



**Geepak Limited & another v Rafiki Microfinance Bank Limited & another (Civil Case £281 of 2024) [2024] KEHC 14684 (KLR) (Commercial and Tax) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE £281 OF 2024  
FG MUGAMBI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**GEEPAK LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**TETI OLE KISHOYIAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MISTAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. By a notice of intended auction published on 20<sup>th</sup> November 2023, the 2<sup>nd</sup> defendant (“the Auctioneers”), acting on the instructions of the 1<sup>st</sup> defendant (“the Bank”), notified the plaintiffs of its intention to auction all that property described as LR No. 14775/1 (IR No. 56041/1) located in the Embakasi area, Mavoko (“the suit property”). This notice arose due to a loan facility of Kshs. 20,000,000/= extended to the plaintiffs by the Bank, secured by a legal charge over the suit property. The loan amount has since accrued interest, surpassing the original amount loaned, and now stands at over Kshs. 29,000,000/=. The plaintiffs filed this suit, claiming they had been diligently servicing the loan until early this year, when they encountered significant economic challenges, making it difficult to continue meeting the loan repayments as required.
2. The plaintiffs aver that, despite facing serious financial challenges, they made every effort to continue servicing the loan, albeit at irregular intervals. They claim that, prior to issuing the redemption notice, the defendants did not issue the 90 day notice required under Section 90(1) of the *Land Act* (Chapter 280 of the Laws of Kenya). Furthermore, the plaintiffs assert that they were never informed of the



nature and extent of the default, the amount required to rectify it, or the minimum three month period within which the payment needed to be completed.

3. The plaintiffs further contend that they were not notified of the consequence that, if the default was not remedied within the time specified in the notice, the Bank would be entitled to exercise its remedies, including the sale of the suit property in accordance with the law. Additionally, they claim they were not informed of their right as chargors to apply to the court for relief in respect of certain remedies. The plaintiffs assert that they were never given an opportunity to rectify the breach and argue that the burden of proving service of the statutory notice rests with the defendants. They maintain that they have been making partial payments towards the loan facility and seek the court's intervention against the sale.
4. Contemporaneously with the suit, the plaintiffs have also filed the Notice of Motion dated 24<sup>th</sup> May 2024 under sections 3A, 1A, 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 40 Rules 1, 2(2), 3, 4, 8, 10 and Order 51 Rule 1 of the Civil Procedure Rules. Through the application they seek to restrain the defendants from exercising their statutory power of sale over the suit property pending the hearing and determination of the suit. Additionally, they seek to set aside the proclamation notice dated 20<sup>th</sup> November 2023 until the suit is heard and determined.
5. The application is supported by grounds on its face and the supporting affidavit of Grace Wamuyu Mathenge, the 1<sup>st</sup> plaintiff's director, sworn on 24<sup>th</sup> May 2024. It is opposed by the defendants through the replying affidavit of Joyce Langat, the Bank's Assistant Manager, Debt Recovery Unit, sworn on 26<sup>th</sup> June 2024. The court directed that the application be canvassed by way of written submissions, which are on record and I will make relevant references to them in my analysis and determination later on.
6. The plaintiffs' application is based on the same grounds outlined in the plaint, which I have already analyzed above and I will therefore not repeat them. In response, the defendants contend that the plaintiffs failed to repay the loan in installments as they fell due. They state that, as of 26<sup>th</sup> June 2024, the outstanding loan balance was Kshs. 35,282,371/= and that the plaintiffs have made no effort to settle this balance, which continues to accrue interest.
7. This situation prompted the Bank to issue the necessary notices to the Borrower as it proceeded to exercise its right of sale. Contrary to the plaintiffs' allegations, the Bank asserts that a three-month statutory notice under Section 90 (1) and (2) of the *Land Act* was served on the Plaintiffs via registered mail. Additionally, the Bank claims that a forty-day statutory notice under Section 96 (2) of the *Land Act* was also served via registered mail, along with a 45-day redemption notice and notification of sale.
8. Subsequently, the suit property was advertised for sale in the Daily Nation newspaper on Monday, 20<sup>th</sup> November 2023, following a valuation conducted on 21<sup>st</sup> August 2023. The property was scheduled for public auction on 7<sup>th</sup> December 2023. The defendants argue that this application is an afterthought and an abuse of court process, claiming that the plaintiffs disregarded the Bank's notices issued as early as December 2022, only to file an application dated 6<sup>th</sup> December 2023 in the Magistrate Court after the property had been advertised for public auction.
9. Notwithstanding that the plaintiffs' application was struck out in the Magistrate's Court and that they have been in default since December 2022, the plaintiffs have made no effort to remit any amount toward settling the loan to date. The defendants note that the plaintiffs neither deny the debt and default nor challenge the existence of the charge.
10. The Bank asserts that it has fully complied with all statutory requirements in exercising its power of sale and argues that the plaintiffs have approached this Court with unclean hands, while the defendants



acted in good faith by serving all requisite notices, which the plaintiffs failed to heed. In summary, the defendants contend that the plaintiffs have not met the threshold for granting a temporary injunction. They therefore pray that the application be dismissed with costs and that the sale of the suit property proceeds to conclusion.

### **Analysis and Determination**

11. I have reviewed the parties' pleadings and submissions. The main issue for determination is whether the plaintiffs have met the threshold for granting the injunction orders they seek. Both parties acknowledge that the plaintiffs must satisfy the conditions established in *Giella V Cassman Brown & Co Ltd*, [1973] EA 358. These conditions require the Plaintiffs to demonstrate a prima facie case with a probability of success, show that they would suffer irreparable harm that could not be adequately compensated by damages, and, if the Court is in doubt, have the application determined on the balance of convenience.
12. These conditions are to be applied as separate, distinct and logical hurdles which the plaintiffs are expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. See *Nguruman Limited V Jan Bonde Nielsen & 2 Others*, [2013] KECA 347 (KLR).
13. I agree with the parties' submissions that as to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others*, [2003] KECA 175 (KLR) explained as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”
14. A prima facie case flows from what has been pleaded in the plaint, the averments which I have summarised above. The Plaintiffs' main grievance is that the defendants failed to issue and serve them with the requisite statutory notices and that this fettered the plaintiffs' equity of redemption. I am in agreement with the plaintiffs' submission that once a chargor alleges non-receipt of the statutory notice it is for the chargee Bank to prove that such notice was in fact sent. See *Nyangilo Ochieng & another V Fanuel B. Ochieng & 2 Others*, [1996] KECA 205 (KLR)].
15. In its bid to surmount this burden, the Bank has annexed the demand notices under section 90 of the [Land Act](#) dated 19<sup>th</sup> December 2022 which on their face and as deponed by the Bank indicate that they were sent to the 1<sup>st</sup> plaintiff and the plaintiffs' deponent among others by way of registered post. The Bank has also annexed copies of the notices to sell under section 96 (2) of the [Land Act](#) dated 17<sup>th</sup> April 2023 under section 96 of the [Land Act](#) which on their face also indicate that they were sent to the 1<sup>st</sup> plaintiff and the plaintiffs' deponent among others by way of registered post. The same can also be said of the 45 days' redemption notice sent to the plaintiffs and the notification of sale.
16. The Bank has also annexed copies of the certificates of posting as proof of the said postages. The plaintiffs do not dispute the listed addresses therein nor did they present any notification sent to the Bank that they had changed their addresses. The Court of Appeal in *Nyangilo Ochieng & Another V Fanuel Ochieng*(supra) held that a certificate of posting is prima facie proof of service of the said notices. In the absence of any other evidence to the contrary, it is my finding that the Bank issued the said statutory notices and the same were served upon the Plaintiffs and they are deemed to have been received by them.



17. I have also gone through the said notices and find that the Bank explicitly makes demands of the outstanding debt and states the extent of what is owed by the plaintiffs together with the consequences for non-compliance of the said notice. This is contrary to the plaintiffs' assertion that no demand has ever been made to them by the Bank as to the outstanding sums and that they were unaware of the consequences of non-compliance. Therefore, based on the material before the court, I find and hold that Bank has discharged its burden of showing that it sent to the plaintiffs the statutory notices as a prelude to the exercise of the statutory power of sale and on that basis no prima facie case has been established on this issue. The plaintiffs' claim on this limb therefore fails.
18. The plaintiffs have admitted to being indebted to the Bank. Having found that the defendants issued and served the requisite statutory notices, it follows that the Bank's right to exercise its statutory power of sale has crystallized and there is no valid reason for the court to stop it from proceeding with the intended sale of the suit property.
19. At this point, I believe it is now obvious that the plaintiffs have not made out a prima facie case with a probability of success. Their inquiry on whether they are entitled to an injunction ends at this point in line with the dicta in *Nguruman Limited V Jane Bonde Nielsen & 2 Others*, (supra). In any event, I find that any loss that is to be suffered by the plaintiffs can be ameliorated by an award of damages as per section 99(4) of the *Land Act*. I have not been shown or told that the Bank is not capable of paying these damages. The balance of convenience also tilts in favour of the Bank realizing their security as early as possible so that the value of the suit property is not outstripped by the ballooning debt.

#### **Disposition**

20. The upshot is that the plaintiffs' application dated 24<sup>th</sup> May 2024 seeking injunctive relief has no merit and it is dismissed with costs. The interim orders are accordingly discharged.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

