



REPUBLIC OF KENYA



**Omusala & another v Absa Bank Kenya PLC (Commercial Case E082 of 2023)
[2023] KEHC 18490 (KLR) (Commercial and Tax) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E082 OF 2023
JWW MONG'ARE, J
JUNE 12, 2023**

BETWEEN

DAVID MBAI OMUSALA 1ST PLAINTIFF

NEW MEGA AFRICA LIMITED 2ND PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. By a Notice of Motion application brought by way of a Certificate of Urgency dated 1/3/2023 under Section 3A and 3B of the [Civil Procedure Act](#), Order 40 Rules 1, 2 & 8 and Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 103, 104 and 105 of the [Land Act](#), Section 52 of the Transfer of Property Act, seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue a temporary injunction order restraining the Defendant by itself, its employees, agents, auctioneers, administrators or receivership managers from advertising for sale, attempting to sell, selling by private treaty or public auction, or in any way trying to conduct or conclude a public auction of all that property known as Title Number 17/267 Original Number 17/36/10 situated in Kitsuru within the City of Nairobi and further restrain them from exercising their rights under the All Asset Debenture instruments dated 25th August 2020 and the further Debenture dated 10th May 2021, in exercise of the Defendant's statutory power of sale or the rights under the Debentures pending the hearing and determination of the suit.



- d. That an order be issued under Section 52 of the Transfer of Property Act preventing the sale and Transfer of this suit title Number 17/267 Original number 17/36/10 situated in Kitsuru within the City of Nairobi to a third party pending active litigation.
 - e. That costs of this application be in the cause.
2. The application is supported by the grounds set within it and the supporting affidavit of David Abai Omusala, the 1st plaintiff and the Managing Director of the 2nd Plaintiff who is also the registered owner of the property known as Title Number 17/267. The application is opposed and the Defendant has filed a replying affidavit sworn by Joseph Okello on 21st March 2023.

Applicants' Case: -

3. The 1st Applicant is the Managing Director of the 2nd Applicant and a Guarantor of the loan advanced to the 2nd Applicant by the Defendant. It is admitted by the Applicants/Plaintiffs that the Defendant/Respondent advanced to the 2nd Applicant/Plaintiff various banking facilities totaling Kshs.72,000,000/- and that the 1st Applicant/Plaintiff as part of the security for the loan offered his property known as LR. No. 17/267 Original number 17/36/10 situated in Kitsuru within the City of Nairobi among other securities provided.
4. The Plaintiffs aver that they have enjoyed a good client - bank relationship since 2019 and that the Defendant has supported the various contracts with their clients to whom they offer transportation services by on request availing various bank products and in return the Plaintiffs' have ensured that all payments for their services to their clients have been serviced through the accounts with the Defendant.
5. The Plaintiff further states that as a result of the covid-19 pandemic, the Plaintiffs' business suffered major financial setbacks leading to delays in servicing the various facilities at the Defendant bank. Subsequently, they sought to restructure their repayments, which restructuring took a long period of time to come through and hence occasioning the default in the loan repayment with the Defendant. The Plaintiffs allege that part of the delay was occasioned by malice and sabotage by some of the Defendant's employees who attempted to frustrate the Plaintiffs' business by leaking confidential business information to their competitors and hence damaging their credibility and image in the business sector. The Plaintiffs allege that this information was shared with the Defendant.
6. In their submissions, the Plaintiffs aver that they are keen on settling the loan advanced to them and they have resumed the repayment of the agreed instalments at Kshs.1,500,000/- and are able, given time, if the relationship has broken down, to move to another institution to obtain a loan to offset the borrowing from the Defendant and for the Plaintiff to continue its operations. The Plaintiffs state that if the Defendant is allowed to proceed with the realization of its securities under the statutory power of sale, the same will occasion them irreparable harm and may lead to insolvency and/or bankruptcy. That the Plaintiff will be rendered homeless if the charged property is sold as the same is a matrimonial property where the 1st Plaintiff and family reside.

The Respondent's Case: -

7. The Respondent has opposed the application and filed a replying affidavit sworn by Johnson Okello, a staff of the Defendant. In its opposition, the Respondent aver that indeed it advanced various banking facilities to the 2nd Plaintiff and the same were secured by various securities including a legal charge over the 1st Plaintiff's property known as 17/267 Original number 17/36/10 situated in Kitsuru within the City of Nairobi.



8. The Defendant has denied the allegations that it attempted to frustrate the Plaintiffs' request for restructuring when the loan ran into default and confirms having acceded to the request and allowed the Plaintiff to make payments of the new loan terms at Kshs.1,619,039/- per month in order to service the loan which now stands at Kshs.92,859,126.05/- as at the time of filing this suit. The Defendant further states that because the 1st Plaintiff has defaulted in making regular loan repayments as per the various agreements, then the Defendant's statutory power of sale has crystalized and it is within its right to proceed and sell the charged the property in order to recover the loan balance.
9. The Defendant further argues that all the necessary statutory notices and demands as envisioned by law have been properly issued to the Plaintiff's and the 1st Plaintiff's spouse since the charged property is deemed matrimonial property. Accordingly, the Defendant argues, that the Plaintiffs cannot move to court to stop the sale since once charged the property became a chattel for sale and it is within the law to advertise for sale by public auction of the charged property. The Defendant has denied the allegations of acts of sabotage by its staff to the Plaintiff's business and avers that it acceded to all the requests by the Plaintiffs save that the Plaintiffs delayed in availing necessary documents hence the delay in agreeing to the restructure arrangement.
10. Accordingly, the Defendant is urging the court to dismiss the application and allow it to proceed to enforce its statutory power of sale as per the law.

Analysis and Determination: -

11. I have considered the pleadings and the submissions together with the list of authorities 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 set out above. The first step is to establish whether a prima facie case has been established. In the case of *Mrao Limited vs. First American Bank & 2 others* (2003) eKLR, Justice Bosire observed as follows;

"So what is a prima facie case? I would say in Civil Cases, it is a case which on 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 a rebuttal from the latter...The evidence must be that of an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly the standard, which is higher than an arguable case."
13. From the evidence availed to the court by the parties, the following fact pattern emerge. Firstly, I note that it is not disputed that the 2nd Plaintiff obtained several banking facilities over a period of time totaling Kshs.72,000,000/- and the same has attracted interest and as at the time of filing this suit the loan balances stood at Kshs.92,859,126.05/-. It is the Plaintiffs' contention that with the support of



the Defendant through making available various banking products including bank guarantees to access credit for fuel of their trucks, their transportation business has grown exponentially and that to allow the bank at this point to recall the facility and sell off the charged properties, will occasion it great loss and lead it to insolvency at the very least. The Plaintiff have given an elaborate breakdown on the various contractual obligations they have committed themselves to but most importantly confirm and commit to continue meeting their obligations given time to do so. In any event the Bank holds an all asset debenture on the assets of the 2nd Plaintiff which allows it to move in legally and manage the business in a way to rescue it and pay itself from the proceeds. I have not seen placed before me any evidence by the defendants that it considered this option before moving to advertise for sale by public auction the guarantor's property. I am therefore persuaded that the application meets the first test on establishing a prima facie case with a likelihood of success.

14. The second parameter that the court ought to consider before granting orders for interim injunction is whether the Plaintiff will suffer irreparable harm if the Defendants are allowed to proceed with the sale of the charged property. In Halsbury's Laws of England [Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that: -

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

15. I am alive to the legal doctrine established in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR that “once property is offered as security it by that very fact becomes a commodity for sale”. However, I believe that a court of law in seeking to allow a bank to exercise its statutory power of sale over charged property must consider other factors that are uniquely applicable in each case. In the case before me, the charge over the suit property LR. No. 17/267 Original number 17/36/10 situated in Kitsuru within the City of Nairobi, is not the only security available to the Defendant to realize the repayment of its loan, in the event of a default by the Plaintiff. The bank has in its possession an All Asset Debenture which is yet to crystalize as the Defendant has not moved to claim their rights over all the assets of the 2nd Plaintiff. The 2nd Plaintiff, has demonstrated that it hold various contracts and its reputation will be damaged if it will be seen by its customers as being unable to meet its financial obligation. Other than the suit property is also the matrimonial property and home of the 1st Plaintiff, to my mind, a sale advertised by was of public auction will damage the business image of the 2nd Plaintiff and lead to collapse of its transportation business and has the potential of completely paralyzing the Plaintiffs' business to render it to insolvency, leading to a damage that may not be adequately compensated by damages and therefore I am persuaded that the application meets the 2nd test of irreparable harm.
16. Finally, the court is to consider where the balance of convenience lies in granting an order of injunction. As stated above, the Applicants have demonstrated that they have all along been willing to pay the loans granted to them by the Defendants and all that they required was the Defendant to allow them time



to recover from the covid pandemic interruptions by allowing them new terms under a restructured agreement. On the other hand, the bank holds, over and above the legal charge over the suit property, an All Asset Debenture over the assets of the 2nd Plaintiff and they have not yet moved to invoke their legal rights under the said securities. I am persuaded therefore in this instance and considering all factors of this case, the balance of convenience tilts in favour of the Applicants.

17. In conclusion and taking into all the facts surrounding this case, I find and hold that the application has met the threshold set for a grant of an order of Interim Injunction and I shall grant it, with costs to the Applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023

J. W. W. MONGARE

JUDGE

In the Presence of:-

- 1) Mr. Simiyu for the Applicant.
- 2) Ms. Waihinya for the Respondent.
- 3) Sylvia- Court Assistant

