



REPUBLIC OF KENYA



**KENYA LAW**

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**Huggins v NCBA Bank Kenya PLC (Commercial Civil Suit E418 of 2022)  
[2023] KEHC 17798 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17798 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E418 OF 2022**

**A MABEYA, J**

**MAY 19, 2023**

**BETWEEN**

**DIANNE TERESE HUGGINS ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... DEFENDANT**

**RULING**

1. Before Court is a Notice of Motion dated 24/10/2022. The same was brought under Order 40 Rules 1&2 of the [Civil Procedure Rules](#), section 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya.
2. The application sought injunctive orders to restrain the defendant/respondent from selling, interfering or alienating the property known as L.R. No 3734/929 Nairobi County (“the suit property”). The applicant further sought that the auctioneer’s charges be settled by the defendant.
3. The application was founded on the grounds set out on the face of the Motion and the supporting affidavit of Dianne Therese Huggings sworn on October 24, 2022. The plaintiff’s case is that on July 18, 2003, she entered into an agreement with the defendant for a facility of USD 370,588 for the purchase of a villa at Mtomondoni Mtwapa, Mombasa County.
4. The facility was secured by the suit property. That the facility was to be repaid in a period of 120 months and the plaintiff had since paid US\$440,861.03 as at 26/09/2022. The plaintiff contended that the defendant had levied illegal penalty charges and non-contractual interest amounting to USD 14,253. That she had not been served with statutory notice under section 96 of the [Land Act](#). That in the premises, the redemption notice of 45 days served upon her was invalid.
5. In response to the application, the defendant filed a Replying affidavit sworn by Stephen Atenya on 8/11/2022. He observed that the plaintiff had been advance a facility by the defendant and the



- same was secured by the suit property. That the plaintiff had been in arrears since January, 2014 and the IRAC report relied upon by the plaintiff reflected that position. He further deponed that the defendant issued statutory notices in the address provided by the plaintiff in the letter of offer and the charge document.
6. That in compliance with section 97 of the *Land Act* 2012, the defendant had conducted a valuation of the suit property and had obtained a valuation report dated 2/8/2022. He faulted the IRAC report relied upon by the plaintiff for excluding the interest for the period between 30/4/2020 and 31/12/2020 and capping the rate of interest for the entire duration of the loan. That a dispute relating to the rate of interest was not a ground for an injunction.
  7. The defendant contended that the statutory notices were properly served by the postal address given by the applicant. That the three-month statutory notice was dated 30/3/2021 whereas the 40 days' notice was dated 20/7/2021 and the 45 days redemption notice was dated 18/8/2022. That the defendant conducted a valuation in accordance to the law and as per the valuation report, the market value was Kshs 41 million and a forced sale value of Kshs.30,750,000/-. That the outstanding loan stood at Kshs 25,928,853.98.
  8. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions filed and the authorities relied upon. This is an application for an interlocutory injunction. The principles applicable are well known as enunciated in the case of *Giella Vs Cassman Brown* [1973] EA. These are that an applicant must establish a prima facie case with a probability of success. That damages will not be an adequate remedy and if in doubt, the court will determine the matter on a balance of convenience.
  9. A prima facie case was defined in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as: -

“I would say that in civil cases 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 as 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
  10. In this case, the applicant's contention was that the respondent had breached their contract by varying interest rates without her knowledge. She further faulted the respondent for charging illegal interests in form of penalty charges which according to the applicant were not contractual. In support of her case, she relied on the report dated 26/09/2022. The applicant further stated that she was not served with the statutory notice of sale as required by law.
  11. The respondent on its part observed that the statutory notices were sent to the applicant's address which had been provided in the letter of offer and the charge. It was the respondent's averment that the applicant had fallen into arrears in 2014 and the same was captured by IRAC's report. The respondent refuted the applicants claim that the statutory notices were not sent to her. With regard to the report, the respondent observed that it was flawed because it excluded interest for the months of April to December 2020 and that it capped the interest rate for the entire duration of the facility.
  12. It is not in dispute that the applicant was advanced a facility by the respondent vide a Letter of Offer dated 18/7/2013 and the suit property was provided as security for the facility. The dispute is with respect to the bank's intention to exercise its statutory power of sale. The applicant in the plaint dated 24/10/2022 admitted that her business suffered difficulty and the facility had to be restructured. Her



case was that she had paid a total of USD 440,861.03 leaving a balance of USD 212,531.59 which consists of illegal interest. The main contention is with regard with the interest charged.

13. In *National Bank of Kenya Limited v Juja Coffee Exporters Limited* [2021] eKLR, the held that: -

“The claim that there was a contest as to the exact amount outstanding was also not a basis for restraining the Bank. Authorities for the proposition that a dispute on the outstanding loan should not scuttle the exercise by a chargee of its power of sale go back many years...”
14. It is trite that an injunction should not be granted on the basis that there is a dispute as to the amount owing. In this regard, the dispute that the amount outstanding of US\$212,531.59 is not the correct amount cannot be a basis to grant the injunction sought.
15. The other issue raised by the applicant is that the statutory notices were not served. I have examined the statutory notices dated 30/3/2021 and the 40days Notice to sell dated 22/7/2021 produced by the respondent. It is evident that the notices were sent to the applicants address which appeared in the charge document. A certificate of postage was attached to show that the notices were sent to the applicant. I find that the bank had shown that the notices were sent as required by law.
16. In this regard, I am not satisfied that the plaintiff has established a prima facie case with a probability of success.
17. The second limb is whether the applicant stands to suffer an injury that may not be compensated by an award of damages. In *Nguruman Limited V. Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court stated of irreparable injury or damage:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
18. The suit property was pledged to the bank to be used as security in the event of default by the applicant. In this regard, sale of the same cannot not be said to result to irreparable harm as it was part of the contractual terms. As it is often said, once a property is pledged as security for a loan, the same becomes a commercial chattel for sale in the event of default.
19. On the third limb, I consider that the balance of convenience in this case lies in allowing the parties to enforce their contractual obligations. The respondent has a right to claim the monies it had loaned out and is within its right to do so by realizing its security against the applicant.
20. In the premises, I find that the application dated October 24, 2022 is without merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCI Arb**



**JUDGE**

