Kaburia v Co-operative Bank of Kenya Limited (Civil Suit E066 of 2024)
[2024] KEHC 16987 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16987 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E066 OF 2024

F WANGARI, J

NOVEMBER 14, 2024

BETWEEN

DAVID KARIMA KABURIA ..... PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 10/09/2024 which sought for the following orders:
    a. Spent;
    b. Spent;
    c. That a Temporarily Injunction do issue restraining the Defendants/ Respondents, by themselves, family, proxies, their servants, agent, employees and/ or otherwise, by way of injunction, from selling, auctioning, offering to sell and interfering with the Applicant's rights over the parcel known as L.R MN/1/5467 (Original No. 5192/14) (C.R No. 18818) pending hearing and determination of this suit.
    d. That the costs of this application be provided for.
2. The Applicant stated that in May 2017, the said property was charged in favour if a facility for Kshs. 30,000,000/= where the same has been liquidated to a tune of Kshs. 18,419,517.31. In April, 2024, the Applicant sought for restructuring of the loan repayment upon noticing the possibilities of default. The Respondent did not respond to the request, instead it advertised the said property of sale by way of auction, hence the filing of this application.
3. The Applicant avers that he is desirous of having the facility liquidated to its completion only of the Respondent would heed his request to have the facility restructured. Further, he stated that if the property would be sold by public auction, he would suffer irreparable damage as the same has been

grossly undervalued with forced sale value of Kshs. 37,500,000/= yet the market value as at 2017 was Kshs. 60,000,000/=.

4. The application was opposed. The Respondents filed a Replying Affidavit dated 23/09/2024 deponed by the Respondent's Legal Manager. It was deponed that the Applicant has been in default of payment since July 2023. Despite the Applicant being served with several demand notices, Statutory Notice dated 13/12/2023, there was no response from the Applicant. Thereafter, he was served with the 40 days' Notice to Sell dated 16/03/2024. It is only after the expiry of the notice that the Applicant made the request to have the facility restructured.

5. The Respondent averred that it has the sole discretion to restructure and cannot be forced to exercise that discretion. The Applicant having failed to show proof that he has the ability to pay, the Respondent should not be denied its right to exercise the statutory power of sale, and if injunction is granted as prayed, the debt will continue to accrue (Kshs. 40,043,756 as at July 2024) outstripping the security offered whose forced sale value is Kshs. 37,500,000/=.

6. The Respondents further stated that in the event the suit is determined in favour of the Applicant, he can adequately be compensated by way of damages. The Respondent prayed to have the application dismissed with costs.

7. The application was disposed of by way of written submissions. The parties complied by filing submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

8. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination

    a. Whether the Applicant has made out a case for grant of orders of injunction;

    b. If the answer to (a) above is in the affirmative, what orders should issue?

    c. Who bears the costs of the application?

9. Turning to the substance of the application, the facts are not in dispute. The Applicant was advanced a loan facility of Kshs. 20,000,000 and the suit property was charged as the security. Due to diminishing the financial capacity to service the loan advanced, the Applicant wrote to the Respondent seeking to reschedule the loan repayment with monthly deposit of Kshs. 300,000/= with an initial deposit of Kshs. 600,000/=.

10. It is also not in dispute that the Applicant had repaid Kshs. 18,419.31 and that the last payment was done in July 2023 as per the copy of bank statement attached to the application. There is nothing to show that despite the bank not responding to the request made to restructure, the Applicant did show good faith on his part by making some deposit towards his loan. The filing of this application was not a bar to have the Applicant make attempts to reduce the money due and owing to the Respondent.

11. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in East African Industries v Trufoods [1972] EA 420 and Giella v Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal restated the law 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) ally 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted..." (Underlying for emphasis)

12. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002). However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.

13. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity.

14. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing. (See JM v SMK & 4 others [2022] eKLR)

15. So has the Applicant established prima facie case? In Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, prima facie case was defined as follows: - "...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..."

16. The purpose of an order of injunction is to preserve the substratum of the suit. The Applicant states that he is still desirous of repaying the loan, and he had already paid over Kshs 18 million as at the time of filing suit. It has been stated that the balance of the loan is more that the value of the security. The Applicant has not made any efforts to make any payments for over one year now, I find that the Applicant has failed to establish a prima facie case in the matter.

17. Even though the Applicant has failed to establish a prima facie case, I shall consider if the Applicant would suffer irreparable damage if the Respondent proceeded to exercises its statutory power of sale. The Court of Appeal in the Nguruman (supra) case expressed itself thus: -

> " ...The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy." (Emphasis added)

18. In Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Warsame, J (as he then was) held as follows: -

> " ...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction..."

19. The current value of the suit property, though disputed is below the loan balance amount. The Respondent being a financial institution has undertaken that it has the capacity to compensate the Applicant in the event the suit is determined in favour of the Applicant. I am satisfied that no irreparable injury would occur if the order sought is not granted.

20. In regard to the balance of convenience, it tilts in favour of the Respondent as per the definition given in the case of Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] eKLR, as follows: -

> " ...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed..."

21. I find no merits in the orders sought. I nevertheless considering that the Applicant has paid over Kshs.18 million, though no payment has been made towards the loan repayment for over 12 months, he shall be given a lifeline by making a considerable deposit as shall be determined by this court, before the Respondent exercises its statutory power of sale.

22. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that costs shall await the outcome of the suit.

23. In order to safeguard the Applicant's interests, it is ordered that the matter be fast tracked. Notice is hereby issued to all parties that once the matter is fixed for hearing; no adjournments shall be allowed.

24. Based on the above discourse, I make the following orders: -

    a. The application dated 10/9/2024 has no merits and the same is hereby dismissed.

    b. Considering the interests of the Applicant, it is hereby ordered that pending the Respondent's exercise of its statutory power of sale, the Applicant do deposit Kshs. 3,000,000.00 being part of the loan arrears within the next 45 days, in default, the Respondent to proceed with the sale.

    c. Parties are encouraged to come up with a settlement plan.

    d. Costs to abide the outcome of the suit.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF NOVEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

Siminyu Advocate for the Plaintiff/Applicant

N/A by the Defendant/ Respondent

Brian, Court Assistant