



**Jamu Imaging Centre Limited v Gulf African Bank Limited (Civil Suit E371 of 2024)
[2024] KEHC 13992 (KLR) (Commercial and Tax) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E371 OF 2024
FG MUGAMBI, J
NOVEMBER 8, 2024**

BETWEEN

JAMU IMAGING CENTRE LIMITED APPLICANT

AND

GULF AFRICAN BANK LIMITED RESPONDENT

RULING

1. On 13th April, 2017, the applicant applied for, and was granted, a loan facility by the respondent (the Bank) in the amount of Kshs. 21,800,000/- as outlined in a letter of variation dated 10th May, 2017. The loan was intended for the purchase of Apartment Unit A1, situated on Land Reference No. 4275/56.
2. The loan facility was secured by a charge over the said applicant's suit property together with a debenture over Siemens Somatom Emotio16 Eco Scan. The directors of the applicant jointly and severally guaranteed the facility.
3. The loan account fell into arrears, prompting the Bank to issue demand letters, followed by statutory notices, requiring the applicant to pay the outstanding loan arrears of Kshs. 15,419,930.77.
4. By the application dated 11th July, 2023 brought under Order 40 Rules 1, 4, and 10 and Order 51 of the Civil Procedure Rules, as well as Section 1A, 1B and 3A of the *Civil Procedure Act*, the applicant seeks injunctive relief against the Bank pending the hearing and determination of this suit.
5. The application is supported by the grounds on the face of it alongside the affidavit of Peter Umara Marenya, a director of the applicant. The main grounds for the application are that the statutory notices and the valuation report concerning the suit property were not served on the applicant. Additionally, the applicant disputes the amount of arrears claimed by the Bank.



6. The application is opposed by the replying affidavit of Grace M. Mwangome, the Bank's legal counsel, sworn on 7th August, 2024. She asserts that the application lacks merit, as the loan arrears have been admitted, making the entire loan due and payable. She further states that the Bank engaged Regent Auctioneers to recover the debt, and that the auctioneer's fees, along with the valuation fees, were to be borne by the applicant, which explains the debit from their account.
7. She avers the relevant statutory notices and demands were duly served on the applicant via email and registered post leaving no grounds for interfering with the Bank's contractual and statutory power of sale. She further contends that no irreparable harm will be suffered by the applicant, as the Bank is in a position to compensate any damages that may arise.
8. Following this court's directions parties filed their respective written submissions, which I have carefully considered alongside the evidence and case law cited.

Analysis and determination

9. The main issue for consideration is whether a temporary injunction should be issued in the circumstances. Order 40 Rule 1 of the Civil Procedure Rules 2010 sets out the circumstances under which a temporary injunction can be granted by the Court. The conditions that guide the Court in granting such orders are also well crystalized from the decision in *Giella V Cassman Brown & Co Ltd*, (1973) EA 385, at page 360 where Spry J. The principles are that:
 - a. A party must show that they have a prima facie case with a probability of success;
 - b. That they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if the order is not granted; and
 - c. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
10. On the first condition, this court is called upon to ascertain whether the applicants have shown a prima facie case following the threshold laid out in *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125. The Court defined a prima facie case as:

“... 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
11. In determining whether a prima facie case has been demonstrated, I am in turn cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen & 2 Others*, [2014] eKLR observed that:

“In considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation.”



12. A similar view was espoused in *Hosea Kiplagat & 6 Other V National Environment Management Authority & 2 Others*, (2015) eKLR, where the Court warned against delving into the merits of a case at the interlocutory stage. The Court had this to say:

“At the interlocutory stage the Court should not venture into making definitive findings of fact or law and particularly where the affidavits filed are contradictory as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case.”

13. I have given due consideration to the issues raised by the applicant against the background of the authorities that I have cited.

14. I note that importantly, the debt is admitted. The applicant states that he fell into arrears from the year 2023 due to financial hardships arising from the COVID pandemic. What remains unclear however, is how the applicant arrives at the conclusion that, despite defaulting since that time, the amount owed to the Bank at the time of filing this suit is only Kshs. 207,723.06. He has provided no basis for this assertion, nor any evidence to challenge the bank's statement of the amount due. Even if, for the sake of argument, this amount were correct, he has offered no explanation for why it has not been paid to date.

15. The evidence on record confirms that the Bank instructed Regent Auctioneers to recover the debt. I have reviewed clause 4.1.22 of the legal charge dated 28/9/2017, executed by the applicant. It is clear that all costs, charges, taxes, liabilities, damages or expenses incurred or suffered by the Chargee in relation or incidental to the negotiation, preparation, completion, protection, preservation, realization and enforcement of this security was going to be borne by the applicant.

16. This explains the debited amounts of Kshs. 278,518.07/= from the applicant's account. Even if this were an overcharge, which the applicant has not demonstrated, the remaining balance of the loan far exceeds this claim.

17. Moreover, regarding the right of statutory sale in cases where amounts are disputed, I align with the Court's, [Njagi, J] finding in *Scholarstica Nyaguthii Muturi V Housing Finance Co of Kenya Ltd*, (2011) KEHC 775 (KLR) in which the Court cited with approval from *The Halsbury's Laws of England* 4th Edition Vol 32 at paragraph 725 as follows:

“The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount into court. ...”

18. As regards the notices, the Bank has adduced copies of the statutory notices which were sent out through the applicant's email address and registered post. At page 50 of the Bank's documents is the 90 days statutory notice dated 22/3/2023. The same was sent through registered post to P.O. Box 87546-80100 and P.O. Box 1915-80100 on 24/03/2023. It was also forwarded to the applicant through email on 22/03/2023 at 16:41pm.

19. A 40-day notice was equally sent to the applicant on 29/02/2024 through the same addresses and a certificate of postage is attached to the bundle of documents. These run from pages 55-57 of the Bank's documents. The notice was sent through email to the applicant on 28/2/2024 at 17:41 as evidenced on page 58.



20. The applicant does not dispute that the postal and email addresses used to send the notices were those provided to the Bank, but simply claims that they did not receive the notices. I find that the Bank has fulfilled its burden of proof regarding service by transmitting the notices to the addresses supplied by the applicant. The presumption is that the addresses provided were valid and in use. Having established that the notices were properly sent, it was incumbent upon the applicant to act to redeem the property. This right of redemption must, however, be balanced against the Bank's right to exercise its statutory power of sale.
21. The final issue is the valuation which the applicant claims was not done. I do note that a valuation report dated 3/6/2024 is attached to the Bank's documents. The same was carried out by M/S Acumen Valuers Ltd and runs from pages 59-70 of the Bank's documents. The applicant cannot deny having notice of the report which in any case, forms part of the evidence in this Court since it was filed.
22. On the face of it, the evidence as a whole clearly establishes that the applicant benefited from a loan facility, that the facility fell into arrears, and that the Bank demanded repayment of Kshs. 13,451,384.62, which was due as of 27/2/2024. Despite being served with the required notices, the applicant took no action to redeem the property. I am therefore not convinced that the applicant has established a prima facie case with a probability of success.
23. Following suit in Nguruman Limited case [supra], the Court stated that if a plaintiff is unable to satisfy this first condition, the issue as to whether damages are sufficient to compensate the plaintiff in the event the suit succeeds as well as the balance of convenience and where that lies, does not arise.

Disposition

24. Accordingly, the application dated 11/7/2023 is devoid of merit. It is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

