



**Geepak Limited & 2 others v Housing Finance Company Limited (Civil Suit E140 of 2023)
[2023] KEHC 22040 (KLR) (Commercial and Tax) (4 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E140 OF 2023
JWW MONG'ARE, J
SEPTEMBER 4, 2023**

BETWEEN

**GEEPAK LIMITED 1ST PLAINTIFF
PARKSONS PACKAGING EA LIMITED 2ND PLAINTIFF
DEQMART COMMERCIAL AGENCIES LIMITED 3RD PLAINTIFF
AND
HOUSING FINANCE COMPANY LIMITED DEFENDANT**

RULING

1. The applicants have moved this court under a certificate of urgency through a notice of motion application filed April 3, 2023 brought under order 40 rule 1 & 2(2), 3, 4, 8 and 10 of the [Civil Procedure Rules](#) and sections 3A, 1A, and 1B of the [Civil Procedure Act](#), cap 21, Laws of Kenya, seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this application *inter-partes*, an order of mandatory injunction be and is hereby issued directing that all the future rental income collected and/or earned from Thika Business Centre situate on land reference No 4953/IV/45 and 46, Thika Municipality blocks 9/9 and 558 be paid directly to the 1st applicants' bank account, being account number xxxxxxxxx, Sidian Bank, Sameer Branch.
 - d. Pending the hearing and determination of the suit herein, an interim injunction be and is hereby issued restraining respondent by itself, its assigns, agents, servants and/or any other



person whosoever acting on the respondent's behalf from selling, alienating, disposing of, auctioning and/or otherwise exercising the respondent's statutory power of sale pursuant to the statutory notice dated March 10, 2023 over the 3rd plaintiff/applicants' property land reference No 30036/2(IR No 190140).

- e. Pending the hearing and determination of the suit herein, a mandatory injunction be and is hereby issued directing that all the future rental income collected and/or earned from Thika Business Centre situate on land reference No 4953/IV/45 and 46, Thika Municipality blocks 9/9 and 558 be paid directly to the 1st applicants' bank account, being account number 0xxxxxx4, Sidian Bank, Sameer Branch.
 - f. Pending the hearing and determination of this application and suit, an order of mandatory injunction be and is hereby issued, directing that the rental income collected and/or earned by the respondent from Thika Business Centre situate on land reference No 4953/IV/45 and 46, Thika Municipality Blocks 9/9 and 558 with effect from May 25, 2021 to date in the sum of Kshs 177,330,536/= or part thereof be utilized to offset the loan arrears due and owing from the applicants to the respondent.
 - g. The honourable court does grant such other or further orders as it deems fit in the interest of justice, expediency and good order.
 - h. The cost of this application be provided for.
2. The application is supported by the grounds set on its face and the supporting affidavit and a supplementary affidavit of Grace Wamuyu Mathenge, a director of the 1st and 2nd plaintiffs sworn on April 3, 2023 and April 7, 2023 respectively. The application is opposed and the defendant has filed a replying affidavit of Anna Masinde, the Head of Micro and Small Businesses at the defendant sworn on April 11, 2023.

The Plaintiffs/Applicants' Case:-

3. On May 25, 2021 the 1st & 2nd plaintiffs participated in a public auction conducted by Garam Auctioneers on instructions from the defendant and was declared the highest bidder at the fall of the hammer for the property known as Thika Business Centre, situated on LR No 4953/45 and 46, Thika Municipality. The plaintiffs offer of Kshs 563,000,000/-, was accepted and at the close of the public auction the plaintiffs paid the requisite 10% deposit of Kshs 56,300,000/- to the defendant. A certificate of sale dated May 25, 2021 was subsequently issued by the said Garam Auctioneers to the plaintiffs and the defendant was finance the balance of the purchase price through a loan facility that was to be secured by the suit property.
4. The plaintiffs/applicants contend that while waiting for the processing of the said facility, the defendant notified them that pursuant to a court order from the Court of Appeal, the completion of the sale process had been temporary stayed pending a ruling in CACA No E140 of 2021-*Kigio Group Company v Housing Finance*. The letter from the Defendant notifying the plaintiffs of the Court of Appeal orders was dated May 27, 2021 and indicated that an outcome was anticipated on the July 9, 2021 when the said court was to issue its ruling.
5. Being pressed for capital finance, the plaintiffs sought a temporary overdraft facility and post import finance and letters of credit from the defendant which was secured by a charge over the 3rd plaintiff's being LR No 30036/2(IR No 190140). Because of the period it has taken to complete the sale of the premises known as Thika Business Centre to the plaintiff, the overdraft facility fell into arrears and the defendant on March 10, 2023 issued a statutory notice seeking to enforce its statutory power of



sale to recover the balances on the overdraft facility now standing at the sum of Kshs 83,143,400.85/- cumulatively. The actions of the defendants have prompted the plaintiffs to move to this honourable court to seek injunctive reliefs to stop the intended sale of the 3rd plaintiff's property.

6. It is the plaintiff's position that they became legal and beneficial owners of the premises known as Thika Business Centre on LR No 4953/IV/45 and 46 at the fall of the hammer and that they are entitled to the rental income, now illegally being collected by the defendant, to utilize towards redeeming the loan facility and to pay for the balance of the purchase price. The plaintiffs further argue that the actions of the defendant are in blatant violation of the *Banking Act*, which prohibits the defendant from engaging in any other activity other than the business of banking and especially real estate business.
7. The plaintiffs further aver that since the close of the sale by public auction, the defendant has so far collected as rent from the suit premises in excess of Kshs 177,330,536/- which funds should be applied to reduce or repay their facility with the defendants. The plaintiff urge the court to mandate the payment of all future rental income to the plaintiffs account as they are legally the legal and beneficial owners of the suit premises and restrain the defendant from continuing to collect the said rent forthwith. The plaintiffs further seek orders restraining the defendant from selling of the 3rd plaintiff's property that was charged to secure the overdraft facility. The plaintiffs further contend that they are not at fault for the impasse created by the pending Court of Appeal case between the Kigio Holdings Group Limited and the defendant, out of which an order restraining the defendant from completing the sale emanates.

The Defendant's Case-

8. The defendant has opposed the application and filed a replying affidavit sworn by Anna Masinde, the Head of Micro and Small Businesses. The respondent argue that the applicants by a legal charge registered over the property known as LR No 30036/2(IR No 90140) covenanted to service the loan facilities advanced thereto and that it was an express term and condition of the said charge under clause 2.1.2 that the applicants would, upon written demand from the respondents, pay all monies due, owing and incurred by the applicants. That the applicants have allowed the facility to go into arrears and are therefore in breach of the said agreement. Subsequently, the respondents argue that the statutory notice of March 10, 2023 issued to the applicants is a necessary legal step towards the exercise of its rights under the charge and in accordance with the legal requirements thereto.
9. The respondent further contends that the loan for which the charge was created has no correlation with the rental income being received by the respondent from Thika Business Centre and that this was a distinct and separate transaction and should be treated as such. In any event, the respondent further avers, the statutory notice issued on March 10, 2023 is only the initial demand as required by law and therefore there is no imminent danger of the sale of the 3rd plaintiff's property as the last statutory notice shall be issued in October 2023, if the default is not rectified. The respondent argue that the applicants are not deserving of a grant of interim injunction as sought and urges the court to deny the prayers sought therein.
10. On the second limb of the mandatory injunction mandating the payment of the rental income to the accounts of the plaintiffs, the respondent denies that it is in violation of the *Banking Act* in collecting the same thereto. The respondent argues that by virtue of a deed of rental income entered into by the defendant and the Kigio Group Limited who owned the Thika Business Premises before the auction, the respondent is legally entitled to continue to collect the rental income until the Court of Appeal case that stopped the finalization of the sale agreement is determined by the courts. The respondent argue that since the balance of the sale price due from the applicants has not yet been paid, then their continued collection of the rental income is justified as its being applied towards the indebtedness of



Kigio Holding Group Limited and pay of the running costs and other expenses of the business centre. The respondent urges the court to dismiss the application as filed.

Analysis and Determination:-

11. I have carefully considered the application herein and the supporting and supplementary affidavits of the plaintiffs/applicants, their written submissions and list of authorities filed herein. I have also carefully considered the defendant/respondent replying affidavit and the written submissions and list of authorities filed herein in opposition to the application. Having done so, I have identified two issues for determination, to wit;
 - i. Whether the applicants are entitled to the interim injunction sought;
 - ii. Whether the applicants are entitled to the mandatory injunction sought.
12. As to “whether the applicants are entitled to the interim injunction sought”; Ostensibly, the applicants seeks two principal prayers. The first prayer sought is a grant of an order of an interim Injunction to restrain the respondent by itself, its assigns, agents, servants and/ or any other person whatsoever acting on the respondent’s behalf from selling, alienating, disposing of, auctioning and/or otherwise exercising the respondent’s statutory power of sale pursuant to the statutory notice dated March 10, 2023 over the property known as land reference No 30036/2(IR No 190140) owned by the 3rd plaintiff.
13. It is important that this court, in line with the decision in the locus classica case of *Giella v Cassman Brown & Co, Ltd.* [1973] EA 358 at p. 360, establish if the application satisfies the conditions for grant of an interlocutory injunction as were set out in the case above as follows: -

“First, an applicants must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
14. The court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR, held that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants is expected to surmount sequentially. The first principle is to determine if the applicants has established a *prima facie* case to warrant the grant of the orders sought. In arriving at a definition of what a *prima facie* consists of, Justice Bosire in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*[2003] eKLR described a *prima facie* case stated as follows;

“So what is a *prima facie* case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.”
15. I note that it is common ground that the 1st applicants is the lawful and/or beneficial owner of Thika Business Centre pursuant to the public auction during which the applicants was declared the successful buyer. Both parties admit that the defendant has been collecting the rental income from the said property. While the applicants argue that the rental income which is estimated to be at Kshs 177,330,536/- should be utilized to their benefit and clear the loan outstanding at Kshs 83,055,428.24/-, the defendant justify the collection of rent on the existence of the deed of assignment of rental income executed between itself and Kigio Holdings Limited which owned the property before



it was auctioned to the 1st applicants, which they claim that they utilize towards repayment of the loan by Kigio Holdings Limited and the running costs of the premises.

16. The applicants argue, on the other hand, that this was a transaction for value pursuant to which the purchaser acquired both legal and equitable rights. Upon the fall of the hammer and payment of the deposit, there was a binding contract. The applicants fault the decision by the defendant to continue to collect rent when it exercised its statutory power of sale by conducting the public auction. I have considered the fact that indeed at the fall of the hammer the applicants became owners of Thika Business Center and having paid the requisite deposit as required of them were issued with a certificate of sale in accordance with the law. Despite the sale, the defendant continues to collect the rental income from the premises and is in possession of the applicants deposit. The defendant is benefitting twice from the same transaction. In other words, the defendant is having its cake and eating it. The flip side is that the applicants having performed their part of the obligation is disadvantaged by actions beyond their control. They wait indefinitely for the outcome of a case for which they are not party to. The property for which they charged to secure short term relief is in danger of being sold by the same defendant who holds their deposit and continues to benefit from their property. The argument advanced by the defendant that there is no imminent danger of the sale is irrelevant since legal and statutory notices have been issued. Its just a matter of time. Having considered the rival arguments by both parties, I am persuaded that the applicants have established a *prima facie* case with a likelihood of success to warrant a grant of an interim injunction
17. The second parameter towards a grant of injunctive orders is whether failure to grant the same will cause irreparable harm that is incapable of being compensated adequately by damages. The definition of what amounts to irreparable harm has been provided by *Halsbury's Laws of England*, 3rd Edition Volume 21, paragraph 739 page 352 defines irreparable injury as:-

“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. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.”

18. The High Court in the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The applicants should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

Further, the court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR, held that:-

“If the applicants 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 applicants' claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration." (Emphasis added).

19. The applicants have demonstrated that they have a *prima facie* case with high chances of success. The applicants contend that to allow the respondent to proceed with the sale of the 3rd applicants' property when the respondent can offset the loan with the amount it owes the 1st applicants would be exposing the applicants to injury that may not be adequately compensated by damages. The respondents on the flip side argue that the suit property was offered as security for loans extended to Geepak Ltd and Parksons Packaging East Africa Ltd, the 1st and 2nd applicants herein and that it was clear that in default of the loan repayments, the suit property would be sold. While I agree with the argument that a property once charged becomes a commodity for sale in the event of default, the case before me is a unique one and one where allowing the defendants to liquidate the applicants property would be injurious to them to say the least. The defendant holds a deposit of a substantial amount of money amounting to Kshs 56,300,000/- belonging to the applicants. They have sat pretty as they continue to collect rent from the premises that they sold at a public auction. The argument that the sale cannot be concluded by virtue of the orders of the Court of Appeal in CACA No E140 of 2021 is being used to ostensibly deny the applicants their rightful entitlement to a property that was offered to them by the defendants. In my view, having exercised their statutory power of sale by conducting the sale by public auction, the deed of rental assignment by Kigio Holdings Limited previously was extinguished by operation of the law. They collect the rent, they hold the deposit paid by the applicants and they have not released anything to the applicants. As I said earlier, the defendant is having its cake and eating it at the same time. I am therefore persuaded that denying the applicants the injunctive relief will occasion them irreparable harm not commensurate with a compensation by way of damages.
20. The final parameter before a grant of injunction can issue is where the balance of convenience lies. The term balance of convenience was defined in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai*¹ as follows:
- “The meaning of balance of convenience will favour the plaintiff¹ is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience, and it is for the plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the defendants. Inconvenience be equal, it is the plaintiff who will suffer.”
21. In the instance case, the applicants having purchased Thika Business Centre from the defendant at a public auction expected to have the sale completed in good time in order to reap the benefit of their investment. From the letter of the defendant to the applicants indeed the defendant expected a decision in their favour from the court of appeal. this has not come to be and it is now 2 years since. The defendant continue to hold the deposits paid and are charging interest to the loans advanced to the applicants. They are also collecting rental income from the premises sold to the defendant. I am therefore persuaded that the party that stands to suffer is the applicants and I find and hold that the balance of convenience in the instant application tilts in favour of the applicants.

¹ [2018] eKLR.



22. The upshot of the above findings is that I am satisfied that the application herein meets the threshold set in the *Giella case* for a grant of an order of injunction against the defendant. This issue therefore succeeds.
23. Secondly, an order of mandatory injunction directing that all future rental income collected and/or earned from Thika Business Centre on land reference No 4953/45 and 46, Thika Municipality Blocks 9/9 and 558 paid directly to the plaintiffs account number 0xxxxx4, Sidian Bank, Sameer Branch held by Geepak Limited, the 1st plaintiff herein. As was held by the Court of Appeal in *Nation Media Group & 2 others v John Harun Mwau* [2014] eKLR ,
- ‘It is trite law that for an interlocutory mandatory injunction to issue, an applicants must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.’
24. Therefore, before this court can grant an order of mandatory injunction at an interlocutory stage, it must be satisfied that there exist exceptional and special circumstances to warrant the same. I have carefully considered all the facts and circumstances surrounding this case. I note that it is not disputed that after their participation in the public auction, the plaintiffs became the owners of the premises of Thika Business Centre. They paid the 10% deposit of Kshs 56,300,000/-. To cushion them as they waited to conclude the sale, they took an overdraft facility from the defendant and charged the 3rd defendants property. They are now faced with accruing interest on the loan. They do not have possession of the property nor are they deriving any benefit from the same. The flip side is that the defendant exercised its statutory power of sale over Thika Business Centre and caused the same to be sold by public auction. The defendant having been stopped from transferring the property to the applicants continued to collect and utilize the rental income from the premises to pay off its obligations from the previous owners. I find the situation herein exceptional and special in that while the plaintiffs struggle to finance their business and stay afloat, the defendant retains both their deposit and the rent from their property. There is a Court of Appeal order stopping the transfer. If the situation persists any longer, the applicants will be greatly prejudiced. I am therefore persuaded that having exercised their statutory power of sale over the property known as Thika Business Centre, the defendants’ rights under the deed of rental income were extinguished and they no longer have the authority or right to continue benefitting from the same. The sale of the property crystalized at the fall of the hammer and therefore there is, in my view, created a constructive trust in favour of the plaintiff. I am therefore satisfied that the circumstances herein warrant the court to grant the order of mandatory injunction orders as sought by the plaintiffs/applicants.
25. In conclusion therefore, I find that the application by the plaintiff has merit. The same is hereby allowed with costs therein being awarded to the plaintiffs/applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2023.

J. W. W. MONG’ARE

JUDGE

