Mturi v Co-operative Bank of Kenya Limited (Civil Suit 22 of 2022) [2023] KEHC 17425 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 22 OF 2022

OA SEWE, J

MAY 12, 2023

BETWEEN

JONATHAN DANIEL MTURI ..... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT

RULING

1. The Notice of Motion dated 7th April 2022 was filed herein by the plaintiff/applicant pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules for the following orders:

   (a) Spent

   (b) Spent

   (c) That pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction restraining the defendant/respondent herein and/or its servants and or employees and or authorized agents and/or any other persons acting on its behalf from selling by public auction and/or private treaty the plaintiff's property known as Title No. CR 10092, Plot No. 120/I/MN situate in Nyali, Mombasa.

   (d) That the costs of the application be provided for.

2. The application is premised on the grounds that the plaintiff is a guarantor of a bank overdraft in the sum of Kshs. 51,200,000/= advanced by the defendant, to M/s Quantum Petroleum Limited (the borrower), on the 5th February, 2013. The financial facility was secured by a Charge dated 18th March, 2013 for the sum of Kshs. 40,000,000/= and a further Charge dated 8th November, 2013 for the sum of Kshs. 11,200,000/= which Charges are registered in favour of the defendant against the suit property.

3. The plaintiff complained that, the defendant through M/s Keysian Auctioneers purported to exercise its statutory right and advertised the suit property, which measures approximately 0.983 acres, for sale by public auction in the Daily Nation Newspaper of Monday the 28th March, 2022. The sale was scheduled for the 8th April, 2022. The plaintiff further averred that, whereas in the statutory notice dated 21st January, 2022, the debt payable to the Defendant had been indicated to be Kshs. 155,527,568.29, in another letter dated 5th April, 2022 the debt was inexplicably stated to be Kshs. 141,723,883.19.

4. The plaintiff further pointed out that the Charge of 18th March, 2013 and the Further Charge of 8th November, 2013 only secured the sum of Kshs. 51,200,000=; and therefore that he is under no obligation to settle the sum of Kshs. 155,527,568.29/= or any other sum in excess of the Guarantee. He added that at no time did he consent to or agree to guarantee any loan beyond the aforesaid sum of Kshs. 51,200,000/=. On that account the plaintiff contended that the intended sale of the suit property is an illegality in law and ought to be stopped pending the hearing and determination of this dispute. He added that he is neither a shareholder nor a director of M/s Quantum Petroleum Limited; and that his involvement with the defendant is only as a guarantor for the financial facility of Kshs. 51,200,000/=. He consequently posited that unless the orders sought are granted he stands to suffer irreparable loss and damage.

5. The application was supported by the plaintiff's own affidavit, sworn on 7th April 2022 together with the documents annexed thereto. He expounded on the grounds aforestated and relied on copies of the Title to the subject property, the Facility Letter, the Charge dated 18th March 2013, the Statutory Notice dated 21st January 2022 and the Redemption Notice, among other documents. He consequently prayed that his application be allowed and orders sought granted as set out therein.

6. On its part, the defendant relied on the Replying Affidavit sworn on 26th March 2022 by its Relationship Manager in charge of Credit Management, Mr. John Kinyua. The defendant thereby asserted that, since the only reason why the plaintiff is challenging the right to exercise its statutory power of sale is because the amount demanded is beyond that which the plaintiff signed for in the Guarantee, the argument is spurious as the plaintiff has, since 2015, been aware that the sums demanded for are in excess of Kshs. 51,200,000.00/=. The defendant further averred that as of 11th June, 2015, 20th November, 2015 and 18th September, 2019, the sums due were declared by the defendant to be Kshs. 117,316,338.92/=; Kshs. 127,070,269.57/= and Kshs. 143,931,148.47/=, respectively; and therefore that at no point did the plaintiff ever complain that the defendant was demanding more than he had guaranteed.

7. The defendant further averred that the borrower, Quantum Petroleum Limited, attempted to stop the exercise of its statutory power of sale by filing Mombasa HCC No. 95 of 2019, but the suit was struck out. Mr. Kinyua pointed out that, it was only thereafter that the plaintiff filed this suit. Thus, he asserted that it is evident that the contest on figures is purely an afterthought. Mr. Kinyua further averred that the defendant is justified in demanding for sums over and above Kshs. 51,200,000.00/=, considering that the borrower was granted credit facilities for Kshs. 90 million vide a Letter of Offer dated 20th July, 2012, and the principal security taken at that point was an All-Asset Debenture for Kshs. 90 million over the borrower's assets.

8. Mr. Kinyua further averred that the credit facility was further extended to Kshs. 40 Million vide a letter dated 5th February, 2013; and that it was at this point that the plaintiff offered his suit land as a security in the form of a Charge dated 18th March, 2013 for Kshs. 40 Million, in addition to a Personal Guarantee dated 12th February, 2013 wherein he guaranteed the payment of Kshs. 130 Million. Mr. Kinyua added

that as an additional security, a Further Charge dated 8th November, 2013 for Kshs. 11,200,000.00/= was also executed by the plaintiff over the suit property.

9. Thus, according to the defendant, the suit property secured the Charges of Kshs. 90 Million and the further charges of Kshs. 40 Million as well as Kshs. 11,200,000.00/=, taking into account Clause 8 of the Letter of Offer dated 5th February, 2013 and Clauses 13 and 14 of the Charge and Further Charge. Mr. Kinyua therefore asserted that it is misleading for the plaintiff to state that he is not bound to pay anything beyond the sum of Kshs. 51,200,000/=. He added that the plaintiff is aware of the debt as he was a party to the Letter of Offer dated 5th June, 2018, which was meant to restructure the loans. Further, to confirm the plaintiff's knowledge of the charges, counsel pointed out that the plaintiff's spouse, Patience Mturi, consented to the creation of the Charges.

10. At paragraphs 25 to 27 of the Replying Affidavit, Mr. Kinyua averred that, although the plaintiff admitted that he provided a Guarantee for Kshs. 51,200,000/= in the event of default by the borrower and that such default has occurred, he is yet to pay that undisputed amount of Kshs. 51,200,000/=. Thus, in Mr. Kinyua's view, the plaintiff is not a bona fide chargor seeking to redeem his property, but a vexatious litigant trying all tricks in the book to delay and frustrate the defendant's statutory power of sale. He further averred that a dispute on the amount, which is what the plaintiff's complaint is all about, is not a valid ground for interfering with the exercise of the statutory power of sale.

11. Mr. Kinyua also contended that plaintiff only stated that he will suffer irreparable loss without adducing evidence of such loss. He added that the defendant is a reputable bank capable of refunding any difference, in the event the sale is ultimately declared illegal. He pointed out that the suit property has a forced sale value of Kshs. 67,500,000/= only; and therefore that the outstanding amount has already outstripped the value of the suit property. In the circumstances, Mr. Kinyua posited that it is in the best interest of the plaintiff that the sale is done promptly.

12. The application was canvassed by way of written submissions; to which end, Mr. Lewa filed the plaintiff's written submissions on 26th May 2022. Counsel provided a brief background of the application as well the legal basis for the orders sought. He relied on Giella v Cassman Brown & Co. Ltd [1973] EA 358 and Mrao Ltd v First American Bank of Kenya Ltd & Others for the applicable principles. He urged the Court to find that, as a guarantor, the plaintiff's obligation is limited to the Guarantee for Kshs. 51,200,000/= and ought not to be called upon to satisfy the entire debt owed to the respondent by the borrower.

13. Mr. Lewa further submitted that, from the Letter of Offer dated 20th July 2012, it is evident that the plaintiff was not a party; and therefore that the terms and conditions set out therein cannot be said to be binding on the plaintiff as alleged by the defendant. Regarding the Personal Guarantee dated 12th February 2013, Mr. Lewa pointed out that the Charge and Further Charge were not in place when the plaintiff is said to have executed the Personal Guarantee, and therefore the Personal Guarantee did not give the defendant the statutory power of sale over the suit property as a result of the Charge and Further Charge. He added that, in any case the right of consolidation was not noted in the Register of Charges; and is therefore not enforceable against the plaintiff. Accordingly, it was the submission of Mr. Lewa that the plaintiff has made out a prima facie case to warrant the issuance of the orders prayed for by him.

14. On whether the plaintiff stands to suffer irreparable injury for which damages may not be an adequate remedy, counsel made reference to the case of Banis Africa Ventures Limited v National Land Commission [2021] eKLR, and urged the Court to find, on the basis of the plaintiff's Supporting Affidavit, that this condition has also been satisfied. He reiterated the plaintiff's assertion that the suit property is the only place he and his family call home; and that there exists sentimental value to it that

cannot be quantified and compensated in monetary terms. He also submitted that, since the sale is an illegality in law, the issue of whether damages can be an adequate remedy does not fall for consideration. He relied on Said Almed v Mannasseh Denga & Another [2019] eKLR.

15. Finally, Mr. Lewa urged the Court to find that the balance of convenience is also in favour of the plaintiff in view of the illegalities referred to in the Supporting Affidavit. Counsel relied on Alice Awino Okello v Trust Bank Ltd & Another LLR No. 625 (CCK) and Peter Kimani Nene v Kenya Commercial Bank Limited [2016] eKLR.

16. Mr. Kongere, learned counsel for the defendant, relied on his written submissions filed on 6th June 2022. He proposed the following issues for determination:

    (a) Whether the plaintiff has made out a prima facie case;

    (b) Whether the plaintiff will suffer irreparably absent an injunction;

    (c) Whether the balance of convenience is in favour of granting the injunction.

17. Mr. Kongere likewise relied on Mrao Limited v First American Bank of Kenya Ltd & Others (supra) as to what is meant by a prima facie case. He also cited East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR to support his argument that the issue as to whether the defendant has a legal right to combine and consolidate accounts will not vary as it is a question of law. He added that the plaintiff's Guarantee was a continuing guarantee and therefore covers liabilities or transactions between the borrower and the defendant beyond the initial sum of Kshs. 51,200,000/=. In this regard, he relied on Robert Njoka Muthara & Antoher v Barclays Bank of Kenya Limited & Another [2017] eKLR, Equip Agencies Limited v I&M Bank Limited [2017] eKLR and John Karanja Kihagi & Another v Jamii Bora Bank & 2 Others [2020] eKLR. Thus, according to Mr. Kongere, the plaintiff has failed to establish a prima facie case.

18. In addition to the foregoing, Mr. Kongere urged the Court to note that, although the statutory notices were issued in 2015, the suit was not filed until 2019. He therefore submitted that the plaintiff is merely out to frustrate the exercise of the defendant's statutory power of sale; and yet not proposing to pay what he says he should pay. He added, on the authority of Mrao Ltd (supra), that a contest as to the exact amount outstanding is not a basis for restraining the Bank from exercising its statutory power of sale.

19. Mr. Kongere conceded that in the event that the Court returns the finding that the statutory notices are faulty, then damages cannot be a substitute for violation of the law. He, however, was quick to add that, since the sums claimed were provided for in the parties' contract, no irreparable injury could have been envisaged by the parties. On the balance of convenience, Mr. Kongere urged the Court to consider that the debt continues to grow bigger by the day; and therefore that, in the circumstances, the balance of convenience is in favour of refusing the injunction. He therefore invited the Court to find and hold that the Notice of Motion dated 7th April 2022 lacks merit and is for dismissal with costs.

20. [20] I have considered all the pleadings, the affidavit evidence presented herein, and the written submissions filed by parties. The guiding principles for the grant of orders of the temporary injunction are well settled and are set out in Giella v Cassman Brown (supra). This position has been reiterated severally and more particularly in the Court of Appeal case of Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR, where it was held: -

> "...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..."

21. Hence, a prima facie case was defined in the Court of Appeal case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others (supra) where the court held: -

> "... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter..."

22. In the premises, the issues that present themselves for determination in the instant application are:

(a) Whether the procedure laid down in the *Land Act* was followed with respect to the attempt by the defendant to exercise its statutory power of sale;

(b) Whether the plaintiff met the laid down conditions for the grant of a temporary injunction.

23. Needless to mention that a Guarantee is a separate arrangement from a loan agreement. This distinction was made in the case of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR thus: -

> (29) There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. The law, the way I understand it, is that a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the *Land Act*. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the *Land Act*. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower. The Notice under section 90(1) of the *Land Act* was properly issued and liability on the guarantor attached. However, I understand the law to be that, after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the *Land Act* before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit land is a charge for all purposes and intents within the sense of the *Land Act* and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender.

24. I am in full agreement with the foregoing exposition. Consequently, there is no gainsaying that the plaintiff, as a guarantor, offered the title to his land as security for the subject loan on the basis of a third-

party legal charge; which charge was registered against the suit property. He was therefore a chargor for purposes of the protections offered to a chargor under Sections 90, 96 and 97 of the *Land Act*. The respondent attached copies of the notices issued to the plaintiff under the above provisions of the law as well as the requisite Redemption Notice under Rule 15(d) of the Auctioneers Rules were as annexures to the Replying Affidavit (see Annexures JI-1, JI-2 and JI-3). On a prima facie basis therefore, compliance has been demonstrated by the defendant with the pertinent provisions of the *Land Act*.

25. The next issue to consider is whether, in the circumstances, the plaintiff has made out a good case for the issuance of a temporary injunction. In this regard, the plaintiff pitched the argument to the effect that the charged property comprises their family residence, in respect of which they have sentimental attachment. I have no hesitation in rejecting this argument because it is now trite that property once charged becomes a commodity for sale like any other. I would thus echo the expressions of

26. Hon. Ringera, J. in Isaac O. Litali v Ambrose Subai & Another HCCC No. 2092 of 2000 thus:

> " ...once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is clearer in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security."

27. The second aspect of the plaintiff's application is that there is a controversy as to the exact amount due from him under the Guarantee. Accordingly, he urged that the sale be held in abeyance pending a resolution of the dispute. In this respect, it is now trite that a dispute over accounts is no valid ground for the issuance of an injunction. For instance, in Halsbury's Laws of England, Vol. 32 (4th Edition) at paragraph 725 it is opined that:

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

28. Similarly, in Bharmal Kanji Shah and Another v Shah Depar Devji [1965] EA 91 it was held that:

> " ...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage..."

29. The foregoing notwithstanding, the plaintiff challenged the defendant's right of consolidation, contending, inter alia, that the right ought to have been noted in the Register of Charges; and is therefore not enforceable against the plaintiff. More importantly, counsel for the defendant conceded, at paragraph 15 of his written submissions that:

> " ...the issue of law whether the Defendant has a legal right to combine and consolidate accounts, cannot be answered without the court expressing a view on the contractual documents..."

30. He thereafter made an attempt, at paragraphs 16-26 of his written submissions, to invite the Court to make dispositive findings as to the construction of certain clauses of the contractual documents.

That would, in my considered view, be premature. I find apposite the principle laid in Shah v Padamshi [1982] eKLR, by the Court of Appeal that:

> " Except in the clearest of cases, which this one was not, it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgment... for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial."

31. [30] In the premises, I am satisfied that the Plaintiff has indeed demonstrated, on a prima facie basis, that he has a right in connection with the Suit Property which has apparently been infringed by the Defendants"...as to call for an explanation or rebuttal from the latter..." within the definition of a prima facie case provided in the Mrao Ltd Case above.

32. As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is a manifest breach of the provisions of the law, an applicant cannot be compelled to accept damages as recompense. In Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Hon. Warsame, J. (as he then was) held as follows:-

> " On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

(32) The same position was taken in Sharok Kher Mohamed Ali & Another v Southern Credit Banking Corporation [2008] eKLR thus:

> "... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)

(33) As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in Charter House Investments Ltd v Simon K. Sang and Others Civil Appeal No. 315 of 2004 is instructive that:

> "Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

33. Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. In Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589 in which Ojwang Ag. J (as he then was)

quoted with approval the following words of Justice Hoffmann in the English case of Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772:

> " The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' ..."

34. In the instant matter, the path leading to the lower risk of injustice would be to sustain the status quo by stopping the impugned auction pending the hearing and determination of the plaintiff's case.

35. In view of the above, it is my considered view that the plaintiff has made out a case to warrant the grant of a temporary injunction as sought. Accordingly, it is hereby ordered that:

    (a) That pending the hearing and determination of this suit, a temporary injunction be and is hereby granted restraining the defendant/respondent herein and/or its servants and or employees and or authorized agents and/or any other persons acting on its behalf from selling by public auction and/or private treaty the plaintiff's property known as Title No. CR 10092, Plot No. 120/I/MN situate in Nyali, Mombasa.

    (b) That the costs of the application be in the cause.

36 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF MAY 2023

OLGA SEWE

JUDGE