



REPUBLIC OF KENYA



KENYA LAW
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**Gehlot & another v African Banking Corporation Limited (Civil Suit 104 of 2018)
[2022] KEHC 96 (KLR) (Commercial and Tax) (11 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 96 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 104 OF 2018
A MSHILA, J
FEBRUARY 11, 2022**

BETWEEN

**LEENA GEHLOT 1ST PLAINTIFF
RISHI RAMRAKHA 2ND PLAINTIFF**

AND

AFRICAN BANKING CORPORATION LIMITED DEFENDANT

RULING

1. The Notice of Motion Application dated 12th March 2018 was brought under the provisions of Order 40 Rules 1&2 of the *Civil Procedure Rules*, Section 90(1) (2), (3) and 96(2) of the *Land Act* and Sections 1A, 1B, 3A and 63 (c) (e) of the *Civil Procedure Act*; the plaintiff/applicant sought the following orders;
 - a. A temporary injunction restraining the advertising for sale of LR No. Nairobi/Block 92/86 situated in Nairobi pending the hearing and determination of the suit.
 - b. A temporary injunction restraining the advertising for sale of LR NO. Nairobi/Block 92/86 situated in Nairobi pending the hearing and determination of the application.
2. The application is premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by Leena Gehlot who deponed that the defendant/respondent demanded from the plaintiff / applicants Kshs.499,782,484.92 together with further accrued interest thereon. The alleged debt was not properly due or payable in that it constituted purely of illegal interest and penalty charges debited to the Principal Borrower's account.



3. Further, that the defendant/respondent served the plaintiff/applicants with a Statutory Power of Sale threatening to auction the suit property to recover the alleged debt. The Statutory Notice was served without leave of the court and was thus fatally defective. The Applicants added that they would suffer irreparable loss should the said sale be carried out.
4. In the 2nd Application the defendant was the applicant and it is a Notice of Motion dated 29th August 2019 which is premised under the provisions of Order 25 Rule 5; Order 13 Rule 2 of the Civil Procedure Rules; Rule 3(1) and (2) of the *High Court (Practice and Procedure Rules)*; Section 3 and 3A of the *Civil Procedure Act*. The defendant/applicant sought the following orders;
 - a. The Court finds that the 1st and 2nd Plaintiff and the Defendant have compromised and adjusted the suit.
 - b. The Court to compromise and adjust the suit herein by entering judgment declaring that the plaintiffs and the Principal Borrower, Intex Construction Limited, are as at 31st May 2018 indebted to the defendant in the sum of Kshs.463, 455,956.60 together with the interest that continues to accrue at the contractual rate in terms of the findings by Ernst & Young in the audit Report dated 10th April 2019.
 - c. The Court orders that the amount held in the escrow account number 0100005341196, opened in the names of Kagwimi Kang'ethe Advocates and Kimani & Michuki Advocates at Stanbic Bank Limited, being Kshs.233, 200,623.40 as at 25th April 2019, be released to the Defendant forthwith.
 - d. The Court orders the balance of Kshs.230, 255,333.20 together with interest at contractual rates, be paid to the Defendant by the 1st and 2nd Plaintiff failing which the Defendant will be at liberty to exercise its statutory power of sale.
5. This application was premised on the grounds on the face of the application and on the Supporting Affidavit made on the same date by Kajuju Marete.
6. The parties were directed to canvass both applications by filing and exchanging written submissions. Hereunder is a summary of the parties' submissions.

Plaintiff/applicant's Case

7. The plaintiff/applicants submitted that the findings of the audit report evidently show that the total recalculated and/or outstanding debt of Kshs.463, 455,956.60 constituted purely of interest and penalty interest debited to the Principal Borrower's Account.
8. The Applicants acknowledged that the subject debt was non-performing hence the realization of the various securities pledged to the loan facilities including the suit property. However, the Applicants contended that the law limits the maximum amount recoverable by a financial institution in such instances as provided under Section 44A of the *Banking Act*.
9. It was the plaintiffs' argument that under Clause 4.4 of the Letter of Offer dated 28th December 2015, the parties expressly acknowledged that the interest chargeable and payable would be within the limits permitted by the law. Going by the findings of the audit report, the respondent had abused the said Clause and charged excessive and illegal interest charges which were not recoverable in law once the loan became non-performing.



10. Further, the Applicants argued that the respondent was not entitled to judgment for the audited amount or to be paid the credit balance of Kshs.233, 200,623.40 in the joint account as sought in its application as the issue needed to be determined in trial. On this, the Applicants relied on the cases of; *Gerald P. O. Onyango vs The Co-operative Bank of Kenya Ltd [2016] eKLR*, *Commercial Bank of Africa Ltd vs Pauls Imison & Another [2012] eKLR*.
11. Further that the respondent was not entitled to proceed with the sale and/or auction of the suit property as threatened and an order preserving the property ought to issue against the respondent. In any event, the respondent is secured by the funds deposited in the joint escrow account and also continues to hold a charge over the suit property.
12. In addition, the Applicants submitted that neither party would suffer any prejudice if an order of injunction was issued and the funds in the joint account preserved pending further investigations and/or final determination of the debt due to the respondent. All the contract receivables would continue being remitted and preserved in the joint account and the respondents' charge registered against the suit property would also remain intact.
13. The Applicants also stated that the respondent's application was fatally defective and the orders sought therein couldn't be granted in law as the respondents had not filed any suit and/or counterclaim against the plaintiff/applicant. The application was thus not anchored in a Plaintiff or Counter-claim. (See: *Dr. Agnes Regina Murei Abuom vs Erastus Amondi Okul & Others [2007] eKLR*; *Cecil Miller vs Jackson Njeru & Another [2017] eKLR*).
14. Further, that mandatory orders based on admissions could only be granted by the court in very clear circumstances and simple cases and this is not one such case.
15. The Applicant prayed that the injunctive orders sought be granted and the defendants application be disallowed.

Defendant's Case

16. The defendant responded both as a respondent and an applicant and submitted on four issues; the first issue was whether disputes on interest entitle an applicant to injunctive orders. The borrower had not paid the principal amount of Kshs.30 million the subject matter of the Letter of Offer dated 25th December 2015 or interest thereon. The overdraft facility of Kshs.30 million had not been settled either. The summary of the Report at Table 3 analyzed communication on interest rate changes and the total amount due constituting of the principal, interest and charges as at 19th November 2019 was in the sum of Kshs.714, 257,302.92.
17. The respondent pointed out that a contractual relationship was not impeached merely because of dispute on interest; referred to *Intex Construction Limited versus Credit Bank Limited [2016] eKLR* where a plaintiff made a similar allegation for an injunction to be issued to stop it from making contractual payments. The court held that the fact that there is a dispute over the correct penalty interest rates was not a basis for an injunction.
18. The defendant/applicant argued that following the issuance of the Audit Report, it was clear that the Plaintiff/applicant and the Principal Borrower were indebted to the defendant/applicant. In the circumstances, prayers a, b, c, d, e and f were compromised. By parties' consent, a true and accurate statement of account had been provided by an audit firm appointed by the parties. This was a suit for compromise and adjustment; there was no explanation to demonstrate why the prayers in the Plaintiff dated 22nd February 2018 should be subjected to a full hearing when parties had consented to a determination by an auditor.



19. Further, it was the defendant/applicant's submission that the plaintiff as Applicants had not satisfied the principles of granting injunctive relief as set out in the case of *Giella vs Cassman Brown & company Ltd [1973]*. Failure to service a loan and pay what is rightfully owed to the defendant was outside the realm of the exercise of the court's discretion;
20. In addition, the plaintiff/applicant would not suffer irreparable damages if the injunction was not issued since the defendant was a giant financial institution and had resources with which to pay any such damages should the suit against be found in favour of the plaintiff/applicants.
21. The balance of convenience also tilted in favour of the defendant who was capable of compensating the plaintiff/ applicants in the event that it is held that it received more funds than that which was legally due;
22. The defendant as a respondent prayed for the dismissal of the plaintiff/applicant had not satisfied the principles of granting injunctive reliefs and as an applicant urged this court to compromise and adjust the suit herein by entering judgment declaring that the plaintiffs and the Principal Borrower, Intex Construction Limited, were as at 31st May 2018 indebted to the defendant in the sum of Kshs.463, 455,956.60 together with the accrued interest thereon.

Issues for Determination

23. The Court, after reading and considering the applications, the affidavits and the respective written submissions, has framed the following issues for determination;
 - a. Whether the plaintiff/applicants had satisfied the conditions for the grant of injunctive orders;
 - b. Whether the parties have compromised and adjusted the suit and therefore judgment should be entered for the defendant/applicant;

Analysis

Whether the plaintiff/applicants had satisfied the conditions for the grant of injunctive orders;

24. The plaintiffs as the applicants in the Notice of Motion dated 12/03/2018 sought from the Court an order of temporary injunction restraining the defendant from advertising for sale of LR NO. Nairobi/ Block 92/86 situated in Nairobi.
25. Before granting such orders the court will seek to establish whether the applicant has satisfied the three (3) principles set out in the above referenced case being that the Applicant must demonstrate that they have made out a prima facie case with a probability of success. They must show that they are likely to suffer irreparable loss which may not be compensated by an award for damages and where the court is in doubt it must make a decision based on a balance of convenience.
26. These principles for the grant of temporary injunctions are well set out in the celebrated case of *Giella -versus- Cassman Brown and Company Limited (1973)* E.A 385, at page 360 where Spry J. held that: -

“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 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.”



27. In the case of *Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125*, the Court of Appeal in determining what amounts to a prima facie case stated;

“A prima facie case in a Civil Case include but is not confined to a “genuine or 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 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.”

28. Have the plaintiff/applicants demonstrated that they have a prima facie case with probability of success?

29. The Applicants argued that it is trite law that a lender must elect which remedial measure to opt for in the event of an alleged default under a facility it has advanced. Section 90 (3) of the *Land Act* provides;

If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land;

30. In this regard, by the use of the word “or” the wording of Section 90(3) is clear; and the import of the above provision of the *Land Act* is that the Chargor can only opt for one remedy for the recovery of the amount owed. In this instance the defendant/respondent had sued for the amount owing under the charge in HCCC No. 282 of 2017; after instituting recovery proceedings for the amount allegedly due also simultaneously now seeks to exercise its statutory power of sale. In this respect and from the material presented to the court by the applicants this court is satisfied that they have demonstrated that they have ‘a fair and bona fide question to raise as to the existence of a right which apparently has been infringed upon by the opposite party as to call for an explanation or rebuttal from the latter.’ This was reiterated in the case of; *Mrao vs First American Bank of Kenya Limited & 2 Others (supra)*;

31. On this principle this court finds that the Applicants have made out a prima facie case with a reasonable probability of success.

32. The second test for determination is whether the applicants would suffer irreparable loss if the order is not granted. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.

33. It was the Applicants’ argument that the defendant/ respondent served them with a Statutory Power of Sale threatening to auction the suit property to recover the alleged debt; and the plaintiff/applicants contention was that they would suffer irreparable loss should the said sale be carried out. It is not enough to merely state that they would suffer irreparable loss the applicants must demonstrate the irreparable harm likely to be suffered that cannot be quantified in monetary terms or which cannot be cured.



34. In this instance, although the Applicants have established a prima facie case they are found to have failed to prove to the satisfaction of the court that they will suffer irreparable loss and damage if the order for injunction is not granted. The respondent on the other hand stated that it is a giant financial institution and has resources with which to pay any such damages should it be found in favour of the applicants.
35. The third principle is if in doubt, the court can determine where the balance of convenience lies. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, it was held: -
- “The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it”.
36. The inconvenience and mischief likely to arise if the order is withheld emanates from the institution of suit HCCC No.282 of 2017 and the simultaneous exercise of the Statutory Power of Sale by the respondent. These circumstances tilt the balance of convenience in favour of the plaintiff/applicants.
37. For those reasons this court is satisfied that the applicants have satisfied the conditions for the grant of injunctive orders and it is therefore imperative that the subject property be safeguarded pending the hearing and determination of the main suit.

Whether the parties have compromised and adjusted the suit and therefore judgment should be entered for the defendant/applicant;

38. The second issue relates to the defendants Notice of Motion dated 29/08/2019 on whether the parties have compromised and adjusted the suit and therefore judgment should be entered for the defendant/applicant;
39. It is not in dispute that there is a suit HCCC No. 282 of 2017 which relates to various banking facilities granted by the defendant herein. In order to resolve the issue of disputes of accounts and the interest accrued on the account, parties in HCCC No.282 of 2017 by consent, recorded in court on 16th April 2018, and appointed the firm of Ernest & Young to carry out an independent audit to tabulate and determine the outstanding principal amount and interest outstanding on the loan account which would be final.
40. The defendant/applicant contends that the suit has been compromised and adjusted pursuant to the provisions of Order 25 Rule 5 which provides that;
1. Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.



41. The above mentioned provision is the basis upon which the consent of 16th April 2018 was based. Both parties herein agree that the issue regarding the release of the amount in the escrow account was settled vide the Ruling delivered on 28th July 2020 in HCCC No. 282 of 2017. But even after the said report was finalized the amount of Kshs.463, 455,956.60 owed to the respondent could not be offset by the amount in the escrow account;
42. The recovery of this balance is found to be the bone of contention as it gives rise to issues of estoppel which would bar a person from re-litigating matters already ruled on. This court will therefore not belabor itself in addressing the merits of the defendant/applicants application as it is this courts considered view that the trial court is best placed to make a determination of law on the issue of estoppel by res-judicata and the applicability of Section 90(3) of the *Land Act*.

Findings And Determination

43. From the afore-going reasons this court makes the following findings and determinations;
- i. The application dated 12th March, 2018 is found to have merit and the applicants are found to have satisfied the conditions for the grant of injunctive orders. The application is hereby allowed;
 - ii. The respondent, by themselves, their agents, servants and/or employees be and are hereby restrained by injunction from advertising for the sale of LR NO. Nairobi/Block 92/86 situate in Nairobi pending the hearing and determination of the suit;
 - iii. The defendant/respondent to bear the costs of the application dated 12th March, 2018;
 - iv. The Request Judgment is disallowed and matters raised in the application dated 29/08/2019 be canvassed at the hearing of the main suit.

Orders Accordingly.

DATED, SIGNED & DELIVERED ELECTRONICALLY AT NAIROBI ON THIS 11th DAY OF FEBRUARY 2022.

HON. A. MSHILA

JUDGE

In the presence;

Mr. Owino for the Respondent

Mr. Arora holding brief for Oraro for the Applicants

Lucy-----Court Assistant

