



Final Auto Centre Limited v Equity Bank (K) Limited (Civil Suit E071 of 2022) [2024] KEELC 879 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CIVIL SUIT E071 OF 2022
MN GICHERU, J
FEBRUARY 22, 2024**

BETWEEN

FINAL AUTO CENTRE LIMITED PLAINTIFF

AND

EQUITY BANK (K) LIMITED DEFENDANT

RULING

1. This ruling is on the notice of motion dated 7/11/2022. The motion which is by the plaintiff is brought under Sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Order 40 Rule 7 of the [Civil Procedure Rules](#) and all other enabling provisions of the law and seeks the following orders.
 1. That this court be pleased to certify this application as one of extreme urgency and hear it ex parte in the first instance.
 2. That pending the hearing and determination of this application, the court be pleased to declare that the auction advertised and slated for 2/12/2022 of the substratum premises is illegal as the case is still pending before this court.
 3. That pending the hearing and determination of this application, the court be pleased to stay and injunct the respondents from advertising and proceeding with the public auction from the aforesaid advertisement.
 4. That the 1st and 2nd respondents herein, immediately forfeit and cancel the advertisement for auction that is scheduled for 2/12/2022.
 5. That costs of this application be provided for.
2. The motion is supported by two affidavits sworn by Francis Muriithi, a director of the plaintiff and several grounds. In addition, there are several annexures. In summary, the applicant states as follows.



- Firstly, the plaintiff is the registered owner of L.R. KJD/Kap-North/40289 and the said land has been used to secure a loan of Kshs. 11, 800,000/-. To this end, the plaintiff and the defendants entered into a loan agreement.
3. Secondly, the defendant raised the interest rate without informing the plaintiff and in contravention of Section 84 of the Land Act. This overcharge on interest resulted in the loan account falling into arrears. As at 13/7/2022, the arrears amounted to Kshs. 6, 460, 891.00.
 4. Thirdly, on 13/7/2022, the defendant served the plaintiff with a statutory notice of the same date to sell the suit land in order to recover the arrears. At the time this application was filed, the defendant was about to commence the process of advertising the sale of the suit land.
 5. Fourthly, that in November 2019, the defendant, with the authority of the plaintiff sold L.R. Kajiado/Kitengela/32676, belonging to the plaintiff and it raised Kshs. 3.5 million which is held in an escrow account by the defendant. This account is not captured in the loan account statement yet the plaintiff stands at Kshs. 15 million.
 6. Fifthly, the plaintiff stands to suffer irreparable loss because the suit land comprises the matrimonial home of the directors and no amount of compensation by way of damages can reconstitute them for the great loss that they are likely to suffer if this application is not allowed.
 7. The motion is opposed by the defendant and in this connection, its Manager Legal Services- Debt Recovery Unit, Kariuki Kingori has sworn a replying affidavit dated 8/11/2022 in which he replies as follows.
 8. Firstly, the plaintiff has an aggregate loan of Kshs. 10.5 million. The first facility had an arrears of Kshs. 4, 821, 135/75 as of 3/11/2022 while the second one stood at Kshs. 1, 925, 104/- as of the same date.
 9. Secondly, owing to the continuous and contumelious default of the plaintiff, the defendant issued a 90 days statutory notice to the plaintiff and its directors, dated 12/11/2021 asking for the settlement of the arrears which then stood at Kshs. 879, 016/75.
 10. Thirdly, the plaintiff did not heed the notice as a result of which the defendant issued the plaintiff with a statutory notice of sale under Section 96 of the Land Act. The said notice was dated 13/7/2022 and it was not heeded to.
 11. Fourthly, the bank did not levy any not contractual interest rate as everything was stipulated in the letter of offer.
 12. Fifthly, the defendant denies any allegation by the plaintiff that the power of sale it is exercising is unlawful or illegal.
 13. Counsel for the parties filed written submissions dated 5/5/2023 and 20/4/2023 respectively and identified the following issues for determination.
 - i. Whether the application meets the three conditions in *Gilla v Cassman Brown* for the grant of an order of injunction?
 - ii. Whether the plaintiff is in default of payment of the loan facilities advanced to it by the defendant in breach of the terms of the letter of offer and the first legal charge?
 - iii. Whether the defendants exercise of power of sale was procedural and lawful?
 - iv. Whether the plaintiff has met the legal threshold for the orders sought for an injunction?



14. I have carefully considered the motion in its entirety including the grounds, the affidavits, the annexures, the submissions and the law cited therein. I make the following findings on the issues raised therein.

On whether the plaintiff has defaulted in payment of loan facilities, I find that it has. Even though it is incumbent upon the plaintiff to prove payment of agreed monthly instalments, there is no evidence of such payments on the part of the plaintiff. The easiest way to prove payment is by way of a deposit slip or bank statement. Even though the plaintiff has filed two affidavits, none of them has annexed bank deposits evidence. That would be the primary evidence in a case such as this.

15. Secondly, the plaintiff has not adduced any evidence regarding the second agreement of November 2019 relating to L.R. Kajiado/Kitengela/ 32676 and how it affected the original loan arrangement.

In short, the plaintiff has not placed all the cards on the table, as it were. It is unclear what impact the new agreement of 2019 had on the earlier agreements. The plaintiff has not demonstrated that it has complied with all the three or so agreements between it and the defendant or that the defendant has breached any of them.

16. On the second issue, I find that the defendant has demonstrated that it complied with all the procedures before advertising the suit property for sale. The plaintiff has been proved to be in breach and the legal notices requiring making good the default and the other warning of sale have both been proved. I am convinced by the deposition made by the defendant's representative that the notices were issued as required by law.

17. On the third and final issue, I find that the motion has not met the threshold for the issuance of an order of injunction. The plaintiff has not established a prima facie case with a probability of success. A prima facie case would have been made out only if the plaintiff had proved repayment of the loan as agreed.

Secondly, the plaintiff has not proved that if the orders sought are not granted, it will suffer substantial loss that cannot be adequately compensated with an award of damages. Though it is deposed that the suit land is the matrimonial home of the directors of the plaintiff, not a single picture of the said matrimonial home was annexed to the two affidavits sworn by one of the two directors. It is also not explained why the directors would charge their matrimonial home and then default in servicing the loan.

Finally, the balance of convenience does not tilt in favour of the plaintiff. The court would only consider the balance of convenience if it was not sure of the other two prerequisites of the grant of an injunction as per the case of *Giella –versus- Cassman Brown and Co. Ltd* (1973) E.A. 358.

18. For the above stated reasons, I find no merit in the motion dated 7/11/2022 and I dismiss it. Costs in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

