



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
COMM SUIT NO. E393 OF 2024

BETWEEN

PETER MBURU MUIRURI 1ST
APPLICANT

SHOECITI KENYA LTD 2ND
APPLICANT

VERSUS

KCB BANK KENYA LIMITED
RESPONDENT

RULING

Introduction and Background

1. The Court is called upon to determine the plaintiffs' Notice of Motion dated 17th July 2024. The application seeks interlocutory injunctive relief restraining the respondent Bank from selling, alienating, or otherwise interfering with land parcel **Nairobi/Block 110/499** ("the suit property"), pending the hearing and determination of this suit.

2. The facts are not in serious contest. The 1st applicant is the registered proprietor of the suit property, which is charged to the respondent Bank as security for some credit facilities advanced to the 2nd applicant. The applicants concede that the facilities are evidenced by a letter of offer dated 21st December 2021, duly executed.
3. The applicants' principal contention is that the Bank's statutory power of sale has not accrued because the mandatory notices under the **Land Act, 2012** were not properly served. They allege that the 90-day statutory notice under **Section 90(1) of the Land Act** and the 40-day notice under **Section 96(2)**, both dated 8th February and 13th May 2024 respectively, were not received until 21st June 2024 when the same were emailed to them. The 1st applicant further alleges that the Bank's refusal to restructure the facilities was actuated by malice, despite the sufficiency of the security to cover the outstanding indebtedness.
4. The applicants also accuse the Bank of failing to render proper accounts, and of unilaterally and arbitrarily varying interest rates to their detriment.

The application is supported by the affidavits sworn by the 1st applicant on 17th July 2024 and 20th August 2024. It is opposed through the replying affidavit sworn on 7th August 2024 by David Maiyo Kiplagat, the respondent's officer.

5. The Bank admits advancing the facilities secured by the suit property but asserts that the applicants defaulted in repayment. It contends that statutory notices were issued and duly served, and that the applicants' request for restructuring came after the notices had been issued, which is evidence of service. It also asserts that the interest terms were contractual, not unlawful, and that the application is premature since no notification of sale or redemption notice under **Rule 15 of the Auctioneers Rules, 1997** has been issued. According to the Bank, the applicants do not dispute the debt but merely seek to delay and frustrate the exercise of its statutory power of sale.

Analysis and Determination

6. I have carefully considered the pleadings, the affidavits, annexures, and the rival submissions filed by the parties. The principles governing the

grant of interlocutory injunctions are trite. As restated in **Giella V Cassman Brown & Co. Ltd, [1973] EA 358**, an applicant must demonstrate a *prima facie* case with a probability of success; that they stand to suffer irreparable harm incapable of being compensated in damages if the injunction is denied and if the Court is in doubt, the application will be determined on the balance of convenience.

7. This test was reaffirmed by the Court of Appeal in **Nguruman Limited V Jan Bonde Nielsen & 2 Others, [2014] eKLR**, where the Court emphasized that the three conditions are sequential, and the failure to establish a *prima facie* case is fatal to the application.

[i] Whether a prima facie case has been established:

8. It is undisputed that the applicants obtained credit facilities from the respondent, secured by a charge over the suit property. The existence of the facilities, the charge, and the applicants' indebtedness is not denied. The only live question is whether the Bank's statutory power of sale has lawfully accrued.

9. The provisions of **Sections 90 and 96 of the Land Act, 2012** establish a mandatory and sequential statutory framework that must be strictly complied with before a chargee may lawfully exercise the power of sale. Under **Section 90(1)**, the chargee is first required to issue to the chargor a ninety-day notice of default, specifying the nature and extent of the breach and affording the chargor an opportunity to remedy the same. Where the default persists, the chargee must thereafter serve a forty-day notice to sell in accordance with **Section 96(2)**.
10. These requirements are substantive safeguards designed to protect the chargor's equity of redemption. In **John Dominic Obel & Another V Consolidated Bank of Kenya Ltd & Another, [2015] KEHC 6778 (KLR)**, this Court (Gikonyo, J), reaffirmed the holding in **Palmy Company Limited V Consolidated Bank of Kenya Ltd, [2014] eKLR**, that compliance with **Section 96** is a mandatory precondition to the valid exercise of the statutory power of sale. The jurisprudence is consistent that failure to prove proper service of

the statutory notices vitiates the entire process and renders any ensuing sale nullity *ab initio*.

- 11.** In the present case, the respondent has exhibited statutory notices dated 8th February 2024 and 13th May 2024, accompanied by a generic schedule of names, including that of the applicant, purportedly indicating that the notices were dispatched by registered post. Critically, however, no certificate of postage or other documentary proof of actual dispatch has been furnished. It is trite that where service is alleged to have been effected by registered post, the chargee bears the burden of producing clear evidence of posting, such as a certificate of postage, to demonstrate compliance. Mere production of a schedule falls short of this evidentiary threshold.
- 12.** As underscored by the Court of Appeal in **Nyagilo Ochieng & Another V Fanuel Ochieng & 2 Others [1996] eKLR**, the onus lies squarely on the chargee to prove service of the statutory notices, failing which the court must presume that no valid service was effected. In this case, the only verifiable mode of service on record is an email

dated 21st June 2024 enclosing the impugned notices. The date fell less than forty (40) days to the threatened sale. Such service does not satisfy the mandatory timelines prescribed under **Sections 90 and 96 of the Land Act**, and therefore undermines the validity of the respondent's attempt to exercise its statutory power of sale.

- 13.** The Bank contends that the forty-day notice was served both by personal delivery and by registered post. Yet, once again, no proof has been furnished to substantiate service by registered mail. The respondent merely relies on a list of names ostensibly obtained from the post office. This, however, is not equivalent to a certificate of postage, which alone constitutes prima facie proof that a specific notice was actually dispatched through the postal system.
- 14.** Whether or not the personal service of the forty-day notice is conceded, that does not cure the fatal defect in the service of the ninety-day notice. The statutory scheme under **Sections 90 and 96 of the Land Act, 2012** is sequential and cumulative;

failure to properly serve the ninety-day notice vitiates the entire process and renders any subsequent steps, including the forty-day notice, legally ineffectual. In the absence of cogent proof of service, I am persuaded that the applicants have raised a bona fide challenge sufficient to establish a *prima facie* case.

15. With respect to the applicants' complaint that the Bank failed to render accounts, I find no merit in that assertion. The respondent placed before the Court comprehensive loan statements covering the relevant period, which detail the disbursements, repayments, and outstanding balances. Indeed, the applicants themselves annexed the very same statements to their affidavits. In those circumstances, the allegation that accounts were withheld is untenable.

16. Turning to the complaint regarding interest rates, the facility letter dated 21st December 2021 expressly provided for interest at the rate of 11.5% per annum. the applicants contend that the interest charged was unconscionable and unilaterally varied without due notice. Such

allegations raise substantive questions of fact and law which cannot be conclusively determined on affidavit evidence alone.

- 17.** As the Court of Appeal stated in **Mrao Ltd V First American Bank of Kenya Ltd & 2 Others, [2003] KLR 125**, issues that go to the validity of the underlying contract or its performance are best reserved for the trial where parties will have the opportunity to tender oral and documentary evidence. Accordingly, the issue of whether the interest charged was unconscionable or unlawfully varied is reserved for determination at the hearing of the main suit. In any case, the Courts have held that a disagreement on interest cannot be a ground to allow an injunction.
- 18.** The critical issue therefore remains compliance with the statutory notice regime, which goes to the root of the chargor's equity of redemption under **Section 90(3) of the Land Act**.

[ii] Irreparable harm:

- 19.** In **Mbuthia V Jimba Credit Corporation Ltd [1988] KLR 1**, the Court underscored the principle

that monetary compensation may not be an automatic remedy for violations noting that the loss of proprietary rights in land is incapable of exact restitution. Applying this principle to the present case, and bearing in mind the finding regarding lack of proper notice, I am persuaded that the applicants stand to suffer irreparable harm which cannot be adequately compensated by damages if the threatened sale is allowed to proceed without strict compliance with the law.

[iii] Balance of convenience:

20. I note that the applicants do not dispute their indebtedness to the respondent Bank. What is in contention is the question of compliance with the mandatory statutory notice regime under the Land Act, which safeguards the chargor's equity of redemption. That right is not a mere technicality but a substantive statutory protection which the courts are enjoined to uphold.

21. Accordingly, while the Bank remains entitled to pursue recovery of the debt, it must do so strictly within the confines of the law. In these

circumstances, the balance of convenience dictates that the suit property be preserved temporarily, to prevent an unlawful sale.

Disposition

22. Considering the foregoing analysis, and with the aim of equitably balancing the applicants' statutory rights against the respondent's right to repayment, the appropriate and just resolution of the application dated 17th July 2024 is to grant it under the following conditions:

- i. A temporary injunction is hereby issued and the respondent Bank is hereby restrained from selling, alienating, disposing of, or otherwise interfering with land parcel Nairobi/Block 110/499, until it has issued and duly served upon the applicants with fresh statutory notices in strict compliance with the law.*
- ii. For the avoidance of doubt, since the indebtedness is not disputed, the respondent Bank shall re-issue and serve afresh the 90-day and 40-day statutory notices as required under Sections 90 and*

96 of the Land Act, 2012. Upon expiry of the said notices, the Bank shall be at liberty to exercise its statutory power of sale, subject to law.

iii. Costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI
THIS 23RD DAY OF OCTOBER 2025.**

**F. MUGAMBI
JUDGE**