Muriithi t/a Design Mate Enterprises v Family Bank Limited (Civil Case E020 of 2023) [2024] KEHC 15937 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E020 OF 2023

FR OLEL, J

DECEMBER 17, 2024

BETWEEN

ANTHONY GITARI MURIITHI T/A DESIGN MATE ENTERPRISES ..... APPLICANT

AND

FAMILY BANK LIMITED ..... RESPONDENT

RULING

A. Introduction

1. The Application before this court for determination is the Notice of Motion Application dated 10th March 2023 brought under Section 1A, 1B, 3 & 3(A) and 63 (e) of the *Civil Procedure Act* and Order 40 Rule 1(a) and 2, of the Civil Procedure Rules,2010 and seeks for orders that;

    a. That this Honourable court be pleased to issue a temporary Injunction restraining the Defendant/Respondent whether by themselves, their agents, servants and/or employees from alienating, transferring, leasing or in any other manner interfering with All that property known as LR NO 12715/7376 (IR NO 132706) ORIGINAL NO 12715/470/13 SYOKIMAU MACHAKOS COUNTY pending hearing and determination of this suit.

    b. That Costs of this Application be provided for.

2. The Application is supported by the grounds stated on the face of the said application and the Supporting Affidavit of the plaintiff, where he depones that he took a mortgage facility with the respondent bank and had been making his monthly repayments religiously as agreed, but this was disrupted by COVID -19 pandemic, which greatly affected his business making him unable to continue paying the monthly installments as scheduled. Following the aforestated failure to service his loan, the respondent had sought to exercise its statutory power of sale, but their action was illegal as

they had failed to issue the 90-day and 40-day statutory notices, thereby rendering their action Null and void.

3. He had on several occasions written to the bank requesting for restructuring of the facility but had not received any response. It was also within his knowledge that the bank had conducted a shambolic auction and sold the suit property for Kshs 9,000,000/=, which was way below the forced sale value, and the successful bidder had already paid a 10% deposit for the alleged auction price. He was thus apprehensive that should the injunction orders not be granted, the respondent would proceed to unlawfully close the sale of his property and seek to evict from his family home, where he resided with his children and elderly parents. This would cause him irreparable loss and damage not capable of compensation by way of damages.

4. He therefore urged the court to find that his application had merit and be pleased to issue the orders sought.

B. The Response

5. This application was strenuously opposed by the respondent, who in response filed their replying affidavit dated 4th December 2023, sworn by one Sylvia Wambani, a legal officer employed by the bank. She averred that the plaintiff applied for and was granted a facility worth Kshs 9,100,000/= made up of a mortgage loan of Kshs 8,600,000/= and an overdraft facility of Kshs 500,000/= for purposes of construction of a residential home on LR. NO. 12715/7376, Syokimau. (hereinafter referred to as the suit parcel) The loan advanced was payable over a period of 120 months with monthly installments settled at Kshs 158,028/= and secured by a first legal charge for Kshs 9,100,000/= over the suit parcel.

6. The plaintiff failed to meet his loan repayment obligations, and for the loan duration, being the last ten years had only paid Kshs 462,971.58/= against the advances sum of Kshs 9,100,000/= without computing commercial and penalty interest due thereon. They issued the relevant statutory notices, which prompted the applicant to make empty promises to remedy the default but failed to do so. Faced with the growing default amount, they valued the suit property as shown by their valuation reports dated 11.01.2021 and 08.02.2022 and eventually instructed Ruol Auctioneers to sell the suit property by public auction.

7. Before the Auction, they had the final valuation done by Liaison Valuers, who generated their report dated 16.10.2023 and placed the forced sale value at Ksh 9,000,000/=. The auction took place on 10.11.2023 and a successful bid of the forced sale value made by one Janeliza Mkonji was accepted. The application filed lacked factual and legal merit and the respondent prayed that the same be dismissed.

C. Analysis & Determination

8. I have carefully considered the Notice of Motion Application, the Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue that arises for determination is whether this court should grant an order of injunction stopping the sale of the suit property as sort by the Applicant.

9. Temporary injunctions are governed by provisions of Order 40 Rule 1 of the Civil Procedure Rules 2010 provides that;

> 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 dispose 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.

10. The principles of granting injunctions are governed by the locus classicus case of Giella vs Casman Brown [1973] 358, the said principles were restated in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others, *CA No. 77 of 2012*, 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.
>
> 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."

11. What constitutes prima facie was discussed by the Court of Appeal in the case of Mrao Ltd vs First American Bank of Kenya Ltd [2003] eKLR, where the court stated as follows:-

> "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."

12. In Nguruman limited Vs Jan Bonde Nielsen & 2 others (supra), the Court of Appeal agreed with the definition of a prima facie case as stated in Marao case and stated that:

> "We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. 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.

13. All that the court at this stage is expected to adjudge is if on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Unfortunately, the plaintiff/applicant's pleadings do not bring out any breach of his rights or any threat thereto when considered in light of his contractual obligations. The Defendant/Respondent did follow to the letter, the prerequisite requirement in law as provided for under section 56(2) of the *Land Registration Act*, and Section 90 and 96(2)of the *Land Act*, while issuing statutory notices after which a valuation was done by Liaison Valuers Ltd.

14. The suit properties were thereafter advertised for sale and sold to the successful bidder, one Janeliza Mkoji vide the public Auction which took place on 10th November 2023. The plaintiff has therefore not established a prima facie case as he failed to repay the loan as scheduled and the respondent is also shown to have complied with all statutory requirements before selling this suit property.

15. As regards proof of irreparable injury, Halsbury's Laws of England, 3rd Edition Volume 21, Paragraph 739 page 352 defines irreparable injury as;

> "injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question."

16. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the court did discuss the issue of irreparable damage and held that:

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant 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 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."

17. That the Court of Appeal further held that:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and 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. 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."

18. The Applicant contends that he will suffer loss if the orders sought are not granted as he resided on the suit property with his family and elderly parents. Further, he was still willing to settle the outstanding sums owed to the bank by paying Kshs 100,000/= monthly toward the settlement of the same. The Defendant/Respondent on the other hand content that it is evident that they have complied with the law and were entitled to recover the sums owned to the Bank. The plaintiff/applicant was fully aware of the consequences of offering his property as security and knew that the said property would be sold if he defaulted in repaying the sums owed.

19. The defendant/respondent's contention is correct. By charging the suit property, the applicant constituted the said property as a commodity in the Market, which the respondent could sell to recover the sums owed. In the absence of any breach identified in this process of sale, the applicant cannot be heard to allege that he would suffer irreparable loss as a result of the statutory recovery process being undertaken. In any event, the value of the property charged is determinable and if at the end of the trial, the court finds in favour of the applicant he can still be adequately compensated.

20. This position too was upheld in the case of Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited [2001] eKLR, where the Court stated the following;

> "Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."

21. On a balance of convenience, I am guided by the decision of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR where it was held 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 the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

22. In the case of Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another [2019] eKLR, it was held that:

> " 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."

23. I find that the balance of convenience, in this case, tilts in favour of the Respondent. The parties are tied at the hip by their contractual obligations which the court cannot interfere with. The Defendant is a financial institution that lends out money and the sums unpaid will continue to accrue to their loss and detriment. The inconvenience caused to them would be greater than that caused to the plaintiff if an injunction is granted and the suit is ultimately dismissed as the outlay of the outstanding loan will grow. In any event, the Defendant/Respondent too is in a strong financial position to compensate the plaintiff/Applicant should he eventually succeed in prosecuting his suit.

D. - Disposition

24. For the foregoing reasons, I find that the Applicant has not demonstrated and/or met any of the pre-requisite conditions necessary to enable the court grant the injunctive orders sought. The notice of motion application dated 22nd November 2023 lacks merit and is accordingly dismissed with costs to the Respondent.

25. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of: -

Mr. Ochulo for Plaintiff/Applicant

Ms. Onsare for Defendant/Respondent

Susan/Sam - Court Assistants