



**New Nyanza Wholesalers Limited v Kenya Commercial Bank (K) Limited
(Civil Suit E002 of 2022) [2023] KEHC 20534 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT E002 OF 2022**

DK KEMEL, J

JULY 21, 2023

BETWEEN

NEW NYANZA WHOLESALERS LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK (K) LIMITED RESPONDENT

RULING

1. The plaintiff/applicant filed an application dated September 16, 2022 in which it seeks the following reliefs;
 - a. Pending the hearing and determination of the application, the court does issue orders compelling the respondent to produce certified copies of the loan account bank statement indicating cumulative amounts paid towards servicing the loan and the balance due.
 - b. Pending the hearing and determination of the application, the court be pleased to issue orders compelling the respondent to provide the applicant with all the charges and debentures related to this matter.
 - c. Pending the hearing and determination of this suit, the court does issue orders compelling the respondent to produce certified copies of the loan account bank statements indicating the cumulative amounts paid towards servicing the loan and the balance due.
 - d. Pending the hearing and determination of the suit, the court be pleased to issue orders restraining the respondent by themselves, their employees and or agents from attaching, advertising, auctioning or selling the applicant's properties known as Bungoma/Municipality/ 10 and 31 and or interfering with the applicant's right to quiet possession.



- e. Pending the hearing and determination of this suit, the court be pleased to issue orders compelling the respondent to provide the applicant with all the charges and debentures related to this matter.
2. The application is supported by the affidavit of Asha Hersi Moghe who depones that she is the applicant's director. That in the year 2006, the applicant entered into several loan agreements with the respondent for sums totaling Kshs 410,000,000/- secured by a charge over LR No 209/7026, Bungoma/Municipality/ 10 and 31 (hereinafter the properties) and debentures in the sum of Kshs 762,200,000/-.
3. She depones that in 2019, the respondent through Keysian Auctioneers attached LR No 209/7026 with the intention of selling through public auction slated for March 22, 2019. They moved the court through Nairobi High Court civil suit No 52 of 2019 and obtained orders barring the sale. Thereafter, they recorded a consent where the respondent was to restructure the loan upon receipt of Kshs 150,000,000/- The applicant then sold two properties in order to raise the amount.
4. She deponed that the respondent reneged on the consent and that the applicant continues to incur huge penalty rates despite preparing and availing to the respondent a draft restructuring proposal which has never been responded to by the respondent.
5. That the respondent has failed and or refused to avail loan account statements despite several pleas by the applicant. That in the year 2020, the respondent attempted to attach one of the properties being LR No 209/7026. The applicant then moved court and were directed to reach a consent. The applicant is thus apprehensive that the respondent intends to defraud it as it has instructed its agents to auction the properties despite failure to provide the loan statement.
6. In opposition to the motion, Fredrick Mungathia filed a replying affidavit deponing that the respondent indeed advanced the applicant some financial facility which the applicant defaulted in its payment and that the respondent thus commenced the process of statutory sale. That the applicant's director one Amina Hersi Moghe moved the court and a consent struck in that matter. The respondent pursuant to the consent agreed to restructure the loan on condition that the applicants availed a resolution from the applicant's board of directors authorizing the restructure. That the restructure was never in relation to the properties subject of this application and that the applicant herein was not subject to the proceedings in that matter as the suit herein relates to Bungoma/Municipality/10 and 31 and not LR No 209/7026.
7. As relates to bank statements, the respondent depones that it supplied the same on September 17, 2021 and on August 23, 2022. That since the applicant has defaulted in paying the loan, the bank on June 4, 2018 issued the applicant with statutory notice of sale of the suit properties which have not been contested by the applicant. He depones that the applicant has not established a *prima facie* case with a probability of success and does not stand to suffer any irreparable damage if the orders sought are not granted.
8. The application was disposed of by way of written submissions. Both parties complied.

Analysis And Determination.

9. I have given due consideration to the application, the responses thereto and the submissions on record. I find the issue for determination at this juncture is whether the applicant is entitled to the orders sought. It is noted that the applicant's grievance in the matter relate to supply of statements by the respondent and the failure by the respondent to restructure the loan owed. The application is one seeking injunctive reliefs against the respondent.



10. The first issue in this application relates to supply of various documents by the respondent to the applicant. The documents specifically are the loan statement account and the balance due to the respondent from the applicant.
11. The respondent on its part contends that the documents were supplied to the applicant through various correspondences between the respondent and the applicant. The respondent asserts that it shared the statements on September 17, 2021 and August 23, 2022. In fact, among the applicant's annexures in the application, more specifically at page 149 and 150 of the application, there is communication from the applicant showing that the respondent had already shared the statements.
12. In the circumstances and from the evidence on record, I am satisfied that the statements and or documents sought to be supplied to the applicant were already shared and were within the possession and knowledge of the applicant.
13. It is now settled law that a grant of injunction is governed by order 40 rule 1 of the Civil Procedure Rules and case law, the leading authority being *Giella v Cassman Brown* (1973) EA 358. Order 40 rule provides;

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
 - (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..
14. In *Giella case* (supra), it was stated that for one to be granted injunctive reliefs, the applicant ought to show; whether the applicant has shown a prima facie case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt then it can decide the application on a balance of convenience
15. The applicant contends that despite there being an order in Nairobi High Court on the settlement of the loan by the applicant through restructuring, the respondent has gone ahead to instruct auctioneers to advertise the properties for sale.
16. The respondent on the other hand, inter alia, asserts that the court in Nairobi gave an order of stay of the intended auction and parties directed to strike a consent. That the consent emanating therefrom required the respondent to restructure the loan. That as a condition, the respondent asked the applicant to avail an authorization of restructure from the applicant's board of directors. That this has never been done. It also contends that the consent in Nairobi did not cover the properties subject of this suit.
17. From the evidence disclosed through the rival affidavits, there is no dispute that the applicant owes the respondent some money which is now in arrears. The parties' position is that the applicant has performed its part of the consent which position is vehemently disputed by the respondent.



18. That being the case, it has been held severally that a dispute on the loan amount is not enough reason to grant an injunction. This was the position in *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 where it was held;

“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.”

19. These sentiments were shared by Okwany J in *Peter Kairu Gitu v KCB Bank Kenya Limited & another* [2021] eKLR where the learned judge held;

“As I have already stated in this ruling, the applicant’s main contention is 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.”

20. The applicant’s case herein turns on the fact that the respondent refused to restructure the loan facility despite there being a consent recorded in the Nairobi case. However, from the evidence on record, there is communication from the respondent directed at the applicant dated June 28, 2017. There is no response by the applicant or a counter proposal on record in response to the offer.

21. From the material placed before me, I find that the respondent did indeed extend a conditional offer to the applicant for the restructure. To this end, I find the applicant’s allegation that the respondent failed to communicate on the restructure proposal to be untruthful. To the contrary, I find it is the applicant who failed to honour its part of the bargain in relation to the restructure proposal.

22. In this case, there is no challenge that there is money owed by the applicant advanced as a loan and secured by a charge over the properties subject of the charge. The respondent has now moved in to exercise its statutory power of sale. This move is faulted by the applicant.

23. I am alive that once the applicant offered the properties as security, it was bound to pay the respondent the sums due under the facility and failure to pay the same would lead to the properties being put up on auction. I find this to be a transaction that the court ought to only interfere where it can be shown that the respondent has failed and or neglected to follow a requisite step in the realization of security in the property so charged.

24. To this, I find guidance in *Maithya v Housing Finance Co of Kenya & another* [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows: -

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”



25. In this matter, the existence of a debt is neither disputed nor the very fact of default so that in the absence of a genuine dispute by the applicant, this court should be careful not to hinder commercial undertakings from proceeding.
26. The upshot of the foregoing observations is that the applicant has not established a *prima facie* case to warrant the issue of injunctive orders against the respondent. The notice of motion dated September 16, 2022 lacks merit and is thus dismissed with costs to the respondent.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 21ST DAY OF
JULY, 2023.**

D.Kemei

Judge

In the presence of:

Miss Olwe for Okach for Plaintiff/Applicant

Achieng for Kiche for Respondent

Kizito Court Assistant

