



Dac Aviation (EA) Limited v KCB Bank Kenya Limited & another (Commercial Case E778 of 2021) [2023] KEHC 3129 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E778 OF 2021**

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

DAC AVIATION (EA) LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. The court has been moved to consider the Plaintiff's Notice of Motion dated August 30, 2021 made, *inter alia*, under Order 40 Rules 1 and 2 of the [Civil Procedure Rules](#). The Plaintiff primarily seeks to restrain the Defendant ("the Bank") from selling or otherwise disposing of or interfering with the property known as LR No 12310 (IR 14930) "DAC Aviation" Wilson Airport, Nairobi City County ("the suit property").
2. The application is supported by the supporting affidavit of the Plaintiff's director, Emmanuel Anassis, sworn on August 30, 2021 and opposed by the Bank through the affidavit of its officer, Francis Kiranga, sworn on October 1, 2021. The parties have filed written submissions. The matter was originally placed before Muigai J., for consideration but when she was transferred, it went in abeyance. In the meantime, the Plaintiff filed another application dated March 22, 2023 for contempt of the interim injunction order when the Bank attempted to sell the suit property by public auction. When the matter came up for hearing on March 24, 2023, I directed that the present application for injunction be disposed of.
3. The Plaintiff is an aircraft operator. Its offices and facilities are located on the suit property. It is not in dispute that it is the registered owner of the suit property which it charged to the Bank to secure certain advances as follows; a Charge dated June 30, 2014 to secure Kshs 6,000,000.00 and USD 4,415,573.00, a Further Charge dated February 2, 2015 to secure USD 739,000.00, a Further Charge dated March 8,



2018 to secure Kshs 6,067,000.00 and USD 5,775,000.00 and a Second Further Charge dated August 19, 2019 to secure Kshs 6,067,067.00 and USD 6,975,000.00.

4. The Plaintiff's case is set out in the Plaint dated August 30, 2021. Although the Plaint is prolix, the thrust of the Plaintiff's case is that the attempt by the Bank to sell the suit property by public auction is unlawful, unprocedural and therefore a nullity on several grounds. It states that it does not owe the amount of Kshs 1,125,513.50 and USD 6,091,839.78 demanded by the Bank as it has been meeting its financial obligations as evidenced by the fact that the Bank continued to advance it additional credit based on business growth, mutual trust and confidence and good financial returns over the years.
5. The Plaintiff states that while servicing its facilities, its business was adversely affected by the COVID-19 pandemic. It complains that despite having knowledge of the difficulties faced by the aviation business, the Bank failed to accommodate it yet it is amenable to a restructure of the facilities. It faults the Bank for failing to comply with the Central Bank Moratorium issued by Gazette Notice No 55 of 2020 in line with section 31(3) of the *Banking Act* (Chapter 488 of the Laws of Kenya) by continuing to levy punitive interest. It adds that as regards the debt, the Bank has violated the in duplum rule.
6. The Plaintiff contends that the Bank's statutory power of sale has not arisen. It asserts that the Bank has not met the conditions precedent for exercising its statutory power of sale as it has not issued and served the mandatory notices required by the law including the three-month statutory notice and the 40-day notice under sections 90 and 96(2) respectively of the *Land Act*, 2012. It alleges that it has also not been served with the notification of sale under Rule 15 of the Auctioneers Rules.
7. Based on the matters pleaded in the plaint, the Plaintiff avers that if the injunction is not granted it will suffer irreparable damage to its business. It states that the existing contracts with other air service providers will be prejudiced and it may lose all its licences, highly skilled staff, library, records and regulatory structures in the event the suit property is sold.
8. The Bank opposes the application and submits that the Plaintiff has not made out a case for the grant of an interlocutory injunction. It avers that the Plaintiff is truly indebted to it. Further, it states that once the Plaintiff defaulted on its obligations, it issued a 14-day notice to the Plaintiff to pay Kshs 1,038,554.00 and USD 5,838,856.00 respectively comprising the principal and arrears which continue to accrue interest.
9. Since the Plaintiff failed to repay demanded sum, the Bank commenced the process of realizing the security. The Bank contends that it issued and served all the requisite statutory notices; the 90-day statutory notice under section 90 of the *Land Act*, 2012 dated February 16, 2021 and the 40-day notice to sell the suit property pursuant to section 96 of the *Land Act*, 2012 dated May 27, 2021. The 2nd Defendant also issued and served the 45-day auctioneers notice of redemption dated July 27, 2021. In addition, the Bank instructed Zenith (Management) Valuers Limited to value the suit property and it prepared a report dated June 25, 2021. The Bank therefore submits that having complied with all procedures, it is entitled to sell the suit property.
10. The Bank states that in the process of recovering the debt, it engaged the Plaintiff and in particular its directors regarding the debt but it did not get any positive response. The Bank avers that it also raised concerns about the increasing arrears, that business was not being channeled through the accounts at the Bank, that the Plaintiff failed to submit audited accounts for the years ending December 2019 and December 2020 and the payment receipts and clearance certificates for the suit property.



Analysis and Determination

11. The main issue for consideration is whether the Plaintiff has made out a case for grant of an order of injunctive relief. The conditions the Plaintiff must meet were settled in *Giella v Cassman Brown* [1973] EA 348. In order to succeed, a party 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 its favour. These three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR). This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.
12. The first hurdle the Plaintiff must surmount is to establish a *prima facie* case with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that 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.”
13. At its core, the Plaintiff’s case is that it is not indebted and that the Bank cannot exercise its statutory power of sale as it has not served the requisite notices under the *Land Act*, 2012. Indebtedness is a condition precedent for exercising the statutory power of sale. In this case, there is no doubt that the Plaintiff is indebted to the Bank. The Plaintiff admits as much in the Plaint. For example, at paragraph 54, it states that it is amenable to a restructure of the outstanding loan once the same is ascertained. It also accuses the Bank of failing to restructure the facilities and prays that it ought to be given a chance to continue operating and fulfilling its obligations. I therefore hold that the Bank was entitled to commence recovery of the debt by issuing statutory demands as the Plaintiff was duly indebted. I would add that if the issue of indebtedness was the only issue, the court would not grant an injunction in line with the established authority that the court cannot restrain a chargee from exercising its statutory power of sale merely on the basis of disputed accounts or interest (see *Mrao Limited v First American Bank of Kenya Limited and 2 Others* (*Supra*) and *Joseph Okoth Waudi v National Bank of Kenya* CA NRB Civil Appeal No 77 of 2004 [2006] eKLR).
14. Since the Plaintiffs is indebted to the Bank, the next question for resolution is whether the Bank has satisfied the procedure necessary for it to exercise its statutory power of sale. The Plaintiff denies that it has received any notices issued in compliance with sections 90 and 96 of the *Land Act*, 2012 which are a condition for the exercise of the statutory power of sale. In this respect, the burden is on the Bank to show that it has issued and served all the statutory notices on the Plaintiff. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden to show that the statutory notice has been served does not in any way rest on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.
15. I have examined the notices produced by the Bank and referred to in the replying affidavit. They are addressed to the Plaintiff and endorsed “By Registered Post”. The Bank did not produce evidence of service of the said notices either by producing the requisite certificates of postage or evidence of physical service. The only one that was served is the Notification of Sale issued by the 2nd Defendant and served by registered post as evidenced by the certificate of postage dated July 28, 2021. Since the Bank has failed to discharge its burden of proving that it served the notices on the Plaintiff, it cannot exercise its



statutory power of sale. I therefore find and hold that the Plaintiff has established a *prima facie* case with a probability of success on the issue of service of statutory notices.

16. While the court may issue an injunction pending the hearing and determination of the suit, it must be recalled that an injunction is an equitable remedy and the court may grant an injunction on such terms and conditions as it deem fit and just in the circumstances of the case. Having found that the Plaintiff is indebted to the Bank and the only issue is service of notices, I hold that granting an injunction pending the hearing and determination of the suit would not be in the interests of justice as the debt would continue to escalate and eat in the value of the suit property. I am therefore guided by the decision of the Court of Appeal in *National Bank of Kenya v Shimmers Plaza Limited* NRB CA Civil Appeal No 26 of 2009 [2009] eKLR where it observed as follows:

“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

17. I shall therefore grant an injunction but only limited to the period necessary for the Bank to comply with the law by issuing and sending to the Plaintiffs statutory notices under section 90 and 96 of the *Land Act*, 2012 and then proceed with all the other steps.
18. Following the ruling I have made, the Plaintiff’s application dated March 22, 2023 is now formally dismissed with no order as to costs.

Disposition

19. I allow the Notice of Motion dated August 30, 2021 on the following terms:
- a. The Defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as LR No 12310 (IR 14930) “DAC Aviation” Wilson Airport, Nairobi City County unless it issues fresh statutory notices under sections 90 and 96 of the *Land Act*, 2012.
 - b. The Defendants shall bear the costs of the application.
 - c. The application dated March 22, 2023 is dismissed with no order as to costs.
 - d. The sum of Kshs 500,000.00 deposited in court by the Plaintiff shall be released to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Oduol instructed by Oduol Achar and Company Advocates for the Plaintiff.

Mr Kiche instructed by TripleOKLaw LLP Advocates for the Defendants.

