



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibishi Hardware and Electrical Limited & 2 others v Equity Bank  
(Kenya) Limited (Civil Suit E440 of 2024) [2024] KEHC 15644 (KLR)  
(Commercial & Admiralty) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
CIVIL SUIT E440 OF 2024  
JWW MONG'ARE, J  
DECEMBER 6, 2024**

**BETWEEN**

**KIBISHI HARDWARE AND ELECTRICAL LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH KIMEU MBITHI ..... 2<sup>ND</sup> PLAINTIFF  
MIKE MBITHI KIMEU ..... 3<sup>RD</sup> PLAINTIFF  
  
AND  
EQUITY BANK (KENYA) LIMITED ..... DEFENDANT**

**RULING**

1. On 31/7/2024 the Plaintiff moved this honourable court under certificate of urgency by a Notice of Motion application seeking the following orders:-
  - a. Spent
  - b. Spent
  - c. That upon hearing this application inter partes, this Honourable Court be pleased to grant an order of injunction restraining the Defendant/Respondent by itself, agents, and/or servants from selling by public auction or private treaty or otherwise, the 2<sup>nd</sup> Plaintiffs/Applicants property situate in the city of Nairobi and known as L.R. No. 5986/85 pending the determination of this suit.
  - d. That costs of this application be provided for.
  - e. That this Honourable court be pleased to make any other order(s) as will be necessary for the ends of justice.



2. The application is supported by the grounds set on its face and the supporting affidavit of MIKE KIMEU MBITHI sworn on 25<sup>th</sup> May 2024. The Application is opposed and the Defendants/ Respondent have filed a replying affidavit in opposition thereto sworn by CAROLINE KORI sworn on 23<sup>rd</sup> August 2024.
3. When the parties appeared before the court during the inter partes hearing of the application both parties agreed to dispose the application by way of written submissions and the court issued directions to that effect. However, at the writing of this ruling, the court notes only the Respondents had filed written submissions dated 26<sup>th</sup> September 2024, which the court has carefully considered alongside the parties' pleadings.

### **Analysis and Determination.**

4. I note that the Plaintiff is seeking injunctive orders and as such, it ought to satisfy the conditions set out in the case of *Giella Vs. Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR).
5. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained 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.
6. It is the applicant's case that this court should grant an order of interim injunction against the defendant and restrain it from selling and or in any way interfering with the suit property being L.R. 5986/65 which property is situated in the City of Nairobi registered in the name of the 2<sup>nd</sup> Plaintiff.
7. The Applicants argue that the said property was by a charge dated 25<sup>th</sup> April 2016 charged to Equatorial Commercial Bank Limited to secure a borrowing of Kshs.50,000,000/= . Further the Applicant states that the Defendant, Equity Bank Limited has by a statutory notice of sale purported to serve the Plaintiffs/ Applicants with a 90 day Statutory Notice under section 90(1), (2),(3) of the [Land Act](#), 2012, of the suit property. In addition, the Defendant went ahead to serve a further 40-day notice of its intention to sell the suit property in compliance with 96(2)(3) of the [Land Act](#).
8. It is the Applicant's case that such statutory power of sale is only reserved by law to a registered chargee over the suit property, which the plaintiffs argue, the Defendant is not. The Applicant's further argue that the purported gazette notice number 600 of 27<sup>th</sup> January 2023, for the take-over of the Assets of Spire Bank Limited, the successor in title to Equatorial Commercial Bank Limited, does not clothe it with the rights of a chargee having failed to comply with the law as set out under section 9(8) and (9) of the [Banking Act](#) which mandates that such take-over of assets and liabilities or amalgamation are to be effected and recorded in the relevant register and therefore against the respective title.
9. It is the Applicant's position that the defendant has to date not complied with the above requirement of the [banking act](#) and therefore cannot purport to exercise rights and powers of a chargee and hence



faults the issuance of the stated Statutory notices. The Applicant urges the court to be persuaded by the Court of Appeal decision in the case of [\*PURBHAI GOPAL RAMJI PATEL VS ASSET RECOVERY SERVICES NAIROBI C.A. NO. 185 OF 2010\*](#) where the court held that a statutory power of sale “is a special one exercisable by the one on whom the charge documents repose power. Absent the charge, the statutory power of sale has no foundation; to put it differently, it is not every creditor who may exercise a statutory power of sale”. They urged the court to find that the purported statutory notice has no foundation and restrain the defendant by an order of injunction from proceeding in the said fashion.

10. Alongside the replying affidavit sworn by the Respondents senior legal officer, Ms. Caroline Kori, the respondents also filed written submissions 24<sup>th</sup> September 2024.
11. The Respondents argue that they are entitled to the rights accruing under the legal charge between the Plaintiffs and Equatorial Commercial Bank Limited registered over the suit premises as pursuant to a take-over of the Assets and liabilities of Spire Bank Limited, the successor in title of Equatorial Commercial Bank, they automatically assumed the same rights as the original chargee. They therefore argue that the Applicants application to restrain the defendant from exercise its statutory power of sale over the charged property is misplaced as the loan secured by the charged property is still outstanding and continues to accrue interest and as at 18<sup>th</sup> July 2024, the same stood at Kshs.50,904,083.62/= . Therefore, it is the position of the Respondent that the Applicant has approached this court with unclean hands is underserving of the equitable reliefs being sought from the court.
12. The Respondent has urged the court to be guided by article 159 of [\*the constitution\*](#) in interpreting section 9 of the [\*Banking Act\*](#) and find that the requirements therein are technicalities and dismiss the present application in the interest of meting substantive justice to all the parties.
13. Having analysed the parties arguments in the present application, the court notes that it is called upon to determine whether to grant the prayers sought by the plaintiff and injunct the defendant from proceeding with its intended exercise of its statutory power of sale of the suit premises.
14. The court notes that pursuant to a gazette notice issued by the Defendant on 12<sup>th</sup> September 2023, the Defendant did issue a public announcement that pursuant to a takeover of the Assets and Liabilities of Spire Bank, the Defendant as at 31<sup>st</sup> January acquired the business previously operated by Spire Bank limited which included both the Assets and Liabilities thereto.
15. The Court notes further that section of the [\*Banking Act\*](#) provides as follows:-
  - a.
    - “(1) No amalgamation or arrangement which involves an institution as one of the principal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of an institution to another person, shall have legal force except with the prior written approval of the Minister.
    - (2) .....
    - (3) Upon the coming into effect of a transaction effecting the amalgamation or acquisition of one institution by another institution, or effecting the transfer of all or part of the assets and liabilities of one financial institution to another institution pursuant to this section:-
      - (a) all the assets and liabilities of the amalgamating institutions or, in the case of a transfer of assets and liabilities, those assets and liabilities of the transferor institution that are transferred in terms of the transaction shall vest in and



become binding upon the amalgamated institution or, as the case may be, the receiving institution;

- (b) the amalgamated institutions or, in the case of the transfer of assets and liabilities, the receiving institution shall have the same rights and be subject to the same obligations as those which the amalgamating institution or, as the case may be, the transferor institution may have had or to which they or it may have been subject immediately before the amalgamation or transfer;
- (c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating institutions or, as the case may be, the transferor institution and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain in full force and effect and shall be construed for all purposes as if they had been entered into, made, up or executed with, by or in favour of the amalgamated institution or, as the case may be, the receiving institution or person to whom the assets and liabilities in question are transferred; and

(d) .....

(4) .....

(5) .....

(6) .....

(7) .....

(8) The Registrar of Companies and the Registrar of Titles, and every officer or person in charge of a deeds registry or any other relevant office shall, if in his office or in any register under his control –

- (a) there is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by; or
- (b) there is registered any share, stock, debenture or other marketable security in favour; or
- (c) there has been issued any licence to or in favour of any amalgamating or transferor institution, and if satisfied:-
  - (i) that the Minister has approved the amalgamation or transfer pursuant to subsection (1); and
  - (ii) that such that such amalgamation or transfer has been duly effected, and upon production to him of any relevant deed, bond, share, stock debenture, certificate, letter of appointment, licence or other document, make such endorsements thereon and effect such alterations in his registers as may be necessary to record the transfer of the relevant property bond or other right, share, stock, 21 CAP 488 *BANKING ACT* debenture, marketable security, letter or



appointment or licence and of any rights thereunder to the resulting institution or, as the case may be, to the receiving institution.

(9) .....

16. it is clear from a reading of the above provision of the Banking Act that upon completion of the amalgamation process the new institution assumes the same rights and obligations as the original institution and that it is bound by any conditions of the agreements arising from the said contractual commitments.
17. To my mind therefore, a reading of the said section 8 and 9 of the Banking Act clearly transfers all rights and obligations created and existing as at the time of acquisition to the new institution. It therefore follows that the defendants were within their rights to issue, as they did, to the Plaintiffs the relevant statutory notices under the Land Act, which then triggered the present suit seeking to stop the Defendants from exercising their statutory power of sale.
18. Be that as it may, having found that the Defendant was legally entitled to exercise the rights of a Chargee under the charge over the suit property, the question then this court should seek to answer is whether the Plaintiff has met the threshold set out earlier of a grant of an order of injunction as per the principles set out in *Giella*(supra).
19. It is not disputed that the Plaintiffs were advanced a loan of Kshs.50,000,000/= by Equatorial Commercial Bank which later changed its name to Spire Bank Limited. It is also not disputed that Spire Bank Limited was acquired by the defendant, Equity Bank Limited and a notice to that effect was gazetted. The defendant allege that the loan facility held by the Plaintiffs and secured under a legal charge over LR. No. 5986/85 is still in arrears and has not been fully repaid. Indeed, the Defendant alleges that the same is still outstanding to the tune of Kshs. Kshs.50,904,083.62/=. This allegation has not been denied or controverted by the Plaintiffs.
20. It is trite that he who comes to equity must do so with clean hands. The orders being sought being of an equitable relief a party seeking the court to grant such orders must demonstrate that it is indeed deserving of such orders. The question then the court must seek to answer is whether the Applicant has demonstrated that they are entitled to the reliefs sought.
21. *Mrao ltd*(supra) has clearly defined what the plaintiffs need to establish for them to set out a prima facie case in the present suit. It is therefore clear from the pleadings and the undisputed facts that the loan secured by the charged property is still outstanding and unpaid and therefore this court cannot grant an injunction as sought on the allegations of the Defendants failure to register its interest as per the Banking Act denied them the power to issue Statutory notices as chargees.
22. In sum it is my finding that the Plaintiffs have failed to establish a prima facie case. Since the Court of Appeal in the *Nguruman* case(Supra) has set out that the principles for grant have injunction are to be considered sequentially with the outcome being where the applicant fails to establish the first one the court is not expected to consider the other two principles, I will therefore not stop to consider whether damages are insufficient or in whose favour the balance of probabilities lie.
23. In conclusion I find and hold that the Plaintiffs' application for injunction is unmerited. The same is hereby dismissed with costs to the Respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 6<sup>TH</sup> DAY OF DECEMBER 2024**

.....



**J. W. W. MONGARE**

**JUDGE**

In the Presence of:-

1. Mr. Adunda for the Plaintiff/Applicant.
2. Ms. Karanu for the Defendant/Respondent.
3. Amos - Court Assistant

