



**Kioko v Agricultural Finance Corporation (Civil Case E006 of 2021) [2021]  
KEHC 32 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 32 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E006 OF 2021  
WA OKWANY, J  
SEPTEMBER 16, 2021**

**BETWEEN**

**NANCY KAVINYA KIOKO ..... APPLICANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... RESPONDENT**

**RULING**

1. This ruling relates to the application dated 6<sup>th</sup> January 2021 wherein the applicant seeks the following orders;
  - 1) Spent
  - 2) Spent
  - 3) That this Honourable Court be pleased to issue interim orders restraining the respondent, its workers, agents or anyone working on its behalf from advertising, attaching, selling alienating, transferring and /or in any other way interfering with the Applicants ownership and occupation of all the property known as L.R No 17864/10(I.R 89642) pending the hearing and determination of this suit
  - 4) That this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> respondent to cause the removal of the negative listing of the applicant at the Credit Reference Bureaus on account of the loan that is subject to this suit pending the hearing and determination of the suit
  - 5) That this Honourable court does award any other orders it may deem just, fit and expedient to award in the interest of justice.
  - 6) That the costs of this application be provide for.



2. The application is supported by the applicant's affidavit and is based on the following grounds;
- 1) That it has come to the Applicants attention that her property known as L.R No 17864/10(I.R 89642) (herein after referred as the suit property) has been advertised for sale by the respondent by way of a Public Auction and the said Sale is scheduled to be conducted on 4<sup>th</sup> February 2021.
  - 2) That despite the fact that the Applicant had entered into an agreement with the respondent that the property known as L.R No 27970/ (I.R 193503) was exchanged and provided as the security for the credit facility in place of the First Property.
  - 3) That in fact the Second property was valued at Kshs 21,500,000 which was way higher than the suit property.
  - 4) That the respondent's actions of advertising the applicant's property despite the fact that there exists an agreement to have it discharged as the property securitizing the loan and a different property provided on its behalf infringes on her rights to property as provided under the law and this Court ought to protect her rights.
  - 5) That the respondent is only acting illegally as a way of seeking vengeance and punishing the applicant for raising an alarm and reporting the respondent's officer who has sought to illegally solicit and wrongfully steal the applicant's money.
  - 6) That the applicant is rather apprehensive that the matter is being subverted and owing to the delay in response from EACC offices, the EACC might have sent the original title documents back to the respondent as it has once again advertised the applicant's property for public auction which is slated for the 4<sup>th</sup> of February 2021.
  - 7) That the applicant is aware that the said Mr. Ngaira is seeking vengeance for the simple fact that she reported the criminal acts that he intended to perpetuate and at the same time con her since he has continued to work as an official of the Respondent and as such, he has continued to use his office to constantly frustrate the applicant and punish her at the same time.
  - 8) That the impending sale is malicious and affronts the principles of equity and natural justice
  - 9) That this application filed under certificate of urgency seeks interim injunction orders restraining the respondent from the selling, transferring, alienating and/or interfering with the ownership of the applicant's properties in realizing the subject loan pending the hearing and determination of the application.
  - 10) That unless this Honourable Court urgently intervenes and grants the orders sought herein, this application and the entire suit stands to be rendered otiose and the applicant will suffer irreparable damage
  - 11) That in the absence of the orders sought herein the respondent's actions will lead to a multiplicity of suits and further delay the finalization and/or conclusion of the matter in court to the applicant's pain, anguish and detriment.
  - 12) That the respondent stands to suffer no prejudice and/or conclusion of the matter in court to the appellant's pain, anguish and detriment.
  - 13) That it is in the interest of justice that this application be certified urgent.
3. The respondent opposed the application through the replying affidavit of its Legal Officer Mr. Mainga Evans who states that the plaintiff obtained a loan facility of Kshs 10,000,000 from the respondent



which facility was secured by registration of a charge over property known as L.R No 17864/10(I.R 89642). He states that despite being served with numerous demand notices the plaintiff defaulted on the loan repayments thereby necessitating issuance of the statutory notice dated 11<sup>th</sup> January 2018. He noted that the plaintiff filed an earlier suit being Milimani Commercial Courts CMCC No 3692 of 2019 seeking to stop the sale of the said property and that through a consent order recorded on 28<sup>th</sup> May 2019 the parties agreed on repayment terms which the plaintiff breached thereby leaving the respondent with no option but to exercise its statutory power of sale. The respondent maintained that the present application is res judicata and an abuse of the court process as it is brought with a view of frustrating the respondent's exercise of its statutory power of sale.

4. The application was canvassed 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 the equitable relief of injunction.

5. The principles governing the grant of temporary injunctions were set out in the celebrated case of *Giella v Cassman Brown and Company Limited* , where the court held as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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.”

6. What amounts to a prima facie case was defined in the case of *Mrao Limited v First American Bank of Kenya and 2 Others* , where the Court of Appeal stated that: -

“A prima facie case in a Civil Case includes but is not confined to a “genuine or 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

7. In the present case, the applicant seeks an order of injunction to restrain the respondent from completing the sale of the suit property. It was not disputed that the respondent extended a loan facility of Kshs 10,000,000 which was secured through a charge on the suit property. It was also not disputed that the applicant defaulted on the loan repayments and that the respondent issued the statutory notices as required by law. It further came to light that the applicant moved the court for similar interim orders in ELC CASE no 3692 of 2019 and that the parties herein recorded a consent order wherein the applicant agreed make monthly loan repayments of Kshs 850,000 failure of which the execution process would continue. It was further not disputed that the applicant still defaulted in the loan repayments thus necessitating the respondent's decision to continue with the process of realizing the security.

8. On prima case, the applicant submitted that the respondent did not issue her with fresh statutory notices. She also stated that the respondent did not furnish the court with the forced valuation report. The applicant explained that the parties had agreed that on alternative be availed to secure the credit facility.



9. The respondent, on the other hand, submitted that it duly served the applicant with the statutory notice dated 10<sup>th</sup> January 2018.
10. A perusal of the annexures filed before this court reveals that the consent order recorded by the parties was categorical that the respondent was at liberty to continue with the execution process in the event that the applicant defaulted in the loan repayments. Needless to say, the applicant did not comply with the terms of the consent. The respondent has demonstrated that adjusted the loan repayment terms so as to give the applicant the opportunity to regularize her account.
11. In *Alpha Logistics Kenya Limited & 2 Others v Edcom Limited & Another* it was held: -

“Therefore though at an interlocutory stage the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity....”
12. It is trite that any party seeking the equitable relief of injunction must come to court with clean hands. This means that the applicant needed to demonstrate that she has performed her part of the bargain and is not at fault. In the instant case, I am satisfied that the respondent demonstrated that it duly served the applicant with the statutory notice and that the applicant failed to honour the terms of their consent.
13. On the claim that the applicant offered to secure the loan by offering a different property, I find that this is an issue that cannot be determined at this interlocutory stage.
14. In sum I find that the facts of this case do not favour the granting of the injunctive orders sought as the applicant has not established a prima facie case against the respondent. Having found that no prima facie case has been established, I find no reason to consider the remaining 2 conditions for the granting of temporary injunction.
15. For the above reasons, I find that the instant application lacks merit and I therefore dismiss it with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>th</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Wamukoya for Okatch for the applicant.

Mr. Mainga for Mabonga for defendant.

Court Assistant: Sylvia.

