Mirongo Enterprises Limited & another v Equity Bank (Kenya) Limited & another (Civil Case E012 of 2022) [2023] KEHC 23891 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E012 OF 2022

MW MUIGAI, J

OCTOBER 12, 2023

BETWEEN

MIRONGO ENTERPRISES LIMITED ..... 1ST PLAINTIFF

USAFI SERVICES LIMITED ..... 2ND PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED ..... 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS ..... 2ND DEFENDANT

RULING

Background

1. By a Notice of Motion dated 29th August,2022 and filed in court on 30th August,2022 brought under Sections 1A,1B,3A, 63 (b) and (e) of the *Civil Procedure Act* Cap 21; Order 40 Rule 1,2 and 4 of the Civil Procedure Rules, 2010; Section 90 and 106 *Land Act*; Article 40 and 50 (1) of *the Constitution*, in which the Plaintiff/ Applicant sought Orders that:

    a. Spent

    b. Spent

    c. Spent

    d. Spent

    e. Pending the hearing and determination of the suit filed herewith, the Honorable Court be and is hereby pleased to grant temporary injunction restraining Defendants/ Respondents whether by themselves, directors, employees, servants, agents and/ or otherwise anyone claiming under its authority from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer or

any sale concluded by auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a charge to lease, let, charge or otherwise howsoever interfering with the Applicant's quite possession, ownership of and title to all that parcel of land known as land Reference Number 9741/20 Original number 9747/2/22

f. The Honorable be and is hereby pleased to grant such other orders as it may deem fit to give effect to the justice of this dispute and preserve the subject matter in this suit being property as land Reference Number 9741/2/22.

g. The coats of the Application be provided for.

Supporting Affidavit

2. By supporting Affidavit Dated 29th August,2022 and filed in court on 30th August,2023 sworn by Geofffrey Chege Kirundi Director of Usafi Services Limited (2nd Applicant), he deposed inter alia that on 14/01/2020 the 2nd Plaintiff/ Applicant applied for loan, four facilities being project finance, letter of credit, post import finance facility and revolving credit line of Kshs 48,000,000/= , Kshs 10,000,000/=, Kshs 10,000,000/= and Kshs 40,000,000/= totaling to Kshs 108,000,000/= (annexed and marked copy of the bank facility); opining that the said loan was secured by a charge on the Guarantor's property being the 1st Plaintiff/ Applicant, a property known as Land Reference Number 9741/20 Original Number 9741/2/22 (suit property) registered in the 1st Plaintiff/ Applicant's name (annexed and marked copy of the title to Land Reference Number 12445/21 and charge instrument); deposing that the 2nd Plaintiff/ Applicant all along complied with the terms of the previous facilities advanced and promptly made payments of the installments however due to pandemic which halted business transactions including the 2nd Plaintiff/ Applicant and that due to pandemic CBK issued the banking circular No. 3 of 2020 that Micro, small and medium sized may request to banks to relief due to circumstances relating to pandemic (annexed and marked copy of the banking circular No.3 of 2020); it is further deposed that the 2nd Applicant's performance and observance of the facilities issued in January,2020 were frustrated and curtailed due to the unforeseen and extraordinary events then prevailing all over the world; deposing further that Defendant/ Respondent Bank clogged the Plaintiff's rights to redeem the property, proceeded to terminate the contract for supply of water which adversely affected the business on the 2nd Plaintiff/ Applicant and its ability to repay the facilities advanced; it is lamented that the Respondent's unlawful actions of clogging the Plaintiff's right of redemption and its desire to sell the suit property is a clear manifestation of some deeply vested interest by the Respondent Bank which has made it act irrationally and maliciously by springing with all guns blazing to sell the suit property on a facility issued in 2020.

1St Defendant's Replying Affidavit

3. The 1st Defendant/ Respondent vide Replying Affidavit dated 8th February,2023 and filed in court on 9th February,2023 Sworn by Kariuki King'ori Manager Legal Services, deposed that: the secured amount in the charge instrument was the aggregate sum of the Prescribed Maximum Debt payable to the bank and that Plaintiffs acknowledged that the chargee can exercise the remedies available to them by virtue of the provision of Section 90 of the *Land Act* by executing the Charge instrument; deposing the 2nd Plaintiff has been defaulting on the payment of the monthly installments hence constituted a breach of the express provisions of the charge instrument; it is opined that upon breach the 1ST Defendant excised the statutory power available to them in issuing a Notice of breach and recommending actions to be taken to remedy that breach on two occasions, 23/9/2021 and 22/11/2021 (annexed and marked copies of the said recommendations) and that the sale was to

take place on 31st August,2022 which was stopped by the Honorable court orders made on 30th August,2022.

4. The matter was canvassed by the written submissions.

SUBMISSIONS

Plaintiff's Written Submissions

5. The plaintiff vide their written submissions dated 2nd March, 2023 and filed in court on 3rd March, 2023, CM Advocates raised an issue of whether the plaintiffs have made out a case for the grant of the injunctive relief sought, reliance is made in the cases of Giella vs Cassman Brown & Company Limited (1973) EA 358 and Paul Gitonga Wanjau vs Gathuthi Factory Company Ltd & 2 Others [2016] eKLR, which they averred laid down the principles of an interlocutory injunction.

6. Counsel submits that the Plaintiff' Applicant have demonstrated a prima-facie case with probability of success. Counsel quoted the case of Mrao Limited Vs First American Bank Ltd & 2 Others (2003) KLR, to buttress his point.

7. It is contended by the Counsel that the 2nd Plaintiff/ Applicant all along complied with the terms of the previous facilities advanced and promptly made payments of installments however, on or about, 2020 the world was hit by a pandemic which halted business transactions and brought the world to a standstill including the business of the 2nd Plaintiff/ Applicant,and that due to pandemic CBK issued the banking circular No. 3 of 2020 on implementation of the emergency measures to mitigate adverse impact of corona virus pandemic on loan advances in which Banks will make assessments and restructure the loans based on the respective circumstances arising from the pandemic.

8. It is urged that the facility advanced in January 2020 was frustrated by the pandemic and Plaintiffs/ Applicants should not be faulted for the said frustration as the Applicants became incapable to observe the repayment of the facility owing to the pandemic and that due to pandemic the plaintiff was forced to restructure its business by retrenching its employees from 170 to 50 employees and consequently reducing its branches from six (6) nationwide depots to only one (1) depot, being the headquarter. Reliance is made in the case of Mariakani Cottage Hospital Limited vs Gulf African Bank Limited [2021] eklr, to buttress the point of frustration.

9. Counsel further contends that the performance of the contract was frustrated leading to the restructuring of the 2nd Applicant's business and that despite frustration, it is argued that the 2nd Applicant has made payments to settle the facility advanced by marketing some of its unencumbered properties for sale to offset the loan hence not a perpetual defaulter but an innocent party that was frustrated by the pandemic and intends to clear the facility herein if given a chance.

10. Counsel avers that the plaintiffs stand to suffer irreparable harm which cannot be adequately compensated by way of damages, urging that the Applicant has repaid a substantial amount and if the Respondent sells the Charged property, the Applicant stands to suffer irreparable loss yet it paid part of the loan and is willing to settle the balance. Further the Applicant has employed several workers and the Respondent's actions will likely cause unfathomable ripple economic and social affiliations of the said workers. Counsel relied on the cases of Michael Gitere & another Vs Kenya Commercial Bank Limited [2018] eklr, Muigai vs Housing Finance Co. Ltd & Another HCCC No. 1678 of 2001, to support the point of irreparable harm which cannot be compensated by way damages.

11. On the balance of convenience, counsel submits that the Applicant took out the loan facility to import bottled water plant-full solution with filling & packaging system for small glass bottles from china.

The 2nd Applicant imported the said plant-full solution which arrived in April 2020 but owing to the adverse effects on the pandemic, 2nd Applicant could not install the plant- full solution and it was frustrated from observing the terms of the facility. Reliance is made in case of Mariakani Cottage Hospital Limited vs Gulf African Bank Limited [2021] eklr which case court quoted with authority the case of Paul Gitonga Wanjau vs Gathuthi Factory Company Ltd & 2 Others [2016] eklr, on the issue of balance of convenience.

12. Finally, counsel contends that the Defendant has not demonstrated any prejudice they will suffer as it is fully secured by the charged property hence prayed that court finds the application merited and be allowed.

1st Defendants Written Submissions

13. The 1st Defendant by its written Submissions dated 8th June and filed in court on 23rd June 2023, Tripple OK Law LLP counsel for the 1st Defendant submits that the guiding principles for the grant of orders of temporary injunction are set out in Giella vs Cassman Brown & Company Limited (1973) EA 358.

14. On those principles counsel raised the following issues:

    a. Whether the Applicant established a prima facie case of success?

    b. Whether the Applicant will suffer irreparable damages if the application is denied?

    c. In the circumstances, what is convenient?

15. On Whether the Applicant established a prima facie case of success, counsel submits that the Applicant has not established a prima facie case as the said Applicant is in breach of the subject agreement with the Respondent to the tune of Kshs 20,000,000/= hence there cannot be a prima facie case which is founded on the Applicant's breach of the contract. Reliance is placed on the cases of Mrao Limited Vs First American Bank Ltd & 2 Others (2003) KLR and Shiva Carriers Limited vs Imperial Bank Limited & Another [2018] eklr, in which it was observed that in satisfying the criterion a Claimant must exhibit that the respondent has threatened to violate or has violated a legal right and intends to perpetuate the said violation.

16. Counsel contends further that the Applicant has not disputed the fact that the loan account fell into arrears, the Applicant has not also disputed the fact that the failure to service the loan repayments has led to a substantial breach of the contract.

17. Counsel for the 1st Defendant avers that the Applicant has acted with indolence towards the repayment of the loan hence places the burden on the court to aid its indolence hence the Applicant has not only failed to lay a foundation for a prima facie case with high probability of success but continue to put the Respondent at immense financial loss. Counsel relies on the case of Naftali Ruthi Kinyua vs Patric Thuitha Gachure & Another [2015] eklr, in which the court of stated that:

> "with reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus, "if there is no prima facie case on the point essential to entitle the plaintiff to complain of the Defendant's proposed activities that is the end of any claim"

18. Regarding the issue of Whether the Applicant will suffer irreparable damages, counsel contends that the Applicant will not suffer irreparable damages because should the intended sale proceed the Applicant will be entitled to proceeds recovered above the amount outstanding from the charge hence

it will not suffer loss which is incapable of being compensated by damages. Reliance placed on the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Orthers [2014] eklr, to buttress this limb.

19. Counsel submits that Covid-19 has placed numerous individuals and businesses in a vulnerable position, exposing them to significant risks, urging that the Applicant is not an exception hence amidst these challenging circumstances, many enterprises have demonstrated reliance by adapting and embracing innovative strategies to navigate through the harsh realities imposed by the pandemic.

20. On what is convenient, it is submitted that the balance of convenience tilts to the court dismissing the application. As it is currently, the outstanding amount continually accrues interest on a daily and monthly basis. It is argued that while the Applicant may temporarily enjoy an injunction from this honorable court they are simply postponing a problem which compounds by the day.

21. Counsel argues that the court allows the sale to proceed and thus save the Applicant as it will be more convenient and more comfortable manner to deal with this issue. To buttress this limb of convenience counsel relied on the cases of Bryan Chebii Kipkoech vs Barnabas Tuitoek Bargoria & another [2019] eklr and Paul Gitonga Wanjau vs Gathuthi Factory Company Ltd & 2 Others [2016] eKLR.

22. Finally, counsel submits that if temporary injunction is granted until the final resolution of the lawsuit, the Applicant would lack the motivation to fulfill their loan obligations, since the law suit could potentially drag on for years, the Respondent would endure ongoing financial risks and exposure while the Applicant remains exempt from their payment responsibilities. Urging that the application be dismissed with costs.

Determination

23. I have considered the application, the affidavit in support, Replying affidavit, the annexures thereto and the submissions on record.

24. The main issues that commends themselves for consideration are:

    a. Whether the applicants satisfied the principles for grant of a temporary order of injunction.

    b. Who bears the cost.

Whether The Applicants Satisfied The Principles For Grant Of A Temporary Order Of Injunction.

25. The governing principles for the grant of temporary injunction is well established under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

> " 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"

26. Further, both parties herein have acknowledged the most celebrated case of Giella v Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the conditions that the Applicant must satisfy for the court to grant an interlocutory injunction as follows: -

    a. Applicant must show a prima facie case with a probability of success.

    b. Applicant must demonstrate that he/she will suffer irreparable injury, which would not adequately be compensated by an award of damages.

    c. If the Court is in doubt, it will decide an application on the balance of convenience.

27. Similarly, in the case of American Cyanamid Co. v Ethicom Limited (1975) A AER 504 where three elements were also noted as hereunder: -

    i. There must be a serious/fair issue to be tried,

    ii. Damages are not an adequate remedy,

    iii. The balance of convenience lies in favour of granting or refusing the application.

28. I am guided by the provision of 40 Rule 1 of the Civil Procedure Rules which is to effect inter alia that if there is proof 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 that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts.

29. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st Respondent contends that it has a legal right to exercise a statutory power of sale on the suit property, which the Applicant vehemently contests by seeking a temporary injunction to stop the sale pending hearing and determination of the case by contending that its business was hard hit by Covid-19 pandemic making it difficult to service the loan as facilities advanced was used to import bottled water plant-full solution from China which arrived in April 2020, but due to adverse effects on the pandemic it was difficult to install the said plant.

30. The question that begs an answer is whether the Applicant has established a prima facie case. In this regard I am guided by the decision in Mrao Ltd V First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, in which the Court of Appeal defined a prima facie case as:-

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

31. I note that the loan facility advanced in this present case is not in contention. The contention is that the 1st Applicant was unable to service the said loan for a single reason that its business was hit by covid-19 Pandemic. On the other hand, the 1st Respondent has set in Motion the process to recover the said loan by exercising its statutory power of sale envisaged under Section 96 of the *land Act* having satisfied conditions set under section 90 of the *Land Act*.

32. I associate myself further in case of Mrao Limited V First American Bank of Kenya Ltd & others (supra) where the court addressed itself thus: -

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

33. In the present case, it is evident and not disputed that the Applicant obtained a loan facility of Kshs108,000,000 million from the 1st Respondent and that the 1st Applicant guaranteed and charged its property being L.R. No. 9741/20 original number 9741/2/22 as security for the said loan. It is also not disputed that the 1ST Applicant fell into arrears on the loan repayments thus precipitating the 1st Respondent's move to exercise its statutory power of sale of the suit property. I note that even though the Applicant states that he has been faithfully servicing the loan, its position being seconded by the 1st Applicant that the 2nd Applicant was complying with the terms of the previous loan facilities, no material was placed before this court to confirm the same. Indeed, the 1st Respondent has demonstrated, through various annexures, that it issued a notice of breach to the Applicants and recommending actions to be taken to remedy that breach on two occasions being 23rd September,2021 and 22nd November,2021. Counsel for the 1st Respondent demonstrated that despite the said notices being issued and served on the Applicants their non-compliance pushed the 1st Respondent to proceed and advertise the sale of the suit property, which sale was stopped by court orders issued in chambers and dated 30th August, 2022. I further note that the Applicant made a commitment to settle the loan vide a letter dated 20th September,2021 by proposing to pay Kshs 500,000,000/- in three months.

34. At the time of writing this Ruling, the Applicant had not demonstrated how it had complied with the said commitment and by how much it had serviced the said loan. It is also not demonstrated by both parties the latest amount due save for a statutory notice dated 8th April,2022 in which the 1st Respondent indicted that Kshs 106,050,620.92 as the total outstanding debt. The Applicant did not also demonstrate by documentary evidence that he had been servicing the outstanding debt a part from averring that he is ready, able and willing to continue servicing the loan.

35. The upshot of the above is that the Applicant has not in my view established a prima facie case to warrant the granting of the orders of injunction. Needless to say, it is trite law that he who comes to equity must come with clean hands and in this case, the applicant cannot be said to have clean hands owing to the existing outstanding debt. I rely on the decision of Ringera J. (as he was then) in the case of Showind Industries v Guardian Bank Limited & Another (2002) 1 EA 284, where he stated as follows: -

> " .....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

36. Having considered that the Applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction

is granted. In Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012, the Court expressed itself 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) ally any doubts as to (b) by showing that the balance of convenience is in his favor."

37. Counsel for the 1st Applicants submitted that the Applicants stand to suffer irreparable harm if the Respondent sells the Charged property yet it paid part of the loan and is willing to settle the balance and further that the Applicant has employed several workers and the Respondent's actions will likely cause unfathomable ripple economic and social afflictions to the said workers as well. Counsel for the 1st Respondent on the other hand submitted that the granting of an interlocutory injunction is typically contingent upon the Applicant potentially enduring irreparable harm that cannot be sufficiently compensated through monetary compensation alone, according to the counsel, the suit land is capable of being valued and compensated by way of an award of damages.

38. In Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, it was observed that:

> "If the applicant 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 applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

39. In this case, I find the argument of the counsel for the 1st Applicant not convincing reason being that at the time of seeking the loan advancement it knew that it will have to service the said loan and that is why the Applicants charged the suit property as security so that in the event of default the 1st Respondent will exercise its statutory power of sale to recover the debt.

40. In HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation) where the court expressed itself as hereunder:

> "... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

41. Similarly, in the case of Maithya v Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139, the Court observed that:

> "Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which

has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized"

42. On the balance of convenience, counsel for the 1st Applicant submitted that the Applicant will suffer more prejudice if the property is sold than the Respondent stand to suffer if the orders herein are allowed. On the other hand, counsel for the 1st Respondent argues that if the 1st Respondent were to forgive every defaulting borrower, it would have severe repercussions. The bank would face financial jeopardy, investment portfolios would suffer, over 8,000 employees would face unemployment and it would significantly alter the competitive landscape within Kenyan banking sector.

43. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR, the concept of balance of convenience was defined as:

> " The meaning of balance of convenience will favour of the Plaintiff' 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.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

44. Further, In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the Court dealing with the issue of balance of convenience expressed itself thus: -

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

45. In the case of Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated that:

> " The Court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

Disposition

1. For the above reasons, I find that the balance of convenience lies in favor of the 1st Respondent. The application for injunction is hereby not merited and I therefore dismiss it with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE