



Wachira t/a Paddy Distributors v Stanbic Bank Limited & another (Civil Suit 970 of 2021) [2023] KEHC 1978 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 970 OF 2021
A MABEYA, J
MARCH 10, 2023**

BETWEEN

JOYCE WANGUI WACHIRA T/A PADDY DISTRIBUTORS PLAINTIFF

AND

STANBIC BANK LIMITED 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

RULING

1. This is the plaintiff's application dated December 17, 2021 brought inter-alia under Order 40 Rule 1 of the *Civil Procedure Rules*.
2. The plaintiff sought a temporary injunction to restrain the defendant from advertising for sale, selling or interfering in any manner with the properties known as LR No 7786/933 and LR No 7786/991 ('the suit properties') pending the determination of the suit.
3. The grounds for the application included that the plaintiff took a loan of Kshs 330,000,000/- from the defendant and created a charge over the suit properties. She has been paying the loan diligently and therefore has no arrears. That it would therefore be unfair for the interested party under the instructions of the plaintiff to sell the suit properties.
4. The defendant opposed the application vide a replying affidavit sworn on January 3, 2022 by Amos Mugambi, the Business Support and Recoveries Manager of the defendant.
5. He averred that the suit properties are registered in the name of the Joyce Wangui Wachira ('the Chargor') and not in the name of Joyce Wangui Wachira T/a Paddy Distributors the plaintiff herein. That the plaintiff has perpetually failed to service the facility on the terms and conditions stipulated therein.



6. That she had failed to pay the contractual instalments on the due dates as a consequence of which the defendant commenced the process of realisation of the security in the year 2020. That in furtherance of the process, the defendant and its advocates, duly issued all the Statutory Notices to the Chargor, the Chargor's spouse, the Plaintiff and the Guarantor by registered mail to their last known addresses.
7. That in response to the notices, the plaintiff initiated negotiations with the defendant whereby the defendant agreed to suspend the realisation process. However, the same was on condition that the plaintiff would settle the outstanding loan arrears and continue servicing the facility by monthly instalments of Kshs 4,200,000/- effective August 2020. In default the defendant was to continue the recovery process.
8. However, the plaintiff once again failed to honour the terms of repayment and repeatedly sought indulgence to settle the accumulating arrears. That absent any serious commitment to regularise the account, the defendant issued a fresh 90 days statutory notice dated July 7, 2021 which notice lapsed on or about October 7, 2021. Upon expiry of the notice, the plaintiff, the chargor, chargor's spouse and guarantor were served with the 40 days redemption statutory notice dated October 15, 2021 which lapsed on or about December 15, 2021.
9. That the plaintiff and the chargor were also served with the 45 days notification of sale dated December 14, 2021 by the auctioneers whereby the auction was slated for February 22, 2022. In further compliance with the law, the defendant procured a Valuation Report from a professional valuer.
10. That in admission of indebtedness, the plaintiff and the guarantor on receipt of the 90 days' notice dated July 7, 2021 held a meeting with the defendant on July 30, 2021 wherein the loan balances were availed to them as requested whereby the defendant sought commitment towards paying the undisputed arrears. The commitment was however not honoured. That as at January 3, 2022, the outstanding loan arrears stood at Kshs 27,877,851.80 and an outstanding loan balance of Kshs 269,537,581/-
11. The defendant filed a supplementary affidavit sworn on January 4, 2022 by Amos Mugambi.
12. The affidavit essentially annexed the copies of the 40 day statutory notice dated October 15, 2021, the plaintiff's guarantor's email to the defendant dated November 17, 2021 and The Repayment Loan Account Statement.
13. The Plaintiff also filed a supplementary affidavit sworn on February 28, 2022 by the plaintiff in response to the defendant's replying and supplementary affidavits.
14. She averred that she is the plaintiff in this suit trading by the name Paddy Distributors, a business that has no distinct legal personality of its own. That in the circumstances, it was misleading for the defendant to allege that the plaintiff was not a party to these proceedings. That the defendant advanced the sum of Kshs 330,000,000/- out of which the plaintiff had re paid a sum of Kshs 324,000,000/-.
15. The plaintiff averred that despite the repayment she had done, the defendant continued to demand an astronomical sum of Kshs 269,537,581/= from her which sum she disputed.
16. Further the plaintiff submitted that she paid Kshs 10,000,000/- on February 7, 2022 as ordered by the court on February 2, 2022.
17. I have considered the entire record. The issue for determination is whether the plaintiff has met the threshold for the grant of a temporary injunction.



18. This is an injunction application. The applicable principles were enunciated in the well known case of *Giella v Cassman Brown [1973] EA 358*. These are that; the applicant must prove a prima facie case with a probability of success, the applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted, and that if the court is in doubt, it will determine the matter on a balance of convenience.
19. On the first limb of prima facie case, it was held in *Mrao Ltd v First American Bank Of Kenya Ltd & 2 Others Civil Appeal No 39 Of 2002* that the same connotes where 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 so as to call for an explanation or rebuttal from the latter.
20. The defendant argued that the chargor of the suit properties was Joyce Wangui Wachira, who was not a party to the suit and as such the orders sought could not be maintained.
21. I find that this submission does not hold water because although the loan was obtained by Paddy Distributors as a business, it is not an entity distinct from its owner who in this case is Joyce Wangui Wachira. Therefore, it was perfectly in order for Joyce to institute this suit and injunction application seeking to halt the statutory sale of the suit property.
22. It is undisputed that the plaintiff obtained a loan facility of Kshs 330,000,000/- on the security of the suit properties. It is also not disputed that a charge dated July 20, 2017 was executed in respect thereof.
23. The plaintiff contended that as at the time of this case, she had paid a sum of Kshs 324,000,000/- with only Ksh 6,000,000/- remaining unpaid. On the other hand, the defendant submitted that the plaintiff has perpetually failed to service the facility. The Repayment Loan Statements of Accounts found at pages 12-36 of the defendant's supplementary affidavit indicated that the outstanding amount as at February 3, 2022 was Kshs 269,537,581/-.
24. The loan was taken about six (6) years ago. It would seem that the plaintiff may have paid nearly the entire principal sum if it is true Kshs 324 M has already been paid. This averment was not denied. What remains would seem to be interest.
25. In view of the foregoing, the issue turns on a dispute as to accounts which per se may not be a ground for restraining a chargee from realizing its security. The question may be how much is due and payable. If the plaintiff pays what she admits to be due then the issue of exercise of the statutory power of sale cannot arise. Even if an issue of account is not a ground to restrain a chargee can a charge be allowed to claim an astronomical sum in order to be allowed to realize a security. I don't think so. That would be to clog a chargors statutory power of sale.
26. Accordingly, I find that prima facie case with a probability of success has been established.
27. On the second lyme of irreparable, it is trite that a property is used as security to procure a facility, it becomes a commodity capable of being sold upon default. However, what if the property is sold without proper cause. It would be impossible to replace the same by arguing that damages would be compensate a charger. It would be better to take the route which would result from a lesser injustice or loss than to whimsically unseat a claimant on the basis that damages would be an adequate compensation. Since the securities are not depreciating the bank would always be able to realize the same if the suit is ultimately dismissed. Accordingly, it would be safer to preserve the properties and await the determination of the suit.
28. As regards the third limb, the balance of convenience tilts in favour of preserving the status quo and have the suit heard on a priority.



29. The upshot is that the Court finds the application dated December 17, 2021 to be merited and the same is allowed.

It is so ordered.

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

A. MABEYA, FCIArb

JUDGE

