



REPUBLIC OF KENYA



KENYA LAW
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**Kiiru v Equity Bank & another (Civil Case E001 of 2024)
[2024] KEHC 14050 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E001 OF 2024
HI ONG'UDI, J
NOVEMBER 12, 2024**

BETWEEN

PETER CHEGE KIIRU PLAINTIFF

AND

EQUITY BANK 1ST DEFENDANT

CLEVERLINE AUCTIONEERS 2ND DEFENDANT

RULING

1. In the notice of motion dated 3rd May, 2024 the applicant seeks the following orders:
 - i. & (ii) Spent
 - iii. That an injunction be and is hereby issued restraining the respondents whether by themselves, their agents, servants and/or anyone acting under their instructions from attaching, alienating, auctioning or otherwise interfering with L. R. No. Dundori/Lanet block 5/507 pending hearing and determination of this suit.
2. The application is supported by the grounds on its face plus the applicant's affidavit sworn on 3rd May, 2024. A summary of the facts of the plaintiff's case is that he is the registered owner of land No. L. R. No. Dundori/Lanet Block 5/507 (New Gakoe) Umoja area Nakuru county. He secured financial facilities from the 1st defendant/respondent using the said title as security. He has not repaid the outstanding loan of Ksh 14.000.000/= to date. He gave the reason for this to be the change of weather leading to very poor harvest of wheat.
3. He also claims to have been promised by the 1st respondent a further loan facility of Ksh 3.5 million to assist him revamp his business. That despite signing the contract to effect it the 1st respondent had not released the money hence his being stranded. He therefore blames the bank for the situation he finds himself in, and that the receipt of the Notice of Sale from the 2nd respondent took him by surprise. Its



his averment that he had been a customer of the 1st respondent since 2005 and getting another financier would be a big problem. He annexed a copy of the redemption notice dated 26th February, 2024 (PCK 2); copy of notification of sale dated 26th February, 2024 (PCK 3) and copy of page 6 of the Nation newspaper advert of 22nd April, 2024 (PCK 4)

4. The 1st respondent filed a replying affidavit by Samuel Karanja its Manager Gatehouse Branch. Its dated 30th May, 2024. He averred that the applicant admits having taken their bank facility amounting to Ksh 14,000,000/= which continues to attract interest. That the security he furnished is Land No. Dundori/Lanet Block 5/507 and he had defaulted in servicing the loan. Further that it is on the basis of default that the 1st respondent sought to exercise its statutory power of sale in terms of the charge instrument of 26th February, 2015.
5. He depones that the applicant has not established a prima facie case with probability of success, nor shown that he will suffer irreparable damages in the event that the security is sold. Lastly that the balance of inconvenience tilts in favour of the 1st respondent realizing the security by way of sale in view of the existing contract.
6. The application was disposed of by way of written submissions.

Plaintiff's/applicant's submissions

7. These are dated 25th June, 2024 and were filed by J. V Juma & company advocates. Counsel gave a background to this matter and submitted that the 1st respondent breached the contract between it and the applicant in that it failed to release Ksh 3.5 million as a working loan as agreed with the 1st defendant's boss. The applicant thus blames the 1st respondent for the mess he has found himself in since he was never informed of the renegeing on the agreement to enable him seek for an alternative source of funding.
8. Counsel thus urged the court to decide the dispute on the 3rd limb of *Giella V Cassman Brown & Company Limited (1973) E. A 358* which is the balance of convenience. He further urged the court to grant the injunction sought against the respondents in respect of Land No. Dundori/Lanet Block 5/507.

The 1st defendant's/respondent's submissions

9. These were filed by Waigwa Ngunjiri & Co. advocates and are dated 5th July, 2024. Counsel set out the gist of the application based on the grounds, supporting and replying affidavits to the application. He thus submitted that the applicant had dismally failed to establish any of the conditions for grant of a temporary injunction as set out in the *Giella V Cassman Brown* case (*supra*) for the reasons that: He owed the 1st respondent Ksh 14,000,000/=, he had not serviced the loan, he was a party to the charge instrument which allows the respondent to realise the security in the event of default, and finally there is no legal reason advanced for the court to stop the auction. He urged the court to dismiss the application.

Analysis and determination

10. Having carefully considered the application, grounds, affidavits and both submissions, I find the main issue for determination to be whether the application is merited. The applicant seeks to have the respondent barred from auctioning his parcel of land L. R No. Dundori/Lanet Block 5/507.
11. The applicant filed his application under sections 1A and 3A of the *Civil Procedure Act* and Order 53 Rules 3 of the Civil Procedure Rules. Section 1A outlines the objective of the *Civil Procedure Act*,



while section 3A sets out the powers of the court while handling civil matters to avoid any injustices to the parties. Order 53 Civil Procedure Rules deals with applications for Judicial Review. The provision that deals with temporary injunctions which is what the application herein is about is Order 40 of the Civil Procedure Rules and it provides as follows:

Rule 1 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 dispute 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.

12. In the case of *Giella V Cassman Brown* (supra) the court set out what the court should consider as requirements before issuing a temporary injunction. They are, that the applicant should:

- i. Establish his case on at a prima facie level
- ii. Demonstrate irreparable injury if a temporary injunction is not granted and
- iii. Ally any doubts as to (ii) by showing that the balance of convenience is in his favour.

13. In addressing what a prima facie case in civil case is the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 states 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence 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”.

14. Referring to the same issue and while citing the case of *Kenya Commercial Finance Co. Ltd V Afraha Education* the Court of Appeal in the case of *Nguruman Limited V Jan Bonde Nielsen & another Nrb Civil Appeal No. 77 of 2012* states thus:

“If the applicant established 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.”

15. Bearing the above provisions of the law and the decided cases in mind, the question this court asks is whether the applicant has established a prima facie case. From the material presented herein there is no dispute that the plaintiff/applicant owes the 1st defendant/respondent, a sum of Ksh 14,000,000/= in terms of loans. It is not further disputed that the plaintiff/applicant has defaulted in repaying the money owed. The plaintiff/applicant does not deny having entered into a contract with the 1st defendant/respondent for disbursement and repayment of the money. The money was disbursed but repayment has not been done.
16. The question this court asks is why the 1st defendant/ respondent should be restrained from exercising its right of recovering its money? The plaintiff/applicant in answer to this explains that he had entered a further agreement with the 1st defendant/respondent for a further loan of Ksh 3,500,000/= which the latter has not fulfilled. That as a result he has not been able to re-establish himself businesswise. Is this a good reason to make this court grant the prayer sought herein?
17. The plaintiff/applicant is well aware that he is indebted to the 1st defendant/respondent. The amount owed is not a small sum. At the time of borrowing the money the plaintiff/applicant gave his land Title L.R No. Dundori/Lanet Block 5/07 as security. He has nowhere stated that he did not understand what this meant. On a balance of probabilities, I find that the plaintiff/applicant has not established a prima facie case to warrant the issuance of the order of temporary injunction.
18. On whether irreparable injury will be occasioned if the temporary injunction is not granted, my finding is that in auctioning the piece of land, the 1st defendant/respondent will simply be exercising its right of sale under the contract. The said 1st defendant is a reputable bank and should be able to compensate the plaintiff/applicant in the event of any injury being caused which is unlikely to be the case.
19. On the element of balance of convenience this court in exercising discretion has considered the inconvenience to be caused to each party. The plaintiff/applicant benefitted from the loans it received from the 1st defendant/respondent and gave his parcel of land as security. The only way to stop the auction would be to pay the sum owed either wholly or partially since the 1st defendant/ respondent is entitled to its money.
20. I therefore find that in the circumstances of this case, it would not be just to grant the orders sought by the plaintiff/applicant.
21. The upshot is that the application dated 3rd May, 2024 lacks merit and is hereby dismissed with costs.
22. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

