



**Makau v I & M Bank Limited (Commercial Suit E012 of 2022)
[2023] KEHC 2966 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E012 OF 2022
DO CHEPKWONY, J
MARCH 17, 2023**

BETWEEN

ELIAS MAUNDU MAKAU APPLICANT

AND

I & M BANK LIMITED RESPONDENT

RULING

1. The plaintiff/applicant filed a notice of motion application dated February 11, 2022 seeking inter alia, the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue a prohibitory order restraining the Respondent, its agents or servants from alienating, disposing of and or selling the Applicant's residential house known as Aberdare in Phenom Park Estate erected on LR No.209/21054 purchased by the house loan under account No.00101157231202.
 - d. That this Honourable Court be pleased to issue an order compelling the Respondent to discharge its interests in the log book of Motor Vehicle Registration No.KCG 265Z and issue the Applicant with the logbook having settled his loan Account No.0010115723451204.
 - e. That the costs of this application be provided for.



2. The application is premised on the grounds on its face and further supported by the affidavit Elias Maundu Makau, the Plaintiff herein sworn on February 11, 2022. The plaintiff's case is that while formerly in the employment of the respondent, he was advanced among other facilities; a car loan through Account No.0010157231204 with an outstanding balance of Kshs.697,987.91 as at June 2, 2020; a house loan disbursed through Account No.00101157231202 with an outstanding balance of Kshs.24,838,389.25 as at June 2, 2020; Staff personal loan of Kshs.940,721.06 through Account No.00101157231201 and Insurance premium finance loan disbursed through Account No.0010115723401502 with an outstanding balance of Kshs.97,279.61 as at June 2, 2020.
3. The plaintiff avers that he has fully repaid the insurance premium facility and the car loan but the respondent has not only failed to discharge its interests in the subject car but has also refused to release the log book to him notwithstanding the numerous demands he has made. However, the Plaintiff admits that he fell back in the repayment of the house loan owing to harsh economic circumstances he finds himself in following the unlawful termination of his employment by the respondent. He adds that despite this he has not stopped the respondent from realizing the loan facility and further issuing him with a 40 days notice to sell his residential home demanding payment of the entire outstanding loan amount.
4. According to the plaintiff, the intended sale is merely meant to intimidate, harass and punish him after he filed a suit against the Respondent for unlawful termination of employment before the Employment and Labour Relations Court in Nairobi where he obtained an order for status quo to prevail but the same abated for lack of jurisdiction by the said court. He adds that since he has regularized his repayment of the amounts in arrears and has continually serviced the house loan, the sale of his house would occasion him substantial loss which would be beyond repair. Further according to the plaintiff, his ability to timeously repay his loan was curtailed by the unfair dismissal from employment wherein he had legitimate expectation to repay the same while still under employment of the respondent.
5. The respondent opposed the application through the affidavit of Peris Wairimu Chege, the Assistant General Manager, Legal Services, sworn on June 10, 2022. She confirmed that the respondent bank indeed advanced the respondent loan for the purchase of a house in Phenom Park Estate erected on LR No.209/21054 and funds disbursed through Account No.001001157231202, which property was charged to the bank as security. Similarly, the Respondent confirms that the Applicant was granted a further loan for purchase of a Motor Vehicle Registration No.KCG 265Z and funds disbursed through Account No.0010115723451204 and the said vehicle purchased by way of Hire Purchase and subject to general terms and conditions of the bank.
6. According to the respondent, although the said facilities were advanced during the subsistence of the employment relationship between them, the plaintiff ceased to enjoy the staff concessionary terms when he voluntarily left employment and therefore the loans translated into commercial loans and the plaintiff ceased enjoying the applicable staff concessionary terms which apply to serving employees and he was duty bound to service the facilities once they became due.
7. The deponent has added that the respondent has continually made intermittent and erratic loan payments towards the facilities hence falling into arrears repeatedly which is contrary to the terms of the loan.
8. Consequently, and owing to such defaults, the Defendant bank issued 90 days statutory notices dated October 1, 2020 and April 22, 2021, as well as 40 days notices to sell dated January 14, 2021 and 3rd



August, 2021, requiring the plaintiff/applicant to clear all the outstanding loan balances but he failed to take any remedial measures thereof, hence the respondent has a right to realize the security.

9. It is the defendant's case that it is merely seeking to exercise its right under the loan facilities which accrued upon default and in any event the same cannot be said to be a case of intimidation, harassment or threat as alleged by the plaintiff. Further, a Prohibitory Order as sought by the Applicant cannot issue from the court as the court cannot stop a lender from claiming its dues or exercising its power of sale or realizing the security, once it becomes clear that the borrower is unable to make repayments as agreed. Lastly, the Deponent averred that the loan facilities advanced to the Plaintiff and any other borrower are not separable once they default and in this case the car loan and the house loan advanced to the Plaintiff are inseparable. On the same note, the standard terms and conditions dictate that the bank as a lender retains a general lien over all the borrower's assets and or properties purchased using the money advanced to it and the same are not separable thus the log book for Motor Vehicle Registration No. KCG 265Z cannot be released to the Applicant when there is an outstanding home loan for which he is repeatedly in arrears. In the upshot, the Defendant maintains that the Plaintiff is not deserving of the orders sought and is not even entitled to protection as a borrower under section 104(2) of the *Land Act*, as he has come to court with bad intentions and has disregarded the terms and conditions of the loan agreement he entered into and charge documents he executed to secure the facilities.
10. On July 27, 2022, the court directed that the application be canvassed by way of written submissions and as the record reflects, the Plaintiff filed a set of submissions dated October 14, 2022 whilst those of the Respondent are dated November 5, 2022. I have read and considered those submissions and since they reiterate the summary tendered in the parties affidavits, there is no need to reproduce the same here.

Analysis and Determination

11. I have considered the application, the affidavits sworn in support and in opposition of the same, the submissions filed on behalf of the parties as well as the authorities cited. In that regard, the court finds the following issues crystallizing for determination;
 - a. Whether the Applicant has made a case to warrant grant of injunction restraining the Respondent from selling his residential house known as Aberdare No.23 in Phenom Park Estate.
 - b. Whether on evidence and material placed before court, an order compelling the Respondent to discharge its interest in the logbook of Motor Vehicle Registration No.KCG 265Z and release of the same to the Plaintiff can issue.
- a. Whether an injunction can issue restraining the Respondent from selling house known as Abardaire No.23 in Phenom Park Estate
12. This being an application for interlocutory injunction, the same is governed by the well-established principles which were initially well laid down in the case of *Giella -vs- Casman Brown & Co. Ltd* [1973] 358. Those principles settling the law on the grant of temporary injunction, have remained that; an Applicant seeking to be granted a temporary injunction must establish a prima facie case with probabilities of success, must establish that he/she stands to suffer a loss irreparable by an award of damages if the injunction is denied and where the court is in doubt, a balance of the convenience as between the parties to apply. The three prerequisites must be established in a sequential manner but more importantly, the Applicant must establish that prima facie case with a probability of success which underscores the consideration of the other two conditions.



13. In the case of *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC NO. 1234 of 2002, the court reiterated the said principles as follows: -

- i. a prima facie case with a probability of success at the trial;
- ii. if the Court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
- iii. the applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
- iv. the conduct of the applicant meets the approval of the Court of equity.

14. Similarly, in the case of *Dr Simon Waibaro Chege v Paramount Bank of Kenya Ltd.* Nairobi (Milimani) HCCC No 360 of 2001, the court held as follows: -

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the

Applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

15. Taking cue from the decisions cited above, it then follows that the grant of an interlocutory injunction is an exercise of the court’s discretion guided by three prerequisites in addition to the requirement that the Applicant’s conduct must meet the approval of the eye of equity. However, the court is required to exercise caution and avoid deciding with finality, the various relevant facts or issues of law especially where the same are in controversy.

16. There are other various authorities which have also guided in the determination of what constitutes a prima facie case and they include the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, where

the Court of Appeal held thus: -

“It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues, but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

17. In this case, the Respondent avers that despite not being in a gainful employment, he has made efforts to repay the instalments on the loan arrears of his residential house even when he falls behind on any repayment. He decries that notwithstanding those efforts, the Respondent issued notice for sale of the said property, the last notice having issued in ignorance of the Applicant's request for more time to enable him make payment of the outstanding sums. The applicant/plaintiff's contention is that the intended sale is likely to deprive him of his hard earned resources and render him destitute and homeless.
18. In rebuttal of those arguments, the Respondent has described the Applicant as a blatant defaulter who now seeks to rewrite the mortgage by making payments of the loan facility in instalments as he wishes. It has further been submitted that the applicant does not state how he wishes to redeem the property notwithstanding that the bank's right of sale arose once the applicant defaulted.
19. It is a common ground that the respondent financed the purchase of the subject house and the same was offered as security for the loan facility under loan agreement annexed by parties in their respective affidavits. Equally, the plaintiff does not deny having defaulted in making the periodical payments as agreed and attributes the same to the hard economic circumstances. And while he alleges to have been subjected to by the loss of his job, the Plaintiff alleges that he subsequently paid the outstanding periodical payments, he does not deny that the Statutory Notices for sale were issued during the period of his default.
20. Section 90(1) of the *Land Act*, 2012 provides that: -

"If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the Chargee may serve on the Chargor a Notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."
21. Section 96(1) of the same Act on the other hand provides as follows: -

"Where a Chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the Chargor under section 90 (1), a Chargee may exercise the power to sell the charged land."
22. The defendant has annexed the 90 days Statutory Notices of sale dated October 1, 2020 and April 22, 2021, in which it demanded the Plaintiff to rectify the default with respect to the outstanding periodical payments. The plaintiff was granted three (3) month's period to rectify the default but failed to do so. Consequently, upon expiry of the time granted therein, the Respondent issued the forty (40) days Statutory Notices of sale seeking to exercise its power of sale unless the entire loan amount was paid. In my view, since it has been established that the plaintiff has an outstanding loan balance and the Defendant bank complied with sections 90(1) and 96(1) of the *Land Act* 2012, I am persuaded that the defendant is justified in exercising its statutory power of sale. The plaintiff cannot be excused by



- alleging that the he has in any event paid the outstanding periodic payments. He ought to have made such payments within the three months he was issued vide the 90 days Statutory Notices of sale to qualify for protection in the eyes of equity. It is a requirement that any time after the issue of the 40 days Statutory Notice, the Plaintiff was enjoined to make the full payments of the outstanding loan amounts made therein as opposed to the monthly instalment payments of the arrears.
23. In addition, and while I agree with decisions made on the same subject by other courts, I reiterate the view that once a property has been charged to secure financial accommodation, it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated by an award in damages. A Chargor who offers his property as security also clearly anticipates the sale of the property in the event that he fails to service the loan hence the claim that the Plaintiff will be rendered destitute or lose his residential house does not assist in advancing his case.
24. As a result of the above finding, this court's humble opinion is that the Plaintiff has failed to establish a prima facie case with a probability of success. Therefore, the Plaintiff has failed to satisfy the first limb for the grant of temporary orders of injunction as sought, and equally am not convinced that there is any evidence that the Plaintiff would suffer irreparable damages if the injunction is not granted.
- b. Whether on evidence and material placed before court, an order can issue compelling the Respondent to discharge its interest in the logbook of Motor Vehicle Registration No.KCG 265Z and release the same to the Plaintiff.
25. On the issue of therespondent holding the log book for the Motor Vehicle Registration No.KCG 265Z, the Plaintiff averred that he purchased the said motor vehicle under Hire Purchase financed by the Defendant/Respondent, which loan facility he has fully settled. He therefore thinks that the Defendant has arbitrarily exercised lien on the logbook notwithstanding that the house loan is separate from the Hire Purchase agreement. On the other hand, the Defendant avers that once a customer is indebted to the Bank as the Plaintiff herein is under the general terms and conditions the bank has a right to exercise lien over the client's property in its possession and consolidate the loan accounts. Thus, the logbook cannot be released in view of the outstanding house loan.
26. The question which now ponder an answer is whether thedefendant bank is justified to combine and consolidate the loan amounts or in any event exercise lien over the logbook in line with the bank's general terms and conditions.
27. As a general rule in the law of contract, in considering whether or not there is a valid and binding contract between parties, and if so, upon what terms, depends on what they had agreed on. Thus, for a contract to be valid and enforceable, an essential term governing the relationship of the parties must be incorporated therein. I have read through the Hire Purchase agreement under which the defendant/respondent financed the plaintiff/applicant in the purchase of Motor Vehicle Registration No.KCG265Z. I find that all through the Hire Purchase agreement, there is no Clause indicating that it had incorporated the general terms and conditions of the bank or parties had agreed on or otherwise to be bound by those terms. In my humble opinion, if that were the case, such terms and conditions ought to have been brought, in one way or the other to the attention of the Applicant before the signing of the Hire Purchase agreement for the Respondent to seek to rely on them at later stage. Thus without prior agreement between the parties, the Defendant bank could not unilaterally consolidate the obligation under the car loan account and the house loan advanced to the Plaintiff under the guise of its general terms and conditions.
28. Since the Bank does not dispute that the applicant has fully performed his obligations under the Hire Purchase agreement by paying in full the Hire Purchase price, I am persuaded that the case is clear and



incontrovertible one to compel the defendant discharge its part of bargain under the Hire Purchase agreement and more specifically by discharging its interests in the said motor vehicle and release the logbook to the plaintiff. It was not anticipated under the said Hire Purchase agreement that the logbook would be released to the Plaintiff upon full settlement of the house loan or any other loan advanced to the plaintiff. Furthermore, the defendant has not alluded that the proceeds to be realized upon its exercise of statutory power of sale would not be sufficient enough to offset the outstanding arrears under the house loan. And even if that were to be the case, the defendant is at liberty to pursue other legal means of execution against the plaintiff.

29. For the aforesaid reasons and discussions, I have come to the conclusion that the Plaintiff's application partly fails and partly succeeds. It only succeeds in terms of prayer (4) thereof and for avoidance of doubt, the following orders do hereby issue: -
- a. That an order do and is hereby issued compelling the Respondent to discharge its interest in the logbook of the Motor Vehicle Registration No.KCG 265Z and issue the plaintiff/applicant with the original logbook.
 - b. That the other prayers in the plaintiff's application dated February 11, 2022 are hereby found without merit and are hereby denied.
 - c. Each party shall bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mrs. Waceke holding brief for Mr. Odongo counsel for Plaintiff/Applicant

Court Assistant - Sakina

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