



**Kandie v Cooperative Bank of Kenya Limited & another (Civil Suit E025 of 2023) [2023] KEHC 18221 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18221 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E025 OF 2023  
DKN MAGARE, J  
MAY 11, 2023**

**BETWEEN**

**ANDREW KIPLIMO KANDIE ..... PLAINTIFF**

**AND**

**COOPERATIVE BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed an application under certificate of urgency seeking the following orders: -
  - i. This application be certified as urgent and heard Ex parte in the first instance.
  - ii. Pending hearing of this application, inter partes, the Honourable Court be pleased to grant an order of temporary injunction restraining the defendants/Respondents by themselves, their employees, servants agents or auctioneers from advertising for sale, selling, whether by public auction or private treaty, disposing of or otherwise howsoever, completing by conveyance or exercising any power conferred by section 90(3) of the *Land Act* by leasing, letting, or charging or otherwise howsoever, interfering with the Plaintiff's ownership of land title to all that parcel of land known as Mombasa/Block2/252.
  - iii. Same as (ii)
  - iv. Pending hearing of the main suit, the Honourable Court be pleased to grant an order of temporary injunction restraining the defendants/Respondents by themselves, their employees, servants agents or auctioneers from advertising for sale, selling, whether by public auction or private treaty, disposing of or otherwise howsoever, completing by conveyance or exercising any power conferred by section 90(3) of the *Land Act* by leasing, letting, or charging or



otherwise howsoever, interfering with the Plaintiff's ownership of land title to all that parcel of land known as Mombasa/Block2/252.

v. Costs

2. The application was filed together with a plaint dated March 22, 2023.
3. The Notice of motion dated /11/2023 together with a supporting affidavit of the plaintiff setting out the matters in dispute in 14 paragraphs. In all those paragraphs, the plaintiff does not admit owing any money or having entered into any other guarantee.
4. His main contention was that he charged parcel of land known as Mombasa/Block2/252. Measuring 0.016 ha in favour of the first Defendant. She guaranteed Bokan transporters ltd for Kshs 1,632, 560/=
5. The company had different loan facilities and some properties from other directors.
6. He stated that a 45-day notice was issued o March 28, 2023 for sale of the suit land. He does not state when the statutory notice was issued. He however does not challenge the same. He stated that he does not owe the money to the 1<sup>st</sup> Defendant. He did not find it necessary to attach the charge documents and bank statements showing that there was no default.
7. The same averments in the Affidavit are repeated in the Plaint. The question is whether, there is evidence of non-default.
8. The Respondents set out a case in a 135-page affidavit. They give the history of the loan and the Plaintiff and the main debtors are not paying the loan. There was a public auction scheduled for May 4, 2023 but I had issued on November 29, 2022 which was stayed by the Court. The orders are subtracting to date.
9. There is an amount that a statutory Notice under Section 90 of the Law Act, 2012 had not been complied with and which was only disclosed tilt e defence filed the same.
10. By a Replying affidavit dated April 24, 2023 the respondent denies the contents of the Plaintiff's application.

### **Replying affidavit**

11. The 1<sup>st</sup> defendant filed a replying affidavit, dated April 24, 2023. They deny that the demand for Kshs 26,436,900 violates in duplum Rule. The plaintiff is said to have been advanced d loan of Kshs 5,000,000 vide a letter of offer dated October 23, 2015. There was another advance of Kshs 5,040,000. There were further advances and deed of variation of charge and further charge dated February 22, 2018. He then gave a breakdown of other advances.
12. Some were asset finance the borrower was Bokan Transporters Limited where the plaintiff was a director. The suit property was reportedly a continuing charge. They state the charged property is valued at Kshs 20,400, 000. The loan stood at Kshs 26,436,900.
13. The security of the first loan of Kshs 500,000 is indicated to be Mombasa/MN/Block 2722521 No of the plaintiff. The loan for kshs 5,040,000/= was secured to and existing charge over existing charge over Mombasa Municipality North Block 2/282. It is dated January 6, 2017.
14. There is a further letter at page 30 dated November 18, 2019. The outstanding balance was said to be Kshs 6,743,948.57 as at April 28, 2019. The charge was said to be the suit –at page 54 of the defendant annexed the deed of valuation of the charge. It was duly registered.



15. There were more letters. I think I have said enough to show that the plaintiff was not candid. He did not make full disclosure in order to be granted an interim remedy, this applicant - come with clean hands. *Techno Holdings Limited & 4 others v National Social Security Fund Board of Trustees [2018] eKLR.*
- a. 'In the case of *Samuel Kipkorir Ngeno And Another -versus- Local Authorities Pension Trust (Registered Trustees) And Another (2013) eKLR* it was held that;
  - b. 'A tenant's first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?
  - c. 'The temporary injunction sought in the present application is an equitable remedy at the court's discretion. He who comes to equity must come with clean hands. A tenant who is in huge arrears is underserving of the court's discretion. The court cannot be the refuge of a tenant who fails to meet his principal obligations of paying rent as and when it becomes due.'

### Analysis

16. The application needs to meet the terms set out in *Giella = vs = Cassman Brown & Co Ltd (1973) EA, 358, 360* the court must be satisfied in the words of Spry VP as follows: -
- ' The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.'
17. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal was of the view that these tests are sequential. The Court stated: -
- ' 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.
18. 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. See *Kenya Commercial Finance Co Ltd V Afraba Education Society [2001] Vol 1 EA 86.*
19. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.
20. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.



21. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.'
22. In the circumstances, the Applicant must not only satisfy the prima facie case but must also satisfy the other limbs.
23. The Applicant has not established a prima facie case. He was a director of the chargors. He was not candid. The debt is due and owing. Notices were duly served. There is full compliance with section 90 of the Land Act. There is no case disclosed.
24. In the circumstances, the Applicant must not only satisfy the prima facie case but must also satisfy the other limbs. He has not satisfied the prima facie case. He could be having a case. However, the same has not come out.

### **The irreparable loss.**

25. The issue of irreparable is not strictly issue of non-financial loss. Where there is a possibility and a rent one at that is being subjected to an illegal process, the Court will find that such an irreparable loss. In this case, there is no loss incurred by the applicant or likely to be incurred that is irreparable. In the circumstances the court need not consider the next aspect, that is the balance of convenient.
26. The balance of convenient tilts in favour of the Respondent. The loan due is about to outstrip the security and keeps ballooning. The Respondent will have useless securities, if it is not realised. The Applicant, on the other hand is simply not paying the loan. He is also not candid to the court.
27. In the case of Chebii Kipkoech vs. Barnabas Tuitoek Bargaroria & Another [2019] eKLR, where it was held that:

' The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.'

28. Before I depart on the issue of injunction, an injunction is an equitable remedy. I need to add that the baseline for the injunction application is equity. Whoever comes to Equity must do equity. While at it, they must come with clean hands. If one comes with soiled hands, equity is turned off.
29. The Plaintiff failed to disclose, that he borrower companies were his brain child. He is a majority shareholder. Lack of his consent does not suffice, when the Applicant is also the applicant on behalf of the companies.
30. The issue of disputes with other directors is neither here nor there. In the case of Florence Wangu Mwangi & Another V British American Insurance Company Limited & another [2010] eKLR, the court stated as doth: -

See the text book Palmer's Company Law twenty second Edition volume One) where the learned authors were dealing with the doctrine of constructive notice and expressed themselves as thus on page 286 the rule in Royal British Bank –vs- Turquand (1885) E & B 327) which provided

' That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been



principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.'

31. In the circumstances, I find no merit in the application. I therefore, dismiss the same in limine.

#### **Determination**

32. The upshot is that I do not find it difficult to come to the conclusion that Application does not meet the threshold of granting an order of injunction.

33. The application dated March 22, 2023 is hereby dismissed with costs of Kshs 25,000/= to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant to bear their costs in the suit.

34. The matter be mentioned for directions on June 29, 2023. Costs to be paid within 30 days in default execution to issue.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 11<sup>TH</sup> DAY OF MAY 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Kongere for the respondent.

No appearance for the Applicant

Court Assistant - Firdaus

