



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 20 OF 2018

HANNAH WAIRIMU MUTURA..... PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED..... DEFENDANT

R U L I N G

1. The undisputed background to the motion before me is as follows. In April 2014, **Hannah Wairimu Mutura**, the Applicant, obtained a loan facility with the **Gulf African Bank**, the Respondent for the sum of **KShs.110,000,000/=** to finance the purchase of a property described as **LR No.4953/29/IV Thika**. The loan was secured in part by a legal charge over the said property (KShs.100 million) and a further charge over a property described as a **IR No.209/13429 Nairobi** (KShs. 10 million) as well as the personal guarantee of the Applicant's spouse, **David Njuguna Ngoi**. In the initial stages, the Applicant made several repayments as they fell due. However, this did not continue for long, and as at April 2018, the Applicant was in arrears amounting to KShs.23,687,137. 2.

2. The Respondents having previously served the statutory notice on the Applicant, instructed Garam Investments Auctioneers to proceed to sell by public auction the property described as **LR No. 4953/29/IV Thika** (the suit property) in realization of the security. The public auction was scheduled for 19th June 2018. The application before me was filed contemporaneously with an Originating Summons, on 18th June 2018. It is expressed to be brought under Order 40 Rules 1 (a) and 4 (1) of the Civil Procedure Act and seeks a temporary Injunction against the Respondent, its agents or employees **"from further advertising in whatever manner or carrying out the sale of LR No.4953/29/IV (IR No. 12168) either by way of publication, private auction until the application by way of Originating Summons dated 18th day of June 2018 is heard and determined"** (sic).

3. On grounds *inter alia* that the Respondent had advertised the sale of the suit property which action would defeat the purpose of the Originating Summons. The Originating Summons (OS) itself expressed to be brought under Order 37 Rule 4 and Sections 103(1) (a), (3) and 104(2) (a), (b) and (c) of the Land Act. The principal prayer in the OS is an order allowing the Applicant to liquidate the loan sums **"due and payable to the Respondent by way of monthly instalments of KShs.1,500,000/= for the first 12 months and thereafter KShs.200,000/= monthly installments until the loan amount is paid in full."** The Applicant also sought **"to be given adequate time within which to sell the aforesaid property by way of private treaty and the proceeds thereof be applied to liquidate the entire debt owed to the Respondent."**

4. Thus in the brief affidavit in support of the motion for injunction, the Applicant states that if orders sought are granted she will **"comfortably service the loan"** and that the bank will suffer no prejudice. And moreover that she is in the process of seeking to liquidate some of her properties with a view to offsetting the loan. She asserts that the Originating Summons will be rendered nugatory if the orders sought are denied.

5. It would seem from annexure **GAB 19** (erroneously referred to as **GAB 17**) in the Replying affidavit sworn on behalf of the Respondent by **Lawi Sato**, the Respondent's Legal Officer, and filed into court on 16th July 2018, one day after filing the present motion and OS, the Applicant also filed a Civil Case No. E 040 of 2018 in the Commercial and Admiralty Division of the High Court in Nairobi, seeking the same orders of injunction against the Respondent and Garam Auctioneers as in this suit. Nonetheless, it is apparent from the letter dated 28th June, 2018 by the Deputy Registrar of the Division the parties did not attend the hearing on 22nd June 2018.

6. The Respondent opposes the application through the Replying affidavit and annexures thereto. Asserting that the Respondent's power to realise security has arisen, the Respondent takes the position that in essence, the orders sought by the Applicant amount to an invitation to the court to rewrite the terms of the loan agreement between the parties. The Respondent takes issue with the Applicant's alleged concealment of her persistent default despite various indulgencies by the Respondent, as particularized in paragraphs 8 – 21, 29 – 30, 31, 33 of the Replying affidavit, to honour her obligations to the Respondent. Therefore, the Respondent views the OS as an extension of the alleged bad faith on the part of the Applicant who therefore does not deserve the equitable reliefs sought. Moreover, that the repayment mode proposed in the OS is contrary to the current contractual repayment at the rate of KShs.3,343,417.00 per month and would result in stretching the repayment period beyond the contractual period, to 14 years in light of the outstanding loan which stood at KShs.117,371,342.47.

7. The court directed the parties on 19.9.18 to file skeletal submissions ahead of the oral hearing on 26/9/18. The Applicant's skeletal and oral submissions through Mr. Wahome are premised on the provisions of Section 103 and 104 of the Land Act whose combined effect in his view has been the introduction, in favor of a chargor, of a counter balance to the chargee's statutory power of sale. The court was urged to allow the injunction to afford the Applicant an opportunity to avail herself of this new right by canvassing her OS. The case of **Amir Suleiman v Amboseli Resort Ltd [2004] e KLR** was relied on.

8. Mr. Wahome took the position that the stringent conditions regulating the grant of temporary injunctions in **Giella v Cassman and Co. Ltd [1973] EA 358** are no longer tenable in view of the new provisions in the Land Act, and that even where there is default, the court may still act in favor of a borrower so that she/he does not suffer irreparable loss. He cited the case of **Joseph Siro Musioma v Housing Finance of Kenya and 3 Others [2008] e KLR**. Reference was made in the written submission to the fact that the charge document did not stipulate repayment in the sum of KShs.3 million per month.

9. For their part, the Respondent while reiterating the undisputed facts and the material in the Replying affidavit, rested their submissions on the dicta in **Giella v Cassman Brown and Order 40 Rule 1** of the Civil Procedure Rules as regards the exercise of the court's discretion in the granting of interlocutory injunctions.

10. Relying on the decision of the Court of Appeal in **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** and **Mrao v First American Bank of Kenya Ltd and 2 Others [2003] KLR** on the definition of a prima facie case and the duty of the Applicant to establish the same, the Respondent, through Miss Weru argued that the Applicant had not demonstrated an infringement of any of her rights by the bank and that all the Applicant is seeking is a restructuring of the debt, a matter which is not within the purview of this court in light of the parties' mutual contract. The Respondent relied on the decisions in **Mrao** and in **Joseph Muzioka v National Bank of Kenya [2015] e KLR** and **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another [2002] EA 503**.

11. To the Respondent, the realization of a security on account of default by the borrower cannot constitute irreparable loss as the charged chattel becomes a commodity for sale in that event, as stated in **Simon Ngigi Kariuki v Barclays Bank Kenya Ltd [2017] e KLR**. Further, as observed by the Court of Appeal in **Nguruman Ltd**, where as in this case, a prima case is in their view not established, the elements of irreparable injury and balance of convenience need not be considered. Nonetheless the Respondents submit that the balance of convenience lies in favor of the Respondent as the Applicant is in default. Pointing to the persistent default by the Applicant towards her obligation under the charge, the Respondent argues that she is not entitled to equitable relief as stated in **Kyangaro v Kenya Commercial Bank Ltd and Another (2004) I KLR 126**, or to the discretionary remedies in Section 103 and 104 of the Land Act. Regarding which, at any rate, the Applicant has not laid a basis by demonstrating an ability to honour the proposed commitment.

12. The counsel closed her submissions by expressing the bank's demand that, if the court should consider granting the orders sought, the same ought to be conditional upon the Applicant clearing arrears amounting to KShs.32 million and resuming repayment at KShs. 3.34 million per month. In a brief response the Applicant's counsel reiterated the court's discretion to intervene, and asserting that the Applicant is incapable of paying the sum demanded.

13. The court has considered the material canvassed in respect of the motion before it. This being an interlocutory motion, the court must proceed with care to avoid making final determinations at this stage. Secondly, the court is conscious that the substantive matter before it at this stage is the notice of motion and not the OS, even though the latter is relevant to the determination of the instant motion.

14. The motion is expressed to be brought under Order 40 Rule 1 (a) and 4(1) Civil Procedure Rule. Order 40 r (1(a) Civil Procedure Rule provides that:

"Where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b).....

The court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the easting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

15. The decision of the Court of Appeal in **Nguruman** is particularly illuminating as to the principles to be considered with respect to interlocutory injunctions. The Court described the role of the judge to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

a) establish his case only at a prima facie level

b) demonstrate irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

16. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a prima facie case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or balance of convenience. The court emphasized that the standard of proof is to prima facie standard.

17. Regarding the meaning of “prima facie case” the Court stated:

“Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party 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.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

18. A prima facie case is built upon evidence and the applicable law. In this matter, the Applicant’s substantive case as found in the OS is based on the provisions of Section 103 and 104 of the Land Act and the supporting affidavit evidence presently before the court.

19. In my view, the Applicant having invoked Order 40 Rule 1 of the Civil Procedure Rules cannot also be heard to argue that in light of the provisions of Section 103 and 104 of the Land Act “the stringent conditions for the grant of injunctions as enunciated ... in **Giella v Cassman Brown** are no longer tenable.” No authority was tendered for this novel and expansive interpretation and import attributed to Section 103 and 104 of the Land Act. None of the authorities cited by the Applicant deal with the said sections, and indeed all of them were decided prior to the enactment of the Land Act. For my part, I cannot find anything in Section 103 and 104 that relieves an Applicant seeking an interlocutory injunction from the duty to establish a prima facie case, at the very least tending to show, as stated in **Nguruman**, that “that there is a clear and unmistakable right to be protected, and which is directly threatened by an act sought to be restrained.”

20. It is safer to start from what is settled jurisprudence: the successful Applicant seeking an interlocutory injunction should establish that there exists a right which has apparently been infringed by the Respondent as to call for an explanation of rebuttal. The Applicant’s affidavit in support of the instant motion is as brief as it is bare. No unlawful act or infringement on the part of the Respondent is deposed therein. The claim contained in paragraph 9 of the affidavit supporting the OS that the Respondent arbitrarily raised the monthly repayment, and repeated in submissions is neither raised in the affidavit supporting the motion, nor substantiated.

21. Be that as it may, the Respondent asserts that the current repayment level of KShs.3.43 million is the contractual rate. An examination of the provision of clause 5:5 of the letter of offer dated 4.12.13 (**annexure GAB1**) which is included in the Charge Document (**annexure GAB2**) at clause 3.1.4, reveals that the bank was entitled to charge default damages at the rate of 20% in the event the chargor failed to honour repayment installments as they fell due. Indeed, by their first letter concerning such default (**annexure GAB 4**), and dated 16th January 2015 the Respondents state *inter alia*:

“Dear Madam,

RE: YOUR OUTSTANDING LIABILITIES

Following your failure to regularize your account as previously demanded, take notice that control of your account has now been passed over to our Debt Recover Unit.

Further take note that we do hereby demand immediate repayment of KShs.8,438,943.33/= being the amount owing to the Bank by you as at 16/01/2015 which continues to accrue profit at the rate of 17% and default damages at the rate of 20% per annum (until payment in full) within FOURTEEN (14) days from the date hereof.”

22. A further demand notice dated 12th February 2015 by the bank’s lawyers Iseme, Kamau and Maema Advocates reiterates the accruing default damages (**annexure GAB5**). By a further letter to the Applicant dated 19th April 2016 (**annexure GAB 7**) the bank’s advocates state *inter alia* that:

“We refer to the above matter and to our meeting held at our offices on 1st March 2016 in which you gave several undertakings to regularize your indebtedness to our client.

We have now been instructed that pursuant to your letter dated 7th March 2016, you did not honor your commitment on the payments as promised most specifically as follows

(a) That your last payment of KShs.1,381,500.00 was made on 14th April 2016 and no subsequent payments have been made to date.

(b) That your promise to make payments of KShs.500,000/= per month did not materialize

(c)

d)

Our instructions are that on 19th April 2016 your total outstanding amount stood at KShs.107,159,300.98 being the outstanding principle and default damages tabulated as follows

.....

As you are aware that outstanding principal continues to accrue interest and default damages and the monthly installments for payments commencing May 2016 will be increasing from KShs.2,135,800.00/= to KShs.2, 959,510/=. Consequently, any proposal to settle the arrears would have to take into account the running monthly installments of KShs.2 million.” (sic)

23. The statement in respect of the Applicant’s account (GAB 18A) shows how the installments escalated within the period of default. By her own letters, the Applicant conceded to the arrears.

Her letter dated 7/3/16 (GAB 6) to the Respondent’s Head of Credit stated *inter alia* that:

“RE: NOTICE TO SELL LR NO. 209/13429

GRANT NO. LR 78345 (CHARGED) TOP GULF AFRICA BANK LTD

We refer to the above matter and to the statutory notice dated 10th November 2015 issued to myself.

I have been ailing for some time and admitted to hospital on several occasions.

I do note I have some outstanding arrears which have led to issuance of the statutory notice.

I kindly request you to allow me to settle the arrears as follows:

.....

.....

.....

Thereafter, I do request you to allow me to be paying KShs.500,000/= above the monthly installment”

24. This letter is likely a response to the statutory notice to sell , issued on 18th February 2016 by the bank’s advocates in respect of the outstanding sum of KShs.104,390,218.47 which also warned that the principal sum continued to attract profit while the “outstanding profit continues to accrue default damages at the rate of 20% per annum”. By subsequent entreaties to the bank (in a **nnexures GAB 9, GAB 12, GAB 13), the Applicant makes several pleas to be allowed to clear arrears and to pay monthly instalment at the rate of KShs.1.5 million.**

25. These exhibits seem to demonstrate that the Applicant was aware that under the contract the repayment instalments increased due to her own default. It is no wonder then that in her present affidavit she avoids mention of the alleged arbitrary increase of monthly instalments contained in the OS. Thus, no allegation of infringement of any right is contained in the affidavit supporting the motion. Where is the *prima facie* case? None is established. Indeed, if I understood the Applicant’s argument, it is that with the enactment of Section 103 and 104 of the Land Act, a new genus of ‘no-fault, no- injury’ interlocutory injunction under Order 40 Rules1of the Civil Procedure Rules had been brought into existence.

26. Looking at the considerations stipulated in Section 104 of the Land Act, these clearly anticipate certain charger’s rights deserving of protection and which would stand in jeopardy whenever the chargee seeks to exercise the remedies stated in Section 90(3) of the Land Act,

upon default by the charger. It is true that Section 104 of the Land Act grants wide discretion to the court to grant relief to a charger. However, when such a charger seeks an interlocutory injunction, he must show a prima facie case with a likelihood to success to justify the Court's intervention where the statutory power of sale has properly arisen.

27. In this case, the Applicant is admittedly in default. The uncontroverted material contained in the Replying affidavit chronicles the history of default since 2015, barely one year since the commencement of the financing arrangement between her and the Respondent. The Respondent has also documented in the said material, the various instances in which they have accommodated the Applicant in the said period, and in particular, highlight their acceptance of the proposal by the Applicant in February 2018 to be allowed to sell the second charge security **IR 209/13429 Nairobi**, which would have fetched KShs.37,000,000/=.

28. Although a sale agreement with a third party was drawn, the same had inexplicably not been executed. The Applicant's affidavit in support of the application makes no reference to this or other accommodations resulting from her default. Nor does it attempt a demonstration of the likelihood that she was indeed capable of making reduced payments proposed. From the tone of her brief affidavit and submissions, the Applicant appears to be canvassing the position that in light of the provisions of Section 103 and 104 in seeking an interlocutory injunction, she neither has the burden to demonstrate a *prima facie* case of infringement of a right that deserves protection by an interim injunction as stated in *Mrao's case* nor a *prima facie* case within the considerations contained in Section 104(1) of the Land Act. This is demonstrated by the statement in the Applicant's skeletal submissions to the effect that:

“New laws, and especially the Constitution have all moved to ensure that even when a borrower has failed to repay loan instalments, the courts can still extend a hand of mercy to them”.

29. This statement comes after the proposition that because of the enactment of Sections 103 and 104 of the Land Act the principles enunciated in *Giella v Cassman Brown* “are no longer tenable”. These are remarkable statements from a party seeking equitable relief at interlocutory stage.

30. In my view, as generous as the said provisions of the Land Act might be, they do not admit a mere *plea ad misericordiae* by a party guilty of persistent default as is the case herein. Discretionary power must be exercised judicially and by known principles, not by whim or caprice. Regarding irreparable injury, I fully associate myself with the words of **Oundo J** in the case of **Simon Ngigi Kariuki and Others v Barclays Bank of Kenya Ltd** on the contractual principle that ::

“...security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by a mortgagee cannot lead to irreparable loss since it is the contractual agreement or intention of the parties and expressly provided for in the loan agreement”. See also *Nguruman Limited case*

31. Additionally, two key facts militate against the exercise of discretion in the Applicant's favour, namely, the documented admissions of persistent default contained in her various correspondence with the Respondent as revealed in the Replying affidavit. In this regard, the Applicant's affidavit eschewed such details and indeed did not even state the amount in arrears as at the date of the auction which was the subject of the application. Section 104(4) of the Land Act cannot be read in a manner to approve or sanction the concealment of material facts in an application for interlocutory relief.

32. Secondly, having filed the present suit on 18.6.18 the Applicant proceeded to file yet another suit in the Commercial and Admiralty Division at the High Court of Kenya in Nairobi. This too was concealed from the Court by the Applicant. He who comes to equity must come with clean hands. The Applicant's acts and omissions above, taken with the persistent default and dishonouring of accommodations made by the Respondent as demonstrated disentitle her from an award of equitable relief.

31. In the result, the Applicant's motion filed on 18.6.18 must fail and is hereby dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF FEBRUARY 2019.

C. MEOLI

JUDGE

In the presence of:

Mr. Olaka holding brief for Miss Weru for Respondent

Mr. Tombe holding brief for Mr. Wahome for Applicant

Court Clerk - Kevin