



**Mogi v Diamond Trust Bank Kenya Ltd & 2 others (Civil Case E941 of 2021)  
[2023] KEHC 4049 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E941 OF 2021**

**A MABEYA, J**

**MAY 5, 2023**

**BETWEEN**

**CHARLES MAKORI MOGI ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK KENYA LTD ..... 1<sup>ST</sup> DEFENDANT**

**DALALI TRADERS AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**ALFRED THIGIRI JACOB & LYDIA KINYA MWITHIMNU .. 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before Court is the Motion on Notice dated November 30, 2021. The same is brought under Order 40 Rules 1, 2, 3, 4, 9 and 51 of the [Civil Procedure Rules](#), Sections 89, 90, 96, 103, 104, 105 and 106 of the [Land Act](#) 2012.
2. The order sought is an order of injunction to restrain the defendants and/or their agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise interfering in any manner with Elegance Gardens, Maisonette No 7 erected on LR No 209/10206 (PART) South C, Nairobi County (hereinafter ‘the suit property’).
3. In the alternative, the plaintiff prayed to have the defendants’ statutory power of sale suspended and/or postponed for a period of 12 months or such other period as the Court may determine to allow the defendants to serve the notices properly as provided by the law.
4. Lastly, in the alternative, the plaintiff sought an order to extend the time for compliance and/or rectifying a default to redeem the suit property for a period of 12 months or for such other period as the Court may determine pursuant to the powers conferred to it by section 104 as read with section 90 of the [Land Act](#) 2012.



5. The grounds for the application included that the 1st and 2nd defendant sought to enforce the statutory power of sale on the entire suit property without following the due process provided by law. That the 2nd defendant had scheduled to sell the suit property by way of public auction and had already advertised it through the Daily Nation Newspaper of November 22, 2021.
6. The plaintiff asserted that the 1st defendant did not serve notice as required by law; that this would result in an unlawful sale and untold prejudice to him if the Court does not intervene.
7. That the 1st and 2nd defendant are reluctant to engage the plaintiff in structured negotiation that would ensure that the plaintiff settles the outstanding purchase price balance and that the 1st and 2nd defendant are only keen to sell or offer for sale the suit property at a price which is below the market value.
8. In opposition, the 1st defendant filed a replying affidavit sworn on February 25, 2022 by Joram Kilwanda, its Senior Officer, Debt Recovery. It was averred that pursuant to a letter of offer dated July 29, 2017, the 1st defendant advanced to the 3rd defendant several facilities aggregating to Kshs 27,728,178/-. That the letter of offer provided, inter-alia, that the facilities availed to the 3rd defendants would be secured by the suit property.
9. That in breach of the terms of the letter of offer, the 3rd defendants defaulted in payment of the monthly installments of the financial facilities when the same became due and owing leading to arrears of Ksh 2,582,429.26 as at November 23, 2018.
10. That despite the bank requesting the 3rd defendants to regularize the loan facilities, they failed to attend to the default. That the bank therefore issued them with a statutory notice dated November 23, 2018 informing them that it would exercise its statutory power of sale if the default was not remedied within 3 months from the date of service of the statutory notice.
11. That the said statutory notice was sent to the 3rd defendants through the address disclosed in the charges. That despite such service, the 3rd defendants failed to regularize their accounts prompting the bank to issue a chargee's notification of sale dated March 13, 2019 in accordance with section 96 of the *Land Act*.
12. It was averred that upon the lapse of 40 days, the bank instructed the 2nd defendant to sell the charged property via public auction. That pursuant thereto, the 2nd defendant served the 3rd defendants with the 45 days auctioneer's redemption notice but they failed to regularize the arrears.
13. That a sale agreement dated July 30, 2020 for the suit property was entered into with the plaintiff without the consent of the 1st defendant. That the said sale was rescinded as the plaintiff failed to complete the sale and purchase within the time frame stipulated in the sale agreement. Since November 2020, the plaintiff made no attempts to revive the sale with a view to complete the same and as a result, the bank was constrained to advertise the suit property for sale by way of public auction on February 16, 2021.
14. That through a public auction held on December 7, 2021, the suit property was sold to the highest bidder. That the Court order restraining the bank from selling was served upon the bank at 2.25 PM on December 7, 2021 while the 2nd defendant was served with the order at 12:49 PM which was well after the public auction took place. That the plaintiff was not serious in purchasing the property and was only managing the bank's expectations to stop the bank from realizing a debt.
15. It was the bank's contention that the public auction took place therefore the equity of redemption had been extinguished and that the present application was solely brought to stop it from exercising its statutory power of sale.



16. I have considered the entire record. The issue for determination is whether the plaintiff has met the threshold for the grant of a temporary injunction.
17. This is an application for a temporary injunction. In *Giella v Cassman Brown [1973] EA 358*, the principles to be considered were set out as; (i) the applicant must prove a prima facie case with a probability of success, (ii) he must illustrate that he will suffer irreparable loss and damage if the injunction is not granted, and (iii) If the court is in doubt, it will determine the matter on a balance of convenience.
18. On prima facie case, the same was dealt with in *Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others Civil Appeal No 39 OF 2002* wherein the court described it to be: -

' ... 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 to call for an explanation or rebuttal from the latter.'
19. It is undisputed that the 3rd defendants took out loan facilities from the 1st defendant to an aggregate amount of Kshs 27,728,178/-. It is also not in dispute that the 3rd defendants defaulted in payment of the monthly installments when the same became due and owing.
20. The bank initiated its statutory power of sale and sent the requisite notices to the 3rd defendants via their post office address. The 3rd defendants claimed that the bank allowed them to enter into a private treaty to sell the property as opposed to the bank continuing to exercise its power of sale. The bank denied this claim and asserted that the private treaty was entered into without its consent.
21. It is also uncontested that the plaintiff entered into a sale agreement with the 3rd defendants and went ahead to pay the deposit of 10% of the purchase price to the bank. This gave the plaintiff a proprietary interest in the suit property thus he has the locus standi to file this suit and application.
22. However, the plaintiff did not complete the payment of the purchase price. That sale agreement was as good as dead. It was rescinded and/or breached.
23. It is my view that at that point, the bank's right to enforce its power of sale was reintroduced. It is trite that once a power of sale has arisen, a chargee has the right to exercise it. The court has no power to prevent the exercise of that power if it is being properly exercised. See *Housing Finance Company of Kenya vs Ngege Kitson Mondo (2006) eKLR*.
24. The loan is in arrears, the debt is admitted by the 3rd defendants and the statutory notices were properly issued to the 3rd defendants. Proper procedure has been followed. I find that the plaintiff has not established a prima facie case to warrant an interlocutory injunction.
25. As such, I need not consider the other two limbs that are usually considered in granting an interim injunction.
26. Besides, the record shows that the suit property was already sold by the bank in a public auction on December 7, 2021.
27. In the premises, the application lacks merit and is hereby dismissed with costs to the 1st defendant.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**



**JUDGE**

