



REPUBLIC OF KENYA



**Tiksowoods Company Limited & 2 others v Auctioneers & another (Civil Appeal E25 of 2022) [2023] KEHC 17645 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17645 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E25 OF 2022**

**JK SERGON, J**

**MAY 16, 2023**

**BETWEEN**

**TIKSOWOODS COMPANY LIMITED ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH KIPLANGAT KIRUI ..... 2<sup>ND</sup> APPLICANT**

**DAVID KIPSAINA KEMEI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REGENT AUCTIONEERS ..... 1<sup>ST</sup> RESPONDENT**

**SIDIAN BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The crux of the matter at hand is that the Applicants herein took out a loan facility and subsequently defaulted in servicing the loan facility advanced to them. The Respondents elected to exercise the statutory power of sale and vide a redemption notice for sale, notified the Applicants of the sale of the subject properties by public auction on May 27, 2022.
2. The Applicants filed an application against the Respondents in Kericho Magistrates Court Civil Suit No E064 of 2022 seeking an order for temporary injunction against the sale of the Applicants' property, the trial court issued temporary orders. Subsequently, the Respondents filed a response to the application and the court directed the parties to file their submissions. The trial court delivered its ruling effectively dismissing the Applicant's application with costs.
3. The Applicants being dissatisfied with the ruling of Hon F. Nyakundi (SRM) delivered on May 25, 2022 in Kericho Magistrates Court Civil Suit No E064 of 2022 filed an appeal pegged on the grounds set out in the memorandum of appeal dated May 26, 2022. The Applicants aver that the appeal raises a substantial issue of law with overwhelming chances of success.



4. The Applicants are apprehensive that the Respondents would proceed and auction the subject parcels by public auction to their detriment rendering the appeal nugatory and it was therefore fair and just that all the proceedings in Kericho Magistrates Court Civil Suit No E064 of 2022 and the impending auction be stayed pending hearing and determination of the intended appeal hence necessitating the instant application.
5. It is against such background, that the applicants herein filed the instant application dated May 26, 2022 seeking the following orders;
  - i. spent
  - ii. spent
  - iii. That pending the hearing and determination of the appeal, there be stay of all further proceedings in Kericho Magistrates Court Civil Suit No E064 of 2022 and the auction of the parcel of land known as Kericho/kabianga/206 And Kapseret/kapseret/block 2 (kaptuiyo)/139.
  - iv. That costs of this application be provided for.
6. The application is supported by the supporting affidavit sworn by Kipngetch Langat Benard one of the directors of the 1<sup>st</sup> Applicant and on behalf on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent herein.
7. The Applicants deponed that they are apprehensive that should the respondents proceed and auction the subject parcels by public auction before the substantive appeal is heard the appeal would be rendered nugatory thereby occasioning loss and prejudice to the Applicants.
8. The Applicants further deponed that they are apprehensive that the Respondents would dispose of the subject properties at an undervalued price and therefore would not be in a position to refund the monies if the intended appeal were successful.
9. The application was opposed by the 1<sup>st</sup> Respondent which filed a replying affidavit sworn by Jackline Ndung'u a Senior Legal Officer at the Respondent bank who deponed that by a letter of offer dated December 10, 2019, the bank agreed to advance various loan facilities to the 1<sup>st</sup> Applicant an aggregate of Kshs 7,389,740/= to be repaid in 48 consecutive monthly installments of Kshs 112,675.48/=.
10. The facility was secured by a duly registered third party legal charge dated October 25, 2018 over property title no Kapseret/kapseret Block 2 (kaptuiyo)/139 registered in the name of David Kapsiana Kemei, the 3<sup>rd</sup> Applicant herein to cover Kshs 3,000,000, a further legal charge dated January 30, 2019 over the said property to cover Kshs 2,000,000 and a personal guarantee and indemnity of David Kipsaina Kemei for Kshs 5,000,000.
11. The facility was also secured by a third party legal charge over the property title no Kericho/kabianga/2067 in the name Joseph Kiplangat Kirui, the 2<sup>nd</sup> Applicant, to cover Kshs 5,000,000 and a personal guarantee and indemnity by Joseph Kiplangat Kirui for Kshs 5,000,000.
12. The Applicants are said to have accepted the terms of the letter of offer by signing a memorandum of acceptance confirming that they had read and understood the letter and they have accepted the terms and conditions therein.
13. The facility was then disbursed to the 1<sup>st</sup> Applicant, but he fell in arrears. The Applicants requested for a restructure of their outstanding loans including arrears and interest accrued into one aggregate loan and amendment of tenor being Kshs 8,255,187/= as at June 4, 2020 and the directors, the 2<sup>nd</sup> and



- 3<sup>rd</sup> Applicants executed another letter of offer. The bank also gave the 1<sup>st</sup> Applicant a moratorium of 4 months on the principal and interest and thereafter the restructured loan facility was to be repaid in 43 consecutive monthly installments of Kshs 241,175.43/=
14. Despite the restructure, the borrower defaulted and the bank issued a demand letter dated August 6, 2021 demanding repayment of the loan facility, the Applicants failed to rectify the default.
  15. On account of the continuing default, the bank issued ninety (90) days' statutory notice over both charged property to the Applicants and spouses requiring the Applicants to remedy the default.
  16. Despite service of notice, the Applicants refused and/or neglected to rectify the default and issued a forty (40) days' statutory notice to sell dated December 21, 2021 to the directors of the 1<sup>st</sup> Applicant and respective spouses demanding the amount due as at December 21, 2021 failure to which the suit properties would be sold.
  17. The Bank through its agent Regent Auctioneers served the Applicants with the forty-five (45) days' redemption notice in respect of the charged properties dated March 16, 2022 together with the notification of sale personally and via registered post. The Bank also issued instructions to Zenith Management Valuers Ltd to value both charged properties as required under the law and a current valuation report was duly prepared in respect of each property.
  18. The Respondent further deponed that the outstanding loan balance as at March 16, 2022 was Kshs, 10,136,101.00/= which has since grown to Kshs 11,779,198.10/= since the applicants are still not servicing the loan and the current account is also overdrawn with Kshs 318,969.24/= totaling to Kshs 12,098,167.34/= which continues to accrue interest at the contractual rates till settlement in full and hence it was in the interest of justice that the Bank be allowed to proceed with the sale to recover the said sums.
  19. The Respondent in its affidavit argued that the applicants have not demonstrated that the appeal is arguable and would be rendered nugatory if orders for stay are declined and further that they would suffer substantial loss that cannot be compensated by damages.
  20. The Respondent reiterated that it followed due process and issued all the requisite notices in compliance with the *Land Act* thus the right to sell the charged property to recover the outstanding sum had crystallized, furthermore, the Applicants were not disputing their indebtedness and therefore Applicants had not established a prima facie case with a probability of success and the instant application was aimed at thwarting the Bank's recovery efforts.
  21. The Respondent reiterated that it is therefore in the interest of justice to have the Bank actualize its statutory remedy of sale of the charged property.
  22. Having considered the pleadings, the affidavit evidence, written submissions and the case law in support of the parties' case in the lower court, the trial court came to the firm conclusion that the Plaintiff did not meet the threshold to be granted an interlocutory injunction as was envisaged in the celebrated case of *Giella v Cassman Brown* (1973) EA 360 in which it was held 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."
  23. Having admitted to being indebted to the Defendant, even after restructuring of the loan facility, the Plaintiff had clearly not made out a prima facie case with a probability of success at trial. I hereby agree



with the findings of the lower court in its ruling dated May 25, 2022 in Kericho Magistrates Court Civil Suit No E064 of 2022 and therefore decline to grant a stay of proceedings in the matter.

24. I have considered the contents of the notice of motion dated May 26, 2022, affidavit in support thereof, replying affidavit against the instant application and the evidence supplied by the parties. I find that the Applicants are not disputing their indebtedness. I find that on account of the applicants continued indebtedness, the Banks' right to sell the charged property to recover the outstanding sums had crystallized. I find that the Respondent has followed due process and issued all the requisite notices and conducted a valuation of the charged properties in compliance with the Land Act. I find that the Respondent herein is at liberty to exercise its statutory power of sale, which right cannot be fettered and sell the subject parcels provided that it fully complies with the strict provisions of the law and with Section 97 of the Land Act, which stipulates that a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The said section provides as follows: "1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale. 2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."

25. Accordingly, I dismiss the application dated May 26, 2022 with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 16<sup>TH</sup> DAY OF MAY, 2023.**

**J.K. SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant - Rutoh**

Mitei for 1<sup>st</sup> Applicant

J. K. Mutai for 2<sup>nd</sup> & 3<sup>rd</sup> Applicant

No Appearance for the Respondent

