



Kenyua v National Commercial Bank of Africa Limited & another (Civil Case E014 of 2022) [2023] KEHC 21149 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E014 OF 2022
SN MUTUKU, J
JULY 18, 2023**

BETWEEN

TUNDU KENYUA APPLICANT

AND

NATIONAL COMMERCIAL BANK OF AFRICA LIMITED .. 1ST RESPONDENT

VINTAGE AUCTIONEERS 2ND RESPONDENT

RULING

1. By a notice of motion (the application) dated August 1, 2022, Tundu Kenyua, the applicant, has moved this court under various provisions of the law seeking the following reliefs against the respondents:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of this suit, this honourable court be pleased to grant a temporary injunction restraining the defendants by themselves, servants, agents, auctioneers, employees or assigns or any of them acting on their own behalf from purporting to sell, alienating, disposing of, completing the sale or in any way alienating, taking possession, transferring or dealing or interfering with the proprietary interest in the suit property known as Title Number Ngong/Ngong/66784 and Ngong/Ngong/66785.
 - iv. That the costs of this application be provided for.
2. The grounds in support of the application are found on the face of it and in the supporting affidavit. Summed up, the grounds in support of the application are that the applicant was advanced a loan facility by the 1st Respondent amounting to Kshs 9,000,000 in February 2018 on the strength of her properties Ngong/Ngong/66784 and 66785; that a legal charge was registered over the two parcels of



- land in favour of the 1st respondent to remain in force until payment of the loan; that the applicant was to repay the loan in monthly instalments of Kshs 130,000 at an interest rate of 14% per annum and that she serviced the loan by paying over Kshs 2,500,000.
3. The applicant claims that the 1st respondent through its earlier auctioneers, Purple Royal Auctioneers, served her with notification of sale and a 45 days redemption notice both dated March 5, 2020 demanding payment of the outstanding amount failing which her charged parcels of land would be sold by public auction. She claims that she received a courtesy notice from the auctioneers that the properties would be advertised in the Daily Nation prior to the sale by public auction on April 26, 2022 without sharing with her any valuation report or indicating to her the market and/or forced value they intended to sell the properties for.
 4. She further claims that the sale did not take place and that there was no communication from the auctioneer or the 1st respondent; that she became aware on July 29, 2022 that the 1st respondent had replaced the Purple Royal Auctioneers with the 2nd respondent who had proceeded to unlawfully advertise the sale of the properties in the Daily Nation of July 25, 2022 for a public auction slated for August 2, 2022.
 5. It is the applicant's case that that the respondents have contravened section 97 of the Land Act by grossly undervaluing the properties to Kshs 9,000,000 and Kshs 10,000,000 respectively contrary to the market value of Kshs 14,000,000 and Kshs 16,000,000 respectively according to the valuation done by Centenary Valuers in 2020. It is her case that the 1st respondent owes a duty of care to the applicant as stipulated in section 97 (1) (2) (3) and (4) of the Land Act.
 6. The applicant accuses the 1st respondent of failing to conduct a reconciliation of the applicant's loan accounts and that without true and accurate account, the 1st respondent's right to statutory power of sale cannot be said to have accrued. She has stated that she is willing to pay any outstanding loan arrears provided that the 1st respondent renders a true and accurate account after reconciliation of accounts. She has stated that she has met the threshold for grant of a temporary injunction and therefore it is in the interest of justice that this application be allowed.

The 1st Respondent's Case

7. The application is opposed through the replying affidavit purported to have been sworn by Ibrahim Ngatia but signed by one Jackson King'ori on September 2, 2022. The gist of the grounds in opposition is that the applicant has admitted charging her two parcels of land, Ngong/Ngong/66784 and 66785 in favour of the 1st Respondent to secure a loan facility of Kshs 9,000,000 advanced to her; that the applicant has defaulted in servicing the loan facility as a result of which the 1st respondent issued her with requisite statutory notices being a 30 day notice in form of a demand letter dated June 24, 2019 under section 90 of the Lands Act, a statutory 90 days' notice dated August 22, 2019 under section 90 of the Lands Act and notice of intention to sale after the expiry of 90 days dated December 3, 2019.
8. It is the 1st Respondent's case that from December 3, 2019 to March 5, 2020, the applicant remained silent and ignored or refused to regularize the loan account necessitating the 1st respondent to take action and instruct their then auctioneers, Purple Royal Auctioneers, to proceed to exercise its statutory power of sale. The said auctioneers issued the applicant with 45 days' notice urging her to remedy the default, but the applicant did not do so.
9. It is the 1st respondent's case that the applicant has admitted being in default but despite that knowledge, the applicant has failed or refused to remedy the default; that the applicant has not demonstrated that she has met the threshold to warrant the reliefs she is seeking and that as at August



4, 2022, the applicant was indebted to the 1st respondent to a sum of Kshs 8,959,424.05. It is the 1st respondent's argument that the applicant has not demonstrated that she would suffer irreparable harm if the orders sought are not granted and that a lawful course of action such as the exercise of statutory power of sale provoked by the applicant's non-payment of the outstanding sums on the loan cannot be said to constitute harm in the legal sense.

10. The 1st respondent asserts that it followed the law in issuing all the statutory notices and therefore the applicant's application dated August 1, 2022 is incompetent, vexatious, an abuse of court process and devoid of merit and ought to be dismissed with costs.

Submissions

11. Parties filed submissions in compliance with the court directions issued on January 19, 2023. The applicant's submissions are dated March 10, 2023. I have read the submissions. The applicant has stated that the replying affidavit of the 1st respondent is fatally defective and offends the provisions of section 5 of *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya for reasons that it is authored by one Ibrahim Ngatia but the name in the jurat is Jackson King'ori. Further, the applicant submitted that the replying affidavit does not state the place where the affidavit was made. The applicant asked the court to expunge the affidavit from the record.
12. On the issue of defective replying affidavit, the applicant relied on *Mary Gathoni & another v Frida Ariri Otolu & another* [2020] eKLR; *Regina Munyiva Ndunge v Kenya Commercial Bank Limited* [2005] eKLR and *CMC Motors Group Limited v Bengeria arap Korir T/a Marben School & another* [2013] eKLR.
13. The applicant submitted on whether the respondents followed due process as provided under the *Lands Act*. According to her, the respondents failed to follow the law in serving her with requisite statutory notices and that her property has been undervalued.
14. She further submitted that she has met the threshold for grant of a temporary injunction by establishing a *prima facie* case with a probability of success by demonstrating that the respondents failed to serve her with notices as required by the law and that the 1st respondent has not discharged its duty of care under section 97 of the *Lands Act* in undertaking a valuation to determine forced sale value and that there are disparities in the amounts outstanding.
15. The applicant submitted that she stands to suffer irreparable loss that cannot be compensated by an award of damages in that she will not only risk losing her property but also pay the 1st respondent punitive and exaggerated amounts in the guise of loan arrears because the 1st respondent has failed to render a true account of the loan accounts. She further submitted that the balance of convenience lies in her favour.
16. On the applicant's claim that she was not issued with statutory notices, she relied on *Anne Wachisi Sifuna & another v I & M Bank Limited & 2 others* [2021] eKLR, *Koileken Ole Kipolonka Orumos v Mellech Engineering & Construction Limited & 2 others* [2018] eKLR, *Giella v Cassman Brown & Company Limited* [1974] EA 358 and *Mrao v First American Bank (CA)* [2003] eKLR, among others.
17. The 1st Respondent's submissions are dated March 28, 2023. The issues framed in the 1st respondent's submissions can be summarized as follows: whether the replying affidavit dated September 2, 2022 is defective and whether the applicant has met the threshold for granting of a temporary injunction.
18. On the Replying affidavit, the 1st respondent has admitted the anomalies in its replying affidavit and explained that the deponent is Jackson Kingori and not Ibrahim Ngatia, both legal officers of the 1st



respondent who interchangeably execute affidavits on its behalf and that the names were erroneously interchanged while preparing the affidavit. It was submitted that the anomaly was not cured early enough because it was only raised after the court directed that submissions be filed. It was submitted that order 19 rule 7 of the *Civil Procedure Rules* gives this court powers to receive affidavits such as this one notwithstanding irregularities in form for ends of justice to be met.

19. It was submitted, further, that courts have held that absence of the place where the oath was taken in the jurat cannot render the affidavit defective if it does not prejudice the applicant. The 1st respondent relied on *Lazaro Kabebe v Ndege Makau & another* [2004] eKLR and *SDV Transami (K) Limited v Steve Andrade* [2022] eKLR.
20. It was submitted that the replying affidavit does not prejudice the applicant in any way; that it was an honest mistake for having Ibrahim Ngatia appear in the replying affidavit and that failure to indicate the place where the affidavit was deponed in the jurat does not go to the root of the application and/or prejudice the applicant.
21. On whether the Applicant has met the threshold for granting of temporary injunction, it was submitted that the Applicant has not demonstrated a prima facie case. While citing *Mrao Ltd*, it was submitted that the Applicant's case is not arguable and has no chance of success for reasons that the Applicant has admitted that her property was charged with the 1st Respondent for a loan facility with the salient term that the loan repayment installments would be paid timely and diligently as and when they fell due but the Applicant failed to pay monthly installments. It was submitted that the Applicant was at all times aware that she had fallen into arrears necessitating issuance of demand notices to her.
22. It was submitted that the property was valued as required by the law and was advertised by an agent of the 1st Respondent. It was submitted that on the face of the record the Applicant has defaulted on the loan repayments and that the 1st Respondent served all the statutory notices required by the law on the Applicant. the 1st Respondent relied on *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.
23. It was submitted that the Applicant has not demonstrated any irreparable injury that cannot be compensated by way of damages by the 1st Respondent; that the value of the suit property can be easily ascertained with reasonable accuracy for compensation by way of damages and therefore no irreparable harm could result if the orders sought are not issued. Citing *Nguruman* case, the 1st Respondent submitted that it is now settled that a temporary injunction will not be issued when compensation by way of damages can suffice.
24. It was submitted that the Applicant having failed to establish prima facie case or any irreparable injury by way of evidence, the balance of convenience tilts against the issuance of the orders sought and in favour of the 1st Respondent. It was submitted that the Applicant has blatantly failed to regularize the loan account despite statutory notices and therefore she is not worthy of the equitable orders she is seeking; that the 1st Respondent followed the law and that the application before the court is frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs to the 1st Respondent.

Analysis and Determination

25. I have considered the issues raised by both parties in their pleadings, the authorities cited by each party and the applicable law. The issues before me which require my input in determining, to my understanding, relate to whether the Replying Affidavit of the 1st Respondent is defective and whether the Applicant has satisfied the principles for granting temporary injunctions.



26. What is not disputed is that the Applicant borrowed money from the 1st Respondent to the tune of Kshs 9,000,000 and a charge over her two parcels of land, Ngong/Ngong/66784 and 66785, registered in favour of the 1st Respondent. It is also not disputed that the Applicant has fallen in arrears.
27. Section 5 of the [Oaths and Statutory Declarations Act](#) Cap 15 Laws of Kenya, provides that:
- "Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."
28. The Applicant has cited the above provisions and authorities to support her submissions that the 1st Respondent's Replying Affidavit is defective. I have considered this issue against the submissions by the 1st Respondent that this court has discretionary powers donated to it by Order 19 Rule 7 to receive affidavits such as the one before this court. Order 19 Rule 7 of the [Civil Procedure Rules](#) provides that:
- "The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."
29. I have considered this issue in light of the explanations offered by the 1st Respondent and the authorities cited. I accept the explanations offered as plausible. To my mind, the anomalies in the Replying Affidavit are not prejudicial to the Applicant given the issues at hand. There is no dispute that the Applicant borrowed money from the 1st Respondent and defaulted in repayments. This has been admitted by the Applicant, her only issue being her claim that the 1st Respondent has undervalued her properties. For the above reasons, I decline the invitation by the Applicant to declare the 1st Respondent's Replying Affidavit defective or to expunge it from the court record. I agree with the court in *SDV Transami (K) Limited* case cited by the 1st Respondent that the anomalies in the Replying Affidavit are not so fundamental as to justify striking out the said Affidavit.
30. On the issue as to whether the Applicant has met the threshold for grant of a temporary injunction, I have considered the submissions of each party. The Applicant holds the view that she deserves the reliefs sought because she has met the threshold. The 1st Respondent, on the other hand, argues that the Applicant has not met the threshold.
31. The 1st Respondent asserts that it followed the law and served the Applicant with all the necessary statutory notices in the process of recovering its money. I have seen and read Demand Notice dated June 24, 2019 giving the Applicant 30 days' notice to pay the outstanding arrears (marked 'B-1'); three (3) months' statutory notice dated August 23, 2019 (marked 'B-2'), forty (40) days statutory notice of sale dated December 3, 2019 (marked ('B-3'), Auctioneers Forty Five days' redemption notice (marked 'C-3') dated March 5, 2020 and notification of sale bearing same date.
32. I have noted that the Applicant has said nothing about the statutory notices served on her by the 1st Respondent except the acknowledgement of the auctioneer's redemption notice and notification of sale. The Applicant has not denied service to her of the notices referred to above. I have noted that they all bear her postal address contained in the charge document, being P O Box 72327-00200 Nairobi. It is my considered view, therefore, that the Applicant was served with the statutory notices. There is nothing from the Applicant's side to show that she took any steps towards making good the default. She has not demonstrated taking any action towards servicing the loans. She has continued defaulting in servicing the loan facility.



33. The Court of Appeal, in *Mrao Limited* described a prima facie case in the following terms:

“In civil cases, a *prima facie* case 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 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, but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

34. It is clear to my mind that the Applicant’s case has not met the above threshold. It is my view that the Applicant has failed to demonstrate a case that fits the above description. The Applicant is aware that she is in arrears. It is also clear that demand notices have been served on her. I have not found any claim that she was never served with the statutory notices in compliance with section 90 of the *Land Act*. She has not demonstrated any efforts on her party to rectify the default. My view is that the Applicant has not demonstrated that she has a right which has been or is threatened with violation. This is not discernible from the face of the evidence presented.

35. The Court of Appeal in *Nguruman* case 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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

36. Given that the Applicant has not, in my view, demonstrated a prima facie case, then I need not consider the other two limbs of irreparable injury and balance of convenience. However, even if I were to extend my determination to the remaining requirements, it is my considered view that after careful analysis of the material placed before me, it is my finding that damages would be an adequate remedy and that the 1st Respondent is capable of paying damages should this become necessary. My view is that the Applicant has failed to demonstrate irreparable injury that cannot be compensated by an award of damages.



37. On a balance of convenience, it is clear to me that the Applicant has blatantly failed to regularize the loan account despite her being aware that she is in default and despite having been served with notices to that effect. For this reason, she cannot claim that the balance of convenience tilts in her favour. To the contrary, it is my view that the balance of convenience tilts in favour of the 1st Respondent.
38. Consequently, the Applicant has failed to persuade this court that she deserves the orders she is seeking in this application. She has failed to demonstrate that she has a *prima facie* case. She has failed to demonstrate that she stands to suffer irreparable injury incapable of being compensated by an award of damages and she has failed to demonstrate that the balance of convenience tilts in her favour. As a result, the application dated August 1, 2022 is hereby dismissed with costs to the 1st Respondent.
39. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JULY 2023.

S. N. MUTUKU

JUDGE

