



**Figondo v I & M Bank Limited & another (Commercial Case E405 of 2023)
[2023] KEHC 22158 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E405 OF 2023
DAS MAJANJA, J
SEPTEMBER 15, 2023**

BETWEEN

HENRY KISSINGER FIGONDO PLAINTIFF

AND

I & M BANK LIMITED 1ST DEFENDANT

REGENT AUCTIONEERS 2ND DEFENDANT

RULING

1. It is not in dispute the Plaintiff is the registered owner of the property; LR No 2951/675 (Original No 2951/344/2) ('the suit property') which he charged in favour of the 1st Defendant ('the Bank') by a charge dated January 25, 2021 to secure a term loan facility for Kshs 33,375,000.00. As the Bank has taken steps to exercise its statutory power of sale, the Plaintiff moved the court by the application dated August 29, 2023 made, inter alia, under sections 1A, 1B and 3A of the Civil Procedure Rules. He seeks an order that the Bank be restrained from selling the suit property by public auction in exercise of its statutory power of sale and that he be permitted to pay the balance of the credit facility in three installments of Kshs 4,000,000.00 in the month of September, Kshs 2,000,000.00 in October and the balance in December.
2. The application is supported by the Plaintiff's supporting and supplementary affidavit sworn on August 29, 2023 and September 8, 2023 respectively. The Defendants oppose the application through the replying affidavit of the Bank's officer, Andrew Muchina, sworn on September 5, 2023. The court heard brief oral submissions by the advocates in the matter.
3. The main issue for determination is whether the Plaintiff has made out a case for grant of an injunction restraining the Bank from exercising its statutory power of sale. A plaintiff who seeks an interlocutory injunctive relief must satisfy the requirements set out in *Giella v Cassman Brown [1973] EA 348*. It



must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. As the Court of Appeal stated in *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No 77 of 2012 [2014] eKLR*, these requirements are to be applied as separate, distinct and logical hurdles which the plaintiff is expected to surmount sequentially.

4. As to what constitutes a prima facie case, the Bank has also rightly cited the decision of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* which explained that it is, ' 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.'
5. In order to establish a prima facie case with a probability of success, the Plaintiff must make out a case consistent with what it has pleaded in the Plaint as this is what he intends to prove at the trial. In the Plaint dated August 29, 2023, the Plaintiff admits that he defaulted in making payments to the Bank following the COVID 19 pandemic. He approached the Bank to sell the suit property by private treaty but this did not bear fruit.
6. The Plaintiff accuses the Bank of exercising its statutory power of sale by failing to follow the laid down procedures on several grounds. First, that it failed to issue a notification of sale to the spouse of the borrower prior to advertising the suit property for sale. Second, that it Bank revised interest rates without giving him due notice as required by law, that it loaded his account with unnecessary and illegal fees and that it operated the account without his authorisation by removing money at various intervals on May 2, 2023, February 25, 2023, March 3, 2023 and June 2, 2023. Further that it demanded Kshs 32,904,844.83 disregarding the fact that he had already paid Kshs 15,179,221.26. In the same vein, he complains that the Bank has not given a breakdown of the total cost of credit in accordance with the Central Bank of Kenya guidelines and that it refused to give him a true account of the charges levied on his loan account. Third, that the Bank has not procured a forced sale valuation of the suit property
7. Since the Plaintiff admits it is indebted to the Bank, the Bank is entitled to exercise its statutory power of sale by issuing the statutory notice as required by the *Land Act*, 2012. The Plaintiff does not dispute the fact that he was served with the three-month statutory notice issued under section 90 of the *Land Act*. In any case, The Bank issued one by way of the letter dated June 4, 2023 and which was sent by registered post. What the Plaintiff dispute is service of the 40-day notice to sell issued under section 96(3) of the *Land Act*. It is settled principle that the onus is on the Bank to prove that it served valid notices on the chargor as was held by the Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260*.
8. The chargee, that is the Bank, is required to serve the notice to sell issued under section 96(2) of the *Land Act* and serve a copy thereof upon several persons enumerated in section 96(3) including, 'a spouse of the chargor who has given consent.' The Plaintiff complains that his spouse was not served with the said notice. According to its deposition, the Bank issued a notice dated September 16, 2022 under section 96(3) addressed to the Plaintiff and copied to the Plaintiff's spouse MFK. The notice was sent to the Plaintiff and his spouse by email address on September 17, 2022. The Plaintiff responded to the email by requesting for a meeting with the Bank. There is no evidence by the Plaintiff or his spouse that the email to which the notice was sent was not hers or that it was not received. I find, on the preponderance of evidence, the notice was duly served hence there is no prima facie case with a probability of success on this issue.



9. The second issue concerns the issue of interest rates, unnecessary and illegal fees, interest and unauthorised debits on the account and other issues relating to the account. These allegations in the Plaint are unsupported by any evidence in the deposition. The Plaintiff has not produced any statements of account showing the illegal charges or debits or any other documents for example correspondence between him and the Bank sharing his concerns on the manner the account was being handled. If the allegations are true, the result would probably reduce the Plaintiffs' level of indebtedness. It is however difficult to tell by how much, given that he is already indebted and admits as much in his own pleading. It is now trite that the court cannot issue an injunction for the reason only that an applicant disputes the level of its indebtedness as was held by the Court of Appeal in *Civil Servants Housing Co Ltd and Another v Lavuna and Others [1995] LLR 366 (CAK)* where it stated that, 'A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.' (see also *Mrao Ltd v First American Bank of Kenya Limited and 2 Others (Supra)* and *Khan and Another v Habib Bank AG Zurich and Another [2022] KEHC 130 (KLR)*).
10. In the Plaint, the Plaintiff alleges that the Bank has failed to procure a forced sale valuation of the suit property. The Bank did not answer to this allegation or produce a valuation to rebut the Plaintiff's allegation that it intends to sell the suit property without establishing the forced sale value. However, the Notification of Sale dated November 24, 2022 issued by Kentrack Auctioneers places the market value of the suit property at Kshs 50,000,000.00 and the forced sale value at Kshs 34,018,077.60. Although the Plaintiff was aware of the forced sale value placed on the suit property by the Bank, it does not demonstrate to the court that this value is such as would persuade the court to issue an injunction.
11. Although the Bank has not furnished any valuation report, it is not in doubt that section 97 of the *Land Act* imposes on the chargee a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. In my view, the mere failure to furnish the valuation is not sufficient to grant an injunction as the court would have turn to the second step in considering whether to grant the injunction, that is to consider whether damages are an adequate remedy. The value of the property is represented by a finite sum of money. In the event the suit property is sold at an undervalue, the amount of damages would be calculated by the difference between the real forced sale value and the undervalue. Taking into account the level of Plaintiff's indebtedness, it would not be difficult for the Bank to refund the Plaintiff any sum that would be found due. It is on this ground that I would refuse the injunction.
12. The balance of convenience in this case does not favour the Plaintiff. He has admitted indebtedness. From the notification of the sale, it is clear that the outstanding debt of Kshs 34,018,077.60 due as at November 22, 2022 will continue to attract interest to the extent it would exceed the value of the suit property.
13. The Plaintiff has not made out a prima facie case with a probability of success to warrant the grant of an injunction. Having rejected the application for an injunction, the court cannot order the Bank to accept payment by instalments as proposed by the Plaintiff as this would amount to re-writing the parties' bargain (see *Muigai Enterprises Limited v Kenya Commercial Bank Limited [2016] eKLR* and *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited and another [2020] eKLR*).
14. In view of the finding I have made, I am constrained to dismiss the Plaintiff's application dated August 29, 2023 with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA



JUDGE

Court of Assistant: Mr M. Onyango

Mr Gatungo instructed by Nelson Gatungo and Company Advocates for the Plaintiff.

Mr Wawire instructed by Wamae and Allen Advocates for the Defendants.

