



**Ufadhili Investments and Holdings Limited v Cooperative Bank of Kenya Limited
(Commercial Case E012 of 2022) [2024] KEHC 13253 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E012 OF 2022
DO CHEPKWONY, J
OCTOBER 4, 2024**

BETWEEN

UFADHILI INVESTMENTS AND HOLDINGS LIMITED APPLICANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

RULING

1. For determination before this Court is the Notice of Motion application dated 28th September, 2022 which seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. That pending the hearing and determination of the suit, the Honourable court be and is hereby pleased to grant a temporary injunction restraining the Respondent bank whether by itself, directors, employees, servants, agents and/or otherwise anyone claiming under its authority from advertising for sale, selling whether by public auction or private treaty, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfering with the Applicant's quiet possession, ownership of title to all that parcel of land known as Land Reference Number Kiambaa/Ruaka/3769 pending interparties hearing and determination of this suit.
 - f. That the Honourable court be and is hereby pleased to issue an order compelling the Respondent to withdraw and/or otherwise suspend any adverse notices or information sent to any licensed Credit Reference Bureau by the Respondent in regard to the subject loan facility.



- g. That the Honourable court be and is hereby pleased to grant such other Orders as it may deem fit and necessary to give effect to the justice of this dispute and to preserve the subject matter in this suit being property as Land Reference Number Kiambaa/Ruaka/3769 and the Applicant's business.
- h. That the costs of the application be provided for.
2. The Application is based on the grounds as set out on its face and the Affidavit in support by David Thuo as the Director of the Applicant sworn on the instant date. It is the Applicant's case that it applied for a construction loan facility from the Defendant/Respondent in the sum of Kshs 133,500,000/= towards part financing of the pristine 32 apartments and the same was secured by charge on a property known as Land Reference No.Kiambaa/Ruaka/3769(hereinafter referred to as the 'suit property') registered in the Plaintiff's/Applicant's name.
3. According to the Applicant, the facility advanced to the Respondent was against the Letter of Offer dated 20th June, 2024, which under the facility's particulars and Miscellaneous 14 on disbursements of the Agreement entrenched a term of engagement between the parties that upon charging of the suit property for the said loan amount, the disbursement of the loan would be tailored to the progress of the project implementation and should be paid directly to the contractor upon presentation of work completed or services rendered. That despite several reminders for payment by the Applicant between 15th December, 2014 to 12th June, 2019, the Defendant/Respondent breached the terms of the agreement and failed to make the disbursements as and when requested.
4. It is the Applicant's/Plaintiff's contention that this delay and or failure to disburse the monies, adversely affected the contractor's progress on the construction and led to a delay in payment of deposits by the buyers of the apartments which deposits would have gone towards servicing the loan. This caused the interested purchasers to vacate their interest in purchasing the apartments and this then led to the project stalling hence the same was grossly affected.
5. The Applicant holds that it complied with the terms of the letter of offer but the Respondent unlawfully called up the total outstanding loan in the sum of Kshs. 190,262,531.55/= as at 7th September, 2022 and further via letter dated 22nd September, 2022 demanded an amount of Kshs. 377,499,446.00 which showed the amount had doubled within a period of two(2) weeks and violates the duplum rule. The Applicant holds that the Respondent has not only threatened to put the Applicant under administration but has also threatened to negatively list the Directors to negatively list of Directors of the Plaintiff with the Credit Reference Bureaus and also institute the process of calling up the full debt.
6. It is the Applicant's contention that the blatant breach by the Respondent in failing to dispatch the entire agreed amounts to it and the inordinate delay in the disbursement counts to breach of contract and therefore it has a prima facie case against the Respondent. The Applicant further holds that there was imminent risk that the Respondent will continue with the illegal acts which will violate its rights and render the suit nugatory.
7. The Respondent opposed the application through Replying Affidavit of its Relationship Manager, Mark Kihara sworn on 28th February, 2023. The Respondent holds that the Applicant applied and was advanced a sum of Kshs. 133,500,000.00 through letter of offer dated 20th June, 2014 and the addendum offer letter dated 17th July, 2014. According to the Respondent, the loan was secured by a charge over the suit property, deed of receivable of all purchases, personal guarantee by each Director and lien on an escrow account in the bank to be used to collect all sale proceeds and that the repayment period was 24 months with a moratorium of 18 months.



8. It is the Respondent's case that on diverse dates it dispatched the sums of money but a sum of Kshs. 12,042,079.30 out of the principal amount was to be remitted subject to the Respondent's inspection and periodic values stage inspections at the borrower's costs as provided in Clause Miscellaneous 1.4 of the Letter of Offer. That this applied to other disbursements made to the Applicant which explains the delay by the Respondent.
9. The Respondent states that its failure to remit the balance of Kshs 12,042,079.30 was not a blatant disregard but the same was due to failure to meet condition 1.4 Clause 3 of the letter of offer dated 20th June, 2014 as the requisite developer's equity funds had not been applied to the project. The Respondent holds that it has granted the Applicant extensive financial accommodation which shows good faith on its part but the Applicant defaulted in servicing the facility which led the Respondent issuing a demand letter for the loan amount of Kshs. 190,262,531.55 which was inclusive of the principal amount, interest and penalty interest.
10. The Respondent went on to state that the Applicant did not regularise its accounts within the 14 days period given and it therefore issued another demand letter dated 22nd September, 2022 for the total amount of Kshs. 377,449,446.04, which the Respondent stated was issued erroneously as the outstanding amount as at 28th March, 2023 was Kshs. 225,628,667.04 and it withdrew the inadvertent demand notice.
11. The Respondent holds that it was a term of contract that the Applicant would repay the loan within the timelines stipulated in the letter of offer which it failed to comply with and the charge crystallised, thus it was free to trigger the remedial measures available to it under the contract. The Respondent holds that it communicated its intention to put the Applicant under administration, list the Director of the Applicant with the Credit Reference Bureau and further institute a process to call up the full debt and institute an enforcement right against the Applicant's property.
12. According to the Respondent, its intentions were informed by the terms and conditions of the home loan facility of the letter of offer in condition 20.4 which provides for confidential information and credit reference bureau. The Respondent further holds that the remedies are expressly provided for in the letter of offer and it was thus acting within its scope.
13. The Respondent averred that it issued sufficient default notice to the applicant through the demand letters and despite the Applicant being in arrears, it caused the sale of the apartments and deliberately failed to remit the proceeds of sale to the Respondent who had priority over the proceeds so that the loan would be offset. The Respondent contends that the Applicant cannot therefore turn and benefit from its own breach and default and hence it does not have a prima facie case as it has already acknowledged the default. The Respondent further holds that there is no prejudice that the Applicant will suffer that cannot be compensated by way of damages.
14. The Respondent holds that on its part it stands to suffer great prejudice by the continuous default by the Applicant who continues to dispose of the apartments to third parties without honouring its contractual obligations and remitting the proceeds of sale. The Respondent also holds that it has not breached any provisions of the letter of offer and therefore the Applicant does not qualify to get any injunctive relief. The Respondent has urged that the Notice of Motion application should be dismissed with costs.
15. The Applicant filed Further Affidavit sworn by the said deponent David Thuo on 20th November, 2023 in which it refuted the bank's failure to remit the balance due to the Applicant's failure to meet its obligations under Clause 1.4 of Clause 3. That in a meeting held on 18th August, 2017, the Respondent attributed the delays to macro-economic issues which parties mutually agreed would have



had a negative impact on the project in terms of marketing and sales and the Respondent thus agreed to reduce the delays and the said minutes were shared with the Respondent which did not object to the same on 2nd November, 2017.

16. According to the Applicant, the Respondent agreeing to pay the delayed certificates on 14th December, 2017, it disbursed the sum of Kshs. 9,658,465.00. The Applicant holds that the default by the Respondent caused some of the Applicant's buyers to withdraw from the project while others sought to consolidate their deposits and terminate the various agreements with the Applicant. The Applicant states that it is now forced to use the funds from the rentals towards repaying the buyers who had withdrawn from the project.
17. The Applicant holds that if the property is sold, it will be stripped off its only source of income and it will be unable to pay the buyers who have demanded a refund of the deposits. The Applicant holds that the Respondent having admitted its breach of terms and agreement but has not shown that the breach was due to the applicant's failure to act according to the terms of the agreement. The Applicant further holds that the Respondent selling the charged property by way of public auction will cause unjust enrichment noting that the Applicant had made substantial payments towards the loan facility.
18. The Respondent also filed a Supplementary Affidavit sworn by the same deponent Mark Kihara on 19th January, 2024 who deponed that at all times, the Respondent dutifully complied with the terms of offer and it disbursed the loan to the Applicant through full settlement of the various 12 certificates which was done after full satisfaction and inspection of the project. The Respondent also holds that all along, it communicated to the Applicant all the concerns it had on the delays. It disputes the allegations made by the Applicant that it breached the provisions of the letter of offer. The Respondent maintained that it has proved the indebted-ness of the Applicant and shown that it issued the requisite notices and therefore injunctive orders should not issue. The Respondent prays that the Notice of Motion application be dismissed.

Analysis and Determination

19. Having read the Notice of Motion application and the supporting affidavit thereof, the Replying Affidavit together with the Further Affidavit and the Supplementary Affidavit sworn by either party alongside the submissions filed by each one of them, the Court finds the main issue for determination being whether the application has merits to warrant the orders sought.
20. It is trite that the requirements for orders for interlocutory injunctions to issue were 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 that were established in the *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

21. Also, the Court of Appeal in the case of Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 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”

22. In this case the Applicant holds that it has a prima facie case against the Respondent since it was the actions of the Respondent, by failing to disburse the money within the required timelines which led the construction to stall. On its part, the Respondent has refuted these allegations and it contends that the payments were to be disbursed subject to approvals and inspection of the project. The Respondent has further stated that the fact that the Applicant was advanced the monies but failed to repay the same shows bad faith on its part.

23. Having considered the arguments advanced by both parties, this Court finds that the fact that the Applicant has acknowledged that there exists a debt it owes the Respondent which debt it was required to repay the same within the required timelines. Having failed to do so, the Respondent was legally at liberty to adopt any remedial measures provided for in law to recover the said amount of money.

24. For these reasons, the court finds that the Applicant has not demonstrated a prima facie against the Respondent. There being no prima facie case demonstrated by the Applicant, the court finds there is no point of addressing the other conditions. This was the position in the case of Naftali Ruthi Kinyua -vs- Patrick Thuita Gachure & Another [2015] eKLR where the Court of Appeal 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 to interlocutory relief.”

25. In view of this, this Court finds that the application lacks merits and is hereby dismissed with costs to the Respondent.

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. Miano counsel for the Plaintiff

M/S Mwenda counsel for Intended Interested Party

Mr. Muiruri counsel for Defendant/Respondent

Court Assistant - Martin

