



**Yashiniyoya Trading and Construction Company Limited v
Spire Bank Limited & another (Commercial Case E448 of 2022)
[2023] KEHC 17604 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E448 OF 2022
JWW MONG'ARE, J
MAY 12, 2023**

BETWEEN

**YASHINIYOYA TRADING AND CONSTRUCTION COMPANY
LIMITED APPLICANT**

AND

SPIRE BANK LIMITED 1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant has moved to court under a Certificate of Urgency via a Notice of Motion brought under Order 40 Rule 1 of the [Civil Procedure Rules](#), dated November 11, 2022 and supported by the affidavit sworn by George Sammy Nganga, the Managing Director of the Plaintiff, on November 11, 2022. The Applicant seeks the following orders;
 - i. Spent
 - ii. That pending the determination of this, a temporary injunction be issued restraining the Defendants/Respondents from proceeding with the planned public auction on November 22, 2022 through the local dailies on properties LR No Kabete/Karura/2005 and LR No Kabete/Karura/1147 and from offering them for sale or selling them by public auction or otherwise.
 - iii. That pending the hearing of the suit, an injunction be issued restraining the 1st Defendant/Respondent from taking any further steps in the exercise of its statutory power of sale over properties LR No Kabete/Karura/2005 and LR No Kabete/Karura/1147.



- iv. That the statutory notices dated March 16, 2022, July 7, 2022, September 20, 2022 and November 7, 2022 be suspended pending the hearing and determination of the suit.
 - v. That the independent valuation conducted by the Plaintiff/Applicant on November 8, 2022 on properties LR No Kabete/Karura/2005 and LR No Kabete/Karura/1147 amounting to Kshs 40,000,000/- be adopted as the current market value of the properties.
 - vi. Any other orders that the court may deem fit and expedient.
 - vii. That costs of this application be provided for.
2. The application is opposed and the Defendants have filed a replying affidavit sworn by Kenneth Likoko, a Manager of the 1st Defendant.
 3. The Applicant seeks to restrain the Defendant from exercising its statutory power of sale over the properties known as LR No Kabete/Karura/1147 and LR No Kabete/Karura/2005. The Applicant being a company, obtained loan facilities from the Defendant, a banking institution for the sum of Kshs 63,000,000/-. The Applicant further states that it has made substantial progress in repaying the loan but as a result of the Covid-19 pandemic fell into arrears of Kshs 31,714,114.78/- and approached the bank for a moratorium and a restructuring the loan for a new term of 60 months.
 4. The Applicant further states that while the negotiations were ongoing, the Defendant bank issued statutory notices for the sale of the charged properties being LR Nos Kabete/Karura/1147 & Kabete/Karura/2005 and proceeded to advertise the same for sale by public auction through the second Defendant. Both notices have since lapsed and the Plaintiff/Applicant is apprehensive that unless the said action is stayed by way of injunction, the Plaintiff will suffer irreparable loss. The Plaintiff/Applicant faults the conduct of the Defendant in proceeding to issue the statutory notices while negotiations were on course. The Plaintiff/Applicant states that it made several payments as a sign of good faith during the negotiations, as it waited for the moratorium.
 5. Further and in addition to the above, the Plaintiff stated that the advertisement for sale by public auction by the 2nd Defendant did not include a reserve price for the two properties. The Plaintiff alleges that there was no valuation carried out on the properties to determine a reserve price before the intended auction, which action will prejudice the Applicant if the property is sold for less value than it is worth. The Applicant insisted that as per its own private valuation, the properties are worth Kshs 40,000,000/-.
 6. The Applicant further stated that it was willing to liquidate the loan balance in 2,263, 375.00 in 19 quarters if the 1st Respondent approves the restructuring of the loan as requested and that the Defendant will not be prejudiced at all. The Plaintiff/Applicant urged the court to allow the application for injunction. The Applicant cited several authorities to buttress its case.
 7. The Respondent in its opposition to the application for injunction filed a replying affidavit sworn by its manager, Kenneth Likoko. The Respondent submitted that the suit as filed was incompetent and an abuse of the court process. The Respondent submitted that the application failed to meet the threshold for a grant of injunction as per the parameters in *Giella V Cassman Brown & Company Limited*(1973) EA 353 in that it has not even established a *prima facie* case to warrant the court to issue injunctive relief. The Respondent stated that there was no proprietary interest in the charged properties by the Plaintiff and as such, the Plaintiff/Applicant lacked the requisite locus standi to bring this suit against the Defendants.



8. The Respondent further argued that the Applicant/Plaintiff admitted to its indebtedness and neither did it dispute that the requisite statutory notices were issued. The Applicant in seeking the orders of the court does not make any proposal on how it intends to liquidate the loan. Instead, according to the Respondent, the Plaintiff is forcing upon the Respondents, new terms of the loan agreement in asking for the Respondent to accept to restructure the loan and grant the Plaintiff a moratorium. The Respondent urged the court to dismiss the application for lack of merit and allow it to proceed to exercise its statutory power of sale.

Analysis and Determination: -

9. I have considered the pleadings herein and the submissions filed by the parties and I note that the only issue that emerges for determination is “whether the Plaintiff/Applicant has satisfied the criteria for grant of an interim injunction pending the disposal of the suit herein.” From the pleadings herein, I note that the loan is not disputed and neither is there a dispute that the properties being LR Nos Kabete/Karura/1147 & Kabete/Karura/2005 were offered as security to guarantee the repayment of a loan of Kshs 63,000,000/- advanced to the Plaintiff/Applicant by the 1st Defendant/Respondent.
10. I further note that indeed there was part payment of the loan and the loan balance as at the time of filing this suit stood at approximately Kshs 32,000,000/-. I further note that the parties attempted to renegotiate new terms but the same were not conclusive forcing the 1st Defendant to issue statutory notices and requisite demand notices to the chargor and even proceeded to instruct the 2nd Defendant to commence the realization of the charged securities by way of public auction.
11. From the record, and parties admit, there were statutory notices and demand notices issued by the 1st Respondent to the Plaintiff/Applicant. The Plaintiff takes issue with the Respondent for proceeding to advertise the properties for sale while negotiations were ongoing and has asked the court to stop the process by way of injunctive orders as it is willing to settle the loan outstanding in instalment.
12. I have considered the law under which this application has been brought and I note that Order 40 Rule 1 provides as follows;
1. Where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or may be wrongfully sold in execution of a decree; or
 - (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The Courts have overtime laid down the parameters of granting injunctive relief. In the Locus Classica case of *Giella v Cassman Brown Company limited*,(1973) EA 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.”

13. I have considered the application by the Applicant/Plaintiff herein and the response by the 1st Respondent and I note that firstly, the property so charged are not registered in the Plaintiff herein. Instead, they are registered in the name of on Sammy Nganga George who is not a party to these proceedings. I also note that the loan to the Plaintiff is not disputed and neither has the fact the loan is in arrears been controverted by the Plaintiff. What I note is that the Plaintiff wishes to have the court force new terms and condition on the loan repayment by this application by requiring the parties do restructure the loan balance repayment to accommodate it.
14. To my mind and as severally held by the court, parties are bound by the terms and conditions they put in their contracts. This court cannot be called upon to order parties to abide by terms that they did not negotiate to accommodate a defaulting party. This cannot be the basis upon which an order for injunction will be issued.
15. Secondly, having observed that the Plaintiff has no registrable interest in the charged property and that requisite statutory notices were properly issued to the chargor, I find that the Plaintiff has not established a *prima facie* case upon which an order for interim injunction may issue.
16. In conclusion therefore, I find that the application before me is without merit and I shall dismiss the same. The Defendants may proceed to exercise their statutory power of sale as per the law provided. Costs of this application are awarded to the Respondents. It is so ordered.

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

J. W. W. MONG'ARE

JUDGE

In The Presence Of

Mr. Asule for the Appellant.

Mr. Mutua for the Respondent.

Sylvia- Court Assistant

