



**Markem Limited v KCB Bank of Kenya Limited (Civil Suit
E007 of 2022) [2023] KEHC 23061 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E007 OF 2022
PM MULWA, J
OCTOBER 5, 2023**

BETWEEN

MARKEM LIMITED PLAINTIFF

AND

KCB BANK OF KENYA LIMITED RESPONDENT

RULING

1. The Applicant filed an application dated April 20, 2022 seeking orders, in a nutshell, that there be an injunction restraining the Defendant/Respondent its agents, appointed receivers, servants, auctioneers, agents or advocates from advertising or offering for sale, or selling, or purporting to sell or in any other way alienating or dealing with the proprietary interests in the suit properties known as Dagoretti/Kinoo/T.660 and LR No 25468/319(original number 25468/41) and the Defendant be compelled to provide a copy of the loan statement.
2. The application is supported by the affidavit of Johnson Mukuha a director of the Applicant. He avers that the joint properties being Dagoretti/Kinoo/T.660 and LR No 25468/319(original number 25468/41) have a joint value of Kshs 375 Million. That the Respondent intends to sell the two properties for an alleged loan of Kshs 250,737,315.52/=. He avers that by a charge and further charge dated February 10, 2016 and June 16, 2016, the applicant obtained the aggregate sum of Kshs 234 Million for the purpose of developing residential units on the Juja Property. As per the agreement the loan was to be paid through the sale of houses constructed on the Juja property and the purchase price was to be paid through an account domiciled with the Respondent to enable it to recover its monies. The defendant failed to issue partial discharge for every unit sold which has frustrated the sale of the units. He further avers that the loans in respect to the two properties are separate and distinct. The loan secured by the Kinoo property is being serviced by the rent collected from it and the loan is performing and not in default. According to the Applicant, the Respondent intends to sell the property to recover a loan arising from another property. That the applicant will suffer loss if the injunction is not issued.



3. In response to the application the Respondent filed a Replying Affidavit sworn by Joel Mbutia the corporate relationship Manager Mortgage division on May 30, 2022. He avers that a charge was created on December 31, 2013 with respect to the parcel known as Dagoretti/Kinoo/T.660 in favour of a loan facility of Kshs 23,000,000/= with a monthly repayment of Kshs 471,161/=, in the year 2015 the applicant approached the bank for a further loan facility of Kshs 35,000,000/= for the purchase of parcel no. LR No 25468/41 now 25468/319 and the property was used as security for the loan and the monthly instalment was Kshs 735,131/=. Further, in 2016, the applicant approached the bank for another bank facility of Kshs 234,902,852/=. He states the bank reserves the right for consolidation of the loans and calls for immediate payment of all monies due secured by any security held by the Bank.
4. He avers that the statutory notices were issued to the Applicant and he was given an opportunity to redeem the properties but failed to do so. The monies borrowed must be paid and the applicant should not be allowed to use the law to escape its obligation. He urged the court to find the application unmeritorious and dismiss the same.
5. The application was canvassed by way of written submissions.

Applicant's submissions

6. Mr Munai counsel for the Applicant filed Submissions on April 17, 2022 and submitted that the Applicant has demonstrated the existence of a prima facie case, that it is not in default of the loan, the Respondent's action of failing to issue a partial discharge has occasioned the default for the Respondent to unlawfully sell the Applicant's property. Counsel argued the applicant was not served with the statutory 90-day notice as provided in Section 90 of the *Land Act*. The failure to adhere to the process of issuing the statutory power of sale renders the sale a nullity. He relied on the case of *William Kanyi Hezekiah vs Equity Bank Limited & Another* (2017) eKLR where the court held - "the statutory notices stipulated under the *Land Act* are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices..."
7. Counsel submitted the Applicant will suffer irreparable loss if the injunctive orders are not issued, as the Respondent is in the process of selling the applicant's properties. The Defendant's power of sale has been invoked by two illegal acts by the Defendants.
8. Mr Munai submitted that the balance of convenience tilts towards preserving the property. The plaintiff is likely to suffer more harm should the injunction be denied. The applicant stands to lose its material assets and source of income. The Applicant is not in default of the loan facility and the defendant has failed to follow the due procedure when exercising its statutory power of sale.
9. In conclusion counsel submitted that the applicant has met the threshold for granting an injunction.

Respondent's Submissions

10. Ms. Kabata, counsel for the Respondent submitted that the loan is due for recovery and the Statutory Notices were duly served upon the Applicants. The Applicant had redeemed one of the suit properties Dagoretti/Kinoo/T.660 and thus the Respondent submissions will majorly be premised on the property known as LR No 2468/319 (original number 25468/41).
11. Counsel submitted that the Applicant violated the terms of the agreement and had the purchase price of the properties deposited in an account held with another bank. When the bank proceeded to realize its repayment instalments there was no money in the escrow account which amounted to default by the Applicant. The bank commenced the process of recovery.



12. Counsel further submitted the first statutory notice was issued on March 9, 2021 via registered post 14422-00800 to the Applicant and its 2 directors. The second statutory notice is dated August 19, 2021 and sent through registered post on August 26, 2021. According to counsel, the applicant is undeserving of the orders having been served with the statutory notices and having defaulted in repayment of the loan facility advanced to it. Counsel relied on the case of *Jopa Villas LLC vs Private Investments Corp & 2 Others* (2009) eKLR where the court stated - “I am clear in my mind that the applicant is running away from the obligation lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st defendant to recover monies lawfully advanced...our courts must uphold the sanctity of lawful commercial transactions”.
13. Counsel submitted that the applicant had failed to meet the conditions set for granting injunctions. It has failed to demonstrate the substantial loss to be suffered if the injunction is not granted. And that the Applicant should not use the court to shield itself from the consequences of its breach.
14. In conclusion, counsel argued that the Respondent had proved that the Applicant is in default and the Respondent is bound to recover Kshs 200,000,000/= which continues to accrue interest. the Applicant intends to hold the bank at ransom. Counsel urged the court to find that an order of permanent injunction is arbitrary. He pleaded with the court to disallow the application with costs.

Analysis Of The Issues

15. Having carefully considered the application, the affidavits both in support of, and in opposition to the application, as well as the parties’ respective submissions, I find that the issue for determination is whether the application for injunction is merited.
16. The *Halsbury’s Laws of England* 4th Edition paragraph 863 illuminates the position of injunctions as follows: “Interim injunctions are generally granted only when the applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the interlocutory in that it will do more good than harm and the applicant is and will be able to compensate the respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted.”
17. Further the classical case of *Giella vs Cassman Brown* [1973] EA 358], the court set out the conditions necessary for the grant of interlocutory injunctions as follows: - “The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally 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.”
18. It is not disputed that the Applicant sought some loan facility from the Respondent to the tune of Kshs 233,902, 852/= for the development of LR No 25468/319 (original number 25468/41) and offered security of suit properties known as Dagoretti/Kinoo/T.660 and LR No 25468/319 (original number 25468/41). The applicant argues that it is not in default of the loan amount but blames the Respondent/Defendant for the failure to issue the partial discharge of the purchased units which caused the Applicant to default in the repayment of the loan in respect to LR No 25468/319 (original number 25468/41). The applicant further argues that the loan secured using the property known as Dagoretti/Kinoo/T.660 is still running and the Applicant has been servicing the same. The applicant disputes being in default of the loan secured using the parcel known Dagoretti/Kinoo/T.660.



19. On the other hand, the Respondent faults the Applicant for breaching the terms of the loan facility and failing to have the purchase money deposited into an account held with the Respondent thereby frustrating the realization of the monthly instalments. In default thereof, the Respondent seeks to exercise its statutory power of sale and recover its money. The Respondent argues that the statutory notices were sent out to the Applicant and its two directors through registered post.
20. The court is clothed with discretion to the effect of not restraining the mortgagor from exercising its statutory power of sale but to direct that a compliant statutory notice be issued. I place reliance in the case of: *National Bank of Kenya Ltd v Shiners Plaza Ltd* [2009]EKLR where the court held: “An injunction is an equitable remedy we venture to say that where the court is entitled to grant an interlocutory order restraining a mortgagee from exercising its statutory power on ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”
21. It is trite law that a Chargor cannot be restrained to exercise its right under the legal charge where the amount is due and owing as stipulated in the instrument. It is also common that property offered as security becomes a commodity for sale in the event of default. The applicant has defaulted in its contractual obligation of the loan repayment, the bank cannot now be restrained from selling the charged properties to recover the monies. The court should not aid defaulters. I do associate myself with the holding by the Court of Appeal in the case of *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* [2006] eKLR where the court stated: “A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged.”
22. The applicant submitted that it will suffer irreparable harm if the injunctive relief is not granted and the bank is allowed to proceed with the sale of the charged properties. I do note that any harm to be suffered by the applicant emanating from the sale of the charged properties could be remedied by an award of damages by the Respondent, as the Respondent has the capability to pay damages. The grant of interlocutory injunction is discretionary.
23. An applicant seeking equitable remedy from the court must come to court with clean hands. The Applicant herein is in default of repayment of the loan amount advanced to it. It now seeks the indulgence of the court in issuing injunctive reliefs to estop the Respondent from disposing off the suit properties. It disputes that the statutory notices were not properly served upon them. The court must balance the rights of both parties, the lender’s rights must also be protected.

Determination

24. In the instant case, I find the balance of convenience shifts in favour of the bank. The loss of the charged property in the exercise of the statutory sale is a legal loss as the bank is allowed to recover what is rightful. However, the fact that the Applicant disputes that the provisions of Sections 90 and 97 of the *Land Act* were not complied with this court will give the applicant the benefit of doubt and allow the application for injunction in the interim until the respondent does fully comply with the provision of Sections 90 and 97 of the *Land Act*.
25. In the upshot, this court makes the following orders:



- i. An injunction is hereby issued in relation to Dagoretti/Kinoo/T.660 and LR No 25468/319 (original number 25468/41) pending the compliance by the Respondent with Sections 90 and 97 of the *Land Act*.
- ii. Costs of the application be in the cause.

Orders accordingly

Ruling delivered virtually, dated and signed at **Kiambu**

This 5th day of **October** 2023.

.....
P.M. MULWA

JUDGE

In the presence of:

Duale – Court assistants

N/A - for the Applicant

Ms. Waigwa - for the Respondent

Page 3 of 3

