



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC SUIT NO 29 OF 2014**

**MOHAMED HASSAN ALI.....PLAINTIFF**

**VERSUS**

**JOSEPH KARIUKI KIBAARA.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 11<sup>th</sup> August, 2017. It is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. It seeks orders that;

a) Spent.

b) Spent.

c) That the Defendant, their servants, agents and/or employees be hereby restrained from selling and/or interfering with the Plaintiff's suit premises being a house developed on and including Plot No. L.R/Mainland North/Section I/17466 pending the hearing and determination of this suit.

d) That an audit be done on the Plaintiff's mortgage account No. MLCOO-001283 and Escrow Current account number CA.721000010 by an independent auditor to be appointed by this court to determine and verify the correctness of the amount owing by the Plaintiff to the Defendant and the interest chargeable if any and the interest which had been wrongly charged be declared null and void.

e) That costs of this application be paid by the Defendant.

3. The grounds are on the face of the application and are listed as in paragraph 1-20. I do not need to reproduce them here.

4. The application is supported by the affidavit of Austin Odour Peter, the director of the Plaintiff/Applicant herein sworn on the 11<sup>th</sup> August, 2017 and a further affidavit sworn on the 22<sup>nd</sup> September, 2017.

5. The application is opposed. There is a replying affidavit sworn by Eunice W. Kamau, the Defendant assistant legal manager-litigation sworn on the 5<sup>th</sup> September, 2017 and further affidavit sworn on the 4<sup>th</sup> October, 2017.

6. On the 22<sup>nd</sup> September, 2017 the court directed that the application be disposed of by way of written submissions. Counsels were given 6<sup>th</sup> October, 2017 to highlight their submissions.

**THE PLAINTIFF/APPLICANT'S SUBMISSIONS**

7. It is the Plaintiff's/Applicant's case that they applied for a construction loan facility from the Defendant for a sum of Kshs53,600,000/= to construct a business premises on Plot No. LR. MN/1/17466.

The loan commenced on 17<sup>th</sup> October, 2013 for 18 months and the loan maturity was 30<sup>th</sup> June, 2015.

8. That after expiry of 18 months the project finance loan was to be converted into a long term loan for 15 years at the prevailing market interest rates. The loan was to be repaid for a period of 15 years and the parties signed a pre-disbursement agreement. The Plaintiff was at all material times paying interest as charged by the Defendant and was issued with certificates of interest for the period already lapsed. The Plaintiff was taken aback when a bank official at the Defendants purported to inform him that he had been instructed to serve a ninety days statutory notice.

9. It is the Plaintiffs/Applicant's further submissions that the Defendant/Respondent did not have a locus to issue any notice against the Plaintiff since the Plaintiff was not in any arrears.

The Plaintiff had only drawn down a sum of Kshs.39,665,862/= which sum the parties agreed to convert to a long term loan of 15 years but was later changed to a period of 10 years under unexplained circumstances.

10. That without any justification the Defendant manually manipulated the opening balance for the year 2016, naming it a migrated capital loan of Kshs.39,618,532/52 up from a closing balance of Kshs.37,165,861/88 as at 31<sup>st</sup> December, 2015. Further that the Plaintiff has paid all the instalment payments which include payment of the loan principal amount and the interest that was payable at the time, in good time vide the escrow account No. CA [particulars withheld] as exhibited in the annexed statement marked "AOP 10" hence Defendant had no right to issue the said ninety days statutory notice or any other notices.

11. The Plaintiff has established a prima facie case with high chances at the trial. They have put forward the cases of;

1. *Olympic Sports House Limited –versus- School Equipment Centre Limited (2012) eKLR.*

2. *Joseph Siro Mosioma –versus- Housing Finance Corporation of Kenya And 3 Others, Nairobi HCCC No. 265 of 2007 (unreported).*

3. *Suleiman –versus- Amboseli Resort Limited (2004) 2KLR 589.*

4. *Alkman –versus- Muchoki (1984) KLR 353.*

That the Defendant has no right to issue statutory power of sale notice as it never issued any formal demand to show that the Plaintiff was in arrears as set out.

The figures in the mortgage account and the escrow account do not reconcile.

They have put forward the case of *Rameshchand Shamji Kerman Shar And Another –versus- Playfair Enterprises Limited And Another (2015) eKLR.*

The Plaintiff has demonstrated that it will suffer irreparable loss since it risks losing the investment if these orders are not granted.

Finally, that the balance of convenience tilts in favour of the Plaintiff/Applicant.

#### **THE DEFENDANT'S/RESPONDENT'S SUBMISSIONS.**

12. A dispute in accounts is not a ground for granting an injunction. They have put forward the cases of;

*Thara Orchards Limited –versus- Kenya Commercial Bank Limited (2012) eKLR, Palmy Co. Ltd –versus- Consolidated Bank of Kenya Limited (2014) eKLR,* where Gikonyo J. held that,

**“This is yet another issue which I should determine in *Limine*; on disputes on the sum owing and the varied interest rates applied to the loan; I need not say more; these two issues are well settled and I am content to adopt a work of *Rudd J. in Bharmal Kamji Shah And Another –versus- Shah Depar Devji (Supra)* that;**

**“..... the court should not grant an injunction to restrain a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage.....”**

13. It is the Defendant's further submission that the issue of the difference in the closing balance as at 31<sup>st</sup> December, 2015 has been addressed. They have put forward the case of *Lalji Karsan Rabadia And 2 Others –versus- Commercial Bank of Africa Limited (2015) eKLR* where the Court of Appeal held that;

**“..... the courts of law should maintain the performance of the contracts accordingly to the intention of the parties, that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves.”**

That clause 4 of the 2015 letter of offer meant that construction loan granted in 2012 “could be converted into a long term loan.”

The Plaintiff knows that these are two different types of loans with different terms. The Plaintiff ought not to import terms applicable to

construction loans to long term loans. That the statutory notice issued under Section 90 of the Land Act 2012 was not premature. The same was issued after accrual of the Defendant's rights.

14. It is the Defendant's further submission that the Plaintiff has not demonstrated a prima facie case with a probability of success. That the authorities cited by the Plaintiff are distinguishable as in the present case there is no clear breach of the law. They have relied on the cases of ;

1) *East Africa Development Bank –versus- Hyndai Motors Kenya Limited (2006) eKLR.*

2) *Nguruman Limited –versus- Jan Bonde Nelson And 2 Others (2014) eKLR.*

The Plaintiff has failed to demonstrate that it is likely to suffer irreparable injury which cannot be compensated by an award of damages if these orders re not granted.

15. The Plaintiff's prayer for taking accounts to show how much it owes and to establish whether there is any unlawful interest which has been charged is not tenable. It does not envisage a situation contemplated in Order 2 of the Civil Procedure Rules,2010.

By seeking accounts to be taken the Plaintiff is asking the court to fish for evidence on its behalf.

The Defendant prays that the application be dismissed with costs.

16. I have considered the Notice of Motion dated 11<sup>th</sup> august, 2017, the affidavits in support and the annexures.

I have also considered the Replying affidavit and further affidavit of Eunice W. Kamau and the annexures.

I have considered the written submissions of counsel together with the oral highlights and the authorities cited.

The issues for determination are;

**i) Whether the Plaintiff's/Applicant's case has met the threshold for grant of temporary injunctions.**

**ii) Whether the Ninety days statutory notice is premature.**

**iii) Who should bear costs?**

Both counsels have pointed out as an issue; whether the Plaintiff/Applicant is in arrears I would not deal with this issue at this stage as it would amount to dealing with prayer (b) of the plaint dated 14<sup>th</sup> august, 2017.

17. In their submissions, counsel have substantiated their clients' respective positions stated in their respective affidavits. It is now appropriate to consider the facts that have emerged and the legal principles applicable.

18. The principles were laid down in the precedent setting case of *Giella –versus- Cassman Brown And Co. Ltd (1973) EA 385.*

First, the Applicant must show a prima facie case with a probability of success at the trial.

Secondly, normally or injunction will not be granted unless the Applicant shows that he is likely to suffer an injury which cannot be compensated by damages, if the injunction is not granted.

Thirdly, if the court is in doubt, it will decide on a balance of convenience.

19. In the case of *Mrao Limited –versus- First American Bank Limited And 2 Others (2003) KLR 125* the Court of Appeal in determining what amounts to a prima facie case stated;

**“So what is a prima facie case? I would say that in Civil cases, it 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 as to call for an explanation or rebuttal from the latter.”**

20. It is the Plaintiff's/Applicant's case that the statutory notice was never served upon it and in any case the same could be premature as the alleged default has not arisen.

In response the Defendant through the replying affidavit of Eunice W. Kamau attached an email dated 7<sup>th</sup> February, 2017 from the Plaintiff's director where he admits default and promises to regularize the account within thirty days.

If this statutory notice was issued on 14<sup>th</sup> March, 2017 then it would not be premature. The statutory notice was issued after accrual of the Defendant's rights.

I find that the Plaintiff/Applicant has failed to demonstrate that it has a prima facie case with a probability of success at the trial. The Plaintiff/Applicant has not denied that it has defaulted instead it seeks that the court do order that the account be audited.

As it stated earlier granting this order would amount to disposing of prayer (b) of the plaint.

21. In the case of Njenga –versus- Njenga (1991) KLR 401 Bosire J.(as he then was) held that;

**“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”**

I am not persuaded by the fact presented by the Plaintiff/Applicant that it deserves the orders sought.

22. In Kenleb Cons Limited –versus- Gathitu Services Station Limited And Another (1990) KLR 557 Bosire J.(as he then was) held that;

**“to succeed in an application for injunction an Applicant, must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”**

I am not satisfied that the Plaintiff/Applicant herein deserves this kind of protection.

23. In the case of Rajput –versus- Barclays Bank of Kenya Limited And 3 Others (2004) 2KLR 393 Hon. Emukule J. in dismissing an interlocutory application held as follows;

**“The application offends the cardinal principle that no final order may issue on an interlocutory application.....”**

24. The Plaintiff/Applicant was afforded a credit facility by the Defendant whose repayment was secured by a charge over the charged property and that the Plaintiff/Applicant has defaulted in making repayments of the said facility. I find that it has failed to establish a prima facie case with high chances of success.

25. A dispute as to accounts is not a sufficient ground to injuncta charge from exercising its statutory power of sale. It was so held by Ringera J. (as he then was) in Thathy –versus- Middle East Bank (K) Ltd And Another (2012) IKLR 595.

I find that the Plaintiff has failed to demonstrate that it stands to suffer irreparable loss if the injunction orders are not granted.

In Ooko –versus- Barclays Bank of Kenya Limited (2002) KLR 394 Page 398 Ringera J. (as he then was) held;

**“The second condition is that an interlocutory injunction will not normally be granted unless the Applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the Applicant to do that. In the instant matter, the Plaintiff did not even attempt to do so. She was content to submit that once a prima facie case has been made, it was not necessary to consider any other matters and that the Defendant had not shown it could compensate her adequately in damages. To my mind the Plaintiff’s submissions is misconceived....”**

I am guided by the above authority in finding that the Plaintiff herein has failed to demonstrate that it will suffer irreparably if these orders are not granted.

26. The Plaintiff seeks a mandatory interlocutory injunction to compel the Defendant to give accounts. In Showind Industries Limited And Another (2002) IEA 284 Ringera J.(as he then was) held;

**“As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of a court of equity or his equity has been defeated by laches.”**

I find that the Plaintiff’s Applicant’s case herein does not meet the above test. It has failed to show that it has a strong and straight forward case.

27. Illegal interest as a basis for granting injunction should be supported by clear and sufficient evidence tabled in court by the Applicant. In the absence of this evidence the court cannot base its decision on unsubstantiated grounds.

I agree with counsel for the Defendant that the court in the present case is being asked to “fish” for evidence if it were to grant prayer (d) of the application.

In Halsburys Laws of England 4<sup>th</sup> Edition Vol. 24 Paragraph 953, it stated;

**“an application for an injunction in aid of a Plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve the property without waiting**

**for the right to be finally established. This depends upon a variety of circumstances and it is impossible to lay down any general rule or the subject by which the court in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course.”**

28. I am also of the view that the balance of convenience tilts in favour of the Defendant/Respondent.

In the case of *Paul Gitonga Wanjau –versus- Gathuto Tea Factory Co. Limited And 2 Others (2016) eKLR* Mativo J. held;

**“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the Applicant in the other hand might sustain if the injunction was refused and he should ultimately turn ought to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”**

I am of the view that in the present case the Plaintiff/Applicant has failed to discharge this burden to the required standard.

29. In conclusion, I find that the Plaintiff’s/Applicant’s application has failed to meet the threshold for grant of temporary injunctions. I find that the same lacks merit and it is dismissed with costs to the Defendant/Respondent.

**It is ordered.**

**Dated, Signed and Delivered at Mombasa on the 18<sup>th</sup> day of April 2018.**

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**L. KOMINGOI**

**JUDGE**

**18/4/2018.**