



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 406 OF 2019**

**BENL DEVELOPMENT LIMITED..... PLAINTIFF**

**-VERSUS-**

**FIRST COMMUNITY BANK LIMITED..... DEFENDANT**

**R U L I N G**

1. This is a ruling on the plaintiff's Motion on Notice dated 8/10/2020. It is brought under *Article 159(2)(a) of the Constitution of Kenya, sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act and Order 40 rules 1&2 and Order 51 of the Civil Procedure Rules.*
2. The application seeks a temporary injunction to restrain the respondent from selling the property known as **L.R NO. 7149/23 (ORIGINAL NO.7149/8/5)** (hereinafter "the suit property") pending the hearing and determination of the suit. There is also a prayer to set aside the proceedings of 13/8/2020 and the consequential *ex parte* order issued thereon that vacated an earlier injunctive order made on 14/11/2019.
3. The application is supported by the affidavit of **MOHAMED YASSIN ISMAEL** sworn on even date. The grounds are; that the applicant brought the present suit against the respondent for failure to issue a statutory notice under *section 90(1) of the Land Act 2012* and for breach of its duty of care *under section 97(1) of the Land Act*, amongst other reasons.
4. That concurrent with the filing of the suit, the applicant filed an application dated 13/11/2019 for an injunction to restrain an auction planned for 14/11/2019. On the same day, an interim order was issued restraining the respondent from dealing with the suit property in any prejudicial manner pending the hearing of that application.
5. Subsequently, the respondent filed an application dated 30/1/2020 seeking the review and setting aside of that order. Before either of the application could be heard, the applicant's erstwhile advocates, Ms. Kariuki E & Co., applied to withdraw from acting for the applicant.
6. That application for withdrawal by Ms. Kariuki E, advocate was allowed on 13/8/2020. Immediately thereafter, the respondent's advocate applied for the discharge of the interim orders which application was allowed. The applicant contended that the said orders of 14/11/2019 were discharged in its absence and without affording it an opportunity of being heard.
7. That it was neither served with a hearing notice nor notified of the proceedings of 13/8/2020. That the oral application was made without regard to the respondent's existing application of 30/1/2020. That unless the impugned proceedings and orders of 13/8/2020 are set aside, the applicant will suffer irreparable loss and damage as the respondent may proceed to auction the suit property.
8. In opposition, the respondent filed a replying affidavit sworn by **CLARIS OGOMBO**, the legal officer of the respondent, on 1/2/2021. The respondent contended that Messrs Kariuki E & Co Advocates were served with a hearing notice for 13/8/2020. That despite the current advocates having executed a consent on 12/8/2020 to come on record, they only filed it on 2/9/2020 and never bothered to attend court on 13/8/2020.
9. That the current application cannot be entertained as it would amount to asking the court to sit on appeal on its own order. That the court's inherent jurisdiction cannot be invoked where it is likely to result in an injustice to one party who has already complied with the orders sought to be reversed. That the respondent had already complied with the order of 13/8/2020 and issued a 45 days' notice and advertised the suit property for sale.
10. Further, it was contended that the applicant had weaponized the interim order and failed to service the facilities the subject of the suit.
11. I have carefully considered the depositions of the respective parties and the submissions of learned Counsel. This is an application for the

setting aside of the proceedings of 13/8/2020 which are said to have been ex-parte and the consequent orders made thereon. There is also a prayer for injunction.

12. Peremptorily, the prayer for injunction cannot be granted as sought. This is because, there is a similar prayer in the original application dated 14/11/2019 which is yet to be heard. The present prayer should have been for a limited period, that is, to last until the application of 14/11/2019 is heard. It is therefore sub-judice.

13. From the record, the order extracted pursuant to the impugned proceedings suggest that the proceedings were not ex-parte. The applicant has not challenged or disputed the extracted order. The same was exhibited in the replying affidavit by the respondent. In this regard, it would be unfair to condemn the Court, as the applicant has sought to, that it acted unfairly.

14. The prayers sought in the current application are in the discretion of the Court. Similarly, the granting or setting aside of an injunction is in the discretion of the Court. Such discretion however, will be exercised judiciously and not capriciously.

15. In the case of **St Patricks Hill School Ltd v Bank of Africa Kenya Ltd [2018] Eklr**, it was held: -

***“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”***

16. The court has unfettered discretion to discharge or vary an injunction if the ends of justice demand so. Interim injunctions are not meant to be punitive of a party to a proceeding. They are meant to preserve the state of things pending the court investigating the dispute.

17. Interim injunctions do not suspend obligations of the parties to their contracts. They are rather meant to afford the parties an opportunity of being heard on their grievances. When a borrower rushes to court and obtains an interim order of injunction, be it ex-parte or inter-partes, he is not absolved from his obligations under the contract with the lender. He is obligated to continue servicing the facilities in the normal manner pending the resolution of the dispute.

18. An interim order of injunction is never a carte blanche licence for the borrower to suspend his obligations under the contract and sit back pretty leaving the lender writhing in pain. The funds disbursed under the contracts of lending belong to depositors out there. They require their monies to be returned to the bank for use as and when it is require.

19. In this regard, an interim injunction that is followed by non-servicing of the loan by a borrower is subject to discharge forthwith without any much consideration. The court retains the discretion to vary or discharge such an interim injunction for good cause. That is why even an injunction made after an inter-partes hearing has a lifespan of only 1 year under **Order 40**.

20. I will here echo Makau J when he delivered himself in **Ochola Kamili Holdings Ltd v. Guardian Bank Ltd [2018] Eklr**, thus: -

***“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter .... Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.***

21. In the present case, it was deposed in the replying affidavit that ever since the applicant obtained the interim injunction on 14/11/2019, it stopped servicing the sums due under the facility. There is no allegation that the amount being demanded by the respondent is not due.

22. In my view, the interim injunction of 14/11/2019 had served its purpose. It had been in force for nearly 10 months. There is nothing to show that the Court exercised its discretion wrongly or considered extraneous factors in setting it aside.

23. In the premises, the application dated 8/10/2020 is without merit and is hereby dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021.**

**A. MABEYA, FCI Arb.**

**JUDGE**