



REPUBLIC OF KENYA



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**Equinox Holdings Limited & another v SBM Bank Limited (Commercial Case E537 of 2023)
[2024] KEHC 14624 (KLR) (Commercial and Tax) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E537 OF 2023**

**MN MWANGI, J
NOVEMBER 14, 2024**

BETWEEN

EQUINOX HOLDINGS LIMITED 1ST PLAINTIFF

MARY WARIARA MBUGUA 2ND PLAINTIFF

AND

SBM BANK LIMITED DEFENDANT

RULING

1. The plaintiffs filed a Notice of Motion application dated 7th November 2023 pursuant to the provisions of Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010, Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and all enabling provisions of the law, seeking an order of temporary injunction restraining the defendant, its agents and/or servants from purporting to sell and/or interfere, alienate or otherwise howsoever deal with the security being Title No. Ngong/Ngong/9198 pending the hearing and determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Prof. Mary Wariara Mbugua, the 2nd plaintiff herein and the 1st plaintiff's Managing Director. She averred that Chase Bank Kenya Limited (the predecessor of the defendant herein), granted the second plaintiff a secured loan of Kshs.9,300,000/= and an overdraft facility of Kshs.3,000,000/= in 2011, which she had not applied for. She stated that the overdraft remained until 2014, when she took a loan of Kshs.35,650,000/= to clear the overdraft and the outstanding balance of the loan of Kshs.9,300,000/=. She averred that during the subsistence of the said loan, Chase Bank collapsed in the year 2016 and it was later acquired by the defendant in May 2017. She stated that she requested to sub-divide the security via a letter dated 24th May 2018, but the defendant declined



and instead attempted to auction the property on 6th August 2018 and 21st February 2019, but it was unsuccessful.

3. She deposed that on 9th May 2020, the defendant asked her to resubmit a full proposal to sub-divide the security, which she did on 20th May 2020, but it was rejected as unviable on 2nd June 2020. She stated that after another failed auction, the defendant approved her sub-division proposal via SMS on 22nd April 2021, shortly after the Central Bank announced Chase Bank's liquidation, leading her to believe the earlier rejection was intended to frustrate her efforts to settle the loan. Prof. Mbugua claimed that after being granted permission to sub-divide the security, the defendant committed to release the Title to register the sub-plots. She averred that they kept the defendant updated throughout the costly sub-division process, which they successfully completed and were even issued with a certificate of sub-division but the defendant refused to release the original Title for it to be sub-divided physically.
4. She stated that while pushing for the release of the Title, the defendant called for a sudden meeting, which the plaintiffs requested to postpone. That in response thereto, the defendant withdrew its consent to the sub-division on 1st March 2023 and threatened to sell the property. The plaintiff argued that the defendant is estopped from retracting its earlier approval, as the sub-division process had already been completed at significant cost. Prof. Mbugua asserted that if the orders sought are not granted, the defendant will proceed with the sale of the security, as it has already issued a 90-day Notice of Sale. She claimed that the sale is in bad faith, as the plaintiffs have identified several buyers for the sub-plots who are waiting for the issuance of Sub-Titles.

On behalf of the plaintiffs, she offered an unconditional undertaking to the defendant to cover damages.

5. In opposition to the application, the defendant filed Grounds of Opposition dated 22nd November 2023 raising the following issues –
 - i. That the instant application fails to meet the basic test for grant of an interlocutory injunction as set out in the locus classicus, *Giella versus Cassman Brown Co. Limited* (1930) EA 358. The plaintiffs have not established a prima facie case with a probability of success nor have they demonstrated that they will suffer irreparable loss if the injunction is not granted;
 - ii. That in the first instance there is no dispute that the plaintiffs/applicants were advanced a loan by the defendant/respondent which was to be secured by the property known as Ngong/Ngong/9198 (“the subject property”);
 - iii. That admittedly, from the evidence adduced by the plaintiffs the loan is clearly in default and no evidence has been adduced to demonstrate that the loan has been settled in full;
 - iv. That further, the plaintiffs have not demonstrated any reasonable or substantial grounds to warrant the grant of the orders sought. The plaintiffs allege that they are in the process of subdividing the subject property to enable them raise funds to settle the outstanding amount. However, the alleged sub-division is only an attempt to delay the recovery process commenced by the defendant Bank;
 - v. That the loan has been in arrears for over four (4) years and the plaintiffs have not made any attempts to reduce the outstanding amount by paying the agreed instalments. Further, despite presenting the proposal to sub-divide way back in 2020 the receipts attached to the application show that the efforts to sub-divide the subject property were only made in March this year when the Bank commenced the process of exercising its statutory power of sale;



- vi. That the plaintiffs will not suffer irreparable harm if the orders are not granted. As a matter of fact, the value of the property can be ascertained and the plaintiffs have already quantified the monies expended in the purported sub-division process at paragraph 17 of the supporting affidavit; and
 - vii. That the balance of convenience tilts in favour of defendant/respondent since the plaintiffs are truly indebted to the Bank. The defendant Bank is therefore within its right to commence the recovery process and the injunction should not be granted.
6. In addition to the Grounds of Opposition, the defendant also filed a replying affidavit sworn on 22nd January 2024 by Beline Ochiel, the defendant's Manager in charge of collections. She stated that the plaintiffs do not dispute their indebtedness to the defendant. Further, that in a letter dated 21st April 2021, the defendant approved the sub-division of the suit property, with conditions inter alia, that the defendant would monitor the process and that the 1st plaintiff would continue making monthly loan payments. Ms Ochiel averred that the aforesaid letter was acknowledged by the plaintiffs in a letter dated 10th May 2021, but the plaintiffs failed to make the required monthly payments and delayed starting the sub-division process. She stated that as at 1st March 2023, the sub-division was still incomplete, leading the defendant to revoke its approval to sub-divide the property in a letter dated 1st March 2023.
 7. Ms. Ochiel averred that due to the plaintiffs' continued default, the defendant initiated the process to enforce its statutory power of sale, and on 22nd March 2023, the defendant issued the 1st plaintiff with a three-month Statutory Notice under Section 90 of the Land Act to correct the default. She averred that after the plaintiffs failed to comply, the defendant served them with a 40-day Notice of intent to sell on 22nd June 2023 under Section 96(2) of the Land Act, but the plaintiffs still failed to settle the debt.
 8. The defendant asserted that the current application is an attempt to delay and frustrate its efforts to recover the money owed. It contended that any costs incurred by the plaintiffs during the sub-division should be claimed as damages, not as grounds for injunctive relief. The defendant's prayer is for the application herein to be dismissed with costs.
 9. In a rejoinder, the plaintiffs filed a supplementary affidavit sworn on 28th February 2024 by Prof. Mary Wariara Mbugua, the 2nd plaintiff herein, and the 1st plaintiff's Managing Director. She stated that the delay in starting the sub-division process was due to the limited availability of recognized Surveyors in Kajiado County and the lengthy process of developing mutations, exacerbated by periodic government office closures during the COVID-19 Pandemic. She argued that the absence of explicit language in the approval letter about revoking the sub-division approval for failing to meet conditions set by the defendant, does not absolve the defendant of its obligation to act fairly under the terms of the letter.
 10. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Kyalo & Associates Advocates on 15th April 2024 & 12th June 2024, whereas the defendant's submissions were filed on 30th May 2024 by the law firm of Mckay & Company Advocates.
 11. Mr. Kyalo, learned Counsel for the plaintiff relied on the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, and submitted that the plaintiffs have established a case to warrant being granted of the orders sought herein. He referred to the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Limited & 2 others* [2003] eKLR, and stated that the defendant had authorized the plaintiffs to subdivide Title No. Ngong/Ngong/9198, allowing them to sell the sub-plots to clear the loan. He stated that after the sub-division was completed and the final certificate of sub-division was issued by the County Government of Kajiado, the defendant refused to release the



original Title, and withdrew its consent, thus disrupting marketing efforts and jeopardizing potential sale of the plots.

12. He cited the Court of Appeal cases of Sarah Njeri Mwobi v John Kimani Njoroge [2013] eKLR and First Assurance Company Limited v Seascapes Limited [2008] eKLR, and argued that the plaintiffs relied on the defendant's acceptance and representations to proceed with the sub-division, resulting in significant loss and damage. Counsel contended that the defendant is estopped from retracting the agreed terms. He referred to the case of International Air Transport Association & another v Akarim Agencies Company Limited & 2 others [2014] eKLR, and contended that damages are not an adequate remedy because the plaintiffs have invested substantial time and resources in the suit property, thus in the event that the property is sold as a whole, the plaintiffs would lose a unique asset that holds significant sentimental value.
13. Mr. Kyalo submitted that the balance of convenience tilts in favour of the plaintiffs, and relied on the case of Robert Mugo wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR. He stated that if the Court does not grant the orders sought and allows the defendant to sell the suit property, the plaintiffs would suffer greater harm than the defendant would, if temporarily restrained from selling the property pending the hearing and determination of the suit.
14. Ms. Muriranja, learned Counsel for the defendant relied on the case of Giella vs Cassman Brown & Co. Ltd (supra), and submitted that an injunction is an equitable remedy that may be denied if the applicant's conduct disqualifies them from such relief. She cited the case of Mrao v First American Bank Limited & 2 others (supra), and contended that the plaintiffs did not meet the conditions imposed by the defendant for the sub-division. Additionally, the plaintiffs dispute their debt or service of the requisite statutory notices upon them. Counsel asserted that the plaintiffs have not established a prima facie case with a probability of success. She argued that there is no legal requirement preventing the defendant from exercising its statutory power of sale over the suit property before exhausting other remedies against the plaintiffs.
15. In addition, she stated that the plaintiffs cannot be considered to have "clean hands" due to their outstanding debt, and since the plaintiffs failed to disclose their breach of the sub-division agreement, they are in violation of the principle that he who comes to equity must come with clean hands. She asserted that they are not entitled to an equitable relief. Counsel cited the case of Nairobi Kiru Line Services Ltd vs County Government of Nyeri & 2 others [2016] eKLR, and contended that the plaintiffs have not demonstrated that they would suffer irreparable harm in the event that the suit property is auctioned. She noted that the cost of sub-dividing the suit property can be ascertained from the plaintiffs' pleadings, and that the plaintiffs can be compensated through an award of damages.
16. Ms. Muriranja referred to the case of Kitur v Standard Chartered Bank & 2 others [2002] eKLR, and stated that the suit property once let loose became a commodity for sale. She asserted that the balance of convenience tilts in favour of the defendant, as granting the orders sought would inflict greater hardship and injustice on the defendant due to the unpaid debt. She relied on the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR, to accentuate her submissions.
17. In a rejoinder, Mr. Kyalo cited the case of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR, and submitted that the plaintiffs performed their side of the bargain, thus they are entitled being granted the orders sought herein. He further submitted that no prejudice would be visited upon the defendant in the event that the injunctive reliefs sought are not granted.



Analysis And Determination.

18. Upon consideration of the instant application, the affidavits filed in support thereof, the replying affidavit and grounds of opposition by the defendant, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether an order for injunction should be granted.
19. The instant application has been filed pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states that -
Where in any suit it is proved by affidavit or otherwise-
 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
20. The conditions to be considered when dealing with an application for temporary injunction were laid down by the Court in the case of *Giella v Cassman Brown & Company Limited* (supra), EA 358, as hereunder -

Firstly, 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.
21. Chase Bank (Kenya) Limited, the defendant's predecessor advanced various financial facilities to the plaintiffs sometime in the year 2011. In the year 2014, the 2nd plaintiff was advanced another financial facility by the said Bank, which monies were used to clear the facilities advanced to the plaintiffs in the year 2011. From the pleadings filed and the evidence adduced, the said facilities were secured by a charge and further charge created over all that parcel of land known as L.R. No. Ngong/Ngong/9198 registered in favour of the defendant. Sometime in the year 2016, during the subsistence of the loan advanced in the year 2014, Chase Bank (Kenya) Limited collapsed and was later acquired by the defendant in May 2017.
22. The averments made by the defendant demonstrate that the plaintiffs defaulted in their loan repayment obligations, and it attempted severally to exercise its statutory power of sale over the security, which is also the suit property herein, but its attempts to sell the said property by public auction were unsuccessful. The plaintiffs have demonstrated that they approached the defendant with a request to sub-divide the suit property, and convert its use from agricultural to residential use, and thereafter sell the sub-divided plots so that the proceeds thereof could be applied towards settling the plaintiffs' debt to the defendant. The plaintiffs' proposal was initially rejected by the defendant, but it was later approved vide a letter dated 21st April 2021. Conditions made were that the sub-division process would be supervised by the defendant's legal team, costs of the sub-division would be borne by the plaintiffs and that they would continue to remit monthly instalments, and fast track the sub-division process.



23. In the said letter, the plaintiffs were also advised that the outstanding loan balance as at 21st April 2021 was Kshs.76,097,737.15. Vide a letter dated 10th May 2021, the plaintiffs informed the defendant of their acceptance of the terms contained in the letter dated 21st April 2021. However, in a letter dated 1st March 2023, the defendant informed the plaintiffs of its decision to revoke its offer contained in its letter dated 21st April 2021 on account of the plaintiffs' breach of the terms therein. The defendant's contention is that the plaintiffs failed to make monthly repayments of the facility, and that their follow up on the sub-division and sale process have not been fruitful. The defendant claimed that the plaintiffs declined a request for a meeting to deliberate on the same.
24. From the evidence adduced by the plaintiffs, it can be seen that they undertook the sub-division process, during which time their Advocates would update the defendant's Advocates by the name Amolo & Gacoka Advocates, on the progress they were making. From the email correspondence annexed to the plaintiffs' supporting affidavit as annexure MW12, it is clear that the delay in sub-division was as a result of the plaintiffs' financial constraints. In an email sent on 4th February 2022, the plaintiffs' Counsel informed the defendant's Counsel that the plaintiffs were required to pay a substantial amount of money to obtain approvals for the sub-division, and that the 2nd plaintiff was in the process of disposing some family land to raise the necessary funds to pay for the approval.
25. In another email sent on 24th June 2022 to the plaintiff's Counsel by the 2nd plaintiff, she indicated that the remaining works to be done including finalizing beaconing, obtaining mutation, numbering plots and registration might take another three to four months since she was paying in instalments as funds became available. Notably, the plaintiffs have neither demonstrated nor alleged that they continued to remit the required monthly instalments towards offsetting the loan balance. It is also noteworthy that the certificate of compliance produced by the plaintiffs has not been filled, executed and certified by the Government Surveyor and registered by the Land Registrar. It is therefore not true that the plaintiffs completed the sub-division process and were even issued with a certificate of sub-division.
26. The plaintiffs contended that the defendant frustrated the sub-division process by declining to release the original Title Deed for surrender to the Land Registry for the purposes of procuring Title Deeds for the sub-divided plots. The plaintiffs did not however adduce any evidence of demand and/or request for release of the suit property's original Title Deed that the defendant refused to honor and/or declined. From the foregoing, it is evident that frustration of the sub-division process was largely attributable to the plaintiffs, by their failure to continue remitting monthly repayments of the facility to the defendant. They also failed to fast track the sub-division process as a result of financial constraints. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (supra) considered what constitutes a prima facie case as follows –

So, what is a prima facie case? I would say that in civil cases it 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 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.

27. Having noted that the plaintiffs' indebtedness to the defendant is not disputed, and that they did not make the payments required during the period the property was being sub-divided, I am not persuaded that the plaintiffs have established a prima facie case with a probability of success to warrant being granted the orders sought herein.



28. It is trite that a property offered as security such as the suit property in this case becomes a commodity for sale in the event of default. See the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2013] eKLR, where the Court of Appeal agreed with the High Court's finding that damages could be adequate compensation as the appellant's guaranteed security therein, had been converted into a commodity for sale upon the same being charged to the respondent.
29. In this instance, the value of the suit property can be easily ascertained from Valuation Reports, and the money expended by the plaintiffs during the sub-division process can also be ascertained from the plaintiffs' pleadings. In addition, the defendant being a financial institution can easily compensate the plaintiffs in the event that this suit is determined in their favour.
30. Given the said circumstances, I am not persuaded that the plaintiffs stand to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event that the instant application is not allowed, and if their suit ends up being successful.
31. In the end, it is my finding that the balance of convenience tilts in favour of the defendant since I am satisfied that the plaintiffs have not established a prima facie case, and the plaintiffs can always be compensated by an award of damages in the event that their suit is successful.
32. On the greater harm test, granting the orders sought would prejudice the defendant, as the loan balance would continue to accrue interest and exponentially exceed the value of the security held by the defendant.
33. This Court therefore finds that the plaintiffs' application dated 7th November 2023 is devoid of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Linet Chamia h/b for Mr. Kyalo Mbombu for the plaintiffs/applicants

Ms Muriranja for the defendant/respondent

Ms. B.Wokabi - Court Assistant.

