



**Migwi v Kenya Women Microfinance Bank PLC & another; Mungai (Interested Party) (Civil Case E182 of 2019) [2021] KEHC 101 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E182 OF 2019  
MW MUIGAI, J  
SEPTEMBER 16, 2021**

**BETWEEN**

**LAWRENCE MAINA MIGWI ..... PLAINTIFF**

**AND**

**KENYA WOMEN MICROFINANCE BANK PLC ..... 1<sup>ST</sup> RESPONDENT**

**TIMELESS DOLPHIN AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ALICE WAMBUI MUNGAI ..... INTERESTED PARTY**

**RULING**

- 1 The 1st Defendant filed a Notice of Motion Application dated 18th November 2020 for orders that; -
  - a. The Court issues an order lifting the injunction over the land subject matter herein.
  - b. The Court issues an order that the auction of the land subject matter herein proceeds for the realization of the Applicant's security.
- 2 Which Application was supported by the sworn Affidavit of Esialila Metrin Mmboga dated 11<sup>th</sup> January 2021 and based on the grounds that; -
  - a. The Bank had advanced a loan secured by the Plaintiff's land and the Plaintiff came to court and obtained an injunction against the Defendants from selling the land.
  - b. The Plaintiff has since ceased repaying the loan which has fallen in arrears and is accruing interest as shown by attached Statement of Account marked **MM-1**



c. The Defendant's position is at risk that the growing debt will outstrip the value of the security.

d. The balance of convenience tilts towards lifting the injunction as the 1<sup>st</sup> Defendant is a reputable bank and will be able to pay any damages proved against it.

### **REPLYING AFFIDAVIT**

3 The Application was opposed vide the sworn Affidavit of Lawrence Maina Migwi dated 23<sup>rd</sup> April 2021 and stated that; -

1. On 20<sup>th</sup> June 2019, the Respondent filed a Notice of Motion Application dated 18<sup>th</sup> June 2019 under a Certificate of Urgency seeking inter alia a temporary injunction restraining the Defendants from proceeding with the unlawful auction of property known as L.R No. 11344/1361 (L.R 154798) Kayole, Nairobi County and the same was allowed.
2. In light of the foregoing the Application by the Applicants amounts to contempt of Court's injunctive orders to maintain status quo between the parties until the full hearing and determination of the suit.
3. The Respondent had raised pertinent issues touching on the illegal debits made by the Applicants and relied upon by the Applicants are still pending in court for determination and the Applicant's Application is in disregard to that position.
4. The orders relied upon by the Applicants were not made by the Court. The Court did not make an order that the Respondent should deposit termly instalments under a new account with the Applicants.
5. The Applicant's Application is premature and disregards the pending disposal of the suit pending in court and in the event the orders are granted, the subject of this suit shall be destroyed.
6. Based on the foregoing, the Application lacks merit and should be dismissed.

### **APPLICANT'S WRITTEN SUBMISSIONS**

- 4 The Applicant submitted that the Orders of the Court of 24<sup>th</sup> June 2019 restrained the Defendants from selling the subject property and did not stop the Plaintiff from making payments towards the loan. The Applicant has been greatly prejudiced as a result. The Respondent enjoys the injunction over the subject property to the detriment of the Applicant who by law is entitled to exercise its statutory power of sale in case one fails to repay the loan as is the case with the Respondent.
- 5 Further, the Applicant added that the Orders stopping the sale of the land did not include an order stopping the Respondent from servicing the loan. The Respondent did not intend to service the loan even after obtaining the orders of 24<sup>th</sup> June 2019. The Respondent is underserving of the said orders and should be lifted to allow the Applicant proceed with the auction of the property to realize the amount due.



- 6 The Applicant relied on the case of [Jim Kennedy Kiriro Njeru v Equity Bank \(K\) Limited \[2019\] eKLR](#) where the court quoted in approval the Court of Appeal decision of [Mrao Ltd –vs- First American Bank of Kenya Ltd \[2003\] K.L.R. 125](#) that; -

*A Chargee cannot be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing or interest charged. However, the Chargee maybe be restrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is uncontractual or illegal. I also wish to categorically state that the existence of a dispute touching on the interest rate payable is not an excuse for non-repayment of the principal amount of the loan facility. Thus despite existence of a dispute on interest rate payable, the Borrower should be able to continue repaying at least the principal amount of the loan facility pending the determination of the dispute on interest payable. In cases like this, evidence that the borrower continues repayment of the loan facility or at least the principal amount or proof of his willingness to do so is paramount.....that since the suit property was given as security for the loan, it became a commodity for sale and it is therefore subject to sale in case of default in loan repayment in the event that the Chargee decides to exercise its statutory power of sale pursuant to the provisions of section 90 and 96 of the Land Act, 2012. The same proposition was taken by Ringera J in Isaac O. Litali v Ambrose W. Subai & Others HCCC No.2092 of 2000(unreported); John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96; Thomas Nyakamba Okong’o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133.*

- 7 It was the Applicant’s submission that in the absence of any effort from the Respondent to rectify the default the Court finds that the Respondent has abused the orders issued on 24<sup>th</sup> June 2019 and is thus underserving of the said orders and the injunction should be lifted to allow the Applicant proceed with the auction to recover the amounts due.

#### **RESPONDENT’S SUBMISSIONS**

- 8 The Respondent submitted on two issues. On whether the Applicant’s Application amounts to contempt of Court’s injunctive Orders, the Respondent submitted that the jurisdiction of the court to set aside an order of injunction is outlined under **Order 40 Rule 7 of the CPR** which provides that;

Any order for an injunction may be discharged, varied or set aside by the court on application made thereto by any party dissatisfied with such order.

- 9 In the case of [St Patricks Hill School Ltd versus Bank of Africa Kenya Ltd \[2018\] eKLR](#) the court opined that; -

*I am of the view that the conditions for the grant of an interlocutory injunction are now well settled as stated in Giella v Cassman Brown and co ltd 1973 E.A 360, Mrao v First American Bank of Kenya Ltd and 2 others 2003 klr 125, and American Cynamid co v Ethicon Ltd 1975 1All E.R. The principles are: (a) an applicant must show a prima facie case with a probability of success (b) In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by*



*damages. (c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience.”*

- 10 On whether the Applicant’s Application disregards the on-going disposal of the Plaintiff’s suit and whether by granting the sought orders, the issues raised in the main suit shall be dispensed with - the Respondent submitted that the suit touching on issues of illegal debits among others made by the Applicant are still pending before the court for determination and the current Application is in flagrant disregard of this position which is tantamount to abuse of the court process. In *St Patricks Hill School Ltd versus Bank of Africa Kenya Ltd [2018] eKLR* the court held that; -

*The issue of the contract relied upon by the Defendant is under scrutiny, the Defendant made illegal debits as per the report filed by the Plaintiffs accountant that demonstrated that the Defendant illegally debited over 42,102,106.44/=. This is an important fact, which should not be overlooked by the court in an attempt to set aside the Interim orders. The Plaintiffs claims a rival competing claim against the defendants alleged claims in the afore stated amount. Therefore, it is my view that by setting aside the interim orders various issues raised in the main suit shall be dispensed with which shall amount to miscarriage of justice*

.....

- 11 The court has discretionary powers under Order 40 Rule 6 of the Civil Procedure Rules, 2010 not to grant an Application to set aside an interim order **if there are sufficient reasons to do so. In this case I believe there are sufficient reasons to decline the Application.”**

**DETERMINATION**

- 12 The Court considered the application, response and the submissions filed by the parties the issue for determination is whether the Applicant’s Application to set aside the order of injunction should be granted.
- 13 The jurisdiction of the court to set aside an order of injunction is set and outlined under **Order 40 Rule 7 Civil Procedure Rules, 2010** which provides as follows:

*Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”*

- 14 The Applicant asked the Court to set aside the order of injunction which was issued on 24<sup>th</sup> June 2019. As a consequence of the discharge, the court to order that the auction of the land subject matter herein proceeds for the realization of the Applicant’s security. The reasons given by the Applicant are that; the Respondent has ceased repaying the loan which has fallen in arrears and is accruing in interest and the growing debt will outstrip the value of the security.

- 15 In the case of *Mobile Kitale service Station versus Mobile Oil Kenya Limited & Another (2004) 1 KLR 1* the court held that; -

*An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff.*

An interlocutory injunction, being an equitable remedy, would be taken away(discharged) **where is shown that he person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.** *The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only*



*meant for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”*

16 In *Benl Development Limited versus First Community Bank Limited [2021] eKLR* the court stated as follows; -

*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 It is not in dispute that the Respondent took a credit facility from the Applicant. The terms of contract include that the Respondent ought to service the loan or redeem the suit property. The Respondent sought for order of injunction on the ground that there was an imminent danger of the property being disposed of at a deflated value. The principal amount remained due and owing the injunction was to preserve the subject matter to allow for hearing and determination of the dispute.

18 It is clear that the motive of the injunctive order was to restrain the Applicant from exercising its statutory power of sale over the Respondent’s property **L.R No. 11344/1361 (L.R 154798) Kayole, Nairobi County**. It was the Court’s order that status quo be maintained and preserve the subject matter pending hearing and determination of the dispute.

19 The Court notes from the record, that the Respondent obtained Interim order of injunction pending hearing of the application where, the Applicant challenged the illegal inflated debits and/or interest to the Loan Account.

20 From 2019 to date, the matter was never set down for hearing despite numerous mentions by parties in Court. The Applicant failed to make payments and reduce the loan facility as per the loan Agreement.

21 The Applicant deposed that the Loan Account has not been serviced by the Respondent since 2017. No evidence of payment or any proposals presented on payment of the loan facility. An interim injunction under **Order 40 CPR 2010** lasts 1 year and has since abated. The illegal debits and/or devalue sale price ought to have been sorted out by reconciliation of Accounts by parties to avert the disputed statutory power of sale. The Respondent obtained a loan facility from the Respondent /Applicant and ought to service the same or redeem the suit property provided as security.

## **DISPOSITION**

**The application to set aside the Injunction granted on 20<sup>th</sup> June 2019 is granted and the injunction is vacated.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 16<sup>TH</sup> SEPTEMBER , 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17<sup>TH</sup> APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**MS MATASI FOR DEFENDANT- PRESENT**

**MS WAMBUI FOR PLAINTIFF-PRESENT**

**COURT ASSISTANT - TUPET**

**MS WAMBUI: We seek 30 days stay of execution**



**MS MATASI: We object to grant of stay of execution**

**COURT: The stay of execution for 30 days is granted, the plaintiff may make payments/service Loan Facility**

