



REPUBLIC OF KENYA



**Chege v Mwananchi Credit Limited & another (Commercial Civil Suit E799 of 2022)  
[2023] KEHC 19235 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E799 OF 2022**

**FG MUGAMBI, J**

**JUNE 16, 2023**

**BETWEEN**

**PETERSON CHEGE ..... APPLICANT**

**AND**

**MWANANCHI CREDIT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MISTAN AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated November 10, 2022 brought under Order 40 rules 1-4, Order 51 rule 1 of the *Civil Procedure Rules* and sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The orders sought in the application are as follows
  - i. Spent
  - ii. That a temporary injunction do issue pending hearing and determination of this application restraining the Defendants, their agents and/or assigns or any of them from trespassing onto, advertising for sale, disposing of, selling either by public auction or private treaty or otherwise interfering with property Known as Land Reference Number 3593/62 (original number 3593/7/55) registered in the name of Peterson Chege.
  - iii. That an order of injunction do issue pending hearing and determination of the suit herein restraining the Defendants, their agents and/or assigns or any of them from trespassing onto advertising for sale, disposing of, selling either by public auction or private treaty or otherwise interfering with property Known



as Land Reference Number 3593/62 (original number 3593/7/55) registered in the name of Peterson Chege.

- iv. That costs of this application be paid by the Respondent.
2. The application is supported by the affidavit sworn by Peterson Chege, the grounds on the face of it and the submissions dated March 15, 2023. The application is opposed by the respondent vide a replying affidavit sworn by Sylvia Wanjiru Njoroge dated December 1, 2022 and buttressed by the submissions dated March 20, 2023.

### **Analysis**

3. I have carefully considered the application, pleadings, evidence and the rival submissions by parties. There is no contention over the loan facility that was secured by the applicant. The main bone of contention appears to be as to what amount is recoverable from the applicant by the respondent and particularly the 1<sup>st</sup> respondent.
4. It is on record that the facility was for Kshs 3,734,400/= secured from the 1<sup>st</sup> defendant at an interest rate of 7% per month for a period of one year. The facility was secured by the applicant's parcel of land being Land Reference Number 3593/62 (original number 3593/7/55). The applicant's position was that he had paid a total of Kshs 7,050,000/= from the date of disbursement before facing medical problems that led to a spinal surgery and the COVID 19 pandemic which affected his business.
5. The applicant avers that he was willing to pay off the loan and settle the debt. The applicant observed that he had approached the respondent with a proposal to pay Kshs 1,350,000/= which would make the total paid amount to Kshs 8,400,000. The 1<sup>st</sup> respondent commenced the security realization process before this was settled. In the further affidavit sworn on 23<sup>rd</sup> March 2023, the applicant further takes issue with the fact that despite paying a total of Kshs 12,012,038/= the first respondent claimed that the amount owed was Kshs 17,432,173/= making it more than triple what was owed. The applicant contended that the interest charged on the principal amount was against the in duplum rule.
6. The 1<sup>st</sup> respondent confirmed the loan facility and security but stated that the applicant had continued defaulting in repaying the loan facility advanced to him and the amount owing was Kshs 5,540,135.51 which continues to accrue interest. The 1<sup>st</sup> respondent stated further that it issued the applicant with a 90day statutory notice on January 21, 2022 and 45days redemption notice as required by the law. It was contended that the applicant freely offered the suit property as security and any dispute with regards to interest and accounts could not form the basis for issuing an injunctive order. That the defendants had complied with the requisite positions of the law in attempting to sell the suit property by public auction.
7. Against this background, this Court is required to weigh the submissions and facts of each side in the light of the well-known and settled principles for the grant of interlocutory injunction as laid out in the case of *Giella vs Cassman Brown & Co Ltd(1973) EA 385*, at page 360 where Spry J held that  

' The conditions for the grant of an interlocutory injunction are 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.'



8. The first issue is whether the applicant has demonstrated the presence of a prima facie case. For the avoidance of doubt, the purport of a prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, where Bosire, JA offered the following definition: -

'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 as to call for an explanation or rebuttal from the latter a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.'

9. Indeed, I am aware that in determining whether there exists a prima facie case, this court is not required to examine the merits of the case. This court is bound in this respect by the Court of Appeal decision in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR* where the court made the following comments:

' We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

10. The applicant seeks to restrain the 1<sup>st</sup> respondent from exercising its statutory power of sale on the grounds that it had paid a substantial amount of the loan. It questions the unconscionable interest rate stating that the same would be a breach of the in duplum principle. A cursory look of the pleadings and evidence placed before court it is evident that as at May 25, 2021 the principle amount stood at Kshs 17,432,173.51/= out of which the applicant had paid a total of Kshs 12,012,038/= leaving a balance of Kshs 5,420,135.51.
11. The applicant has raised some issues regarding what interest is rightly due, and that could only be ascertained at full trial. The issue of the amount paid based on the in duplum rule is in contest and this brings to light the existing rights, duties and obligations of the parties in the agreement, which the applicant questions. The applicant deserves to be protected by an injunctive order from this court so as to ventilate his position in a full hearing. It is therefore my finding that the applicant has met the first threshold.
12. Does the applicant stand to suffer irreparable injury, which would not adequately be compensated by an award of damages should this application not be granted? The court in *Joseph Siro Mosioma Vs. Housing Finance Company of Kenya Limited & 3 Others (2008)eKLR*, held that:-

' Damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to effuse an



injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.'

13. I concur with the view that a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction. The respondent submitted that the applicant would not suffer any harm that could not be compensated by damages. The applicant on the other hand states that he would be greatly prejudiced by the intended sale as the suit property is his home.
14. Indeed, I am aware of the need to balance the interests of the parties especially because the fact is that a borrower, when placing security for a facility lives with the expectation and knowledge that upon default, the security will be executed to make good his default. While this is so, I note the efforts that the applicant has put in to try and secure the security in the facility and should he be successful in this suit, this effort will stand to be an exercise in futility. This would be different from a situation where there is blatant ignorance of the borrower's obligation. I am of the view that the prejudice to the applicant warrants the grant of an injunction.
15. As such, I find that the balance of convenience tilts in favour of the applicant as he stands to risk greater injustice if the orders sought are not granted.

#### **Determination and orders**

16. The upshot of this is that I find merit in the application dated November 10, 2022 and the same is allowed as prayed. The costs shall be in the cause. I further direct as follows:-
  - i. Parties shall comply with all the requirements to have the suit listed for hearing within 45 days from this ruling. Pre-trials must be completed within the next 30 days.
  - ii. For this reason parties shall therefore prepare for pre-trial conference and appear before the Deputy Registrar, Hon Stephanie Bett on June 20, 2023.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16th DAY OF JUNE 2023.**

**F. MUGAMBI**

**JUDGE**

**Court Assistant: Ms. Lucy Wandiri.**

