



**Sheikh v Diamond Trust Bank & another (Commercial Suit E447 of 2022)
[2023] KEHC 22497 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E447 OF 2022
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

HAFSA KASSIM SHEIKH PLAINTIFF

AND

DIAMOND TRUST BANK 1ST DEFENDANT

DALALI TRADERS 2ND DEFENDANT

RULING

Brief Facts

1. Before the court is an application dated 9th November 2022. It was brought under Order 40 rules 1 and 2 *Civil Procedure Rules*, Sections 3 & 34 *Civil Procedure Act* and all other enabling provisions of the law.
2. The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this honorable court be pleased to issue a temporary order against the Respondent jointly and severally whether by themselves their agents, representative, assigns and anybody acting for them and one restraining them from, selling, disposing, transferring and /or dealing with the Parcel Number known as L.R no [particulars withheld] Lavington Nairobi pending the hearing and determination of this suit
 - iv. That cost of this application be provided for.



3. The application was supported by the grounds on the face of it, the supporting affidavit sworn by Hafsa Kassim Sheikh, a further affidavit dated 7th March 2023 and written submissions dated 7th March 2023.
4. The dispute herein is founded on the alleged intended illegal sale of the applicant's property, title L.R no [particulars withheld] Nairobi (the suit property), by the 1st respondent. The applicant argues that the 2nd respondent advertised the said property in the dailies on 7th September 2022 stating that six (6) town houses were charged to the 1st respondent and were on sale.
5. It was the applicant's case that besides her house which is not charged to the 1st respondent, the other houses on the property had been sold to third parties and the sums collected by the 1st respondent and each owner had their certificate of title. The applicant denies owing any money to the respondents or having been served with any documents by the respondents to warrant sale of her property.
6. The applicant termed the sale as illegal as the suit property did not wholly belong to her or to A.O. Basid Limited as indicated in the daily. In the further affidavit, the applicant stated that she was only the guarantor of the facility and the 1st respondent ought to have recovered from the borrower A.O. Basid Limited.
7. The application was opposed by the 1st respondent *vide* a replying affidavit dated 7th January 2023 sworn by Faith Ndonga, a Legal Officer in the 1st respondent's Debt Recovery Unit and written submissions dated 28th February 2023.
8. The 1st respondent takes issue with the lack of full disclosure by the applicant. The 1st respondent's case is that the applicant had applied for various loan facilities aggregating to a sum of ksh 157,690,000/= from the year 2009. The facilities were secured by a first legal charge dated 16th February 2009, a further legal charge dated 14th December 2012, a second legal charge dated 2nd June 2015 and a third further charge dated 3rd December 2016 over property known as Land Reference no 3734/135.
9. It was stated that the applicant defaulted in making payments and as at 16th February 2022 the applicants arrears stood at ksh 41,263,703.49. The respondent further contended that a statutory demand was sent to the applicant under section 90 of the Land Act. The demand sent on 16th February 2022 was for payment of ksh 41,263,703.49. On 6th July 2022 the 1st respondent sent a Notification of Sale to the applicant under section 96 (2) of the Land Act notifying the applicant that the 3 months period in the earlier Notice had lapsed and that the Bank would proceed to exercise its statutory power of sale.
10. The applicant remained in default until the lapse of the 45-day redemption notice dated 12th July 2022 that she approached the Court seeking injunctive reliefs. The 1st respondent further noted that the applicant had offered the properties as security for loan facilities, contrary to her allegations that the properties were not charged.

Analysis

11. I have carefully considered all the pleadings, the written submissions and the authorities on record as presented by the parties. The main issue for determination is whether the applicant has made out a case for the injunctive relief sought.
12. Order 40 Rule 1 of the Civil Procedure Rules 2010 gives the circumstances under which a temporary injunction can be granted by the Court. The conditions that guide the Court in granting such orders



are also well crystalized. These were set out in the celebrated case of *Giella v Cassman Brown & Co Ltd*, (1973) EA 385, at page 360 where Spry J. held that:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant 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.”

13. On the first condition, this Court is called upon to ascertain whether the applicants have shown a *prima facie* case following the threshold laid out in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125. The Court defined a *prima facie* case as:

“...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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

14. In determining whether a *prima facie* case has been demonstrated, I am in turn cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others*, [2014] eKLR observed that:

“In considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation.”

15. The primary source of the terms of relationship between parties herein is contained in the Charge document. From a cursory perusal of the record, I confirm that there is a Charge over Land Reference no 3734/135 dated 16th February 2009. It is executed by the applicant herein as the mortgagor, A.O. Basid Limited as the borrower and the respondent as the lender.

16. There is also a Second Further Charge dated 2nd June 2015, a Further Charge dated 14th December 2012 and a Third Further Charge dated 3rd December 2015 all executed by the 3 parties over the suit property.

17. The applicant correctly states that she was a guarantor to the facility extended to the borrower and that it is the borrower, A.O. Basid Limited, that should be liable for the outstanding amount. The charge documents creating the securities however speak of a different position. The applicant herein, although a guarantor, in addition to the borrower, both had primary responsibility on any outstanding amount of the facilities extended to the borrower, upon demand by the 1st respondent. This condition is replicated in all the security documents at different clauses.

18. By offering the suit property as security, the applicant was therefore well aware that the bank acquired the right to sell it in the event of default by the parties, to the extent of the amount guaranteed. The record shows that the property was still charged to the bank and according to the loan statement annexed to the 1st respondents replying affidavit, the borrower A.O. Basid Limited was still indebted to the bank.



19. The record further shows that the letters and statutory notices were disbursed and sent to the applicant through P.O Box 2809-00100 Nairobi. This is the address indicated in the charge documents. The track summary from the Postal Corporation indicates that the correspondence was received. The applicant cannot therefore state that the statutory notices were not received by her or that they do not bear her address. In view of the foregoing, I am not satisfied that the applicant has established that she has a prima facie case with a chance of success.
20. In *Nguruman Limited v Jane Bonde Nielsen & 2 Others*, NRB Civil Appeal no 77 of 2012, [2014] eKLR the Court stated that if the plaintiff is unable to satisfy this first condition, the issue as to whether damages are sufficient to compensate the plaintiff in the event the suit succeeds does not arise.

Determination

21. In the premises I find that the applicant has not made out a case for grant of injunctive orders. I find no merit in the application and the same is dismissed with costs.
22. I further direct that parties comply with Order 11 of the *Civil Procedure Rules* in the shortest time so as to have the matter ready for hearing. Parties shall appear before this Court on a date to be agreed upon for purposes of fixing a hearing date.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Mr. Ogechi h/b for the Mr. Nyaberi for the applicant

Ms. Angwenyi for the respondent

Court Assistant: Ms. Carolyne Kyalo

