



Kariuki & another v Paramount Bank Limited; Sichuan Huashi Enterprises Limited & another (Interested Parties) (Commercial Suit E690 of 2021) [2021] KEHC 40 (KLR) (Commercial and Tax) (17 September 2021) (Ruling)

Neutral citation: [2021] KEHC 40 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E690 OF 2021
DAS MAJANJA, J
SEPTEMBER 17, 2021**

BETWEEN

ALICE WANJIKU KARIUKI 1ST PLAINTIFF

AFRICA BEL AIR LIMITED 2ND PLAINTIFF

AND

PARAMOUNT BANK LIMITED DEFENDANT

AND

SICHUAN HUASHI ENTERPRISES LIMITED INTERESTED PARTY

SAROHINDI INVESTMENT LIMITED INTERESTED PARTY

RULING

1. The Plaintiffs have moved the court by the Notice of Motion dated 18th July 2021 made, inter alia, under Order 40 rules 2 and 4 of the *Civil Procedure Rules* seeking an injunction restraining the Defendant (“the Bank”) from proceeding with the transfer of NAIROBI/BLOCK/ 27/567 (“the suit property”) sold by way of auction or any other means of sale, trespassing or in any way interfering with the Plaintiffs’ quiet possession of the suit property pending hearing and determination of the suit. They also seek to restrain the Registrar of Lands Nairobi County from interfering with their quiet possession.
2. In addition to the orders of injunction, the Plaintiffs seek a mandatory injunction directing the Bank to provide to the Plaintiffs comprehensive, complete and certified statements of account for 6 named accounts from January 2014 to date. They also want a mandatory order directing the Bank to provide a comprehensive audit by a qualified auditor of all the facilities advanced to the 1st Plaintiff by the Bank.



The Plaintiffs also seek an order compelling the Bank to produce a valid Memorandum of Sale, details of the reserve price set for the sale, the participants present at the sale at the auction, a confirmation of the payment of the 25% of the purchase price and the current valuation report relied on by the Bank during the auction conducted on 6th July 2021.

3. The application is supported by the 1st Plaintiff's affidavit, further affidavit and supplementary affidavit sworn on 18th July 2021, 5th August 2021 and 10th August 2021 respectively. The 1st Interested Party supports the Plaintiff's application through the affidavit of its director, Cao Zheng, sworn on 5th August 2021. It has also filed a Notice of Motion dated 5th August 2021 seeking to join Gami Properties Limited as the 3rd Interested Party. The application is supported by the affidavit of Cao Zheng sworn on the same date. The 2nd Interested Party also supports the Plaintiff's case through the affidavit of its director, Ahmed Mohammed Kassim, sworn on 25th August 2021. The Bank opposes the application through the affidavit of its Chief Executive Officer, Ayaz Merali, sworn on 26th July 2021.

Plaintiffs' Case

4. It is not in dispute that at the time material to this suit, the 1st Plaintiff was the registered proprietor of the suit property. The Bank advanced her an aggregate loan facility of KES. 250,000,000.00 secured by a First Legal Charge of KES. 90,000,000.00 and a Further Charge of KES. 160,000,000.00 over the suit property. The development of the suit property was undertaken by the 1st Interested Party. The Plaintiffs' case is set out in the Plaint dated 15th July 2021 and its depositions. Unless the context otherwise admits, I shall refer to the 1st Plaintiff as the Plaintiff.
5. According to the Plaintiff, the construction project stalled and parties entered into negotiations to resolve the matter. In due course, the parties entered a Settlement Agreement in which the parties agreed to jointly sell the suit property whereupon the Bank would be paid first, then the 1st Interested party and the balance to the Plaintiff. As part of the negotiations, the Plaintiffs requested statements of account from the Bank but the statements given to her were incomplete as they did not bear material entries reflecting the sale of certain units and monies placed in a fixed deposit account.
6. In the meantime, the 1st Interested party filed suit HC COMM E114 of 2021, Sichuan Huashi Enterprises Corporation East Africa Limited v Alice Wanjiru Kariuki and Bel Air Limited and Paramount Bank Limited (Interested Party) where the court recorded the following consent adopted by the court on 15th March 2021:

THAT the Plaintiff and the Defendant shall be at liberty to sell the suit property; NAIROBI/BLOCK 27/567 by private treaty within 90 days from the date hereof, in default of which the Interested Party shall be at liberty to exercise its statutory power of sale in accordance with the law.

7. The gravamen of the Plaintiffs' case is that while they were in the process of securing purchasers for the suit property, the Bank went ahead and sold the suit property on 6th July 2021 without notice to them. They state that they had secured the 2nd Interested Party as a purchaser who was willing to purchase the suit property at KES. 850,000,000.00. The Plaintiffs accuse the Bank of failing to give them all the information relating to the sale despite requesting for it.
8. The Plaintiffs contend that the Bank did not issue a 40-day notice as required by section 96 of the Land Act, 2012. They state that upon expiry of the 90-day notice given in HC COMM E114 of 2021, the sale took place approximately 21 days later. They further contend that the sale did not fetch the best possible price since the 1st Interested Party was willing to purchase the suit property at KES.



850,000,000.00 on the basis of a valuation report it had shared with all the parties showing the market value of the suit property at KES. 950,000,000.00 and the forced sale value at KES. 712,500,000.00.

9. The Plaintiffs state that they stand to suffer grave loss and damage in terms of loss of income from the sale of the suit property, loss of savings and interest from the accounts, loss of potential investors and purchasers and negative publicity and damage.

1st Interested Party's Case

10. The 1st Interested Party's supports the Plaintiffs' case. It states that the Plaintiff contracted it to carry out construction works on the suit property and as a result it is owed KES. 266,000,000.00. Since the Plaintiff also owed the Bank money, the parties negotiated and entered into a settlement agreement in which the Bank recognized its rights but never paid it. When it discovered that the Bank was attempting to sell the suit property, it filed HC COMM E114 of 2021 where the parties recorded a consent.
11. The 1st Interested Party states that it instructed Reliance Valuers Limited to value the suit property. According to the report, the market value was KES. 950,000,000.00 and the forced sale value KES. 712,500,000.00. The 1st Interested Party states that after the expiry of the 90 days agreed in the consent order, it learnt that the suit property had been sold by public auction contrary to the consent order and without recognizing its rights.

2nd Interested Parties Case

12. The 2nd Interested Party also supports the Plaintiffs' case. It states that the 1st Plaintiff approached it to purchase the suit property and it agreed to offer KES. 850,000,000.00 after conducting a valuation. It further states that it made an offer to the Plaintiffs and duly notified the Bank. It complains that the suit property was sold without its knowledge or that of the Plaintiffs despite the fact that negotiations between it and the Plaintiffs had been completed and that it had proceeded to secure resources.

Defendant's Case

13. The Bank opposes the application. It states that 1st Plaintiff defaulted in making payments to the Bank whereupon it issued a 90-day statutory notice pursuant to section 90 of the *Land Act*. Thereafter, the 1st Plaintiff and her business associate, Ann Gakere, as debtors engaged in negotiations with the Bank in order to settle their indebtedness. This yielded a proposal from them dated 28th September 2016 which was accepted by the Bank by its letter dated 3rd October 2016. When the 1st Plaintiff and Ann Gakere again defaulted on the agreement, the Bank issued a 90-day notice dated 20th June 2019 and a 40-day notification of sale dated 25th November 2019 precipitating another round of negotiations culminating in an agreement dated 23rd November 2020.
14. The Bank states that before the timelines in the agreement dated 23rd November 2020 could expire, the 1st interested party filed HCCOMM E114 of 2012 seeking to stop the Bank from selling the suit property as the Plaintiff owed it money. The Bank further states when the Plaintiffs failed to get a buyer within the 90 days after the suit was compromised, it proceeded to exercise its power of sale. The Bank states that it conducted the sale in accordance with the law and was concluded when the suit property was purchased by Gami Properties Limited who were declared the highest bidder at the auction that took place on 6th July 2021.

Analysis and Determination

15. The parties made brief oral submissions which mirrored the positions taken in their respective pleadings and depositions I have outlined above. The application before the court is for both restraining and mandatory injunctions. I shall deal with the restraining injunction first.



16. As regards the restraining injunction, the question is whether the Plaintiffs have met all the conditions for the grant of an injunction as set out in *Giella v Cassman Brown*. In order to succeed in obtaining an interlocutory injunction, the Plaintiff must demonstrate that she has a prima facie case with a probability of success, that she will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated those conditions and added that they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially.
17. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that a prima facie case 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 to call for an explanation or rebuttal from the latter.” It also observed in the *Nguruman Case (Supra)* that:

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.
18. The Plaintiffs’ case, in this respect, is founded on two broad grounds as submitted by their counsel; First, that the Bank breached the terms of the consent order in HC COMM E114 of 2021 by selling the suit property without issuing the proper notification of sale. Second, that the sale was not conducted procedurally without issuing the proper notices and selling the suit property at an under value.
19. In resolving this issue, the following issues are not in contention. First, the Plaintiff does not dispute that she is indebted to the Bank. Second, the Plaintiff does not contest the fact that the Bank’s statutory power of sale in respect of the suit property had accrued. Third, that the suit property was sold at a public auction on 6th July 2021 to Gami Properties Limited.
20. The consent in HC COMM E114 of 2021 which forms the basis of the Plaintiffs’ case was clear that the Plaintiff and the 1st Interested Party were at liberty to sell the suit property by private treaty within 90 days in default of which the Bank was at liberty to exercise its statutory power of sale. On the material before the court, it is clear the Plaintiff had made an effort to secure a buyer for the suit property. However, no sale agreement had been concluded within the 90 days contemplated under the consent as the two letters exhibited by the Plaintiff show. The 2nd interested party wrote the letter dated 8th June 2021 indicating its interest to which the 1st Plaintiff responded by her letter dated 1st July 2021 confirming that she was willing to sell the suit property. There is no indication that the contracts were exchanged and the Bank informed formally of the proposed transaction. In any case, by 15th June 2021, the time fixed by the consent order had already lapsed.
21. Once the time fixed by the consent had lapsed, the Bank was entitled exercise its statutory power of sale. The Plaintiff argues that the Bank ought to have given another 40-day notification of sale under section



96(2) of the [Land Act](#). In this respect, I agree with the position taken by Ngugi J., in *Joyce Wairimu Karanja v James Mburu Ngure & Another* KBU HCCA No. 118 of 2017 [2018] eKLR as follows:

There is no basis in law, equity or practice for the Learned Magistrate to conclude that a mortgagee who in exercising a statutory power of sale which is ephemerally stopped by the Court must issue a Notification of Sale to the mortgagor before conducting a sale once the order stopping the sale is lifted.

22. The same principle applies to this case. The Bank was not under any obligation to issue another notification of sale after the intervening court order had lapsed (see also *Joseph Kiarie Mbugua and Another v Garam Investment Limited* ML HCCC No. 44 of 2005 [2006] eKLR and *George Gikubu Mbuthia v Jimba Credit and Another* NRB CA Civil Appeal No. 111 of 1986 (UR) per Apaloo JA). Furthermore, in the further consent recorded in this matter on 16th April 2021 before the Deputy Registrar, the parties agreed in default of the consent dated 15th April 2021, the Bank would be at liberty to sell the suit property, “without being required to re-issue the requisite statutory notices save for the advertisement.”
23. The fact that the suit property has been sold is, in my view, a decisive consideration. I have looked at the evidence and I am satisfied that indeed an auction took place on 6th July 2021. The date of the intended sale was advertised in the Daily Nation and Standard newspapers of 17th June 2021 and the Standard newspaper of the 22nd June 2021 indicating the auction of the suit property would be on 6th July 2021 at 12.00noon. There is evidence that the sale was attended by several people and was sold to Gami Properties Limited the highest bidder at KES. 435,800,000.00. The Bank has provided the Memorandum of Sale signed by the purchaser and evidence of payment of the 20% of the purchase price and correspondence between it and the purchaser’s advocates confirming that the suit property has now been sold. This means that the Plaintiff’s equity of redemption was extinguished at the fall of the hammer.
24. The 1st Plaintiff, as chargor, has a right at any time before the auction to pay the amount outstanding and redeem the property. Once the Bank exercised its statutory power of sale, the Plaintiff’s right to discharge the suit property was extinguished. The finality of the sale is buttressed by section 99 of the [Land Act](#) which protects the purchaser from any action to set aside the sale and provides for damages as a remedy. It states as follows:

99 (1) This section applies to—

- (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- (2) A person to whom this section applies—
- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
 - (b) Is not obliged to see to the application of the purchase price;
 - (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection



with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

25. The court in *Joyce Wairimu Karanja v James Mburu Ngure & Another* (Supra) observed as follows in regard to the aforesaid provisions:

[30] This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.

26. I hold that once the sale took place, the Plaintiff's right of redemption was thereby extinguished and the Plaintiff's remedy lay in damages as provided by section 99 of the *Land Act*.

27. In this case, even if I were to hold that the sale was irregular and allow the application for the reasons stated by the Plaintiff, such finding would be made in the absence of the third party who is not a party to this suit and who has now acquired an interest in the suit property whether lawfully or unlawfully. The third party has the right to be heard before any adverse order is made against it as was held by the Court of Appeal in *Pashito Holdings Limited & another vs Paul Ndungu & 2 others* NRB CA Civil Appeal No. 138 of 1997 [1997] eKLR where it was noted that:

The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to *Jowitts Dictionary of English Law* (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable *Latin maxim* which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said: "However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these



proceedings". With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief".

28. It is thus clear that this court cannot grant the injunction sought by the Plaintiffs in the absence of the purchaser. The 1st interested Party attempted to cure this defect by filing the Notice of Motion dated 5th August 2021 seeking to join Gami Properties Limited as the 3rd Interested Party. I doubt that an interested party has the right to join another interested party to the suit which belongs to the Plaintiffs. An interested party does not have a right of relief against any party to the suit nor is it entitled to any relief. I therefore hold that the 1st Interested Party's application cannot cure the fundamental defect in the Plaintiffs' application.
29. Since the third party who purchased the suit property is not party to this suit, the Plaintiffs have not established a prima facie case with a probability of success in respect of the prayers seeking an injunction restraining the transfer of the suit property to the third party.
30. Following the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*, once the applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end. However, and for the benefit of the parties I shall consider the other requirements. In respect of the charged property, the question whether damages are an adequate remedy is answered by section 99(4) of the *Land Act*. The Plaintiff have prayed for damages and in fact, the parties always contemplated that the suit properties would be sold in the event of default hence damages are an adequate remedy if the suit ultimately succeeds. In view of its admitted indebtedness, the balance of convenience is against the Plaintiff. The value of suit property would continue to diminish in relation to the debt which the Plaintiff owes.
31. Turning to the orders in the nature of mandatory injunction on Prayer No. 5 and 6 of the application, it is evident that these relate to the named accounts at the Bank. At the stage I would point out that every customer is entitled to account statements of account a bank usually issues in the course of the ordinary course of business upon request. Indeed, the Bank received a request for certified statements from the 1st Plaintiff by the letter dated 12th March 2021. The Bank responded to the letter by attaching statements where possible and informing the Plaintiff that some of the accounts referred to were closed.
32. The general principle governing the grant of a mandatory injunction is that while the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks it ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see *CFC Financial Services v Juja Road Fancy Store Limited NRB CA Civil Appeal No. 12 of 2010 [2017] eKLR*, *Belle Maison Limited v Yaya Towers Limited NRB HCCC No. 2225 of 1992 (UR)* and .
33. The Plaintiffs have not established any special circumstances or reason why the court should impose a third party to resolve the accounts supplied by the Bank at this stage without a full hearing of the parties in the appropriate manner particularly in view of the fact that the accounts have been compromised several times by agreement between the parties.
34. Prayer No. 7 of the application seeks an order compelling the Bank to produce the documents relating to the sale of the suit property at the public auction. These documents have been provided by the Bank in its deposition hence such an order is unnecessary.
35. Before I conclude this ruling, I note that the Plaintiff referred to other proceedings in HC COMM E148 OF 2021 *Anne Muthoni Gakere and Others v Paramount Bank* in which the court granted a



temporary injunction. The Plaintiffs suggested that the Bank had violated the injunction by disposing of the property and had failed to disclose the suit. Since the suit is pending before another court, I will not comment on it save to state that if the order issued in that court was violated, then the Plaintiffs are at liberty to move that court.

Disposition

36. For the reasons I have set out above, I dismiss the Plaintiffs' Notice of Motion dated 18th July 2021 with costs to the Defendant. I also dismiss the 1st Party's Notice of Motion dated 5th August 2021.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Owaga instructed by Owaga and Associates LLP for the Plaintiffs.

Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the Defendant.

Mr Osman instructed by Aguko, Osman and Company Advocates for the 1st Interested Party

Mr Wachira instructed by Wachira Mumbi and Company Advocates For the 2nd Interested Party

