



**Koech (Suing As a Trustee/Administrator of the Late Kipngéno
Arap Ngény) v Spire Bank Limite (Commercial Case 037 of 2021)
[2023] KEHC 21923 (KLR) (Commercial and Tax) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 21923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 037 OF 2021
DO CHEPKWONY, J
MAY 23, 2023**

BETWEEN

**JOHN C KOECH (SUING AS A TRUSTEE/ADMINISTRATOR OF THE LATE
KIPNGÉNO ARAP NGÉNY) APPLICANT**

AND

SPIRE BANK LIMITE RESPONDENT

RULING

1. This Ruling relates to the Notice of Motion Application dated October 4, 2021 which seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the Plaintiff/Applicant’s suit an interlocutory order of injunction do issue restraining the Defendant/Respondent either by itself or through its agents, employees servants or those working on its instructions from selling or advertising for sale land parcel number Nairobi LR. No. 13149 (original part of 6861/2) IR 25764.
 - d. That costs of this application be borne by the Defendant/Respondent.
2. The Application is based on the grounds on its face and the Supporting Affidavit of John C. Koech in his capacity as the Trustee/ Executor of the Estate of the late Kipngeno Arap Ngény sworn on October 4, 2021. The Application is opposed through the Replying Affidavit of John Wageche the Senior Legal Officer of the Respondent “the Bank” sworn on May 13, 2022. The Applicant further filed his Supplementary Affidavit sworn on June 10, 2022.



The Application

3. According to the Applicant the parcel of land number NairobiLR. NO. 13149 (original part of 6861/2) IR 25764 hereinafter “the subject property” is registered in the names of the late Kipngeno Arap Ngeny hereinafter “the deceased” who died on 1st July, 2014 and the property therefore forms part of his estate.
4. The Applicant states that the Bank (previously Equatorial Commercial Bank) registered a charge over the subject property which was executed on behalf of the deceased by Elizabeth by virtue of a Power of Attorney No. 58376/1 dated May 10, 2012 which lapsed on July 1, 2014 upon the demise of the deceased.
5. The Applicant holds that upon the demise of the deceased the charge became invalid, null and void and is thus unenforceable. The Applicant states that the Power of Attorney that was issued became worthless upon the demise of the deceased and it is therefore his obligation to safeguard the estate of the deceased. He states that the Bank has already issued a statutory notice dated September 25, 2020 seeking to sell the property which he holds that the estate is absolved from any liability. He states that the Bank has refused to discharge the charge which has led to the filing of the suit.

The Response

6. The application is opposed through the Replying Affidavit of John Wangeche, the Senior Legal Officer of the Respondent, “the bank” sworn on May 13, 2022. On its part, the bank holds that it issued a credit facility to the borrower, Soin Limited which was secured by a charge which was registered over the subject property in the name of the deceased for the sum of Kshs. 22,000,000/=. The Bank states that the borrower defaulted in the repayments and despite issuing demand letters dated October 12, 2019, August 7, 2020 and October 28, 2021 respectively, the borrower failed to pay the outstanding amount which prompted the Bank to issue a Statutory Notice upon the Borrower and the Chargor with the intention to sell the property to recover the amount.
7. The Bank states that it issued a Redemption Notice dated 11th November, 2021, Statutory Notice to sell dated January 28, 2022 and then instructed Purple Royal Auctioneers to issue a notification of sale which was issued on April 26, 2022 and the intended sale was scheduled for July 7, 2022. The Bank states that it was never served with any court order stopping the sale or the issuance of the statutory notice and disputes that the case is subjudice as alleged.
8. The Bank contends that the outstanding amount is Kshs 21,645,707.6 and disputes the allegation that the demise of the deceased discharged the Power of Attorney which revoked the whole charge. The Bank argues that the Power of Attorney cannot revoke existing transactions but it cannot be used to initiate any new transactions. The Bank argues that the Applicant is engaging in a scheme to avoid financial obligations and to frustrate the Bank’s statutory power of sale through the court process.
9. The Bank contends that the Applicant has breached the contractual terms and an injunction orders cannot issue since there is an existing debt which the Bank ought to recover through its Statutory Power of Sale. The Bank seeks to have the Application dismissed.
10. In response, the Applicant filed a Supplementary Affidavit in which the Applicant argues that the Bank’s deponent in the Replying Affidavit, John Wageche did not provide any documentary proof showing his authority to swear the Affidavit and therefore the Affidavit is incompetent and it should be struck out. The Applicant further argues that at the time of filing the Replying Affidavit, the Bank had not filed its Defence and therefore the prayers sought in the Plaint are unopposed and should be



granted at an interlocutory stage. Further, the Applicant holds that the Bank has not provided any documents to show that it registered the charge instrument over the subject property and therefore the estate of the deceased has nothing to do with the Bank.

11. Pursuant to directions issued on May 11, 2022, the Application has been disposed of by way of written submissions. The Applicant filed his submissions dated June 10, 2022 while the Bank filed its submissions dated June 9, 2022.
12. In his submissions, the Applicant raised three issues for determination being:
 - a. Whether orders sought for by the Applicant can be granted at an interlocutory stage taking into account the threshold set out in the case of *Giella v Cassman Brown* (1973) I EA 358.
 - b. Whether there is a valid claim by the Respondent against the estate of the deceased.
 - c. Whether there is a valid charge over the subject property.
13. On its part, the Bank has raised these two issues for determination:-
 - a. Whether the charge document executed on behalf of the deceased vide a power of attorney upon his demise the same became discharged.
 - b. Whether the applicant should be granted injunction.
14. The main issue for consideration is whether injunctive orders should issue in this case which will address all concerns raised over the validity of the charge instrument.

Analysis and Determination

15. The court has carefully considered respective pleadings by the parties, their evidence in the affidavits and submissions alongside the statute and case law and find the main issue for determination being whether injunctive orders should issue in this case over the validity of the charge instrument.
16. Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR relied on the principles established in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and held as follows,

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”



Prima facie case

17. On the issue of what entails a prima-facie case, the Court of appeal in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 considered the question and held that:

“In civil cases, a prima facie case 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”
18. In answering whether the Applicant has a legal right in the matter which has been infringed, the starting point would be to establish whether there is a valid charge instrument over the property and whether the Power of Attorney was spent by the demise of the deceased.
19. The allegation that the Power of Attorney lapsed by virtue of death of the donor the deceased is true but it does not revoke the transactions done in the course of that Power of Attorney. The charge therefore remain to be binding and enforceable in law. In the case of *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR where the court held as follows;

“At law, the demise of the vendor only terminated the powers which the defendants had hitherto exercised as attorneys of the deceased vendor. The death of the vendor did not terminate the contract which the defendants had executed on behalf of the deceased vendor. The contract remained binding on the estate of the vendor, and the personal representatives of the vendor were, by law, required to initiate succession proceedings and discharge the vendor’s obligations under the contract.”
20. It therefore follows that the contract entered for the registration of the charge over the property was valid and remains to be valid even after the demise of the deceased and the lapse of the Power of Attorney.
21. On whether there is a valid charge instrument, in the Bank’s Replying Affidavit at paragraph 6 annexure JW2, there is a registered charge instrument over the property which was registered in favour of the Bank. There is however no proof of registration in the Certificate of Title.
22. It is trite law that the registration of the charge as an encumbrance completes the perfection of security process in accordance to section 56 (3) of the *Land Registration Act* No. 3 of 2012 which states:

“The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.”
23. In the instant case, the Bank has not proved the registration of the charge as an encumbrance but this issue does not relate to the registration of the charge instrument but the loan disbursed which had not been disputed. There are various correspondences between the parties which confirm that the amount was issued to the borrower based on the security of the subject property. Through a letter dated September 24, 2019 the Borrower Soin Limited where the Applicant herein is a director sought a moratorium on the loan repayments. The Applicant has also not disputed receiving the Statutory Notices issued by the Bank. This goes to confirm that the Applicant is aware of the loan and does not dispute the loan.
24. On the other hand, the Bank has proved the issuance of the Statutory Notice and services thereof through registered posts on diverse days and it followed all due legal procedures and is entitled to recover the amount loaned out to the Applicant. In this case, the Applicant’s mission is to avoid



the loan repayment and keep the property that was used as security. The Applicant cannot then be said to have prima facie case since he does not have any rights over the property since the rights were extinguished the moment the property was issued as security.

25. The court in the case of *Julius Mainye Anyega vs. Eco Bank Limited* [2014] eKLR cited the case of *Maithya v Housing Finance Co. of Kenya & another* [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows: -

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”

26. In this case since the property was offered as security to the loan, it obtained commercial value which can be sold in case of any default in the loan repayments. This court is cognisant to the Equity Maxim that Equity considers done what ought to be done. The court in the case of *Guaranty Trust Bank (Kenya) Ltd v Christopher Kimeli Kiplangat* [2022] eKLR held as follows:

“The court of equity cannot overlook all sideline which has come out of the wisdom of the two contracting parties unless there exist an allegation of misrepresentation, fraud or mistake in the transaction. The effect of the illegality is to prevent a party from receiving or benefiting under his own illegal act. Clearly it is important to note that the respondent borrowed the loan amount from the appellant bank and on the basis of it offered land parcel Moibek/Moibek/ Block8/116 as security. The redemption of it dependent upon evidence of settling the debt.”

27. The court cannot order a blanket order for discharge of a charge without proof of payment of the loan. For that reason, this court holds that the Applicant lacks prima facie case.
28. Since there is no prima facie case there is no point of addressing the other conditions. This was the position in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR where the Court of Appeal stated that:

“With reference to the establishment of a prima facie

case, Lord Diplock in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

29. In the end, the court finds that the application lacks merit and it should be dismissed with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY __, 2023.



D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Kamau holding brief for M/S Karanu counsel for Respondent

Mr. Siele Sigira counsel for Plaintiff/Applicant

Court Assistant - Martin

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