



REPUBLIC OF KENYA



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Parrallel Media Ltd & another v Family Bank Ltd & another (Civil Case E014 of 2022) [2023] KEHC 27391 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 27391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E014 OF 2022
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

PARRALLEL MEDIA LTD 1ST APPLICANT

DAVID MUTUGI MUTHIGANI 2ND APPLICANT

AND

FAMILY BANK LTD 1ST RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS

AGENCIES 2ND RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion application dated 2nd November, 2022 seeking the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the suit herein, the Defendants by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling the property known as LR No Ruiru/Ruiru West Block1/468 and LR 20727/148 Membley Estate by public auction or otherwise howsoever on 4th October, 2022 as scheduled or any other time thereafter and from auctioning, disposing off, alienating, transferring and or otherwise howsoever interfering with the 1st and 2nd Applicant's interest.
 - d. That costs of the application be provided for.



2. The Application is based on the grounds set out on its face and the Supporting Affidavit sworn by David Mutugi Muthigani on his own behalf as the 2nd Applicant and on behalf of the 1st Applicant as its Director and Shareholder on 2nd November, 2022.
3. The 2nd Applicant holds that he is the registered proprietor of the parcels of land being LRNo Ruiru/Ruiru West Block1/468 and LR 20727/148 Membley Estate (hereinafter referred to as “the subject properties”). He has averred that the 1st Applicant applied and was granted various credit facility by the 1st Defendant (hereinafter referred to as “the Bank”) on or about 24th June, 2015 in the sum of Kshs. 49,600,000/= which was secured by registered charges over the subject properties.
4. The 2nd Applicant goes on to aver that the Bank failed to issue the Statutory Notices and instead instructed the 2nd Defendant (hereinafter referred to as “the Auctioneers”) to advertise the subject properties for sale by public auction. The Applicants also hold that the Bank charged exorbitant interest and penalties which were contrary to those in the letter of offer, the charge instruments and the law. It is the Applicants argument that the Defendants did not conduct any valuation on the properties and that despite numerous reminders, the bank refused and failed to issue them with the statement of account to show the interest, penalties and other charges on the loan. It is therefore the Applicants’ holding that the scheduled public auction is illegal since due procedures were not followed and thus a temporary injunction should issue.
5. The Bank filed its Replying Affidavit which was sworn by Wambani Deya as its Senior Legal Officer on 20th January, 2023. The Bank confirms granting the Applicants the loan facility of Kshs. 49,600,000/= which was secured by the charge instruments of the subject properties. The Bank holds that on diverse dates, the Applicants were also granted additional banking facilities to wit, Kshs. 12,000,000/=, amalgamation into existing facility of Kshs. 8,000,000/=:, invoice discounting revolving line of Kshs. 3,000,000/= and overdraft facility of Kshs. 1,000,000/=
6. The Bank also avers that the Applicant applied for a debt restructuring which led to a three month moratorium on the principal sum only on the outstanding loan of Kshs. 31,977,254 as at 30th December, 2020.
7. According to the Bank, the Applicants started defaulting on the loan repayments and the bank issued a letter dated 15th October, 2021, and another letter dated 8th December, 2021, warning them on the penalties that would accrue. The Bank also avers that the Applicants continued defaulting and on 17th January, 2022, it issued them a 90 days Notice which was sent through their registered postal address. (See attached its Certificate of postage marked WD-6). Upon lapse of the 90 days Notice, the Bank then issued a 40 days Redemption Notice which was also sent through the registered postal address of the Applicants. (See attached Certificate of postage marked WD-7).
8. The Bank holds that it then instructed Acumen Valuers Ltd to undertake professional valuation over the subject properties which was done and thereafter it instructed the Auctioneers to advertise and sell the subject properties.
9. The Bank states that the Auctioneers issued a 45 days Redemption Notice and a Notification of Sale on the subject properties which were affixed at conspicuous places. That the Auctioneers proceeded and advertised the subject properties on 17th October, 2022 and 31st October, 2022 announcing the intended auction of 4th November, 2022.
10. It is the Bank’s contention that it complied with the requisite statutory procedures and the Applicants cannot accuse them of feigning the law and that the Applicants have also not denied their indebtedness to the Bank.



11. On the issue of interest rates, the Bank has averred that it is required by law to charge interest and that the Applicants have not proved that the interest charged were exorbitant or unlawful and since the Applicants had agreed to the terms they ought to hold their end of the bargain.
12. The Bank also contends that as at 31st December, 2022, the Applicants still owe an outstanding loan amount of Kshs. 27,674,361.42 which is still accruing interest and they have not remedied the default. The bank's position is that its right to dispose the property has accrued and the Applicants do not have a prima facie case with a likelihood of success and therefore the application should be dismissed.
13. When the matter came up for interparties hearing of the application on 12th June, 2023, the court directed that it would rely on the respective pleadings filed by the parties despite the request by counsel for the Defendants to have the same dismissed for non-attendance by the Applicants.

Analysis and Determination

14. In considering the application, I have read through the affidavits sworn by respective parties in support and in rebuttal thereof and placed reliance on both established case and statute law. I find the main issue for determination being whether the Applicants have made a case to warrant the grant of an injunction.
15. The Court of Appeal in Nairobi in the case of *Nguruman Limited v Jan Bonde Nielsen and 2 Others* [2014] eKLR relied on the principles established in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and held 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) allay 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.”

16. What constitutes a ‘prima facie case’ was considered by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 when it held that:-

“In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter”

17. In view of the said provision, this court finds the following issues crystalized for determination in establishing if a prima-facie case has been demonstrated by the Applicant:-
 - a. Whether there are validly registered charges.
 - b. Whether the Bank issued Statutory Notices.
 - c. Whether there was valuation done on the subject properties.



- d. Whether the Bank and Auctioneers followed due procedure.
18. With regard to whether there were validly registered charges, it is common ground that the Applicants applied and were granted credit facilities as seen in the charge instrument dated 24th February, 2016, a further (or second) charge dated 21st August, 2015, a further Charge dated 29th August, 2013 and Charge dated 4th June, 2012 which were all duly registered, hence are valid. It is also not disputed that the Applicant charged the subject properties as security for obtaining the loan amounts from the 1st Defendant/Respondent.
19. On the issue of whether the Bank issued the statutory Notices, the Applicants' position is that they were not served with the statutory notices. To confirm this, the burden of proof lies upon the Bank and the Auctioneers to prove whether or not the statutory notices were issued. In going through the parties respective affidavits and analysing the submissions therein this court notes the Statutory Notice dated 17th January, 2022 which was issued upon the Applicants indicated an outstanding balance of Kshs. 28,509,354.42 and an amount of Kshs. 3,342,313.87 of which it was in arrears of and which was sent by registered post and a certificate with a list of all registered mails sent by the Bank was duly attached as WD-6 and WD-7. The Bank later issued a Notice of Intention to Sale dated 19th April, 2022 which was similarly sent by registered post and hand delivery and list of registered mails from the bank attached.
20. With this information, the burden of proof then shifts back to the Applicants to prove that they did not receive the notices sent through the registered post. In the case of Mbsa High Court Civil Commercial & Admiralty Division Case No. 31 of 2013 *Fredrick A. Makumbi v Kenya Commercial Bank Limited* in its Ruling, the court relied on the case of *Maithya v Housing Finance Corporation of Kenya* HCCC No. 1129 of 2002 in which it was stated as follows:-
- “It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”
21. In this case, it is worth-noting that the Applicants' did not file a Supplementary or further affidavit and attend court to contest the claim and evidence by the Respondents that they were served with the Statutory Notices and Notice of Intention to Sale. They did not even contest the addresses through which the said Notices were alleged to have been sent through. Clearly, the Applicants have failed to avail evidence to dislodge the Respondents evidence confirming that the requirements under section 90 of the *Land Act*, 2012 were duly complied with.
22. The next issue is whether there was valuation done on the subject properties. And on this, the court notes the letter dated 5th May, 2022 addressed to Acumen Valuers Ltd from the Bank (Professional Valuers) requesting them to undertake the valuation of the subject properties. The said Acumen Valuers Ltd proceeded to conduct a valuation on the said properties and vide a letter dated 17th May, 2022 provided two reports for the subject properties which are all valid. (See annexure Marked WD-8). The Applicants have again not provided any evidence to rebut this evidence by the Respondent and therefore the requirement under section 97(2) of the *Land Act* which provides for valuation of properties has been shown to have been complied with.



23. As for whether the Auctioneers followed due procedure, attached to the response by the 1st Respondent is a letter dated 26th August, 2022, wherein the Bank instructed the Auctioneers through Letters of Instructions who proceeded to issue a 45 days Redemption Notice which was served upon the 2nd Applicant and Notification of Sale dated 29th August, 2022 and a Certificate of Service dated 5th September, 2022, which were duly issued upon the Applicants. These, have also not been rebutted by the Applicants.
24. The Auctioneer then proceeded and issued the advertisement for sale of the suit properties in Daily Nation Newspaper on 17th October, 2022 and 31st October, 2022 respectively which shows that due statutory procedures were followed by the Auctioneers.
25. All in all, the court finds that the Bank and the Auctioneers duly complied with all the requisite legal procedures having shown that there is an existing debt, owed to the bank by the 1st Defendant/ Respondent. The Applicants on their part have not shown that they have repaid the loan amount and provided any evidence to prove that the legal procedures were not complied with by the Respondents. It therefore follows that the Applicants have not satisfied the court that they have a *prima facie* case and hence the court need not to address the other two conditions. On this, the court is guided by the Court of Appeal decision in the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya v David Kitu & Another* (2014) eKLR, where it was observed as follows: -

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

26. In the end, the court finds that the Notice of Motion application dated 2nd November, 2022 lacks merit and is hereby dismissed with costs with orders that:-
- a. The interim orders issued herein be and are hereby discharged.
 - b. The matter to be sent back to the Deputy Registrar of the court to fix the same for pre-trial conference.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

**In the presence of:

No appearance for and by either party

Court Assistant - Martin

