



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**River Road School Limited & 2 others v Kenya Womens Microfinance Bank  
(Civil Case 5 of 2019) [2021] KEHC 384 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL CASE 5 OF 2019  
A MSHILA, J  
NOVEMBER 5, 2021**

**BETWEEN**

**RIVER ROAD SCHOOL LIMITED ..... 1<sup>ST</sup> APPLICANT**

**HUTCHINSON GITHINJI WANJOHI ..... 2<sup>ND</sup> APPLICANT**

**GODFREY NGUNJIRI WANJOHI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**KENYA WOMENS MICROFINANCE BANK ..... RESPONDENT**

**RULING**

1. The Notice of Motion was filed under a Certificate of Urgency and is dated the 20<sup>th</sup> June, 2019; the application is premised under the provisions of; Order 51 Rule (1) of the *Civil Procedure Rules* and Sections 1A, 1B,3A and 63 of the *Civil Procedure Act* the inherent jurisdiction of the court and all other enabling provisions of the law; the applicants seek the orders as set out hereunder;
  - (i) Spent
  - (ii) Spent
  - (iii) That the court be pleased to grant a temporary injunction restraining the defendant/ respondent whether by itself, servants and/or its agents from interfering, alienating, disposing, selling or otherwise dealing with land TITLE NO. NYERI MUNICIPALITY BLOCK 1/1020 AND TITLE NO. NYERI MUNICIPALITY BLOCK 1/1021 in any manner whatsoever pending the hearing and determination of this suit;
  - (iv) Spent
  - (v) That the costs of the proceedings be granted to the applicants herein.



2. The applicants rely on the Supporting Affidavit made on the even date and sworn by the 2<sup>nd</sup> plaintiff/applicant as a director of the 1<sup>st</sup> plaintiff; hereunder is a summary of the applicants' case.

#### APPLICANT'S CASE

3. The 2<sup>nd</sup> applicant deponed that the 1<sup>st</sup> plaintiff is the bona fide registered proprietor of the properties known as TITLE NO. NYERI MUNICIPALITY BLOCK 1/1020 and TITLE NO. NYERI MUNICIPALITY BLOCK 1/1021; on or about the 15/06/2015 the respondent advanced to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff/applicants a loan amount of Kshs.40,000,000/- to be utilized towards a construction project; the terms of the agreement was 144 monthly repayments with a grace period of six (6) and the properties were to be utilized as security for the loan;
4. After execution of the loan agreement the respondent only disbursed a total of Kshs.34,400,000/- paid out as follows: 6/08/15 – Kshs.23,920,000/- and 20/07/16 – Kshs.10,480,000/-; the applicants assert that the respondent failed to fully disburse its obligation hence stalling their project; to date the applicants have within the first quarter of the expected period of 12 years paid the sum of Kshs.21,632,749/05; the applicants contend that the rate of interest indicated in the loan agreement as 20% is excessive and also contrary to the banking rules;
5. The applicants also claim that the amount charged for the insurance life cover was Kshs.66,667/- is excessive and punitive and the applicants have never been supplied with proof of the policy; the repayment clause depicts that the repayable amount is Kshs.2,733,367/- at the least and Kshs.3,022,917/- which amounts grossly violate the terms of the agreement as it depicts repayment within 4 years contrary to the anticipated period of 12 years; the applicants also contend that the calculation of the repayment amounts is erroneous in light of the fact that the entire amount was never fully disbursed; the interest and punitive penalties accrued over a period of four (4) years amounting to Kshs.18,392,538/82 is vehemently disputed; the applicants state that they are desirous and have continued to make payments towards the principle sum so as to settle their liabilities but have been hindered by the punitive penalties and interest placed on them;
6. That the loan agreement amounts to an unconscionable agreement as its effects present a heavy burden on the applicants and is an affront to the principles of natural justice.
7. Additionally, the Statutory Notices were not issued in accordance with the provisions of the [Land Act](#) and that the respondent is in breach of; Section 90 (1) of the [Land Act](#); the respondent had also skewed the value of the land and that there were two conflicting valuation reports dated 24/04/2019 and 11/05/2015 all prepared to defeat the 1<sup>st</sup> applicants interest in the charged properties; the intended auction is pegged on the wrong figures and is equally unlawful and un-procedural as it does not meet the pre-requisites set by law for a valid public auction; in the event the illegal sale goes ahead. The applicants' losses shall be irreparable and incapable of compensation by way of damages as the same constitutes the applicants' matrimonial property situate in a very prime area.
8. They submitted that they had satisfied the requirements for the grant of the orders sought and relied on the cases of *Giella vs Cassman Brown & Co. Ltd [1973] EA 358*, *Mrao Limited vs First American Bank of Kenya Limited [2003] eKLR* and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR*.
9. In conclusion the applicants submit that the account for which the foreclosure relates to belongs to a party other than the borrowers; that the principal amount of Kshs.34,000,000/- has been settled albeit with reservations as disclosed.

#### RESPONDENT'S CASE



10. In response, the respondent submitted that the anomaly in the repayment terms set out in Clause 7:1 of the Loan Agreement was rectified and addressed as per the Addendum executed by the parties on 8/07/2015;
11. The respondent further submitted that the loan repayments are required to satisfy not only the principal but the contractual interest on the principal and also on the default; according to the loan statements the applicants had not been making payments on time;
12. With regard to the claim that the interest was excessive, the respondent contended that the applicants had not proved that the agreed interest was an unconscionable bargain. The Defendant relied on *LTI Kisii Safari Inns Ltd & 2 others vs Duetsche Investitions –Und Entwicklungsgellschaft ('D') & others [2011] eKLR* where the Court of Appeal set the three prerequisites to the application of the doctrine of unconscionable bargains;
13. The respondent submitted that the interest rate charged was not excessive as claimed by the applicants but was as stipulated in the Letter of Offer and Addendum; the respondent clarified that the interest agreed upon was reflected in Clause 5.1 of the Loan Agreement as 11.46% per annum on a reducing balance and not 20% as alleged and that the interest rate was extremely fair compared to the prevailing interest rate of 13% per annum; the default interest rate had been agreed at 2% per month on the outstanding arrears. The Defendant cited the case of; *Elson Plastics (K) Ltd vs National Water Conservation and Pipeline Corporation [2014] eKLR* where the court observed that there was nothing illegal in parties agreeing on interest as a penalty for default on the terms of a contract;
14. The respondent submitted that the applicants were undeserving of the equitable remedies sought; that they had not made out a prima facie case as they had admitted their indebtedness and had not also demonstrated how their rights had been infringed upon; the loan statements demonstrate that calculation of the repayment was based on the amount disbursed; process of realizing securities was commenced due to the persistent default by the applicants in paying off the loan and the respondent sought to exercise its statutory power of sale by way of public auction as such right had crystalized and become exercisable; the Statutory Notice dated 27/08/2018 were duly served upon the applicants.
15. To the applicants' complaint that they had not been furnished with a current valuation report; the respondent submitted that there was no such requirement under Section 97(2) of the [Land Act](#); the respondent pointed out that it had undertaken of a Valuation of the property and that the applicants had not called for the Valuation Report neither had they been denied a copy and it had annexed the report to its Replying Affidavit;
16. As regards irreparable loss, the respondent submitted that the applicants' charged the suit properties with the knowledge and understanding that the same would be sold to satisfy the outstanding debt in the event of default of payment of the loan; therefore, the applicants would not suffer any irreparable loss. Further, it submitted that in the unlikely event they did damages would suffice as an adequate remedy. Reliance was placed on case of; *Sammy Japheth Kavuku vs Equity Bank Limited Another [2014] eKLR*.
17. With regard to balance of convenience, the respondent argued that it stood to suffer a disadvantage more than the applicants would gain an advantage; it pointed out that the applicant had shown tendencies of failing to honour their contractual obligations and if an injunction is granted, the value of the suit property might become insufficient to satisfy the debt.
18. The respondent cited the case of *Kyangaro vs Kenya Commercial Ltd & Anor (2004) 1KLR 126* for the proposition that he who comes to equity must come with clean hands and must also do equity.



## ISSUES FOR DETERMINATION

19. The Court has considered the application, the supporting affidavit, the reply thereto and the parties' respective submissions the only issue for determination which is; whether the applicants have met the conditions for granting the injunctive orders.

## ANALYSIS

20. The first condition to be satisfied is the establishment of a prima facie case; in the case of *Mrao Ltd vs First American Bank of Kenya and 2 Others* [ 2002] eKLR defined a prima facie case as;

'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 applicants' case upon trial. That is clearly a standard, which is higher than arguable case.'

21. The application was brought under a Certificate of Urgency and the Applicants obtained temporary injunctive orders pending the hearing and determination of the application. This order was conditional on the payment of Kshs.1,700,000/- within 60 days from 15/07/2019. The applicant was also required to give an undertaking for payment of damages to be given within seven (7) days; the applicant filed the undertaking for damages on 24/10/2019 and paid the sum of Kshs.1,700,000/- on 6/02/2021.
22. The respondent intimated to the court that the applicants have persisted in default of servicing the loan since their last deposit made on 6/02/2021; the loan is accumulating and the amount outstanding as at 11/11/2021 it stands at Kshs.27,927,762/94.
23. The applicants had instituted this suit against the respondent and sought injunctive orders on the ground that the respondent disbursed to them an amount less than what was agreed on. From the addendum to the Letter of Offer dated 9/07/2015 it is apparent that the loan was conditional and was subject to the progress of the performance on the applicants part; it is clear that the repayment clause 7:1 was amended to require termly rather than monthly instalments.
24. The applicants also claimed that the interest charged on the loan and the penalties were excessive; however, the law requires that an applicant deposits the amount claimed into court where the dispute is about the amount due. The case of; *Mrao (supra)* cited with approval the Halsbury's Laws of England Vol.32 (4<sup>th</sup> Edition) paragraph 725;

'725. When mortgagees may be restrained from exercising power of sales-

The mortgagee will not be restrained from exercising his power of sale because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is 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.'

25. The Court of Appeal reiterated this in the case of *Priscilla Krobought Grant vs Kenya Commercial Finance Co. Ltd and 2 others CA Nairobi Civil APP. No. Nai.227 of 1995 (Unreported)* held as follows;

'Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely



on the grounds that there is a dispute as to the amount of money due under the mortgage – see *Barmal Kanji Shah & Another vs Shah Depar Devji* (1965) EA 91; 32 *Halbury's Laws of England* (4<sup>th</sup> Edition) paragraph 725 and *Uburu Highways Development Ltd vs Central Bank Kenya and 2 Others* Civil Application No.Nai 140 of 1995 (unreported) per Kwach J.A'

26. The applicants stated that there was no proof of service of the notices dated 6/08/2018 and 27/08/2018 but they did not dispute the issuance and service of the 2<sup>nd</sup> Statutory Notice dated 4<sup>th</sup> December, 2018. This court notes that the respondent produced a Certificate of Postage as evidence that the notice dated 4<sup>th</sup> December, 2018 was properly served on the applicants;
27. This court also notes that the applicants do not dispute their default in making loan repayments; thus it is clear that the applicants seek to be granted injunctive orders based on technicalities of procedure to avoid repayment of the loan; this is because they have not made any efforts to meet their obligation to service the loan by demonstrating attempts to either request the respondent to restructure the loan or to pay off or deposit the arrears claimed into court. As to the claim regarding the valuation report, the respondent produced the Valuation Report dated 24/04/2019 which reflects a forced sale value of Kshs.7,650,000/-;
28. There are two other conditions to be discharged by an applicant which are irreparable loss and balance of convenience; this court need not belabor itself in addressing the two, as it was held in the case of *Kenya Commercial Finance Co. Ltd vs Afraba Education Society (2001) 1EA* where it was held that; 'The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied.'
29. All in all from the material placed before this court the applicant has not demonstrated a prima facie case to warrant the grant of the injunctive orders sought; also due to the outright default of the applicants this court is disinclined to exercise its discretion in equity in their favour for as the maxim goes 'he who seeks equity must do equity'.

#### FINDINGS AND DETERMINATION

30. For the foregoing reasons, this court makes the following findings and determinations;
  - (i) This court finds that from the materials placed before the court the applicants have not satisfied the conditions for granting the injunctive orders.
  - (ii) This court finds that this is not a suitable case for it to exercise its discretion in their favour;
  - (iii) The application is found lacking in merit and
  - (iv) is dismissed with costs to the respondent.

Orders accordingly.

**DATED AND SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON.A.MSHILA**

**JUDGE**

