



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E470 OF 2019**

**MESGO LIMITEED .....1<sup>ST</sup> PLAINTIFF**

**EMBU FOOD INDUSTRIES LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. Through the application dated 23<sup>rd</sup> December 2019, the plaintiffs seek orders for:

**1. Spent**

**2. Spent**

**3. That a temporary injunction do issue restraining the defendant whether by itself, its agents, servants and/or employees from selling for sale, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property situated within Embu Township approximately 200 metres off Meru- Nairobi Highway known as Embu Food Industries Limited in Embu town, Embu County measuring 0.0709 of a hectare pending the hearing and determination of this suit.**

**4. That, costs of this application be awarded to the plaintiffs/applicants**

2. The application is supported by the affidavit of the plaintiff's Director **Mr. Kaviu Mugo** and is premised on the grounds that: -

**i. The defendant by a Newspaper advert dated 16<sup>th</sup> December 2018 from its Auctioneers Garam Investments, has served a newspaper notice threatening to sell the plaintiffs' property situated within Embu Township approximately 200 metres off Meru - Nairobi Highway known as Embu Food Industries Limited in Embu town, Embu County measuring 0.0709 of a hectare effective 7<sup>th</sup> January 2020.**

**ii. That no Statutory Notices have been served at all for the redemption of accrued and unpaid debt, if any.**

**iii. The plaintiffs are in possession of the suit premises known situated within Embu Township approximately 200 metres off Meru- Nairobi Highway known as Embu Food Industries Limited in Embu town, Embu County measuring 0.0709 of a hectare and have charged the same to the defendant.**

**iv. That no loan is thus indicated to be due by the advert.**

**v. The plaintiffs paid has been paying the consolidated/amalgamated facility to the defendant in instalments.**

**vi. The plaintiffs are apprehensive that if interim orders of injunction are not granted, the defendant will proceed to evict them and they stand to suffer irreparable damage.**

**vii. It is paramount that the amount owing is divulged prior to any intended advert.**

**viii. Action is preferred here in Nairobi as it is nearest Commercial Court from Embu.**

3. The respondent opposed the application through the replying affidavit of its Legal Officer, **Mr. Morris Tiema**, who states that on 4<sup>th</sup> July 2014 the 2<sup>nd</sup> plaintiff applied for a loan facility of Kshs 15 million from the defendant which facility was secured by a legal charge over the 1<sup>st</sup> plaintiff's property known as LR No. Embu/Municipality/931 (hereinafter "**the suit property**").

4. He states that according to the charge instrument, the plaintiffs covenanted to repay the facility in monthly instalments of kshs 250,000 but that sometime in the year 2016, the plaintiff defaulted in the performance of their contractual obligations by failing to make the monthly repayments thereby prompting the commencement of the security realization process through the issuance of statutory notices.

5. He avers that on 19<sup>th</sup> July 2017 the 1<sup>st</sup> plaintiff sought an order of injunction to stop the sale of the suit property in Embu Environment and Land Court being ELC Case No. 125 of 2017, **Mesgo Ltd v National Bank of Kenya Ltd** (hereinafter "**the earlier case**") wherein the 1<sup>st</sup> plaintiff admitted being indebted to the defendant. He adds that the 1<sup>st</sup> plaintiff's application in the earlier case was however dismissed on 21<sup>st</sup> June 2018 for failure to demonstrate a prima facie case after which a Notification of sale was issued by Purple Royal Auctioneers. He avers that instead of appealing against the decision in the earlier case, the plaintiffs filed a similar application being Nairobi HCCC No. 129 of 2019 **Mesgo Limited v National Bank of Kenya Limited** (hereinafter "**the 2<sup>nd</sup> case**") which case was on 17<sup>th</sup> June 2019 withdrawn with no orders as to costs.

6. He further avers that the instant application is therefore not only resjudicata but also subjudice and that the defendant was under no obligation to reissue Statutory Notices as the earlier notices issued to the plaintiff were still valid and sufficient.

7. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the plaintiffs have made out a case for the granting of orders of injunction. Underlying the issue of injunction is also the issue of whether the application is both resjudicata and subjudice,

#### **Resjudicata/subjudice.**

8. Section 7 of the Civil Procedure Act codifies the doctrine of *res judicata* in Kenya as follows:

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

9. Our case law has distilled the essential ingredients of the doctrine as can be noted in the following decided cases: **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others** [2014] eKLR; **Kamunye & others v Pioneer General Assurance Society Ltd** [1971] E.A. 263 and **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR. The four ingredients of *res judicata* that can be discerned from the cited cases are:

- a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
- b. Are the parties in the present suit the same as those who litigated the original claim?
- c. Did the Court which determined the original claim have jurisdiction to determine the claim?
- d. Did the original action receive a final judgment on the merits?

10. The four ingredients make the instant task quite straightforward. It was not disputed that the 1<sup>st</sup> plaintiffs earlier application for injunction was on 21<sup>st</sup> June 2018 dismissed for failure to establish a prima facie case as shown in the Ruling marked as annexure "**MST5**" to the respondent's replying affidavit. The parties and subject matter in the earlier case are the same as in the instant case save for the inclusion of the 2<sup>nd</sup> plaintiff. Clearly therefore the issue of whether the plaintiffs herein are entitled to orders of injunction is a matter which has already been determined against them in a suit that is still pending before the Environment and Land Court and for which no appeal has been preferred.

11. Turning to the doctrine of *sub judice* **Section 6** of the **Civil Procedure Act** provides as hereunder:

***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

12. In **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others** [2017] eKLR the court held that:

***"...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."***

13. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 Of 1993 - *Nyanza Garage v Attorney General* in which the Court held that:

***“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”***

14. In *Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 Others* [2012] eKLR the court held that:

***“... if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”***

15. In *Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga* (2013) eKLR the Court opined that:

***“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”***

16. Guided by the principles espoused in the above cited cases, I find that the instant suit and application offends both the subjudice and resjudicata. I further find that the conduct of the plaintiff in filing strings of application before this court and the Environment and Land Court reeks of abuse of the court process and is thus conduct of a party that has not come to court with clean hands.

17. My findings on the issues of resjudicata and subjudice would have been sufficient to determine this matter but I am still minded to consider the main issue of injunction.

## **Injunction**

18. It is not disputed that the plaintiffs obtained a loan facility from the defendant which facility they did not service thereby precipitating the defendant's exercise of its statutory power of sale. The gist of the plaintiffs' case is that they were not served with the requisite statutory notices for the redemption of the accrued debt.

19. On its part, the defendant maintains that it served the plaintiffs with the demands, statutory notices and Notification for sale as shown in annexure “MST4” to the replying affidavit. Section 90(1) of the Act stipulates that:

***“(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”***

20. Under Section 90(2) of the Act, it is stated that the notice must adequately indicate the nature and extent of default, the amount to be paid to rectify the default and the time within which the money claimed is payable.

21. Section 90(3) of the Act on the other hand provides for the remedies that accrue to a chargee once the chargor fails to comply and remedy its default within the 90 days period.

Section 96(2) of the Act stipulates as follows: -

***“(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”***

22. Rule 15 of the Auctioneers Rules imposes an obligation on the auctioneer to send a chargee a written redemption notice of a minimum 45 days.

23. I have perused the said annexure “MST4” and I note that it contains notices sent to the plaintiff by the defendant and the auctioneer at different times between 8<sup>th</sup> April 2015 to 3<sup>rd</sup> May 2016. I further note that the Notice of 3<sup>rd</sup> May 2016 was received by the plaintiffs' Director **Mr. Mugo** on 4<sup>th</sup> May 2016. As I have already stated in this ruling, the plaintiffs have prior to the filing of this suit filed other applications before other courts seeking to stop the Defendant from exercising its statutory power of sale. To my mind, this is a clear demonstration that the plaintiffs were served with the requisite statutory notices and are therefore aware of the extent of their indebtedness to the Defendant. I am therefore satisfied that the plaintiffs were duly served with the requisite Statutory Notices that precede the chargee's exercise of statutory power of sale.

24. In any event, even assuming that there was lack of or improper service of the statutory notices, such a lapse in procedure cannot be a basis for stopping the charge from exercising its statutory power of sale. In *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR the learned judges held as follows:

***“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”***

25. Needless to say, the principles governing the granting of orders of injunction were stated in the oft cited case of ***Giella v Cassman Brown*** [1973] EA 353 and restated, together with their mode of application in ***Nguruman Limited v Jan Bonde Nielsen & 2 Others***, CA No. 77 of 2012, as follows:

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

- 1. establish his case only at a prima facie level,***
- 2. demonstrate irreparable injury if a temporary injunction is not granted, and***
- 3. allay any doubts as to (b) by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).***

#### **Prima facie case**

26. It is well established that in order to secure an injunctive relief, the applicant must first establish a prima facie case with a high chance of success. The Court of Appeal pronounced itself on what constitutes to a prima facie case in ***Mrao Ltd v First American Bank of Kenya and 2 others*** [2003] KLR 125 as follows: -

***“A Prima facie case in a civil application includes but not confined to a genuine and 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 later”.***

27. The question which arises is whether the applicants have established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the law, the pleadings filed herein and the arguments advanced by both parties.

28. As I have already noted in this ruling, it is not in dispute that the plaintiffs are indebted to the defendant for monies advanced to them under the loan Facility Agreement. My finding is that owing to the said indebtedness, the plaintiffs cannot be said to have established a prima facie case against the defendants so as to warrant the granting of the orders of injunction. I also note that the plaintiffs were silent on their indebtedness to the Defendant and did not indicate that they had made efforts to pay the amounts due which debt continues to attract interest. I therefore find that the plaintiffs have not established that they have a prima facie case against the Defendant so as to warrant the granting of the orders of temporary injunction.

29. Having regard to the observations and findings that I have made in this ruling, I find that it will not be necessary to consider the other two conditions for issuance of orders of injunction. In sum, I find that the application dated 23<sup>rd</sup> December 2019 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 16<sup>th</sup> day of July 2020 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 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Cheruiyot for defendant/respondent

No appearance for plaintiff/applicant

Court Assistant: Sylvia