



**Kimani v Equity Bank & another (Commercial Miscellaneous Application E771 of 2022)
[2023] KEHC 24593 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E771 OF 2022**

**MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

SIMON NGIGI KIMANI APPLICANT

AND

EQUITY BANK 1ST RESPONDENT

PHILIPS INTERNATIONAL AUCTIONEERS 2ND RESPONDENT

RULING

1. Through a Notice of Motion application dated 22nd February, 2023 brought under the provisions of Articles 40, 48 & 50(1) of *the Constitution* of Kenya, 2010, Sections 1A & 1B of the *Civil Procedure Act*, Order 21 Rules 8(2) & (5) and Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010, the applicant seeks the following orders -
 - i. Spent;
 - ii. That pending the hearing and determination of this suit an order of injunction do issue restraining the respondents/defendants by themselves, their agents and/or representatives or persons acting under their instructions from auctioning the property namely L.R. No. 12778/47 to any other party;
 - iii. That pending hearing and determination of this suit an order of injunction do issue restraining the respondents/defendants by themselves, their agents and or representatives or persons acting under their instructions from effecting the transfer of property L.R. No. 12778/47 to any other party;
 - iv. That pending hearing and determination of this suit an order of injunction do issue prohibiting the respondents by themselves, their agents and/or representatives or persons



acting under their instructions from evicting the applicant from property L.R. No. 12778/47;
and

- v. Costs of the application be provided for.
2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 22nd February, 2023, by Simon Ngigi Kimani, the applicant herein. In opposition thereto, the 1st respondent filed a replying affidavit sworn by Kariuki King'ori, the Legal Services Manager of the 1st respondent.
3. The application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Nyandwaro Boyani Advocates on 2nd May, 2023, whereas the 1st respondent's submissions were filed on the same day by the law firm of Mohammed Muigai LLP. I note from the record that the 2nd respondent did not file any documents in opposition to the instant application.
4. Mr. Nyandwaro, learned Counsel for the applicant submitted that the dispute herein is as a result of a loan facility amounting to Kshs. 177,707,105.00 advanced to the applicant by the 1st respondent and secured by a legal charge created over the property known as L.R No. 12778/47 within Langata area, belonging to the applicant. He further submitted that since taking out the credit facility, the applicant has been servicing the loan without any delay but after sometime, he was unable to service the loan facility properly owing to financial difficulties that affected his business operations. It was stated by Counsel that the applicant wrote to the 1st respondent to propose an appropriate means through which the said loan facility would be repaid but his letter elicited no response from the 1st respondent and instead, the respondents showed up ready to auction the property which was used as security.
5. Counsel submitted that on or about 27th October, 2022, the respondents conducted a private auction for sale of the suit property but the auction was unsuccessful. It was contended that the amount the respondents sought to sell the suit property for, was way below the actual price and/or the forced sale value of the property. Mr. Nyandwaro also contended that a valuation carried out on 13th August, 2015 which was used by the 1st respondent to advance the applicant the loan amount in question placed the value of the suit property at Kshs. 160,000,000/=. He urged that unless this Court intervenes and issues the orders sought in the application herein, the applicant stands to suffer substantial loss.
6. He relied on the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, where the Court laid down the conditions to be considered in granting an order of injunction. He also relied on the case of *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125 where the Court of Appeal defined what constitutes a prima facie case, as cited with approval by the Court in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others* [2014] eKLR, Mr. Nyandwaro submitted that the applicant has established a prima facie case with a probability of success because the suit property is in the process of being sold off by the respondents at a value that is below its market value, despite the fact that the applicant offered a payment plan to pay off its debt to the 1st respondent.
7. It was stated by the applicant's Counsel that the applicant does not deny liability and has always been willing to enter into a payment plan with the respondents. Counsel cited Section 21(3) of the *Auctioneers Act* and stated that the suit property was valued at Kshs. 160,000,000/= after a valuation exercise was conducted on it, but after the bid, the 1st respondent informed him that the reserve price of the suit property was Kshs 58,500,000/- pursuant to their valuation, which valued the suit property at Kshs. 78,000,000/-. He referred to the provisions of Sections 97(1), 98 and 100(1), (2) & (3) of the *Land Act* and submitted that sale by auction of any parcel of land must be in accordance with the law, which means that if the sale cannot be through the valued sale, then it should be done through a reserve



- price. To support his submission in that regard, Counsel relied on the case of Koileken Ole Kipolonka Orumoi v Mellech Engineering & Construction Limited & 2 others [2018] eKLR
8. Mr. Nyandwaro referred to the provisions of Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya and stated that the respondents had not produced any Valuation Report in this Court to ascertain that they actually conducted a valuation over the suit property and that the price mentioned by the 1st respondent is appropriate.
 9. Mr. Mongere, learned Counsel for the 1st respondent submitted that the application herein has been filed without an underlying suit thus the orders sought are not interim but final orders as there will be no suit for this Court to determine. He relied on the case of Giella v Cassman Brown & Company Limited (supra) where the Court outlined the grounds upon which injunctive orders are granted. He also relied on the case of Mrao Ltd v First American Bank of Kenya and 2 others (supra) where the Court of Appeal considered what constitutes a prima facie case. Counsel submitted that the applicant has failed to establish a prima facie case with high chances of success since he does not dispute that the 1st respondent advanced loan facilities to the borrower, he executed the charge that secured the loan advanced to the borrower and that the borrower has defaulted in repayment of the loan facility.
 10. It was stated by Counsel for the 1st respondent that following the continuous default by the borrower, the 1st respondent issued the applicant with a demand notice dated 12th March, 2019 informing him of the default, the outstanding amount and that if he failed to make payment within three months, the 1st respondent would proceed to exercise its statutory power of sale. Counsel indicated that since the applicant failed to rectify the default, the 1st respondent issued him with statutory notices dated 25th July, 2019 pursuant to the provisions of Section 90 of the *Land Act*, 2012 which notice was sent through registered post. Counsel stated that thereafter, the applicant was issued with a notification of sale dated 8th November, 2019, pursuant to the provisions of Section 96 of the *Land Act*, 2012 which notice was also sent to the applicant via registered post and copied to the borrower.
 11. Mr. Mongere further stated that the 1st respondent halted the recovery process pending negotiations in view of their long-standing relationship and good faith in pursuit of an amicable settlement. That vide letters dated 17th October, 2022 and 15th February, 2023 the applicant proposed to make monthly payments in order to regularize the loan facility but the proposed payments were paltry compared to the outstanding amount hence vide a letter dated 21st February, 2023, the 1st respondent informed the applicant that the proposed monthly payments were not commercially viable. Counsel contended that neither the borrower nor the applicant had made payments to substantiate the applicant's intention to regularize the loan facility.
 12. Counsel contended that due to the applicant's failure to rectify the default, the 1st respondent proceeded with its recovery proceedings. That on 15th February, 2023, having established that the applicant was in breach of his contractual obligations, the 1st respondent was constrained to auction the charged property in order to recover the outstanding amount. As such, the 2nd respondent acting on the 1st respondent's instructions advertised the suit property for sale by auction on 3rd March, 2023, through the Daily Nation Newspapers, Counsel cited the case of Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR and submitted that the applicant has not established a case which has chances of success as the 1st respondent wholly complied with the provisions of the law in issuing all the statutory notices.
 13. Mr. Mongere further submitted that the applicant has failed to demonstrate what irreparable loss he will suffer in the event the application herein is disallowed and that any harm suffered cannot be compensated by way of monetary damages, as the 1st respondent is a financial institution with



the means to reimburse the applicant, should he succeed. To this end, Counsel relied on the case of *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2001] eKLR. Counsel contended that in submitting that the auction is illegal because the sale value is below the current open market value, the applicant was relying on a valuation report conducted in 2015, which valuation did not reflect the current value of the property. He stated that the default amount is currently in excess of KShs.200,000,000/= thus should the suit property be sold, the 1st respondent would still not recover the entire amount.

14. He cited the case of *Mary Wanjiku Mwaniki & another v Dream Credit Limited* [2017] eKLR and submitted that should the suit property not be sold now and a determination made in favour of the applicant, it will be impossible for the 1st respondent to recover the sums owed, yet the applicant can always be compensated by an award of damages in the event the application herein is disallowed and if he succeeds as provided for under Section 99(4) of the *Land Act*, 2012. Mr. Mongere emphasized that property once pledged as security becomes a potential commodity for sale, and the sentimental attachment placed upon it becomes diminished. He submitted that the balance of convenience tilts in favour of the 1st respondent since the applicant was well aware of the consequences of default and the default amount is no meager sum, thus the issuance of an injunction will only exacerbate it.
15. Mr. Mongere submitted that it is trite that a Court of equity should not aid a person whose default is the very reason why a statutory power of sale is being exercised. In addition, he stated that a party cannot derive benefit from his own wrong.

Analysis and Determination.

16. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the 1st respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for injunction should be granted.
17. In the affidavit filed by the applicant he deposed that he executed a charge over the suit property in favour of the 1st respondent who agreed to offer the borrower a credit facility of KShs.177,707,105.00. He averred that he had been diligently and faithfully servicing the said credit facility in the agreed instalment and without delay.
18. The applicant further averred that he has been going through financial challenges recently, owing to the tough economic times hence he contacted the 1st respondent's Advocates seeking an extension of time to service the facility and to come up with alternative repayment options, however, the 1st respondent ignored his request and engaged the 2nd respondent to auction the suit property.
19. He stated that the 2nd respondent has since issued him with statutory notices and formally caused to be published in the newspaper of nationwide circulation an advertisement that the suit property would be sold by auction on 15th February, 2023 (now past). The applicant further stated that the intended auction is illegal because it is based on a valuation which was way below the current open market value of the suit property thus any sale would be void by virtue of Section 97 of the *Land Act*, 2012.
20. The applicant stated that he is willing to continue servicing the credit facility and asked for more time to do so. In addition, he stated that he has developed an alternative payment option intended to aid him in servicing the loan. He asserted that in the event the suit property is sold and subsequently transferred to third parties, it will be taken out of his reach rendering him unable to generate income, hence exposing him to further demands by the 1st respondent to settle the amount which may remain outstanding.



21. The applicant averred that in the event the application herein is disallowed, his right to access to justice, right to a fair hearing and right to property enshrined under Articles 48, 50(1) and 40 of *the Constitution* of Kenya, 2010, respectively will be infringed.
22. The 1st respondent in its replying affidavit deposed that on diverse dates, it advanced facilities to Rudufu Limited (the borrower). In addition to the guarantee and indemnities by the directors, the facilities were also secured by a charge over property L.R No. 12778/47 registered in the name of the applicant. The said property secured a prescribed maximum debt of Kshs.172,000,000/=.
23. The 1st respondent averred that the borrower failed to make payments as and when they fell due thus the facility fell into arrears as early as in the year 2018. That vide a letter dated 18th November, 2018, the applicant and his co-director admitted that the borrower had defaulted in its payments and informed the 1st respondent of its decision to liquidate the properties which had been charged to the 1st respondent.
24. It further averred that the applicant and his co-director sought to engage the 1st respondent on several occasions and despite the bank's indulgence, the borrower failed to regularize its accounts. The 1st respondent contended that vide a letter dated 21st February, 2023 it responded to the applicant's payment proposal stating that the proposed monthly payments were commercially unattainable thus the proposal was denied.
25. It asserted that the current market value of the suit property is Kshs.78,000,000/= with a forced sale value of Kshs.58,500,000/=. The 1st respondent averred that the economic and financial challenges in the country have rendered it impossible to get a bid on the suit property at the market value hence it is constrained to dispose of the suit property at the forced sale value.
26. It was stated by the 1st respondent that it is not opposed to the applicant disposing of the suit property by way of private treaty provided that he deposits the outstanding amounts within 60 days of the date hereof.

Whether an order for injunction should be granted.

27. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010, which states as follows-

“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.”
28. It is trite that in an application for an interlocutory injunction, the onus is on the applicant to satisfy the Court that it should grant an injunction. The test for granting of an interlocutory injunction was



considered in the case of *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504, where three elements were noted to apply to an application of this nature-

- i. There must be a serious/fair issue to be tried;
- ii. Damages are not an adequate remedy, and
- iii. The balance of convenience lies in favour of granting or refusing the application.

29. The Court of appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a prima case and stated thus-

“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. 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.”

30. It is not disputed that the applicant is one of the directors of Rudufu Limited (the borrower), and that the 1st respondent advanced credit facilities to Rudufu Limited, which facilities were secured by a guarantee, indemnities by its directors and a charge over property L.R No. 12778/47 registered in the name of the applicant. The borrower however defaulted in its loan repayment and the 1st respondent opted to exercise its statutory power of sale over the property charged to secure the loan. The applicant admits to having been served with all the requisite statutory notices, but challenges the planned auction on grounds that the suit property is in the process of being sold off by the respondents at a value that is below its current market value.

31. The applicant’s Counsel contended that the respondents have not produced any valuation report in this Court to ascertain that they actually conducted valuation over the suit property and that the price mentioned by the 1st respondent is appropriate. It is trite that a chargee is expected to exercise a duty of care towards a chargor when exercising its statutory power of sale. This duty is provided for under Section 97 of the *Land Act*, 2012 which states that -

- “(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
3. If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-
 - a. there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
 - b. the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but



the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1)...

32. The 1st respondent averred that the current market value of the suit property is Kshs.78,000,000/= with a forced sale value of Kshs.58,500,000/=. It however failed to attach a valuation report of not more than 12 months prior to the intended sale as provided for under Rule 11(b)(x) of the Auctioneers Rules, which states as hereunder-

“the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

33. Based on the foregoing, this Court has no way of ascertaining whether suit property has been undervalued or not for purposes of the intended sale by auction and/or whether in exercising its statutory power of sale, the 1st respondent complied with the provisions of Section 97 of the Land Act, 2012 as read with Rule 11(b)(x) of the Auctioneers Rules. As a result, I find that the applicant has demonstrated a prima facie case with probability of success.

34. On whether the applicant stands to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event the instant application is not allowed, I am persuaded that this is the case. It is trite that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. To this end, I am guided by the holding in *Kanorero River Farm Ltd and 3 others v National Bank of Kenya Ltd* [2002] 2 KLR 207 quoted by the Court in *Beatrice Wathanu Waithaka v Kenya Women Micro-Finance Limited & another* [2019] eKLR where it was held that –

“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

35. In this case, the applicant does not dispute being indebted to the 1st respondent and being served with all the requisite statutory notices by the respondents. However, despite the fact that the 1st respondent’s right to exercise its statutory power of sale over the suit property has accrued, it did not demonstrate that it has complied with the provisions of Section 97 of the Land Act, 2012 as read with Rule 11(b)(x) of the Auctioneers Rules hence there is a risk of the suit property charged to secure the loan being sold at a value that is way below its current market value. If this is the case, then the applicant stands to suffer loss and damage that cannot be compensated by an award in damages.

36. On the issue of balance of convenience, this Court finds that it tilts in favour of the applicant since compliance with Section 97 of the Land Act, 2012 is couched in mandatory terms. In *East Africa Venter Co. Ltd v Agricultural Finance Co-op Ltd & another* [2017] eKLR the Court held that –

“The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer is provided for in Section 97 of the Land Act, 2012 which makes it statutory and obligatory. It should not be left to the whims of the chargee and its agents especially the auctioneers.”

37. The upshot is that the application dated 22nd February, 2023 is merited and it is allowed in the following terms –



- i. That an order of injunction is hereby issued restraining the respondents by themselves, their agents and or representatives or persons acting under their instructions from disposing, transferring and/or dealing with property known as L.R. No. 12778/47 in any other way whatsoever pending compliance with Section 97 of the Land Act, 2012 and Rule 11(b)(x) of the Auctioneers Rules;
- ii. That an order of injunction is hereby issued prohibiting the respondents by themselves, their agents and/or representatives or persons acting under their instructions from evicting the applicant from property known as L.R. No. 12778/47 pending compliance with Section 97 of the Land Act, 2012 and Rule 11(b)(x) of the Auctioneers Rules; and
- iii. The applicant is awarded costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ochieng h/b for Mr. Ngéthe for the applicant

Ms Aden h/b for Mr. Mogere for the 1st respondent

