



Odhiambo & another v Kenya Commercial Bank Limited (Commercial Case E379 of 2022) [2023] KEHC 3118 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E379 OF 2022**

DAS MAJANJA, J

APRIL 6, 2023

BETWEEN

MAXWEL MAURICE ODHIAMBO 1ST PLAINTIFF

SALOME GRACE ORWA 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. In their Notice of Motion dated September 29, 2022, the Plaintiffs have invoked, *inter alia*, Order 40 Rules 1, 2 and 4 of the [Civil Procedure Rules](#) seeking an injunction to restrain the Defendant (“the Bank”) from selling and/or advertising for sale of their property, LR No 217/17453 (Orig No 10829 LR No 48589/2) Maisonette No 217, Eagle Plains Estate, Nairobi (“the suit property”) pending the hearing and determination of the suit.
2. The application is grounded on the 1st Plaintiff’s supporting and further affidavits sworn on September 29, 2022 and November 11, 2022 respectively. It is opposed by the Bank through the affidavit of its officer, Andrew Bore, sworn on October 12, 2022. The parties supplemented their arguments in their respective pleadings and depositions by filing written submissions.
3. It is not in dispute that the Plaintiffs, as registered owners of the suit property, charged it to secure a loan of Kshs 6,200,000.00 from the Bank in 2008. In their Complaint dated September 29, 2022, they state that during the COVID-19 pandemic, they were unable to service the loan on the agreed terms due to the economic downturn but they nevertheless engaged the Bank from time to time and as a result the Bank agreed to restructure the loan. They however complain that the Bank has been varying the interest rates in secret and that the Bank has failed to disclose to them how much they have paid or how much is owing. They further complain that they were served with a statutory notice to sell the



suit property on the basis of a claim of Kshs 3,861,920.69 which they dispute as they have been paying the loan diligently and have now paid over Kshs 7,000,000.00.

4. The Plaintiffs aver that the Bank has breached its contractual obligation by failing to respect and observe the repayment periods of the loan agreements, charging, varying and altering the interest rates and seeking to sell the suit property without having regard to the COVID-19 pandemic and the parties' past conduct. They claim that in the event the suit property is sold, they shall suffer irreparable loss and damage hence the court should grant the injunction.
5. While the Bank admits that it holds a charge over the suit property, it denies that it varied the interest agreed arbitrarily. It states that while the interest on the charge would be 14% p.a, the Bank was entitled to vary it from time to time within the limits permitted by the law. It avers that that the Plaintiffs were required to pay the principle amount in compounded installments of Kshs 95,465.00 over a period of 12 years and that the Plaintiffs defaulted in making payment hence it was entitled and it did commence realization of the security.
6. The Bank states that it served the statutory notices upon the Plaintiffs by registered post at their last known address as stated in the charge. That it complied with all the provisions of the law and advertised the suit property for sale by public auction on September 27, 2022 in the Daily Nation of September 12, 2022. It states that the auction took place on the said date where the suit property was sold to the highest bidder, Gurvuinder Singh Harjiy and Hareet Kaur.
7. The main issue for determination is whether the Plaintiff has made out a case for grant of an order of injunctive relief so that the Bank can be restrained from selling or advertising for sale the suit properties. A Plaintiff who seeks an interlocutory injunctive relief must satisfy the requirements 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.
8. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR, the Court of Appeal expounded on these requirements and clarified that they are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. This means that if the Plaintiff 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. As to what constitutes a *prima facie* case, the Bank has also rightly cited the decision of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR which 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."
9. In order to establish a *prima facie* case with a probability of success, the Plaintiffs must make out a case consistent with what they have pleaded in the Plaint. The thrust of their case is that a substantial part of the amount claimed by the Bank comprises unauthorised interest due to the Bank varying the interest rates arbitrarily. The issue of interest is provided for in the letter of offer dated April 7, 2008 and it provides that while the interest rate is 14% p a, the Bank reserved the right to vary it from time to time. Moreover, a default rate of 3% p a above the applicable rate is to be charged on amounts in excess of the authorised limit.
10. If the Plaintiffs' case is that interest is fixed at 14% p a, then they do not have a *prima facie* case with a probability of success as the interest rate according to the contractual documents was not fixed and default interest was chargeable. Further, the Plaintiffs do not deny that they are indebted. This fact is



confirmed by their request to restructure the loan as confirmed by the Letter of Offer dated January 15, 2015. By that time, the Plaintiffs owed Kshs 4,988,259.09. The interest therein was agreed at the time agreed at 16% p a and a default rate of 10% p a above the agreed rate of interest.

11. The substance of the Plaintiffs' case is that while they do not deny indebtedness, they dispute the amount owed to the Bank. It is now settled law that a chargee cannot be restrained 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). The Bank will therefore not be restrained from exercising its statutory power of sale on this ground.
12. The more fundamental reason the court cannot grant an injunction is that the suit property has now been sold to third parties. This suit was filed on September 30, 2022, two days after the suit property had already been sold by public auction as advertised. The Bank has produced the Memorandum of Sale and Certificate of Sale of the suit property confirming the suit property had been purchased by third parties.
13. The Plaintiffs, as chargors, had a right at any time before the auction to pay the amount outstanding and redeem the property. Once the Bank exercised its statutory power of sale by selling the suit property to a third party, the highest bidder at the auction, the Plaintiffs' right to redeem the suit property was extinguished. The finality of the sale is buttressed by section 99 of the [Land Act](#), 2012 which protects the purchaser from any action to set aside the sale and provides for damages as a remedy. It states as follows:

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(1) This section applies to—

- (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
- (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
- (b) Is not obliged to see to the application of the purchase price;
- (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.



- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.
14. These provisions were the subject of comment by Ngugi J., in *Joyce Wairimu Karanja v James Mburu Ngure & Another* KBU HCCA No 118 of 2017 [2018] eKLR where he observed as follows:
- [30] This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.
15. In my view, once the sale took place, the Plaintiffs' right of redemption was extinguished and the Plaintiffs' remedy lay in damages as provided by section 99 of the *Land Act*, 2012. In the circumstances, the court is barred by statute from granting an injunction. In addition, the court cannot grant an injunction against third parties who have now acquired an interest in the suit property without hearing them as this would violate the fundamental rule of natural justice (see *Pashito Holdings Limited & Another vs Paul Ndungu & 2 Others* NRB CA Civil Appeal No. 138 of 1997 [1197]eKLR).
16. For the reasons I have stated, I now dismiss the Plaintiffs' application dated September 29, 2022 with costs to the Defendant.

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

D S MAJANJA

JUDGE

Court of Assistant: Mr M Onyango

Mr Okech instructed by Oketch Nyabuto and Associate Advocates for the Plaintiffs.

Mr Njenga instructed by Irungu Kang'ata and Company Advocates for the Defendant.

