



**Kigio Group Company Limited v Housing Finance Company Limited &
4 others (Commercial Case E634 of 2021) [2024] KEHC 15344 (KLR)
(Commercial and Tax) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E634 OF 2021
NW SIFUNA, J
NOVEMBER 21, 2024**

BETWEEN

KIGIO GROUP COMPANY LIMITED PLAINTIFF

AND

HOUSING FINANCE COMPANY LIMITED 1ST DEFENDANT

JM GIKONYO T/A GARAM INVESTMENTS 2ND DEFENDANT

GEEPAK LIMITED 3RD DEFENDANT

ELIJAH ITEGI GITHINJI 4TH DEFENDANT

GRACE WAMUYU MATHENGE 5TH DEFENDANT

RULING

1. By a letter of offer dated 29th April 2015 the plaintiff and the 1st Defendant entered into a financial arrangement of Kshs 520, 000,000/= for the construction and development of 11 storey commercial building on the Plaintiff's property known as L.R. No. 4953/IV/45 and 46 Thika Municipality Block 9/96 and 58. The Plaintiff executed a charge in respect of the above property and the property known as L.R. No. 4953/63/V Kigio Group.
2. The amount was to be to the contractor upon issuance of a milestone certificate which would be approved by the 1st Respondent. The Plaintiff defaulted in payment and the property was sold by way of public auction to the 3rd Defendant on 25th May 2021. The subject public auction is the foundation of the Notice of Motion dated 16th June 2021.



3. The Plaintiff has moved the court by the Notice of Motion dated 16th June 2021 made inter alia under Order 51 Rule 1 and 3, Order 40 Rule 1(a) and (b) 2 and 3, Rule 4(1) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure act, Section 97(1), (2), (3), Section 86(1) of the Land Act 2012 and Section 21 of the Auctioneers Act Rules 6,10, 15, 17(c) 18(1) and 3 of the Auctioneers Rules 1997. It seeks inter alia the following orders:
 1. spent
 2. That pending the hearing and determination of the application an interim injunction be granted restraining the 1st and 2nd Defendant from transferring, alienating or in any other manner whatsoever altering the ownership and/ or registration of the parcel of Land known as Land Reference Number 4953/IV/45 and 46 Thika Municipality block 9/96 and 558 currently registered under the name of Kigio Group Company Limited the Plaintiff / Applicant herein to the 3rd, 4th and 5th Defendants/Respondents either individually or jointly or to any other person whatsoever.
 3. That pending the hearing and determination of the application and the suit an interim injunction be granted restraining the 1st and 2nd Defendant from transferring, alienating or in any other manner whatsoever altering the ownership and/ or registration of the parcel of Land known as Land Reference Number 4953/IV/45 and 46 Thika Municipality block 9/96 and 558 currently registered under the name of Kigio Group Company Limited the Plaintiff / Applicant herein to the 3rd, 4th and 5th Defendants/Respondents either individually or jointly or to any other person whatsoever.
 4. That the results of the sale by public auction of the Plaintiff s Applicant property known as Land Reference number 4953/IV/45 and 46 Thika Municipality Block 9/96 and 558 held on the 25/5/2021 by the 2nd Defendant be suspended/cancelled pending the hearing and determination of the suit.
 5. That the costs of this application be in the cause.
4. The application is grounded on the affidavit of Stanley Njenga Ndegwa the founding shareholder, director and chairman of the Plaintiff sworn on 16th June 2021. The applicant contends the 2nd Respondent conducted an illegal auction on 25th May 2021 where the suit property was sold to Geepak Limited the 3rd Respondent. The applicant alleges the auction was a sham and alleges conspiracy to defraud the suit property amongst the defendants. According to the Plaintiff the defendant failed to conduct any valuation of the subject property prior to the sale it also avers that no notice was served as per the requirement of Section 90 (1)(2) of the Land Act 2012. The plaintiff contends it was denied the right to redeem the loan facility and that the 1st Defendant ignore the offers sent by Nisk Capital and Mwananchi Credit to offset the loan.
5. The Application is opposed by the 1st Respondent through the Replying affidavit of Christine Wahome who described herself as the litigation counsel sworn on 19th July, 2021. She gave brief background of the case and points out that the applicant had earlier filed Kiambu High Court Civil Suit No. 1 of 2020 Kigio Group Company Limited vs Housing finance company Limited & J.M. Gikonyo t/a Garam Investments which was filed simultaneously, filed with a Notice of Motion seeking injunctive orders against 1st and 2nd Respondents from selling the suit property through public auction at the hearing of the application the court found the Plaintiff had admitted the debt and dismissed the application.



6. The Deponent states the Plaintiff has filed a Notice of Motion application in HCC no 140 of 2021 Kigio Group Company Limited vs Housing Finance Company Ltd & J. M Gikonyo t/ a Garam Investments seeking conservatory orders and interim injunction against the 1st and 2nd respondent restraining the sale of the suit property by way of public auction pending the hearing and determination of the appeal filed against the Ruling of Hon Lady Justice Kasango delivered on 29th April, 2021. She states the applicant also sought the similar orders in the Court of Appeal in Civil Application No. E193 of 2022.
7. She asserts the sale of the subject property was advertised in the newspaper by the 2nd Defendant advertised on 10th and 17th May, 2021, to take place on 25th May 2021 and attached copies of the Notices. She deponed the Auction was lawful and Geepak emerged as the highest bidder, paid a deposit of kshs. 56.3 M and executed a Memorandum and conditions of sale dated 25th May, 2021 with the 2nd Respondent. She deponed the Plaintiff defaulted on its repayment obligation under the charge and the outstanding balance as of 13th July, 2021 stood at Kshs. 20,582,553.14 and Kshs 554,409, 434.50/ = as exhibited by the loan statements. she alleges as such the Plaintiff is undeserving of the orders.
8. The 5th Defendant acting as the managing director of the 3rd Respondent and a spouse of the 4th Respondent acting on their behalf swore the Replying affidavit dated 19th June 2021 she avers the sale of L.R. No. 4953/IV/45 and 46 within Thika Municipality Block 9/9 and 558 conducted on 25th May 2021 was lawful. she denied any fraudulent dealing and conspiracy with the 1st and 2nd Defendant as alleged by the Plaintiff. She depond that the 3rd Defendant complied with the pre-conditions of sale and deposited 5 Million to secure the bid and at the fall of the hammer paid the 10 % deposit of Kshs. 56,300,000/= and thereafter executed with the 2nd Defendant a memorandum of payment.
9. The application was canvassed by way of written submissions. The Plaintiff submissions are dated 18th May, 2022 and the 1st and 2nd Respondent's submissions are dated 4th July 2022.

Analysis and Determination

10. I have carefully considered the pleadings by both parties and the rival submissions filed herein. This is an application for interlocutory injunction the applicable principles and cited several authorities, e.g Nguruman Limited v. Jane Bonde Nielsen and 2 Others [2014] eKLR where the Court of Appeal in reiterating the conditions for grant of an interim injunction settled in Giella v. Cassman Brown [1973] EA 360 stated 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.”
11. The above three pillars for granting an injunction are to be applied distinct and separately and ought to be supported by evidence by the applicant. It is trite that a prima facie case alone is not sufficient to grant an injunction as the applicant must show that irreparable loss will be suffered that cannot be compensated by way of damages if an injunction is not granted. In the instant that a prima facie case is not established the court need not consider the other two limbs of granting an injunction.
12. The first consideration is whether the Plaintiff has established a prima facie case.



13. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Limited & 2 Others* [2003] eKLR elaborated what constitutes a prima facie case 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. While adopting the same position the Court of Appeal in *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR added that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
15. From the Pleading, the Plaintiff acknowledges it breached the loan arrangement thereby falling into arrears, it somehow blames the 1st Defendant for the failure to remit the instalment to the contractor. The Plaintiff also faults the manner in which the auction was conducted, according to the Plaintiff the defendants colluded and defrauded it the subject property. Counsel submits the Plaintiff was not given a chance to redeem the Loan facility. According to the Plaintiff the subject public auction is a sham and illegal, it argues that no redemption notice and notification to sell were issued. The question therefore is whether the Plaintiff can be granted an injunction based on the above?
16. It is not disputed that the 1st Defendant entered into a financial arrangement of Kshs 520, 000,000/= for the construction and development of 11 storey commercial building on the Plaintiff’s property known as L.R. No. 4953/IV/45 and 46 Thika Municipality Block 9/96 and 58 and executed a charge in respect of the above property and the property known as L.R. No. 4953/63/V Kigio Group. The charge provides for the terms of engagement and the consequence of breach by either party. The Plaintiff fell into arrears and admits the indebtedness. The breach thereof by the Plaintiff the 1st Respondent was under the obligation to exercise its statutory power of sale.
17. I am alive to the fact that the bank cannot be prevented from exercising its statutory right of sale by the court based on the amount disputed. One’s a property is offered as security it becomes a commodity for sale, and damages are enforceable in law if the Plaintiff successful proves the sale was illegal or unlawful. see the Court of Appeal decision in *Jacob Ochieng’ Muganda v. Housing Finance Company of Kenya Limited* [2002] eKLR.
18. The public auction took place on 25th May, 2021 with the 3rd Respondent being the highest bidder. It was at the fall of the harmer that the subject property passed to the purchaser at that instant. It is at that point that the Plaintiff’s equity of redemption was extinguished. In *Kamulu Academy Limited & Anor v. British American Insurance (K) Ltd & 2 Others* (2018) eKLR where the court held that “The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not....”



19. Further, in *Bomet Beer Distributors Limited and Another v. Kenya Commercial Bank Limited and 4 Others* [2005] e KLR the court sated as follows:

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

20. Since the applicant's equity of redemption was extinguished at the fall of the hammer and the sale by public auction has already occurred, I must emphasis on the need to protect the innocent buyer. Further Section 99 of the *Land Act* protects a purchaser from a charge and states that

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

21. The suit property herein has already been sold to a third party as per the memorandum of sale exhibited as annexure “AK9” to the replying affidavit. The said purchaser is not a party to these proceedings.

22. The Plaintiff seeks a remedy of injunction remedy seeking to restrain the perfection of the sale that has already taken place, I have already established that the court should not interfere with the banks right in their exercise of their statutory right. I have thus reached a conclusion that the applicant has not shown a prima facie case for granting of an injunction.

23. As was held in *Nguruman Limited v. Jane Bonde Nielsen & 2 Others* (supra), without a prima facie case being established, this court will not consider the other two principles of granting an injunction. It follows therefore that the application dated 16th June 2021 is bereft of merit. I dismiss the same with costs to the defendant.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

PROF (DR) NIXON SIFUNA

JUDGE

