application an interim order of injunction leaves the court with difficulty to make any findings of a *prima facie* case as stipulated in *Giella* (supra). Since the 2nd defendant has failed to establish a prima facie case there is no need to consider the other limbs necessary to making a decision before granting the interim injunction.
23. The upshot of the above is that the instant application lacks merit and the same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MARCH 2023

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J W W MONGARE



JUDGE

