



**Gatehi & another v Equity Bank (Kenya) Limited (Commercial Case E003 of 2023) [2024] KEHC 16648 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16648 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
COMMERCIAL CASE E003 OF 2023  
JL TAMAR, J  
DECEMBER 10, 2024**

**BETWEEN**

**JOHN NJAU GATEHI ..... 1<sup>ST</sup> PLAINTIFF**

**WAMBUGU GROVE HOTEL LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

1. BY a Notice of motion dated 6<sup>th</sup> March 2023 and filed in court on 7<sup>th</sup> march 2023, the plaintiffs/applicants moved this court seeking mainly the following orders;
  - i. Spent.
  - ii. That pending the hearing and determination of this application, an order of temporary injunction be and is hereby issued, restraining the defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with all that Property known as L.R NO KJD/Kaputei North/54422 until the application is heard and determined.
  - iii. That pending the hearing and determination of the entire suit an order of injunction be and is hereby issued restraining the Defendant/respondent whether by itself, employees, servants and/or agents or otherwise assigns and/ or any person whatsoever acting on its behalf and/ or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise in any manner whatsoever interfering with all that Property known as L.R NO KJD/Kaputei North/54422 until the suit is heard and determined.



2. The application is premised on the grounds on the face of the application and supported by the affidavits of John Njau Gatehi and Agnes Wambui the 1<sup>st</sup> applicant and the director of the 2<sup>nd</sup> applicant respectively. The applicants contend that the respondent instructed Purple Roya Auctioneers to sell the above property without issuing appropriate notices as required by section 90 of the Land Act 2012 and if the sale proceeds, the loss shall be irreparable as the applicant will be greatly prejudice and many people, who depend on the property for their livelihood will be rendered jobless and desolate. Further that the applicants have deposited ksh.1(one) million and is in the process of disposing property worth ksh.10 million to settle the outstanding default amount.
3. The defendant in opposition filed grounds of opposition and replying affidavit on 15<sup>th</sup> December 2023 deponed by Amos Wakaba defendant Credit Manager Karen Branch stating that the notice of motion application is misconceived, frivolous, scandalous, vexatious and abuse of the court process, as the entire suit does not disclose any cause of action as against the defendant to warrant relief sought. The respondent contends that there is in existence a valid legal charge duly executed by the applicants in favour of the respondent Bank which the applicants have not denied. Further contrary to the assertion by the applicants, all the requisite statutory notices by the respondent had been served and received by the applicants and that the intended sale was regular and in accordance with the law. That the dispute (if any) on interest on the loan facility and the auctioneer's fees cannot be ground for the grant of the orders sought as the respondent statutory power of sale has arisen.

### **Background**

4. The undisputed facts in this case are well captured in the pleadings and the submissions of the parties which I shall set forth herein below albeit in brief;
5. On 3<sup>rd</sup> July 2019, the directors of the 2<sup>nd</sup> plaintiff approached the Defendant/Respondent for financial assistance in form of credit facilities of ksh. 67,000,000 and the same was accepted by the Defendant vide Letter of offer dated 3<sup>rd</sup> July 2019, which the Directors including the 1<sup>st</sup> plaintiff duly executed. The principal terms of the said facility were firstly, that the 1<sup>st</sup> plaintiff shall provide a personal guarantee supported by a first legal charge of ksh.90,000,000.00 over the suit property L.R NO KJD/Kaputei North/544422 registered in favour of the Defendant/respondent. Secondly, a deed of assignment of rental income receivable from the building erected over the suit property will be executed in favour of the defendant/respondent. Thirdly, that the 2<sup>nd</sup> plaintiff directors shall provide a personal guarantee for ksh. 67,000,000 duly executed in favour of the Defendant/respondent. On 27<sup>th</sup> August 2019 and pursuant to the terms of the facility, the 1<sup>st</sup> plaintiff and directors of the 2<sup>nd</sup> plaintiff executed a charge instrument as charger and borrower over the suit property.
6. On 28<sup>th</sup> January 2020 the 2<sup>nd</sup> plaintiff for two (2) other loan facilities of Ksh. 8,400,000 and Ksh. 6,320,000 for a plot purchase and business loan respectively secured by the same charged property L.R NO KJD Kaputei North/544422/
7. It is not in dispute that the plaintiff/applicants continued to service the loan up until February 2022 when they defaulted. It is also accepted as a fact that as a result of the said default, the Defendant/respondent then issued a demand Notice under section 90 of the Land Act demanding the payment of outstanding arrears owed, and Subsequently thereafter on 28<sup>th</sup> June 2022, the defendant /respondent served the plaintiff/applicants with a statutory Notice under section 96 of the Land Act. As a result of continued default, the defendant/respondent instructed Purple Roya Auctioneers to sell the charged suit property in exercise of its statutory power of sale and a Notification of Sale was issued.



8. On realizing that the Defendant/Respondent was keen on selling the charged property, the plaintiff/Applicants on 1<sup>st</sup> September 2022, sought the respondent indulgence and paid Ksh. 5,000,000 to settle part of the debt and a further Ksh.1,000,000 on 23<sup>rd</sup> February 2023. According to the defendant/respondent, the debt owing and due is ksh. 85,851,553.50 whereas the plaintiff/applicants on the other hand contend that the amount due as per their calculation is ksh.79,486,358.98.

### **Plaintiff/applicants submissions**

9. Briefly, the plaintiff/applicants submitted that once the applicants paid ksh 6,000,000 and were indulged by the defendant/respondent, they ought to have issued fresh notices to reflect the payment that had been done by the applicants to conform with section 90(2) so as to inform the chargor the nature and extent of the default. As a consequence of the above, the applicants contend that the defendant/respondent has occasioned injustice upon it; in that despite the applicant partial payment of the arrears and despite undertaking to complete the sale of parcel of land in Gilgil to offset the loan, the defendant insisted on proceeding with the sale. Secondly, the defendant intends to proceed with the sale of the suit property without issuing fresh statutory notices and that the property had been undervalued at ksh 120, 000,000.00 against an independent valuation which returned the value at ksh. 200,000,000.00. counsel placed reliance on the following cases Mrao ltd vs First American Bank of Kenya ltd & 2others as well as Mohamed Abubakar vs Benjamin Sila t/a Legacy Auctioneers Service & 3 others (2022) eKLR, Nguruman ltd vs Jan Bonde Nielsen &2 others {2014} eklr, Stanley Anyamba Ageyo & ano. Vs Musa Matu Riunga & 5 others, Joseph Siro Mosioma vs Housing Finance Company {2008} eKLR, and Paul Gitonga Wanjau vs Gathuthis Tea Factory Company ltd {2016} ekl on what constitutes prima facie case, irreparable harm and the balance of convenience.
10. Counsel for the plaintiff/applicants submitted on the issue of irreparable damage and the balance of convenience which he argues favour the grant of the reliefs sought.

### **Defendant /Respondent submissions**

11. The defendant/Respondent on the other hand submitted that the applicant has not demonstrated that they have a prima facie case with probability of success for the reason that there is a valid legal charge duly executed between the parties; that the applicant admits that there are in default of the terms of the charge. Reliance again is placed on the case of Mrao Supra. It is also argued that the applicants have failed to demonstrate that they will suffer any harm that cannot be adequately compensated by an award of damages and that if any harm be suffered by the applicant the defendant has financial muscle and capacity to compensate the applicant. The defendant further submitted that although in its view the applicant has failed to establish the first two principles for grant of temporary injunction, the balance of convenience tilts not in their favour. The following case law were referred to; Esso k ltd vs spark Makara okiya (1992) eklr, Middle East Bank (k) ltd vs Milligan Properties ltd C.A 194 of 1998, Wilstone Mdindi Mwawugunga vs Kenya Women Microfinance Bank plc {2022} eklr, and Samson Mwathi Nyutu vs Savings & loans Kenya ltd.

### **Analysis And Determination:**

#### **I discern the issue for determination to be; whether the court should restrain the Defendant/Respondent from exercising its statutory power of sale**

12. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown &



Co. Ltd [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

13. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR had this to say:

“...these are the three pillars on which rest 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... 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 are 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.”

14. The plaintiff/applicant contend that the advertisement for sale of the plaintiff/ applicant property was done without issuance of fresh Notices contrary to the law. The defendant/applicant issued the first Statutory Notice under section 90 (1) of the *Land Act* on 4<sup>th</sup> February 2022, and on 27 February 2022 and acting on the instructions by the defendant, the auctioneer advertised the property for sale which appeared on the standard news paper of the same date for sale on 15<sup>th</sup> March 2023. Subsequently, on 28<sup>th</sup> June 2022, the defendant issued a statutory Notice to sell the suit property under section 96 (2) (3) of the *Land Act* informing the applicant of the nature and the extent of the default and the amount in arrears being 8,021, 094, 92. By letter dated 24<sup>th</sup> August 2022, and received by the applicants on 25<sup>th</sup> August 2022, Purple Royal Auctioneers notified the applicants of a Sale by Public auction of the suit property scheduled for 27<sup>th</sup> October 2022.

15. The chronology of the events above is important because despite the above notices being in place, the applicants paid ksh. 5,000,000 in September 2022, and 1,000,000.00 in February 2023 reducing the arrears. Further, through its advocates the applicants engaged the defendant and informed them that they were in process of disposing a parcel of land in Gilgil with a view to pay the amount owed. It is for this reason that the applicants argue that having accepted to indulge the applicants by accepting the payment of six million, in part settlement, the defendant ought to have issued fresh Notices under section 90 of the *Land Act* to clearly specify the nature and extent of the applicant’s indebtedness taking into account the amount already paid.

16. I agree and hold that once a chargee in writing or by conduct indulges a chargor having issued the statutory notices provided in law, an obligation is created that entitles the applicants to fresh Notices to reflect the true nature and extend of the applicant’s indebtedness after appropriate adjustment are



made since the earlier notices had been spent and compromised by the bank. In *First Choice Mega Store Limited vs Ecobank Kenya Limited* [2017] eKLR Onguto J stated;

“The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right to redeem the property. In the absence of a Notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have notifications of such actions and an opportunity to redeem his property”.

17. Therefore, find that the plaintiff/applicants have made a prima facie case with a probability of success.

18. I shall now consider the other two conditions for grant of an interlocutory injunction.

**Whether the plaintiff/applicant will suffer irreparable harm which would not be adequately compensated by an award of damages.**

19. The court of appeal in *Nguruman Limited* case addressed this second principle by stating that;

“On the second factor, the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction ... and the burden is on the applicant to demonstrate, prima facie, the nature and the extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant...”

20. The plaintiff/ applicants submitted before this court that the suit property is a prime piece of land on which the plaintiff have built several apartments currently let out to tenants and is the only lifetime project that has been undertaken by the applicants and which sustains their every day lives. It is the plaintiff case that if the court does not stop the sale of the property, they will have lost their daily source of income crippling their ability to continue tending to their basic needs. Further given undervaluation by the defendant, and considering that the valuation undertaken by the applicants returned a value of ksh. 200,000,000 they will loss considerably.

21. It is submitted on the other hand that the defendant is a financial institution with financial muscle and capacity to compensate the applicants for injuries that may be suffered. It is indeed true that the applicants offered their developed suit property as security for monies advanced, well aware that in the event of default the same will sold to recover the debt. It is my view that defendant is capable of compensating the applicants for any damages that maybe suffered in the event that the suit property is lawfully sold.

**In whose favour does the balance of convenience tilt**

22. In my view the court should always opt for the lower rather than the higher risk of injustice as stated in *Suleiman vs Amboseli Resort* [2004] 2 klr. The applicants submitted that the balance of convenience tilts in their favour for the reason that should the court decline to grant an injunction and the suit ultimately succeeds, they will not be able to retain the suit property as well as losing on the Gilgil property where an agreement for sale had already been executed.



23. In *Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR and *Chebii Kipkoech vs Barnabas Tuitoek Bargarioria &ano* [2019] eKLR, the court explained that;

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

24. I agree with the plaintiff that the balance of convenience tilts in favour of the applicants.

25. The Plaintiffs/applicants are indebted to the defendant Bank and this is readily admitted by the applicants that the facility to a great extent remain unpaid. Since the court has found that Plaintiff/applicants have established a prima facie case with a probability of success on the issuance of fresh notices, under section 90(1) of the *Land Act*, it would not be in the interest of justice to grant an injunction pending the hearing and determination of the suit as the debt would continue to accumulate. I am therefore inclined to grant an injunction on terms as was approved by the Court of Appeal

26. in *National Bank of Kenya v Shimmers Plaza Limited* NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR the court stated thus;

“An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

27. In the Circumstances therefore, I shall grant an injunction only limited to the period necessary for the defendant/respondent Bank to comply with the law by issuing and sending to the Plaintiffs fresh statutory notices under section 90(1) of the *Land Act*, 2012 and then proceed with all the other steps.

Consequently;

- i. The Defendant/Respondent be and is hereby restrained from exercising its statutory power of sale in respect of the properties known as L.R NO KJD/Kaputei North/544422 unless it issues fresh statutory notices under section 90 of the *Land Act*, 2012.
- ii. The Defendants shall bear the costs of the application.

**DATED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10TH DAY OF DECEMBER 2024**

**JOHN.T LOLWATAN**

**JUDGE**

