



**Ready Consultancy Company Limited v Cooperative Bank of Kenya Ltd & another
(Commercial Case E035 of 2023) [2024] KEHC 11545 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E035 OF 2023
JK NG'ARNG'AR, J
OCTOBER 1, 2024**

BETWEEN

READY CONSULTANCY COMPANY LIMITED PLAINTIFF

AND

COOPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

THAARA AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion application dated 1st December 2023 under Certificate of Urgency pursuant to Section 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, and under any other relevant provisions of the laws of Kenya.
2. The Plaintiff/Applicant prays for orders of temporary injunction restraining the Defendants/ Respondents from auctioning, advertising for sale, selling, transferring, offering for sale, alienating and/or in any way dealing with the Applicant's property being LR No. MN/VI/4012 (CR.68725) pending the hearing and determination of this suit. The Plaintiff/Applicant also prayed for an order that they are given first priority to sale the suit property LR No. MN/VI/4012 (CR.68725) by private treaty and the proceeds therefrom be applied to settle the outstanding loan and the balance be retained by the Plaintiff. That costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of Mohamed Issa Ducale sworn on 1st December 2023 that the Plaintiff/Applicant secured an overdraft and a mortgage facility with the 1st Defendant/Respondent. That the Plaintiff/Applicant offered his property being LR No. MN/VI/4012 (CR.68725) as security for the facility. The Plaintiff/Applicant is in the business of manufacturing plastic which was affected by Kenya Power and Lighting Company (KPLC) transformer and that the factory had to shut down as they await an upgraded replacement of the



transformer. That the Plaintiff/Applicant notified the 1st Defendant/Respondent of the predicament and requested for restructuring of the overdraft and mortgage facilities. That the 1st Defendant/Respondent was agreeable to it and the Plaintiff/Applicant was awaiting confirmation in writing but the 1st Defendant/Respondent proceeded to instruct the 2nd Defendant/Respondent to advertise the property for sale. That despite the challenges, the Plaintiff/Applicant is keen on settling the mortgage and overdraft facilities. That unless the court issues an order of injunction, the Plaintiff will suffer great loss and prejudice as it will lose its property. That it is in the interest of justice that the application is allowed as prayed.

4. The 1st Defendant/Respondent in the Replying Affidavit sworn on 6th May 2024 by Duncan Matisero, their Legal Manager, averred that the 1st Defendant/Respondent advanced a loan of Kshs. 16,000,000 on the terms of the letter of offer dated 22nd September 2020. That as security, there was a charge dated 26th November 2020 over LR No. MN/VI/4012 (CR.68725). That the Plaintiff/Applicant defaulted in repaying the loan causing the 1st Defendant/Respondent to issue a 3-months' notice dated 22nd March 2023. That as the default was not rectified, the 1st Defendant/Respondent issued a 40-days' notice to sell dated 26th June 2023. That the two notices were sent by registered post to the same postal address provided by the Plaintiff/Applicant in the letter of offer and charge.
5. The 1st Defendant/Respondent further stated that the 45 days' redemption notice and the notification of sale dated 6th October 2023 were pasted on the suit property by Josrick Merchants Auctioneers and not the 2nd Defendant/Respondent, which mode of service is permitted by Rule 11 of the Auctioneers Rules 1997. That the redemption notice and notification of sale were also sent by registered post to the same postal address. That repayment of the loan was not pegged on the Plaintiff/Applicant's business operating optimally. That the restructure requested for merely sought a repayment holiday of 90 days from 22nd February 2022. That by the time the first notice went out, the repayment holiday had been exceeded by over 9 months. That the 1st Defendant/Respondent is lawfully entitled to insist on its contractual rights. That the Plaintiff/Applicant has not demonstrated how it will suffer irreparably in the absence of an injunction. That the suit property has a force sale value of Kshs. 13,500,000, the loan stood at Kshs. 25,265,698.87 as at 6th October 2023. That the 1st Defendant/Respondent is already significantly prejudiced.
6. This court gave directions for the application to be canvassed by way of written submissions. As at the time of writing this ruling, only the 1st Defendant/Respondent had filed their submissions in the Judiciary Case Tracking System (CTS). The 1st Defendant/Respondent in their submissions dated 17th May 2024 relied on the case of *Giella v Cassman Brown* which sets out the issue for determination to include whether there exists a prima facie case with a probability of success, whether there will be irreparable injury absent an injunction and whether the balance of convenience favours granting the injunction.
7. On the prima facie case on whether statutory notices were duly issued, the 1st Defendant/Respondent submits that when there is an allegation of non-service, duty falls on the 1st Defendant/Respondent as was held in the case of *Nyangilo Ochieng' & Another v Fanuel B. Ochieng' & 2 Others* (1996) eKLR, and that the 1st Defendant/Respondent was in compliance. That the burden then shifts to the Plaintiff/Applicant to show that the notices addressed and posted to its postal address did not reach it. That it would present evidence from postmaster general as proof in accordance with the holding in *Jampen Enterprises Limited v NIC Bank Kenya Plc & Another* (2019) eKLR.
8. The 1st Defendant/Respondent contended that the Plaintiff/Applicant makes the argument that because its business suffered some challenges it deserved leniency. However, in *Kbunaif Trading Company Limited v Equity Bank Limited & Another* (2015) eKLR, it was held that problems



with business, however real, have never been a basis for granting an injunction. That therefore, any accommodation of the Plaintiff/Applicant by the 1st Defendant/Respondent is within the 1st Defendant/Respondent's discretion. That it is not a right that the Plaintiff can seek to enforce through an injunction as was held in *Seabawk General Logistics Limited & 2 Others v Stanbic Bank Kenya Limited* (2021) eKLR. On the alleged right to sell by private treaty, the 1st Defendant/Respondent relied on the decisions in *Crested Acres Investment Limited v National Bank of Kenya Limited* (2017) eKLR and *Premier Flour Mills Ltd & 2 Others v Standard Chartered Bank Kenya Ltd* (2019) eKLR, and that the supposed sale by private treaty is only in word.

9. The 1st Defendant/Respondent submitted that there will be no irreparable injury absent an injunction. That the burden is on the Plaintiff to show real and irreparable injury. That the loss of a property offered as security is not irreparable injury. The 1st Defendant/Respondent also contended that the balance of convenience tilts in their favour. They therefore prayed that this court dismisses the Notice of Motion application with costs.
10. I have considered the Notice of Motion application dated 1st December 2023, the Replying Affidavit sworn on 6th May 2024 and submissions. The issues for determination are: -
 - a. Whether the Plaintiff/Applicant has satisfied the conditions for grant of temporary injunction
 - b. Whether the Plaintiff/Applicant is entitled to first priority to sale the suit property LR No. MN/VI/4012 (CR.68725) by private treaty.
 - c. Who should bear costs of this application

11. On the first issue, the application herein is premised on Order 42 Rule 6 (6) of the *Civil Procedure Rules* which provides that: -

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. The conditions for grant of interlocutory injunctions was held in *Giella vs. Cassman Brown* (1973) EA 358 as follows: -

“The conditions for the grant of 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.”

13. The applicant is required to first establish that there is a prima facie case with probability of success. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125, a prima facie case was defined as: -

“So what is a prima facie case ... In civil cases it is a case which on the material presented to the court or 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 on rebuttal from the latter.”



14. The Applicant averred that he offered his property being LR No. MN/VI/4012 (CR.68725) as security for an overdraft and a mortgage facility with the 1st Defendant/Respondent. The Plaintiff/Applicant's business was affected by power and had to shut down as they await an upgraded replacement of the transformer. That the Plaintiff/Applicant notified the 1st Defendant/Respondent of the predicament and requested for restructuring of the overdraft and mortgage facilities which the 1st Defendant/Respondent was agreeable to it and the Plaintiff/Applicant was awaiting confirmation in writing but the 1st Defendant/Respondent proceeded to instruct the 2nd Defendant/Respondent to advertise the property for sale. That despite the challenges, the Plaintiff/Applicant is keen on settling the mortgage and overdraft facilities.
15. The Respondent disputed this position by stating that the Plaintiff/Applicant defaulted in repaying the loan causing the 1st Defendant/Respondent to issue a 3-months' notice dated 22nd March 2023. That as the default was not rectified, the 1st Defendant/Respondent issued a 40-days' notice to sell dated 26th June 2023. The 1st Defendant/Respondent further stated that the 45 days' redemption notice and the notification of sale dated 6th October 2023 were pasted on the suit property. That repayment of the loan was not pegged on the Plaintiff/Applicant's business operating optimally. That the restructure requested for merely sought a repayment holiday of 90 days from 22nd February 2022. That by the time the first notice went out, the repayment holiday had been exceeded by over 9 months.
16. It is not in dispute that the Plaintiff/Applicant secured an overdraft and mortgage facility of Kshs. 16,000,000 with the 1st Defendant/Respondent where the Plaintiff/Applicant offered his property, LR No. MN/VI/4012 (CR.68725), as security. It is also not in dispute that the Plaintiff/Applicant fell into arrears causing the 1st Defendant/Respondent to exercise its statutory power of sale. Even though the Plaintiff/Applicant stated that they are keen on settling the mortgage and overdraft facilities, they have not furnished this court with evidence of an attempt on their part. The 1st Defendant/Respondent has on their part demonstrated that the Plaintiff/Applicant indeed failed to fulfil their promise on settlement of the debt.
17. This court finds that the Plaintiff/Applicant has not established a prima facie case with a probability of success. It will therefore not delve into the other conditions for grant of interlocutory injunctions. The 1st Defendant/Respondent has a right to claim what is owed to them and it is within its right to realize its security against the Plaintiff/Applicant. This court also establishes that the balance of convenience tilts in favour of the 1st Defendant/Respondent.
18. On the issue of whether the Plaintiff/Applicant is entitled to first priority to sale the suit property LR No. MN/VI/4012 (CR.68725) by private treaty, the said discretion lies with the 1st Defendant/Respondent as was held in *Premier Flour Mills Ltd & 2 Others v Standard Chartered Bank Kenya Ltd* (2019) eKLR.
19. Accordingly, this court makes the following orders: -
 - a. The Notice of Motion dated 1st December 2023 lacks merit and is dismissed.
 - b. Costs to the respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 1ST DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE



In the presence of: -

Kyele Advocate for the Plaintiff/Applicant

Kongere Advocate for the 1st Defendant/Respondent

No appearance Advocate for the 2nd Defendant/Respondent

Court Assistant – Mr. Samuel Shitemi

J.K. NG'ARNG'AR, J.

