



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCC NO. E261 OF 2020

PETER KAIRU GITU.....PLAINTIFF/APPLICANT

VERSUS

KCB BANK KENYA LIMITED.....1ST DEFENDANT

EXCELLENCE & INTERGRITY AUCTIONEERS.....2ND DEFENDANT

RULING

1. This ruling is in respect to the application dated 21st July 2020 wherein the plaintiff/applicant seeks orders that:

1. Spent.

2. Spent

3. Spent

4. That the 1st defendant either by itself, servants and/or agents be restrained by an injunction from selling plot number L.R. No. 12913/19 (I.R. No. 39168) KAHAWA WANDANI ESTATE by way of public auction fixed for 24th September, 2020 pending the hearing and determination of this application and the main suit.

5. That the 2nd defendant either by itself, servants and/or agents be restrained by an injunction from selling the proclaimed plot number L.R. No. 12913/19 (I.R. No. 39168) KAHAWA WENDANI ESTATE pending the hearing and determination of this application and the entire suit.

6. That the costs of this application be provided for.

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

a. That the defendants herein have advertised the plaintiff's property for public auction slated for 24th September, 2020 without following the due process of the law.

b. That the Plaintiff/Applicant is prejudiced by the very action and stands to suffer irreparably noting the property is valued at over Kshs 40 million and it has been his family's home for the past 30 years.

c. That the Plaintiff/Applicant herein took a 6.2 million loan on 28th August, 2011 from the 1st defendant and continued to service the same without delay to a tune close to Kshs 4 million, paying a monthly installment of Kshs 130,000 with a grace period 20 years.

d. That the plaintiff has requested for a comprehensive loan statement but the efforts have been futile as he was only given grossly overstated figures that were not reducing but increasing and not the actual tabulation of the loan account.

e. That currently the figure given to the plaintiff as initial balance is kshs 6,738,250.83 together with auctioneer's charges

being Kshs 735,000.

f. That the 1st defendant has instructed the 2nd defendant to auction the charged property being plot number L.R. No. 12913/19 (I.R. No. 39168) belonging to the Plaintiff/Applicant.

3. The 1st defendant opposed the application through the Replying affidavit of its Recovery Manager **Mr. Justus Wambua** who avers that Applicant obtained a loan facility of Kshs 6,200,000.00 for which he voluntarily offered the parcel of land known as I-R 1291 2119 (IR No. 39168) (hereinafter referred to as **“the Suit Property”**) as security to be charged in favour of the bank. He states that despite the clear provisions of the Charge instrument, the Applicant defaulted in repaying the loan as provided in the charge instrument thereby forcing the Bank to commence the realization process after issuing the requisite demand notices.

4. He further states that the applicant is aware of his indebtedness to the 1st respondent and has made several unfulfilled proposals to settle the loan facility. He reiterates that the Bank has complied with the legal requirements in exercising its statutory power of sale and that it is evident, from the applicant’s Affidavit, that what he disputes is the figures of the loan amount.

5. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.

6. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which 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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(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.”

7. The conditions for consideration in granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

8. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely: -

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

9. The important consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st defendant does not deny that it has set in motion the process of realizing the security offered by the plaintiff for the debt. The 1st defendant however contends that it has a legal right to exercise a statutory power of sale, whereas the Plaintiff/Applicant challenges such a right while contending that he has not been furnished with a comprehensive loan statement and further, that the figures given are grossly overstated.

10. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In **Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR**, the Court of Appeal defined a prima facie case as: -

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

11. As I have already stated in this ruling, the applicant’s main contention is that the outstanding loan amount is grossly overstated. I find that

it is trite law that a dispute as to the outstanding loan amount cannot be a ground for granting an order of injunction. This is the position that was adopted in **Mrao Limited v First American Bank of Kenya Ltd & others (supra)** where the court addressed itself thus: -

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

12. In the present case, I note that it is not disputed that the applicant obtained a loan facility of Kshs 6.2 million from the 1st defendant and that he charged his property being L.R. No. 12913/19 (I.R. No. 39168) as security for the said loan. It is also not disputed that the applicant fell into arrears on the loan repayments thus precipitating the 1st defendant's move to exercise of its statutory power of sale of the suit property. I note that even though the applicant states that he has been faithfully servicing the loan, no material was placed before the court to confirm this. Indeed, the 1st respondent demonstrated, through various annexures, that the applicant made numerous but unfulfilled promises to settle the debt. The applicant did not also demonstrate that he is ready, able and willing to continue servicing the loan.

13. I am therefore not satisfied that the applicant has established a prima facie case so as to warrant the granting of the orders of injunction. Needless to say, it is trite law that he who comes to equity must come with clean hands and in this case, the applicant cannot be said to have clean hands owing to the existing outstanding debt. I am guided by the decision of Ringera J. (*as he was then was*) in the case of **Showind Industries v Guardian Bank Limited & Another** (2002) 1 EA 284 where the Learned Judge stated as follows: -

".....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

14. Having found that the applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others**, CA NO. 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction 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) ally 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." (Emphasis added).

15. The applicant also argued that he will be greatly prejudiced by the auction of the suit property and stands to suffer irreparably as the property is valued at over Kshs. 40 million and has been his family home for the past 30years. Courts have on numerous occasions expressed their positions regarding mortgage over family/matrimonial property and I am happy to refer to HCCC Number 82 of 2006 **Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)** where the court observed that: -

"... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

16. Similarly, in **Maithya v Housing Finance co. of Kenya & Another** [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows: -

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized"

17. For the above reasons, I find that the application for injunction is not merited and I therefore dismiss it with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF MAY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Nkatha for Mumia for Defendant/Respondent.

Mr. Mbito & Company for Applicant.

Court Assistant: Sylvia.