



Ngugi & 2 others v KCB Bank Kenya Limited & another (Commercial Case E263 of 2022) [2023] KEHC 17558 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E263 OF 2022**

A MABEYA, J

MAY 19, 2023

BETWEEN

**MARGARET WAMBUI NGUGI 1ST PLAINTIFF
KIMURI HOUSING COMPANY LIMITED 2ND PLAINTIFF
JOHN NGUGI 3RD PLAINTIFF**

AND

**KCB BANK KENYA LIMITED 1ST DEFENDANT
JM GIKONYO T/A GARAM INVESTMENT AUCTIONEERS LERY
ENTERPRISES 2ND DEFENDANT**

RULING

1. This ruling is in respect of the plaintiff's Motion on Notice dated November 1, 2022. The same was brought pursuant to Order 40 Rule 1 and 2 of the [Civil Procedure Rules 2010](#). The plaintiffs sought injunctive orders against any interference of the properties known as LR No 23364/27, 23364/28, 23364/29, 23364/30 and 23364/31 'the subject properties'.
2. They also sought a mandatory injunction for the provision of bank statements in respect to the account numbers MG xxxx and xxxx 'the said accounts' and the provision of the details of the public auction conducted on March 8, 2022 including the names and number of the bidders and the results of the bids.
3. The application was based on the grounds set out on the face of the Motion and the affidavit of Margaret Wambui Ngugi sworn on November 1, 2022. The plaintiffs' case was that in June, 2015, the 1st defendant afforded the 2nd plaintiff facilities amounting to Kshs 453,600,000/-. The same was



repayable by monthly instalments of Kshs 11,500,110/- for 5 years with a 6 month moratorium from the date of draw down.

4. The subject properties were given as securities for the said facilities. The said accounts were opened for the purposes of the said facilities. That in breach of the term for moratorium, the 1st defendant demanded Kshs 61,504,970/- on August 10, 2016 as interest. That the 1st defendant also breached other terms of the charge and letter of offer. That on May 18, 2021, the 1st plaintiff a call from the 1st defendant that the securities had been sold and Kshs.18 million credited to the plaintiffs' accounts.
5. That later, she learnt that the 3rd defendant had purported to purchase 5 of the suit properties for Kshs 286 million. 90 days period lapsed before the 3rd defendant could pay the balance of the purchase price. Correspondence seeking information about the sales fell on deaf ears. That the plaintiffs had secured a buyer for LR No 11486/11 who had offered to pay Kshs 500 million for the same. That the plaintiffs should be allowed to sell LR Nos 11486/11 and 10390/4 which were valued at over Kshs 1.7 billion and save the rest of the suit properties.
6. The application was opposed vide a replying affidavit of Kennedy Kasamba the Recoveries Manager of the 1st respondent 'the Bank' sworn on November 25, 2022 and the grounds of opposition dated November 10, 2022. It was deposed that the bank gave facilities to the plaintiffs amounting to Kshs 562,643,369/38 which was secured by the suit properties. When the plaintiffs were unable to service the same, bank commenced recovery processes. This provoked three suits which were settled by consents whose terms the plaintiffs failed to honor.
7. That the suit and application have been overtaken by events as the properties were sold on March 8, 2022 for a total sum of Kshs 286,000,000/- to Paul W Gichu who was the highest bidder. He paid Kshs 28,600,000/- being 10% of the purchase price and the bank financed the balance of Kshs 228,000,000/- on the security of the said properties. The allegations of fraud on the part of the bank was denied. It was averred that the applicants were guilty of material non-disclosure and that the application should be dismissed.
8. The parties filed their respective submissions. The applicants submitted that the bank was in breach of the terms of the contract when it sold the properties to the 3rd respondent on March 8, 2022 by way of public auction. That they were now seeking information pertaining to that auction which the bank has refused and/or failed to provide. That the 3rd respondent wrote a letter dated October 26, 2022 to the tenants of the subject properties to channel their rent to him. That in the premises, the applicants seek to restrain any interference on the properties and/or collection of the rent from the tenants in the subject properties.
9. On the other hand, the respondents submitted that the applicants were advanced a credit facility which they defaulted prompting the bank to initiate recovery procedures. It issued all requisite notices but the applicants filed several suits which aborted the recovery process. The said suits were later withdrawn with consents which the applicants never adhered to. As a result. The suit properties were sold to the 3rd respondent.
10. In the premises, it was submitted that the application was therefore vexatious as it failed to disclose information relating to the previous suits. The consent entered into had permitted the bank to sell the properties in the event of default. That since the properties had been sold, the application had been overtaken by events.
11. I have considered the pleadings, the affidavits and the submissions on record. This is an application for an interlocutory injunction and a mandatory injunction for the bank to supply the applicants with bank statements and information pertaining to the sale of the suit properties.



12. The principles applicable are well known as enunciated in the case of *Giella vs Cassman Brown*. These are that an applicant must establish a prima facie case with a probability of success, that he will suffer irreparable damage and if the court is in doubt, it will determine the matter on a balance of convenience.
13. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR*, the Court quoted with approval the case of *RJR Macdonald vs Canada (Attorney General)*, and stated the applicable principles as follows: -
 - i) Is there a serious issue to be tried?
 - ii) Will the applicant suffer irreparable harm if the injunction is not granted?
 - iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called 'balance of convenience')
14. On prima facie case, the Court notes that indebtedness was admitted. Five of the 7 properties have already been sold. Statutory notices seem to have been issued. Further, there was a consent in one of the suits that if the applicants failed to honour the payments agreed, the bank be at liberty to sell the properties.
15. Be that as it may, the applicants alleged fraud on the part of the bank and the 3rd defendant on the way the alleged auction was conducted. One striking issue is that, the valuation of the sold properties was made on April 29, 2021 for an auction carried on May 11, 2021. In that auction, Paul Gichu, who still represented the 3rd defendant in the alleged auction of March 8, 2023, was the highest bidder at Kshs 286 million. In the alleged auction of March 8, 2022, one year later, there were only 3 bidders and the representative of Paul Gichu once again is said to have given the highest bid of the same amount of Kshs 286 million. The coincidence can only be unravelled at the trial where parties will have to give tested testimony.
16. Whilst the sale is said to have occurred on the said March 8, 2022, the 10% was not paid until 2 months later on, 8th and May 9, 2022 and the transfer and charge effected in October, 2022. That is the time that the applicants were being notified of the same.
17. The view the Court takes is that, the way the alleged auction was conducted does not inspire confidence that the bank properly exercised its power of sale. That notwithstanding however, the Court notes that the 5 properties seem to have been sold. The 3rd defendant has already paid the purchase price, although 90% thereof was financed by the bank. That being the case, in respect of the 5 properties, the application for injunction cannot succeed. It has been overtaken by events. If at the trial the allegations against the defendants are proved, there is remedy provided for under the *Land Act* which shall issue accordingly.
18. I have considered the foregoing and note that there are two properties which have not been sold yet. They are said to be valued at about Kshs 1.7 billion. The applicants allege that they have a buyer therefor. That they should be left to sell the same and pay whatever the outstanding shall be.
19. In view of what I have observed about the alleged auction of March 8, 2022, I am satisfied that there exists real danger of such a prime property being sold at an undervalue. The applicants have already lost what was the most prime property which was bringing income for them. Yet the bank is claiming more money. In my view, if the remaining two properties are also sold, the applicants may suffer irreparable loss and damage.



20. As regards the mandatory injunction, the Court notes that the bank produced a statement of account for xxxx only. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR*, the Court of Appeal observed: -

' Which leads us to the third issue raised in the appeal; whether the bank supplied statements of accounts to the appellant. Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance.'

21. In this case, the Bank has only provided one statement of accounts which only shows the remittance of the monies paid by the 3rd respondent. It does not provide the details of the account from its inception to show the loan advancement, the payments made if any, the interest charged or any other charges to ascertain how the outstanding amount was arrived at. I believe in the banker-customer relationship, moreso where a colossal sum is being demanded such as in this case where the securities have been sold and a huge balance is being demanded, the bank is under an obligation to provide the customer with a detailed statement of accounts involved.

22. It was the bank's position that the no special circumstances had been demonstrated to exist to warrant the mandatory injunction sought being issued at the interlocutory stage.

23. It is trite that mandatory injunction cannot be granted in an interlocutory stage unless there exists special circumstances. In *Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR*, the Court of Appeal said:

' It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.'

24. In this case, the provision of the bank statements is critical for determination of the suit during trial as it will ascertain the amounts advanced, the charges and interest levied and the total amount owed. The details and the results of the public auction of March 8, 2022 which show whether or not the public auction was done in accordance with the law. I have already stated that in the circumstances where the securities have been sold and the bank still claims that a huge part of the debt is still due qualifies to be a special circumstance. Further, having in mind the manner in which the sale was conducted and that the applicants were being informed of the same after a considerable lapse of time, I believe these would constitute special circumstances to warrant the issuance of a mandatory injunction.

25. In the circumstances, I allow the Notice of Motion dated November 1, 2022 in the following terms: -

- a. That within 30 days of this ruling, the defendant do provide the statements of account for A/ C numbers MG xxxx and xxxx from the date of inception to-date.



- b. That within 30 days of this ruling, JK Gikonyo T/A Garam Auctioneers do provide the applicants with the names of all the bidders who attended the auction of March 8, 2022 together with the bid results thereof.
- c. In the meantime, pending further orders of the Court, the respondents whether by themselves or their agents and/or servants are hereby restrained from taking possession, transferring or interfering with the properties known as LR Nos 10390/4 and 11486/11. This order to remain in force for 6 months from the date hereof to give the applicants an opportunity of having a buyer for the same.
- d. Since the application was only partially successful, there will be no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2023.

A. MABEYA, FCIARB

JUDGE

