



REPUBLIC OF KENYA



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**Sheribiz Supplies Ltd v Credit Bank Ltd & 4 others (Civil Case E022 of 2020)
[2021] KEHC 356 (KLR) (Commercial and Tax) (9 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E022 OF 2020
WA OKWANY, J
DECEMBER 9, 2021**

BETWEEN

SHERIBIZ SUPPLIES LTD APPLICANT

AND

CREDIT BANK LTD 1ST RESPONDENT

TIARA AT LAVINGTON LIMITED 2ND RESPONDENT

TIARA VILLAS LIMITED 3RD RESPONDENT

SURAYA SALES LIMITED 4TH RESPONDENT

INTEGRA AUCTIONEERING (K) COMPANY 5TH RESPONDENT

RULING

1. The applicant herein, Sheribiz Supplies Ltd, seeks the following orders in the application dated 5th February 2020: -
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued preventing the 1st Defendant, its employee, agents or persons acting on its behalf and or instruction, from disposing off the LR No 3734/295 by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way whatsoever;



4. That pending the hearing and determination of this application, a temporary order of injunction be and is hereby issued prohibiting the 2nd Defendant, their employees, agents or persons acting on their behalf from creating a second charge, a further charge or any other interest on LR. No 3734/295;
5. That pending the hearing and determination of the suit, an injunction be and is hereby issued preventing the 1st Defendant, its employee, agents or persons acting on its behalf and or instruction, from disposing off the LR No 3734/295 by way of public auction, private treaty, transferring, appointment of a receiver, leasing or in any other way whatsoever;
6. That pending the hearing and determination of the suit, the 2nd -4th Defendant, their employees, agents or persons acting on their behalf from creating a second charge, a further charge or any other interest on LR No 3734/295;
7. That costs of the application be provided;
8. Any other order as the Honourable Court may deem fit.

2. The application is supported by the affidavit of John Maina Chege and is based on the grounds that: -

1. The Plaintiff bought a villa that was being constructed on LR No 3734/295 from the 2nd to 4th Defendant and paid an installment of Kshs 11,263,000.00;
2. The Plaintiff has become aware that the property known as LR No3734is scheduled for auction on 7th February, 2020;
3. The Plaintiff learnt of this information on 4th February, 2020 and was caught unaware as though it had interest on the suit property, it was not aware of any impending sale by auction until 5th February, 2020 when a Daily Nation newspaper advertisement was seen by its employee;
4. The 1st Defendant, despite knowing that the villas on LR No 3734/295 had been sold off plan to third parties did not bother to notify the public of the intention to sell by placing and or affixing statutory notices on the suit property;
5. The sale will affect third parties who were not aware of the transaction between the Defendants thus causing great prejudice;
6. Having paid a deposit on the property, the Plaintiff acquired a proprietary interest over the property and the property cannot be sold with the Plaintiff be adequately given notice and involved;
7. The 1st Defendant has therefore not complied with statutory requirement of *Land Act* with regard to notices being issued to all person who might be affected by the statutory power of sale;
8. The Plaintiff therefore has a prima facie case with a high probability of success as its proprietary interest is being deprived unprocedurally;



9. Unless the orders are issued, the Plaintiff will suffer irreparable loss that may not be compensated by way of damages as the property is situated in a very unique place and may not get a similar property;
 10. The Defendants will not suffer any prejudice as the 1st Defendant still has a charge over the property;
 11. The balance of convenience lies in the maintaining the status quo pending the hearing of the application and the suit
3. The 1st respondents opposed the application through the grounds of opposition dated 17th February 2020 and the replying affidavit sworn by its Head of Legal Department Mr. Wainaina Francis Ngaruiya.
 4. Mr. Ngaruiya states that the 1st defendant offered a term loan facility of Kshs. 100,000,000 to the 2nd defendant to finance the purchase of property known as L.R. No. 3734/295 and a that legal charge was created to secure the said facility. He contends that the loan was thereafter enhanced to Kshs 108,000,000 and a legal charge created on 1st April 2016. He states that the 1st defendant was not a party to the agreement between the plaintiff and the 2nd, 3rd and 4th defendants and that a charge had already been registered over the suit property by the time the plaintiff was given the purported letter of offer.
 5. The 1st defendant's case is that the 2nd - 4th defendants needed to obtain its consent before entering into any legally binding agreement. The 1st defendant's deponent adds that the amount owing to the 1st defendant is Kshs 127,761,812 which amount continues to accrue interest.
 6. The application was canvassed by way of written submissions which I have considered.
 7. The main issue for determination is whether the applicant has made out a case for the granting of the equitable orders of injunction.
 8. The principles governing the grant of orders of temporary injunction were set out in the case of *Giella vs Cassman Brown and Company Limited* (1973) E.A 385, at page 360 where Spry J. held that: -

“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.”
 9. What amounts to a prima facie case was defined by the Court of Appeal in *Mrao Limited vs First American Bank of Kenya and 2 Others* (2003) KLR 125, as follows: -

“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.”
 10. In the present case, the applicant seeks orders to restrain the 1st respondent from disposing off the LR No 3734/295 by way of public auction, private treaty, transferring, appointment of a receiver,



leasing or in any other way dealing with the suit pending the hearing and determination of this suit. The applicant also seeks orders of injunction to restrain the 2nd – 4th defendants from creating a 2nd or further charge on the suit property.

11. The 2nd – 4th defendants did not file any response to the application in which case, the applicant’s claim that it purchased a villa situate on the suit property, thus granting it a purchaser’s lien over the property, is not disputed. The 1st defendant, on the other hand, argued that it was not a party to the agreement between the plaintiff and the 2nd, 3rd and 4th defendants. According to the 1st defendant, the 2nd to 4th defendants needed to obtain its consent before transferring the property to another party.
12. From the undisputed facts of this case, it is clear that there were 2 tiers or sets of agreements between the parties herein, namely; the loan facility agreement between the 1st defendant and 2nd – 4th defendants for the construction of the villas on the suit property, and; the off plan purchase agreement between the plaintiff and the 2nd – 4th defendants. This is to say that the plaintiff purchased a villa in the suit property that was constructed using a loan secured from the 1st defendant. It then turns out that the 2nd – 4th defendants defaulted in the loan repayments and that the villa purchased by the plaintiff is now in danger of being auctioned by the 1st defendant in exercise of its statutory power of sale.
13. My finding is that the agreements between the parties herein are, to some extent, intertwined as each has given the parties herein rights and obligations that this court cannot ignore when determining this application. I find that the plaintiff established a prima facie case against the 2nd to 4th respondents who have not denied that they sold the subject villa to the plaintiff. I also find that while it is true that the 1st defendant has a right to exercise its statutory power of sale over the suit property following the default by the chargor in repaying the loan, the court cannot, at this interlocutory stage, overlook the interests of the plaintiff who has already demonstrated that it is bona fide purchaser of the subject property. My further finding is that the issue of whether the 2nd to 4th defendants sought and obtained the consent of the 1st defendant before selling the villa in question is an issue that can only be unpacked at the hearing of the suit. This court however finds it hard to believe that the 2nd to 4th defendants could have sold the villas on the suit property to third parties without the knowledge and/or consent of the 1st defendant.
14. The next issue for determination is whether the plaintiff will suffer irreparable loss if the order of injunction is not granted. In *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR the Court considered the *Halsbury’s laws of England* definition of what amounts to irreparable loss and stated that: -

“first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

15. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court stated as follows on irreparable injury or damage: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that



is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

16. In the instant case, the plaintiff demonstrated that it bought the villa from the 2nd to 4th defendants and paid an instalment of Kshs. 11,263,000 towards the said purchase. The 2nd to 4th defendants did not controvert the plaintiff’s claim that it acquired a purchaser’s lien in respect to the purchased villa. In the circumstances of this case, I find that the answer to the question on whether the applicant will suffer irreparable harm should the purchased villa be sold is in the affirmative. Should the 1st respondent proceed to sell the subject villa on account of the 2nd to 4th respondents’ default, the applicant will lose the suit property which it has already paid for.
17. My take is that looking at this case in totality, it is not possible to make a finding that the plaintiff will be able to recover its loss/damages from the 2nd to 4th defendants who have already defaulted in making the loan repayments due to the 1st defendant. The applicant’s loss is further exacerbated by the fact that the 1st defendant did not demonstrate that it notified the applicant of the intended auction of the suit property despite having been aware that the villa had been sold off plan. I find that in the circumstances of this suit, it is imperative that the subject property be preserved until the suit is heard and determined. I am guided by the decision in *Orion East Africa Ltd vs Eco Bank Kenya Ltd and Another* [2015] e KLR where the Court of Appeal set out the circumstances under which a mortgagee may be restrained from exercising its statutory power of sale as follows: -

“In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case, not only to strength of the Applicant but also to the strength of the defence advanced by the Respondent, then make an appropriate order. In *Hubbard v Vosper* [1972] I ALL ER, 1023 at page 1029 Lord Denning MR, in setting aside an interlocutory injunction granted by a trial court stated:

“We are told that practitioners have been treating these cases as deciding that, if the Plaintiff has an arguable case, an injunction should be granted so that the status quo may be maintained. The judge was so told in the present case, and that is why he granted the injunction.

I would like to say at once that I cannot accept the proposition stated in those two cases. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the Defendant but leave him free to go ahead.” [Emphasis added].

18. In view of the foregoing, I need not consider the third limb of the *Giella* Case. However, for avoidance of doubt, I find that the justice of this case and the balance of convenience tilts in favour of granting an order to maintain the status quo currently obtaining in the suit property so that the dispute between the parties herein can be heard on merit. The costs of this application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF DECEMBER 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: -

Mr. Gachaga for Plaintiff.

Ms Mungai for Kimondo for 1st and 5th Defendants/Respondents

Court Assistant: Margaret

