Mohammed & another v SBM Bank Kenya Limited & another (Miscellaneous Application E140 of 2022) [2023] KEHC 1698 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1698 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E140 OF 2022

FG MUGAMBI, J

MARCH 10, 2023

BETWEEN

ABDIKARIM OSMAN MOHAMMED ..... 1ST PLAINTIFF

SIFA IMPORTS LIMITED ..... 2ND PLAINTIFF

AND

SBM BANK KENYA LIMITED ..... 1ST DEFENDANT

KEYSIAN AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. Before the court is an application dated April 21, 2022. It is brought under Order 40 rules 2,3,4 and order 51 Rule 1 of the *Civil Procedure Rules 2010* cap 21, Sections 90, 96,97 and 104 of the *Land Act* 2010, Articles 40,50(1) and 159 of *the Constitution* and sections 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law.

2. The application seeks the following orders;

    i. Spent

    ii. Spent

    iii. A temporary injunction be and is hereby issued restraining the defendants /respondents by themselves their servants agents and/or employees of whosoever is acting on their behalf and/ or under mandate and/or instructions from trespassing onto, alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, disposing off of in any manner whatsoever interfering with Title No Garisa/Block 1/23 registered in the name of

Abdikarim Osman Mohammed, director of the plaintiff/ applicant, pending the hearing and determination of this Suit.

iv. A declaration be issued that the 45 days Auctioneers Notification of Sale issued to the plaintiff/ applicant by the 2nd defendant/respondent is a nullity since the 2nd applicant has and is actively servicing the facility.

v. Costs of this application be borne by the defendants

3. The applicants case is that the 2nd applicant was advanced a loan facility in 2016 by the 1st respondent and a legal charge was registered in favour of the 1st respondent as security over the applicants' property. The applicants continued to service the loan diligently until they fell into difficulties in April 2016. It was contended that the 1st respondent sent statutory notices in December 2019, intending to sell the suit property and after receipt of the notices, the applicant still continued making payments. The applicants state that the 1st respondent ignored numerous attempts to engage the 2nd applicant on regularizing the loan account. On March 9, 2022 the 2nd respondents served the applicants with a forty-five (45) days notification to dispose of the charged property.

4. In its response to the application, the 1st respondent filed a replying affidavit dated June 9, 2022 sworn by Peter Chege who is the Assistant Manager, Debt Management Unit and Special Assets. He confirmed that by a letter of offer dated November 7, 2015 the 1st respondent advanced a loan facility to the applicant for a sum of Kshs 23,900,000. That the facility was secured by a charge over land reference number Garissa/Block1/23 registered in the name of the 1st plaintiff. It was stated that the applicant defaulted in repaying the loan and consequently the 1st respondent sent out demand notices and subsequently statutory notices of sale.

5. He averred that the plaintiff filed this application after receiving the statutory notices before the auctioneers had advertised the suit property. That the service of the statutory notices and valuation was done in accordance to the law. Further, he contended that the applicants had raised issues with respect to accounts and that was not sufficient grounds for granting the application. It was his averment that the debt was not disputed and the applicant had not demonstrated how it would suffer irreparable harm if the same was not granted. The application was canvassed by written submissions which I have considered.

6. The applicant submitted that the respondents move to dispose the applicants' property was made in bad faith as the applicant had on numerous occasions sought to regularize the loan account. Counsel submitted that the applicants had still continued making monthly payments towards settling the loan and the respondent's actions were only intended to extinguish the applicants' rights over the suit property. It was submitted that the suit property was the 2nd applicants home and he would risk losing is home and life work.

7. The 1st respondent submitted that the respondents had not infringed on the right of the applicant as the applicants were fully aware of the implications of securing the property by a legal charge. Counsel submitted that the 1st respondent had demonstrated that its statutory power of sale had crystallized. Further, it was submitted that the parties were bound by the terms of the charge document and the court could not rewrite the contract. That the applicants did not demonstrate that they were likely to suffer a harm that could not be compensated by damages.

Analysis and determination

8. I have considered the application, the response and the submissions by both parties. The main issue for determination is whether the applicants have made out a case for the injunctive reliefs sought. Order 40

Rule 1 of the *Civil Procedure Rules 2010* sets out the circumstances under which temporary injunction can be granted by the Court.

9. In the celebrated case of *Giella v Cassman Brown* (1973) EA 358 so as to merit an order of temporary injunction the court held that;

> " The settled principles therein are firstly that the applicant must show a *prima facie* case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately be compensated by damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience".

10. As regards the definition of a prima facie case, the same was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 to mean: -

> " In civil cases it is a case which on the material presented to the court or 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 on rebuttal from the latter."

11. On whether the applicant has demonstrated a *prima facie* case, the applicants contend that while they admit default on their part, they had on a number of times tried to engage the respondents to have the loan restructured and regularize the account. The applicants further contend that despite the notices, they continued in making payments towards settling the loan amount.

12. On its part the 1st respondent observed that the contract was clear that in case of default the 1st respondent would sell the suit property to realize the loan amount. Further the respondent observed that the debt was not disputed and that the applicants' rights were not breached to warrant grant of the orders sought.

13. From the foregoing, the bank holds the legal charge to the property known as Garissa/Block/1/23 located in Garissa town. The agreement between the parties was clear than in the event the applicant defaults in making payments then the property held as security would be sold to offset the loan amount. On *prima facie* basis the applicants admitted that there was default on their part. They further contended that they attempted to regularize the payment however from the record and annexures provided I note that the payments were not consistent.

14. The parties are bound by the terms of their contract and the 1st respondent is entitled to recall the debt and security. The process of realizing security has not been faulted by the applicants. I find that the applicants have not made out a prima facie case.

15. On irreparable harm the applicants stated that they would risk losing the home and their life's work. In the case of *Andrew Mwanjohi v Equity Building Society & 7 Others* [2006] eKLR, it was held that: -

> " Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

> By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.
>
> In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security. Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss."

16. From the foregoing, the applicants offered their property as security and the effect of that was that the property was at risk of being sold in the event of default. Any loss suffered by the applicants can be well compensated by damages. The balance of convenience tilts in favour of the respondents for the reason that the court could not re-write the contract between the parties herein by restraining it from exercising its rights as a chargee.

17. In conclusion, I am not satisfied that the applicant has made out a case for the granting of the orders sought in the instant application. I find no merit in the application and the same is dismissed with costs. The respondents are hereby directed to issue fresh notices before effecting the sale.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI (VIRTUALLY)

THIS 10th DAY OF March, 2023

F. MUGAMBI

JUDGE