



REPUBLIC OF KENYA



**Uplands Premium Diaries & Food Ltd & another v Equity Bank Kenya Limited
(Commercial Suit E007 of 2023) [2024] KEHC 13455 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL SUIT E007 OF 2023
DO CHEPKWONY, J
OCTOBER 4, 2024**

BETWEEN

UPLANDS PREMIUM DIARIES & FOOD LTD 1ST PLAINTIFF

GOLDEN VALLEY PROPERTIES LTD 2ND PLAINTIFF

AND

EQUITY BANK KENYA LIMITED DEFENDANT

RULING

1. What is before the court for determination is the Notice of Motion application dated 23rd May 2023 filed under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 and therein the Applicant/Plaintiff seeks the following orders:-
 - a. Spent.
 - b. That pending the hearing of the application inter partes, this Honourable Court be pleased to commission a Certified Public Accountant to confirm the true and correct loan indebtedness between the Applicants and the Respondent.
 - c. That pending the taking of such accounts, the Applicant be allowed to liquidate the loan sums by monthly instalments of Kshs 5,000,000/=
 - d. Spent.
 - e. That pending the hearing and final determination of this suit herein, an Order of injunction do issue restraining the Respondent whether by itself, its agents, servants, nominees, officers or in any way whatsoever selling, advertising for sale, disposing or in any way interfering with the Applicant's following properties namely Title No. Ruiru/Ruiru East Block 1/4418, Title No. Ruiru/Ruiru East Block 1/4425, Title No. Ruiru/Ruiru East Block 1/4419, Title No. Ruiru/Ruiru East Block 1/T.668, Gatamaiyu/Kagwe /850 and Ruiru 1/586.



- f. That the costs of application be provided for.
2. The Application is based on the grounds as set out on its face and the Affidavit in support sworn by Mary Wambui Njihia on 23rd May, 2023 as the Managing Director of the 1st Applicant and Director of the 2nd Applicant. It has been deposed that the Applicants are the registered proprietors of the subject properties which were used as collateral for a loan issued by the Respondent on diverse dates. That the Managing Director of the 1st Applicant, one Mr Peter Njenga Kuria died on 20th February, 2022 which led to a stall in the loan repayments. The Deponent avers that when she took over as the Managing Director, she negotiated a loan repayment plan with the Respondent since the loan was in arrears.
 3. The Applicants hold that the Respondent charged exorbitant interest rates which showed bad faith and further indicated that one of the properties being Title No. Ruiru/Ruiru East Block 1/4418 which, although had not been charged was listed among those which it had been notified for sale. The Applicants therefore holds that it would be fair that a Certified Accountant be commissioned to determine the true indebtedness between the Applicants and the Respondent. According to the Applicants pending the taking of the accounts, they are willing to pay Kshs 5,000,000/= per month on reducing balance. The Applicants hold that the huge amounts applied on the loan account have had a huge impact on the principal amount which must be removed.
 4. The Respondent opposed the application through Replying Affidavit of its Legal Services Manager, Kariuki King'ori sworn on 3rd July, 2023. It confirmed that the Applicants applied and were advanced various credit facilities, which the 1st Applicant defaulted inpayment and it requested for the restructuring of the loan and a moratorium and the same was granted for six months on the principal amount which lapsed on 25th March, 2023. It holds that towards the lapse of the said moratorium, the 1st Applicant requested for a further extension which the Respondent declined.
 5. It is the Respondent's case that the 1st Applicant requested for a confirmation on the loan accounts which the Respondent shared in an email of 22nd March, 2023 and further on 27th March, 2023, which accounts it states that the Applicants did not object to.
 6. The Respondent holds that the Applicant defaulted and was in arrears of Kshs 18, 818, 913.70/= and the outstanding loan amount of Kshs 577,682, 692.70/=. It is the Respondent's contention that the Applicant has issued a ninety days statutory demand dated 30th March, 2023 and informed of the intention to sale the subject properties in realisation of the security. And on the claim by the Applicant that one of the suit properties listed for sale had not been charged, the Respondent avers that this is false as the title deed for that particular land was registered as an encumbrance.
 7. The Respondent contends that the fact that the Applicant is disputing the interest rates is a mere afterthought, and there is no need for certified public accountant since the Applicants have not denied their indebtedness. It holds that it served the statutory notice since the Applicant was in default and the Respondent cannot be stopped from exercising its statutory power of sale.
 8. Also, the Respondent states that the Applicants have not demonstrated a prima facie case with probability of success to warrant the orders of injunction being issued and there can be no irreparable loss that can arise since the values are quantified and damages would be sufficient remedy, hence the balance of convenience tilts in favour of disallowing the application as the right of the Respondent has rightfully accrued. The Respondent therefore urges the court to dismiss the application with costs.
 9. The Applicant Further Affidavit sworn on Mary Wambui Njihia sworn on 18th July, 2023 wherein she contends that that the Respondent concealed the fact that it took over the loan from Family bank and did not disclose which loan was secured and by what security. They insisted that suit property



No. Title No. Ruiru/Ruiru East Block 1/4418 had not been charged. According to the Applicant, the fact that the Respondent was opposed to taking of accounts to determine the true indebtedness of the Respondent so as to establish the correct amount of loan owed and yet this is meant to develop a sustainable and affordable repayment plan which will not be prejudicial to the Respondent on a big way. It is the Applicant's contention that there is dire need for the accounts to be taken and therefore urge the court to allow the application.

10. The Application was argued by way of written submissions as directed by this court.

Analysis and Determination

11. In considering the prayers sought in the Notice of Motion application dated 23rd May, 2023, I have read through their respective affidavits sworn by the parties herein alongside their written submissions and find the issue for determination being whether the Applicant/Plaintiff is entitled to the prayers sought in the application.
12. The order for interlocutory injunctions was discussed by the Court of Appeal in Nairobi in the case of *Nguruman Limited –vs- Jan Bonde Nielsen & 2 others* [2014] eKLR which relied on the principles established in the case of *Giella –vs- Cassman Brown & Co Ltd* [1973] EA 358 and held 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

Prima facie case

13. The Court of appeal in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 also considered what constitutes a prima facie case and held that:

“In civil cases, a prima facie case is 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 to call for an explanation or rebuttal from the latter”

14. In this case, the court has been called upon to determine whether the rights of the Applicant have been infringed by Respondent in order to establish whether he has demonstrated a prima facie case or not. It is common ground that the Applicant applied and was granted loan facilities which were secured by the subject properties duly named on the face of the application. The Applicant herein has admitted its indebtedness to the Respondent but only seeks to be furnished with a Certified Accountant to verify the loan account and establish the amount that is in debt.
15. It is trite that the court is not required to grant an injunction for the sole reason that the amount of debt is disputed. This was the position in the case of *Priscillah Krobought Grant –vs- Kenya Commercial*



Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R.) (unreported), where the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see *Barmal Kanji Shah & Another Vs. Shah Debar Devji* (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and *Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others*, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

16. However, the only time the court will restrain a bank from exercising its statutory power of sale or other prescribed remedies is where the amount claimed is alleged/said to be excessive. And the only way to deal with this issue is by or being availed as a provision with a comprehensive bank statement of accounts to show the period when the loan was granted, the repayments made, the interest charged and the outstanding loan balance. On this issue, the Court of Appeal in the case of *Margaret Njeri Muiruri –vs- Bank of Baroda (Kenya) Limited* [2014] eKLR, held that:-

“Which leads us to the third issue raised in the appeal; whether the bank supplied statements of accounts to the appellant. Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance.

17. It is the court’s view that the only way to determine the amount granted, amount repaid and the outstanding balance due would be for the Statement of Accounts to be availed during trial to assist the court in arriving at a just and fair decision. Therefore, the court finds that it would be prudent to preserve the subject property until the determination of the suit in which the amount payable, if any, would be ascertained as the balance of convenience then lies in favour of the Applicant. However, since the court was not privy to the contract between the parties, it cannot allow the prayer by Applicant to liquidate the loan sum by monthly instalments of Kshs 5,000,000/= as this would amount to the court vying the terms of the contract between the parties.
18. In the circumstances, the court allows the Notice of Motion Application dated 23rd May, 2023 in the following terms:-
- a. An Order is hereby issued to the Respondent to provide the full comprehensive bank statement account of the Plaintiff from the time of its inception to date within 30 days upon payment of the requisite fees by the Applicant.
 - b. An Order of injunction is hereby issued restraining the Respondent whether by itself, its agents, servants, nominees, officers or in any way whatsoever selling, advertising for sale, disposing or in any way interfering with the Applicant’s following properties namely Title No. Ruiru/Ruiru East Block 1/4418, Title No. Ruiru/Ruiru East Block 1/4425, Title No.



Ruiru/Ruiru East Block 1/4419, Title No. Ruiru/Ruiru East Block 1/T.668, Gatamaiyu/
Kagwe /850 and Ruiru 1/586.

- c. The matter fixed for Mention on 11th October, 2024 for Pre-trial Conference and parties to fix hearing date of the main suit.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF
OCTOBER, 2024.**

D. O. CHEPKWONY

JUDGE

In the presence of:-

Mr. Odhiambo holding brief for Mr. Munyu counsel for Defendant

M/S Mwenda counsel for Intended Interested Party

Court Assistant - Martin

