



REPUBLIC OF KENYA



**Kesom Freight International Limited & 2 others v Guaranty Trust
Bank (Kenya) Ltd & another (Commercial Case E986 of 2021)
[2023] KEHC 2275 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E986 OF 2021
DAS MAJANJA, J
MARCH 22, 2023**

BETWEEN

**KESOM FREIGHT INTERNATIONAL LIMITED 1ST PLAINTIFF
ABDI MUNIM HAJI ABDI 2ND PLAINTIFF
ABDI KHALIQ HAJI ABDI 3RD PLAINTIFF**

AND

**GUARANTY TRUST BANK (KENYA) LTD 1ST DEFENDANT
ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS
AGENCIES 2ND DEFENDANT**

RULING

Introduction and background

1. The plaintiffs' notice of motion dated December 29, 2021 has been filed, *inter alia*, under order 40 and order 51 rule 1 of the [Civil Procedure Rules](#). They seek a temporary injunction restraining the defendants from selling or otherwise howsoever disposing off the property known as Apartment No 4A1 on LR No 37/371 Serene Valley Apartments in Upperhill Nairobi County ("the suit property") pending the hearing and determination of the main suit.
2. The application is supported by the grounds and facts on its face together with the supporting affidavit and further affidavit of the 2nd Plaintiff sworn on December 29, 2021 and January 26, 2022 (erroneously dated January 26, 2021). It is opposed by the 1st Defendant ("the Bank") through the replying affidavit of its Legal Officer, Josephine Gachuru, sworn on January 14, 2022. In support of their respective positions, the parties have also filed written submissions.



3. The facts giving rise to the suit and instant application are common ground and can be gleaned from the Plaintiffs' Plaint and the Bank's deposition. At all material times relevant to this suit, the 1st Plaintiff ("the Company") was a customer of the Bank and there existed between them a banker customer relationship which has been ongoing for a couple of years now. As the Company was desirous of expanding its clearing and forwarding business, in 2016 it approached the Bank for loan facilities which were granted when the Company was offered a Kshs 10,000,000.00 Overdraft facility and a Kshs 30,000,000.00 Term Loan through the Letter of Offer dated September 1, 2016.
4. The facilities were secured by *inter alia* a First Legal Charge for Kshs 40,000,000.00 over the suit property registered in the name of the 2nd and 3rd Plaintiffs and Personal Guarantees issued by the 2nd and 3rd Plaintiffs as directors and shareholders of the Company. The Overdraft Facility was subsequently renewed/reviewed through a Letter of Offer dated August 22, 2017 and in the year 2017, the Plaintiffs sought an additional facility of Kshs 3,800,000.00 to facilitate the payment of a deposit for rent of a new Go-Down in the United Kingdom, in the nature of a Temporary Overdraft. The facility was issued by the Bank following the agreement of repayment terms contained and accepted and acknowledged by the Plaintiffs in a Supplemental Offer Letter dated September 25, 2017.
5. Over time, the Plaintiffs failed to consistently service the facilities and their loan account fell into arrears, which prompted the Bank to begin the process of recovering the outstanding debt by realizing the securities. The plaintiffs then sought a restructure and amalgamation of the facilities from the Bank. The Bank acceded to the request through the letter of offer dated November 11, 2019 where the facilities were restructured and stabilized to a term loan of Kshs 14,227,987.34 and which was to be repaid through a reduction of the original monthly amount of Kshs 1,025,315.38 to a new monthly instalment of Kshs 562,163.91.
6. Despite the restructure, the Plaintiffs continued to default in their obligations. The Bank instructed the 2nd Defendant ("the Auctioneer") to advertise the suit property for sale, which sale by public auction was scheduled for January 5, 2022. It is this impending sale that prompted the Plaintiffs to file this suit and the instant application to forestall the auction and to which I now turn.

The Application

7. The Plaintiffs aver that the parties have been negotiating on a further restructure of the facilities and that the Bank had indeed accepted to restructure the loan in the terms proposed by the Company and that the said arrangement was at an advanced stage as evidenced by an email of the Bank to the Company's director of December 21, 2021.
8. However, the Plaintiffs state that as the Company was obtaining the documents requested by the Bank in its email of December 21, 2021, they learnt that the Bank, had over the Christmas holidays, instructed the Auctioneer to advertise the suit property for sale by way of public auction. They contend that this action was in disregard of the ongoing negotiations between the Company and the Bank and was unfair and in bad faith. They aver that the Bank, in accepting the proposal for restructuring and having numerous discussions with the Plaintiffs, created a legitimate expectation that the process of exercising statutory power of sale had been halted and the Plaintiffs focused on working on the terms of restructuring.
9. The Plaintiffs are also apprehensive that the Bank has not undertaken a current valuation of the suit property a year prior to the proposed auction. That the suit property is currently being occupied by a tenant and the Company is aware that no valuer has visited it within preceding year in line with rule 11 (b) of the [Auctioneers Rules, 1997](#). They contend that the Notification of Sale does not indicate the



reserve price contrary to rule 15 of the *Auctioneer's Rules, 1997* which is couched in mandatory terms and provides that the notification of sale must indicate the value of the property.

10. The Plaintiffs' case is that they fear that the suit property will be sold without a current valuation being undertaken and that it will be sold at a throw away price. That if the orders sought are not granted, disposal of the suit property through the Auctioneer will cause them to suffer irreparable loss and damage. The Plaintiffs submit that they have made out the case to warrant the grant of the orders sought.

The Bank's Reply

11. The Bank opposes the application and asserts that the Plaintiffs have not made out a case for the grant of an interlocutory injunction. It states that it did not promise, nor did it make or offer any formal position regarding any restructuring of the loan facility pursuant to the Plaintiffs' admission of continued indebtedness. It denies that it formally indicated to the Plaintiffs that it would forego initiating any recovery process.
12. The Bank states that the sale scheduled for January 5, 2022 was procedural in all aspects. It admits that the Notification of Sale dated October 26, 2021 did not contain the Reserve Price/Forces Sale Value because the updated Valuation of the Suit property had not been finalized at that point in time and therefore none could be offered therein. The Bank submits that it is not mandatory to indicate the value of the property to be sold. In any case, the Bank asserts that on November 10, 2021, it procured a Valuation Report for the suit property generated by Gimco Limited (Valuers and Land Development Consultants) and which gave the suit property's market value at Kshs 23,000,000.00 and a Forced Sale Value of Kshs 17,250,000.00. That this valuation would form the right basis for the commencement of the deferred sale or that which may be instituted in less than one (1) year.
13. The Bank states that following the Plaintiffs' request to restructure and peg the repayment of the Loan facility to the suit property's monthly rental income of Kshs 159,850.00, the Bank responded in its letter dated November 2, 2021 that they should instead enhance the monthly repayment amount to Kshs 350,000.00. The Bank, however, insisted that the scheduled auction would proceed unless these discretionary terms were met by the Plaintiffs. The Bank denies that it agreed to, "accept to restructure the loan in the terms proposed by the 1st Plaintiff/Applicant" as indicated by the Plaintiffs. That the Plaintiffs did not furnish the Bank with any "supporting documents to demonstrate capacity to repay the proposed amount net of the rental income" to enable it "review" its position and they have never done so to date. The Bank avers that there is no express or implied legitimate expectation and thus the issue of the Bank's alleged breach of the same does not arise at all as the Bank never indicated that it was going to restructure the facility in its letter of November 2, 2021. The Bank states that due to the Company's failure to honour its commitment and the 2nd and 3rd Plaintiffs' collective failure to ensure the said commitment was met, the Bank had no alternative but to exercise its statutory power of sale.

Analysis and Determination

14. It is not in dispute that in order to succeed in an application for an interlocutory injunction, a party must meet the conditions 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. These conditions must be applied as separate, distinct and logical hurdles which an applicant must surmount sequentially as was held by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR.



15. A *prima facie* case with a probability of success proceeds from what a party has pleaded in the plaint. According to the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Limited and 2 others](#) [2003] eKLR, a *prima facie* case 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.”
16. In its plaint, the Plaintiffs avers that Bank has not undertaken a current valuation of the suit property one year prior to the scheduled auction. They complain that the reserve price has not been indicated on the Notification of Sale and that the intended sale is taking place while the parties are negotiating to restructure the loan facility, which restructure proposal has been accepted by the Bank.
17. On the valuation of the suit property, I do not think it is in dispute that under section 97 of the [Land Act, 2012](#) the Bank, as chargee has a duty of care to the 2nd and 3rd Defendants as chargors to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. In as much as the Plaintiffs aver that no valuation has been conducted on the suit property within one year of the date of the suit and application, I note that the Bank has produced in evidence a valuation report on of the suit property dated November 16, 2021 which gives the suit property a market value of Kshs 23,000,000.00 and a Forced Sale Value of Kshs 17,250,000.00. A valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of land based on accepted parameters. In order to displace a professional valuation, the Plaintiffs must produce clear evidence that the valuation is wrong or at least doubtful. This was not done and mere assertions or statements that the valuation was not done cannot displace an uncontroverted valuation report (see [Palmy Company Limited v Consolidated Bank of Kenya Limited](#) ML HCCC No 527 of 2013 [2014] eKLR).
18. Since this valuation report was prepared within one year from the date of the contemplated sale on January 5, 2022, I find that there is indeed a valuation report on record in respect of the suit property and that the same is in accordance with the [Land Act, 2012](#) and [Auctioneers Rules](#).
19. As to whether the Bank may exercise its statutory power of sale as the parties negotiate a restructure of the loan facility, I have considered the correspondence produced by the parties and I agree with the Bank that it never acceded to any restructure. The letter dated November 2, 2021, written on a without prejudice basis, was in response to the Plaintiffs’ request to accept instalment payments from the rental income only. The Bank stated candidly that a restructure was not a viable option as the said instalments were insufficient to cover the interest portion. However, the Bank stated that it could, at its discretion, consider a restructure if the instalment was enhanced to Kshs 350,000.00 and if the Plaintiffs were to demonstrate a reliable source of financing the deficit. The Bank reiterated that it would nevertheless proceed with the scheduled auction.
20. From the totality of the material before the court, it is clear that the Bank had not accepted any restructure as averred by the Plaintiffs. The Plaintiffs were aware all along that the Bank was still proceeding with the auction and that no legitimate expectation was created that the auction was to be halted or postponed. In any case, I agree with the Bank that the court cannot compel it to accept the Plaintiffs’ proposals to restructure the loan facility as this would amount to re-writing the parties’ bargain (see [Muigai Enterprises Limited v Kenya Commercial Bank Limited](#) [2016] eKLR). The issue of the restructure remains solely at the discretion and goodwill of the Bank to the Plaintiffs.



21. What is clear, at least on a prima facie basis is that the Plaintiffs are truly indebted to the Bank and that this indebtedness is admitted by the Plaintiffs. The Plaintiffs have also admitted that the Bank has the right to exercise its statutory power of sale as all the requisite statutory notices have been issued and the Plaintiffs were given a chance to rectify their default and redeem the securities, which they have failed to do. The fact that the Notification of Sale has not indicated the reserve price of the suit property is not a ground to forestall its sale and I cannot fault the Bank for stating that the same was subject to the reserve price/Forced sale value indicated in the valuation report. In any case, the failure to indicate the reserve price is an irregularity
22. The Plaintiffs have not surmounted the first hurdle on the road to an interlocutory injunction. That being the case and in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 others* (supra), the Plaintiffs' quest ends at this point.

Disposition

23. The plaintiff's application dated December 29, 2021 is dismissed with costs. Any interim orders in force are discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Kyeva instructed by Thiong'o Law and Company Advocates for the Plaintiffs.

Mr Ng'ang'a instructed by Taibjee and Bhalla Advocates LLP for the Defendants.

