



REPUBLIC OF KENYA



KENYA LAW

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**Towett v Mwananchi Credit Limited & another (Commercial Case E346 of 2022)
[2023] KEHC 17603 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E346 OF 2022**

JWW MONG'ARE, J

MAY 19, 2023

BETWEEN

RUTH CHELAGAT TOWETT PLAINTIFF

AND

MWANANCHI CREDIT LIMITED 1ST RESPONDENT

MARY RITA WANJIRU T/A MISTAN AUCTIONEERS 2ND RESPONDENT

RULING

1. By a Notice of Motion dated September 9, 2022 the Applicant has moved to court under a certificate of urgency brought under Order 40 Rules 1,3.4 & 10 of the *Civil Procedure Rules*; Section 3 & 3A of the *Civil Procedure Act* Cap 21, Laws of Kenya, Sections 90 & 91 of the *Land Act*, 2012 and all enabling provisions, seeking the following orders;
 1. Spent
 2. Spent
 3. A temporary injunction be and is hereby issued restraining the Defendants or its agents from selling by way of public auction property known as LR No 209/18428 (IR No 115759) Original No 209/12736/25 Maisonette No 27 Bandari Villas, Phase 1 South C, Nairobi City County, pending the hearing and determination of this suit.
 4. An order directing the 1st Defendant to provide a bank Account into which the instalments are to be paid.
 5. An order be and is hereby issued directing the 1st Defendant/ Respondent to render an up to date account of the balance due.



6. Costs of this application.
2. The application is supported on the ground set on its face and a supporting affidavit sworn by Ruth Chelangat Towett, the Plaintiff herein. The Application is opposed and the Defendants have filed a replying affidavit sworn by Dennis Mwangeka Mombo, the Managing Director of the 1st Defendant.
3. It is the Plaintiff's case that she obtained a loan from the 1st Defendant for Kshs 5,500,000/- and the same was capped at 11,000,000 with interest. That as security for the loan, the Plaintiff provided property LR No 209/18428(IR No 115759) Original No 209/12736/28, Maisonette No 27 Bandari Villas Phase 1, South C within the Nairobi County.
4. That the Plaintiff states that she has been diligently repaying the loan and has so far paid a total of 7,200,000 leaving a balance a balance of Kshs 3,800,000/-. The Plaintiff further stated that sometime in February 2022, the 1st Defendant instructed his lawyers to stop receiving payments from the balance and instructed the 2nd Defendant to advertise the security for sale by way of public auction and proceeded to place an advertisement for its sale on September 14, 2022.
5. The Plaintiff submitted that she was committed to repay the balance of the loan but deemed the actions by the 1st Defendant as an attempt to deprive her of her property instead of allowing her to repay the balance, and that she was ready and willing to repay the balance and prayed that the court to order the 1st Defendant to among other things provide an account through which she can repay the loan balance.
6. The Plaintiff while acknowledging the existence of prior litigation in the lower court on the same subject matter stated that she withdrew the said suit on realization that the pecuniary jurisdiction of the lower court was below the value of the subject matter and has now moved to the High court because she believes that the court has jurisdiction to determine the issues between the parties.
7. The 1st Defendant/Respondent opposed the application and filed a replying affidavit sworn by the Managing Director, Mr Dennis Mwangeka Mombo sworn on September 22, 2022. The 1st Defendant averred that it was a non-deposit taking money lending institution that advances loans to its customers on a willing lender willing borrower basis, against collateral that the borrower offers as security and that the loan agreement is voluntarily executed by the borrower having read and understood the conditions of the loan and that the said agreement was purely within the tenet of the law of contract.
8. The Respondent took issue with the circumstances surrounding the withdrawal of the previous suit in the lower court and stated that the Plaintiff was forum shopping in that having sensed defeat in the lower court, she moved to the High Court to obtain fresh orders under flimsy grounds. The Respondent further stated that it was not true that the value of the subject matter was in excess of the pecuniary jurisdiction of the lower court but that what was in issue was the loan balance and not the value of the collateral.
9. The Respondent acknowledged the arrangement to settle the loan debt at 11,000,000 but stated that the Plaintiff breached the said agreement leaving it no choice but to pursue the Plaintiff for the loan balance including realizing the security through a public auction.
10. The 1st Defendant urged the court to dismiss the application and allow it to proceed to recover the loan balance through sale of the charged property as provided for by the law.

Analysis and Determination:

11. I have considered the pleadings and the submissions filed by the parties and I have identified one issue for determination, to wit; "whether the Plaintiff/Applicant has met the threshold for a grant of an



order of injunction”. In the Locus Classica case of *Giella v Cassman Brown Company limited*, (1973) E A at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited v. Jan Bode Nielsen & 2 others*, (2014)eKLR, the court stated that “ 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.”

12. I have considered the facts of this case and in order for a grant of an order of injunction to issue, the facts of this case must be put through the three step test. The first test is to establish whether a *prima facie* case exist? From a look at the facts of this case, I noted that there was a loan agreement of Kshs 5,500,000/- which both parties acknowledge. Further, the Plaintiff alleged that the loan was to be capped at 11,000,000 being principal and interest and these allegations or averments were not denied or controverted by the Defendant. The Plaintiff alleges to have paid from the loan advanced, the sum of Kshs 7,200,000/- leaving the balance of Kshs 3,800,000/- which the Plaintiff argued that she was always willing to pay but the Defendant had frustrated her efforts by instructing their lawyers not to receive the said funds anymore. All these facts were not controverted by evidence from the Respondent. To my mind, I am persuaded that the Plaintiff has established a *prima facie* case.
13. The second test is whether the Applicant stands to suffer irreparable loss if the order for injunction is not granted. In this case, the Applicant alleges that she obtained from the Defendant a loan of Kshs 5,500,000/- and agreed to have the same capped at 11,000,000, double the amount borrowed. As security for repayment of the loan, she offered as security her property namely, LR No 209/18428 (IR No 115759) original No 209/12736/28, Maisonette No 27 Bandari Villas Phase 1, South C, Nairobi. The Plaintiff has alleged in her submissions that in an effort to frustrate her ability to redeem the property, the Defendant instructed their lawyers not to accept payment from the Plaintiff and instead instructed the 2nd Defendant to proceed to advertise the property for sale by Public Auction. It is the Plaintiff's submissions that the purported sale will greatly prejudice and occasion her irreparable damage. From the testimony of the Plaintiff, she has demonstrated willingness to repay the loan and has made substantive payment towards the loan and interest and alleges that she has been willing and ready to pay the balance but has been frustrated by the Defendants. If the public auction is allowed to proceed while the Plaintiff is making efforts to redeem the loan balance, then I am persuaded that in this instance, she will suffer irredeemable harm as she will lose both the house and the money. I am satisfied therefore that the facts of this case support the second test for injunction.
14. On the balance of convenience, arising from the facts of this case, the Plaintiff has demonstrated that the balance of convenience will tilt in her favour. She has had a long running relationship with the Defendant and despite being impacted by Covid-19, she has demonstrated willingness to clear the loan. There is no evidence adduced by the Defendant to rebut the Plaintiff's averments and none was offered to controvert or contradict the facts as presented by the Plaintiff. Instead, the Defendant dealt on facts not material to its case. It accused the Plaintiff of forum shopping in its admission of having withdrawn its case in the lower court and filed the current case in The High Court.
15. Having weighed the evidence on the three prongs of *prima facie* case, irreparable harm and a balance of convenience tests, I am persuaded that the Plaintiff has made a case for grant of an order of interim injunction, pending the hearing and determination of the main suit herein. I find and hold that the application herein has merit and I will allow the same with costs to the Plaintiff/Applicant.



16. Having allowed granted the order for interim injunction, the Defendant is ordered to provide to the Defendant an account for the repayment of the loan balance forthwith.

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

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J W W MONG'ARE

JUDGE

In the Presence of:

Mr Kiboi for the Appellant.

Mr Kuloba for the Respondent.

Sylvia- Court Assistant

