Kimutai v Mwananchi Credit Ltd & another (Commercial Case E003 of 2023) [2023] KEHC 19504 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

COMMERCIAL CASE E003 OF 2023

RN NYAKUNDI, J

JULY 4, 2023

BETWEEN

ALBERT KIMUTAI ..... PLAINTIFF

AND

MWANANCHI CREDIT LTD ..... 1ST DEFENDANT

MISTAN AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. By anotice of motion dated May 31, 2023, the applicant seeks the following orders: -

    1. Spent.

    2. That pending the hearing and determination of this application inter-parties, an order of temporary injunction be and is hereby issued restraining the 1st defendant/respondent whether by himself, employees, servants and or agents or otherwise assigns and or person whatsoever acting on his behalf and or under his mandate and or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Eldoret Municipality Block 8/589.

    3. That pending the hearing and determinationof the main suit, an order of temporary injunction be and is hereby issued restraining the 1st defendant/respondent whether by himself, employees, servants and or agents or otherwise assigns and or person whatsoever acting on his behalf and or under his mandate and or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Eldoret Municipality Block 8/589.

    4. That costs of this application be provided for.

2. The application is premised on the grounds therein and it is further supposed by the affidavit sworn onMay 31, 2022 by Albert Kimutai, theapplicant herein.

The Applicant's Case

3. The applicant deposed that he is the registered owner of parcel of land known as Eldoret Municipality Block 8/589 measuring 0.1825hectarres (hereinafter referred to as the suit property). The applicant further deposed that the said property is developed with various commercial establishment including a permanent staff quarter, car yard office and ablution block.

4. The applicant deposed that on or about March 4, 2022, he approached the 1st respondent for a loan facility for purposes of business expansion whose interest rate was capped at 8% per month for a period of 10 calendar months at a reducing balance. That the loan was approved on April 4, 2021 and was scheduled to run till January 4, 2022. The monthly repayments was Kshs 147,540/=.

5. The applicant added that on or about November 11, 2021, he approached the 1st respondent for another loan facility of Kshs 1,000,000/= which was disbursed to his account for the purpose working capital. The applicant further deposed that the loan facility of Kshs 1,000,000/= attracted an interest of 8% per which totalled to Kshs 80,000/= per month on a reducing balance and that the term of the loan facility was for a period of 10 calendar months with no grace period.

6. According to the applicant in good faith, he continued servicing the loan by paying the interest and the principal amount as per the terms of the loan without default.

7. However, the applicant alleges that the 1st respondent has been in a habit of shifting goal posts in as far as the interest rates are concerned and thus, he cannot be in a position to know the accurate interest rate.

8. The applicant deposed that on April 24, 2023, the 2nd respondent served him with a (45) days redemption notice and that he was surprised to learn from the redemption notice that he ought to pay Kshs 4,173,998/=, a sum that is inordinately high. The applicant contends that he has made every effort to service the loan but the said amount keeps increasing. The applicant alleges that the respondent have hatched a well calculated scheme to illegally and fraudulently grab his piece of land whose value is Kshs 40,000,000/=.

9. According to the applicant the 1st respondent's demand of Kshs 4,173,998/= amounts to unjust enrichment and offends the principle of in duplum rule. The applicant maintains that respondents shall suffer no prejudice if the orders sought herein are granted. In strengthening the material evidence in support of grant of interlocutory injunction learned counsel invited the court to appreciate the guiding principles in the following case law: *Giella v Gassman Brown & Co* [1973] EA 358, America Bank of Kenya Ltd & 2 others [2003] eKLR *Hoffman La Roche & Co Industry v Secretary of State for Trade and Industry* [1975] AC 295 at 355 (HL) Films Rover Internationale [1986] EALL, ER *Bonde Nielsen & 2 others* [2014] Eklr, Civil Appeal No 252 of 2009 *Kenya Hotels Limited v Oriental Commercial Bank Ltd (Formerly known as the Delphis Bank Limited* [2019] Eklr, environment & land case No 927 of 2017 *Wilfed Omondi Opiyo v Mwaanchi Credit Limited* [2018] eKLR , civil appeal No 30 of 2018 *Mwambeja Banching Company Limited and another b Kenya National Capital Corporation* [2019] Eklr & civil case No 145 of 2019 *Francis Mbaria Wambgu v Jijenge Credit Limited & another* [2020] eKLR.

1st Respondent's Case

10. The application was opposed vide a replying affidavit sworn onJune 15, 2023, by Sylvia Wanjiru Njoroge, the 1st respondent's legal officer who deposed *inter alia* that the applicant is guilty of latches,

concealment of material facts and has deponed half-truths in his affidavit and has indeed concealed the real issues.

11. She further deposed that it is indeed true that the applicant herein approached 1st respondent for two loans which were secured by a charge on parcel of land known as Eldoret Municipality Block 8/589. That the applicant *vide* a loan agreement dated March 5, 2021, took a loan of Kshs 990,000/= which was to be repaid in 10 monthly instalments of Kshs 147,540/= which payment included the repayment of the principal amount borrowed together with the interest. Further, the applicant vide a loan agreement dated November 11, 2021, took a loan of Kshs 1,000,000/= which was similarly secured by the suit property herein and was to be repaid in 10 monthly instalments of Kshs 149,030/= which payment also included the principal amount borrowed together with the interest.

12. She further deposed that as a term of the loan agreement the applicant was to be charged an interest rate of 8% on reducing balance till payment in full but in both the letter of offer and the loan agreements there are provisions for penalty interest at the rate of 5% per week for default in payment of any one instalment or underpayment and till the same is cleared and which provisions are contained under clause 5 of the loan agreement and clause 2 of the letter of offer respectively.

13. She maintains that the applicant is and has been in breach of his loan obligations for the loan dated March 5, 2021, as the loan ought to have been fully settled way back in January, 2022. She further contends that the applicant herein has defaulted by not repaying the monthly instalments at all or by making late underpayments, all which attracted weekly penalty interest and which remains unpaid to date.

14. She further deposed that a scrutiny of the loan statement herein will reveal that the plaintiff/applicant was in default from the very first month and that his loan repayment cheque bounced and that he further either totally defaulted and whenever he paid the particular instalments, they were either late or unpaid and was thus in all those instances charged penalty interest as per the loan agreement and the letter of offer.

15. She further deposed that the applicant herein is and has been in breach of his loan obligations for the loan datedNovember 11, 2021, as the said loan ought to have been fully settled in August, 2022 but he similarly defaulted by not repaying the monthly instalments at all or by making late underpayments, all which attracted weekly penalty interest and which remains unpaid to date.

16. She reiterated that a scrutiny of the loan statement herein will reveal that the plaintiff/applicant was in default from the very first month and that his loan repayment cheque bounced and that he further either totally defaulted and whenever he paid the particular instalments, they were either lateor unpaid and was thus in all those instances charged penalty interest as per the loan agreement and the letter of offer.

17. She further deposed that from the above it is apparent that the applicant herein never honoured his loan obligations at all and that the terms and or the duration of his loan ended with the same being in arrears which he has never bothered to make good. She further maintains that the loan arrears ad all amounts due have been calculated as per the loan agreement which he breached by defaulting in making the requisite repayments thus resulting in the amount owing which amount is perfectly legal. She further maintains that the plaintiff/applicant is the author of his own problems.

18. According to the 1st respondent, the applicant is not being sincere when he alleges that the illegal penalties and interests have been levied as he has not despite having the loan statements, letter of offer and the loan agreement pointed out any single illegal or hidden charge, interest charged or added to his loan account/arrears.

19. She added that upon default the 1st respondent in exercise of its rights as laid out in compliance with the loan commenced the process of realizing the security charged to recover the loan arrears and in doing so sent out all the statutory notices and notifications to the applicant who ignored the same and did not regularize his loan account but chose to approach the court herein for the reliefs sought.

20. She maintains that the applicant's claims that the 1st respondent has offended the duplum rule by demanding an amount more than the principal amount loan is untrue as the 1st respondent herein is not bank nor Micro Finance and neither does it operate under the *Banking Act* or even section 44 of the said Act. She further contends that the applicant herein has not made any plausible explanation on why he defaulted and has not faulted the realisation process as irregular but is using the issue of interest to get reprieve from his contractual obligations. She added that the applicant's loan arrears continue to accrue interest due to the default on repayment of the principal amount borrowed, interest, penalties and repossession expenses which are likely to continue accruing and occasioning the 1st respondent further losses.

21. She further deposed that the 1st respondent herein is a financial institution and thus capable of compensating the applicant at the end of the suit if he is successful and further maintains that that since the valuation of the said property reveals that the value is more than the arrears owed, he will not incur a total loss as he's entitled to the remainder of the sale proceeds after deduction of the arrears and expenses.

22. She added that the present application was made in bad and is an abuse of court process and that the applicant's prayer seeking to restrain the 1st respondent from auctioning the charged land when he is clearly in arrears is tantamount to asking the court to rewrite the terms of the loan agreement and thus denying the 1st respondent the exercise of its rights.

23. According to the 1st respondent, the court herein cannot interfere with the terms of a written contract and can only interpret and give effect to the terms therein. She therefore argued that the applicant herein has not pointed out any illegalities in the terms contained therein or any vitiating factors like undue influence, misrepresentation or coercion to warrant any interference by the court. Further that the applicant has not pleaded any fraud or use of coercion or misrepresentation on the part of the 1st respondent in formulating the terms and the signing of both the offer letter and the loan agreement and or the calculation of the loan arrears, interest and penalties accrued. She maintained that the loan agreement was signed by the applicant on his free will and full comprehension of the terms and the consequences for the breach thereof. Learned counsel for the respondent vehemently opposed the application on grounds that the critical threshold for grant of interlocutory injunction has not been met. He cited and relied on the dictum in the following authorities: The American case of *Cynamid Co v Ethicom Ltd* [1975] A AER, *Giella v Gassman Brown & Company Limited* EA 358 (Supra), *Robert Mugo Wa Karnja C Ecobank (Kenya) Limited & another* [2019] Eklr, *National Bank of Kenya Ltd v Pipeplastic Samokoit (K) Ltd & another*, *Kitur v Standards Chartered Bank & 2 others*, In *Nguruman Ltd B Jan Bonde Nielsen & 2 others*, civil appeal No 77 of 2012, & *Paul Gitonga v Gathuthi Tea Factory Limited*.

24. The application was canvassed by way of written submissions. Both parties filed their respective submissions which I have duly considered.

Analysis and Determination

25. The main issue for determination is whether the plaintiff/applicant has made out a case for the granting of orders of temporary injunction. The hallmark of the notice of motion by the applicant is deducible from the dictum of *Downsview Nominees Ltd v First City Corporation* [1993] AC 295

Instructive .At page 312 Lord Tempeman stated: "several centuries ago equity evolved principles for the enforcement of mortgages andthe protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and manager appointed by the mortgagee." [my emphasis] "If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor."

26. Subsequently, learned authors Fisher and Lightwood's Law of Mortgage went a step further to state as follows: "The mortgagee will not be restrained from exercising his power of sale because the mortgagor has commenced a redemption action or because he objects to the arrangement for sale or because the amount due is in dispute. But he will be restrained, if before there is a contract for sale or the mortgaged property the mortgagor pays into court, the amount claimed to be due, that is the amount the mortgagee swears to be due to him for principal, interest and costs.

27. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the court restated the law as follows:

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) ally 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

28. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules 2010* which provides that:

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 wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure cap 21 [subsidiary] C17 – 165;

(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."

29. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely: -

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

30. The important consideration before granting a temporary injunction underorder 40 rule 1 of the *Civil Procedure Rules* is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court isin such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st respondent does not deny that it has set in motion the process of realizing the security offered by the plaintiff for the debt. The 1st respondent however contends that it has a legal right to exercise a statutory power of sale, whereas the plaintiff/ applicant challenges such a right while contending that the figures given are grossly overstated.

31. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, [2003] KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR,the Court of Appeal defined a *prima facie* case as: -

> " Aprima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

32. The applicant's main contentionis that the outstanding loan amount is grossly overstated. I find that it is trite law that a dispute as to the outstanding loan amount cannot be a ground for granting an order of injunction. This is the position that was adopted in *Mrao Limited v First American Bank of Kenya Ltd & others* (supra)where the court addressed itself thus: -

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the

mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

33. In the present case, it is not disputed that the applicant approached the 1st respondent on March 5, 2021, for a loan facility of Kshs 990,000/= and subsequently on November 11, 2021 for a loan facility of Kshs 1,000,000/= with him provided parcel of land known Eldoret Municipality Block 8/589 as security for the two loan facilities. From the evidence on record it is not also disputed that the applicant fell into arrears on the loan repayments thus occasioning the 1st respondent's move to exercise of its statutory power of sale of the suit property. I note that even though the applicant states that he has been faithfully servicing the loan, no material was placed before the court to confirm this. Indeed, the 1st respondent demonstrated, through various annexures, that the applicant did not try to make good the default. The applicant further did not also demonstrate that he is ready, able and willing to continue servicing the loan.

34. From the above analysis it is evident that the applicant has not established a prima facie case so as to warrant the granting of the orders of injunction. Needless to say, it is trite law that he who comes to equity must come with clean hands and in thiscase, the applicant cannot be said to have clean hands owing to the existing outstanding debt. I am guided by the decision of Ringera J. (as he was then was) in the case of *Showind Industries v Guardian Bank Limited & another* [2002] 1 EA 284 where the learned judge stated as follows: -

> " an injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of court of equity or his equity has been defeated by laches"

34. Having found that the applicant has not established a *prima facie* case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. It is no part of the court function at this state of the proceedings to try to dissolve conflicts of evidence as to facts on which the dispute of either party may ultimately repent nor to decide difficult questions of law which call for detailed augments and mature considerations. I also reiterate in addition to those factors adverted to elsewhere in this ruling there are many other special factors to be taken into account in the particular circumstances of individual cases. Learned counsel for the applicant articulated factual foundations of the impugned contract against the intended action by the 1st respondent to exercise its power of sale *in lieu of* default of payment. The governing principles for grant or denial of injunction as set out in the seminal cases above emphasise preconditions to be met before the weight of judicial discretion is exercised in favour of the applicant. As seen from the dicta their must and extremely strong prima facie case and further the actual or potential damage must be very serious and if denied an injunction he would be forever financially ruined. A further basis of jurisdiction is found on the condition, commonly referred as the balance of convenience. These considerations lead to the conclusion that the instruments relating to the underlying transactions between the applicant and the 1st respondent as a matter of interpretation it would not be correct to gag it from exercising the contractual statutory power of sale. Notwithstanding that position no form of undertaking in damages has been given by the applicant.

35. In the premises, the application dated May 31, 2023, is without merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH JULY, 2023

In the Presence of:

Mr. Mwaka for the Defendant

Mr. Kimaru Kiplagat for the Applicant

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R. NYAKUNDI

JUDGE