



**African Budget and Executive Homes Company Ltd & another v
Middle East Bank Kenya Limited & another (Environment & Land
Case E010 of 2023) [2024] KEELC 4375 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4375 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E010 OF 2023**

FM NJOROGE, J

MAY 29, 2024

BETWEEN

**AFRICAN BUDGET AND EXECUTIVE HOMES COMPANY
LTD 1ST PLAINTIFF
DAVID MUREITHI KANYI 2ND PLAINTIFF**

AND

**MIDDLE EAST BANK KENYA LIMITED 1ST DEFENDANT
SUSAN WAWERU T/A TREVO AUCTIONEERS 2ND DEFENDANT**

RULING

1. For determination is the Plaintiff's Notice of Motion dated 11th August 2023 and the preliminary objection dated 18th September 2023. The Notice of motion seeks the following orders:
 1. Spent.
 2. That this honourable court be pleased to grant temporary relief in the nature of an injunction barring the 1st and 2nd defendants jointly and severally either by themselves, agents, servants, workers, employees, proxies and/or any other person whomsoever claiming through the 1st and 2nd defendants from further precipitate action, disposition, wasting, further advertisement in any of the local dailies selling by public auction private treaty, alienating, trespassing unto property and/or in any manner disposing and or/dealing with the property known as Title No. Kilifi/Mtwapa/3258, Kilifi County, Kilifi /Mtwapa/3259, Kilifi County, Kilifi/Mtwapa/3260, L.R Number MN/1/6660, Linmks Road, L.R Number 29965 (C.R 61489), Baharini Area Tana River County, Kilifi County L.R Number Mainland North /IV/906, Mtwapa Creek Estate, Kilifi County, L.R Number Mainland North/908, Mtwapa Creek Estate Kilifi County pending the hearing of this application inter-partes.



3. That this honourable court be pleased to grant temporary relief in the nature of an injunction barring the 1st and 2nd defendants jointly and severally either by themselves, agents, servants, workers, employees, proxies and/or any other person whomsoever claiming through the 1st and 2nd defendants from further precipitate action, disposition, wasting ,further advertisements in any of the local dailies selling by public auction private treaty, alienating, trespassing unto property and/or in any manner disposing and or/dealing with the property known as Title No. Kilifi/Mtwapa/3258,Kilifi County, Kilifi /Mtwapa/3259, Kilifi County, Kilifi/Mtwapa/3260, L.R Number MN/1/6660, Linmks Road, L.R Number 29965 (C.R 61489), Baharini Area Tana River County, Kilifi County L.R Number Mainland North /IV/906, Mtwapa Creek Estate, Kilifi County, L.R Number Mainland North/908, Mtwapa Creek Estate Kilifi County pending the hearing and determination of the main suit.
 4. That the honourable court be pleased to issue such a declaration that the 2nd defendant/respondent in conjunction and instructions of the 1st defendant/respondent did not issue statutory notice by dint of mandatory operation and requirement of Section 90 (2) (b) of the Land Act No. 6 of 2012; 45 (forty five) days Auctioneers (3rd defendant) as per Rule 15 of the Auctioneers Rules (Subsidiary legislation) in essence Notice to sell as per requirements (Mandatory) of Section 96 (2) of the Land Act No. 6 of 2012.
 5. That in light of the aforementioned the honourable court be pleased to issue a forensic audit of the entire transaction involving Title NO. Kilifi/Mtwapa/3258, Kilifi County, Kilifi /Mtwapa/3259, Kilifi County, Kilifi/Mtwapa/3260, L.R Number MN/1/6660, Linmks Road, L.R Number 29965 (C.R 61489), Baharini Area Tana River County, Kilifi County L.R Number Mainland North /IV/906, Mtwapa Creek Estate, Kilifi County, L.R Number Mainland North/908, Mtwapa Creek Estate Kilifi County including but not limited to calling for statement and the original charge instrument.
 6. That the honourable court be pleased to issue such further orders as merited in the interest of justice.
 7. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face and the supporting affidavit of David Mureithi Kanyi who deponed that the suit properties belong to him. He stated that vide a charge instrument, the 1st and 2nd defendants for financial obligations in unknown amounts charged the property known as Kilifi/Mtwapa/3259, Kilifi County, Kilifi/Mtwapa 3260. He added that the 2nd defendant instructed by the 1st defendant have issued a notification of sale of immovable property dated 2nd June 2023 and sale of Title No. Kilifi/Mtwapa/3258,KilifiCounty, Kilifi /Mtwapa/3259, Kilifi County, Kilifi/Mtwapa/3260, L.R Number MN/1/6660,Limks Road L.R Number 29965 (C.R 61489), Baharini Area Tana River County, Kilifi County L.R Number Mainland North /IV/906, Mtwapa Creek Estate, Kilifi County, L.R Number Mainland North/908, Mtwapa Creek Estate Kilifi County which is null and void ab initio as initially the charge instrument is solely in respect to all that property known as Kilifi/Mtwapa/3259, Kilifi/Mtwapa/326 and not the entire L.R Number 29965 (C.R 61489), Baharini Area Tana River County, Kilifi County L.R Number Mainland North /IV/906, Mtwapa Creek Estate, Kilifi County, L.R Number Mainland North/908, Mtwapa Creek Estate Kilifi County. Additionally, that the charge legal obligations expire on 30th September 2026 thus the anticipated sale of the aforementioned properties is premature.
 3. Mr. David Kanyi further deponed that the intended sale vide public auction is illegal. He added that he did get a buyer for the property L.R Number MN/1/6660, Links Road.



4. The 1st defendant filed a preliminary objection dated 18th September 2023 raised on the following grounds;
5. The suit should be struck off as the Plaintiff has not been verified on behalf of the 1st plaintiff and the Plaintiffs' advocates have failed to prepare and file summons to enter appearance together with the plaint.
6. Alternatively, the suit should be stayed under Section 6 of the Civil Procedure Act or under the doctrine of *les pendens* in lieu of Kilifi ELC No. E106 of 2023.
7. The *ex parte* injunction issued herein on 11th August 2023 was issued without jurisdiction and was null and void ab initio as this honourable court has no power to grant an injunction for a period exceeding 14 days) *Omega Enterprises v KTDA* [1998] eKLR)
8. The said *ex parte* order was also null and void as the learned judge granting the order failed to record her reasons why the object of granting the injunction would be defeated by delay.
9. That the order being a nullity is not capable of being extended.
10. That by the said order the court became functus officio.
11. That this honourable court had no jurisdiction to make a second *ex parte* order.
12. That the entire process was in breach of rules of natural justice
13. The 1st defendant further filed a replying affidavit sworn by Elizabeth Ong 'are the Credit Manager of Middle East Bank Kenya Limited who stated that in the year 2021 the borrower established a relationship with the bank and was offered by the bank total banking facilities of Kshs. 50.5 million charged over Title Numbers Kilifi/Mtwapa/3258, Kilifi/Mtwapa/3259 and Kilifi/Mtwapa/3260 as well as subdivision Number Mainland North/1/6660 which terms the borrower agreed vide the offer letter dated 6th July 2021. It was additionally stated that by its letter of 14th September 2021 the chargor in agreement with the borrower amended the said facility agreement, varying its terms to include additional properties as securities for the banking agreed to be extended to the borrower, namely, Land Reference Number 29965 and subdivision Numbers Mainland North/IV/906 and Mainland North/IV/908 and the seven properties all belonging to the charger were charged and registered. It was stated that the borrower approached the bank to restructure the facility which resulted to the aggregate of Kshs. 139,600,000 and a floating debenture of all the assets was registered. It was stated that the facilities were never serviced on time. Consequently, the bank issued several notices including a 90 days' statutory notice dated 17th January 2023 and the amounts have remained unserviced.

Analysis and Determination

14. Both the preliminary objection and the application were disposed of by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. I find the following issues for determination;
 - a. Whether the preliminary objection is merited;
 - b. Whether the injunction orders sought are merited.



15. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

16. The Court went further to note that: -

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

17. Similarly, the Court in the case *Oraro v Mbaja* [2005] KLR 141, on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

18. I have gone through the grounds raised in the preliminary objection. The same are not points of law but facts that invite evidence to ascertain. Therefore, the preliminary objection herein cannot be sustained as the same does not meet the threshold discussed above.

19. The law governing the granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which 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. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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 wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”



20. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- “Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
21. The Court of Appeal in the case of *Nguruman Limited Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:
- “...these are the three pillars on which rest 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... 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 are 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.”
22. The Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a *prima facie* case 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”.
23. The Applicant’s case anchors itself on that he stands to lose the suit properties should the advertisement and sale go through. The Respondent on the other hand maintains that the facilities remain unserved and despite several notices and reminders, the applicant has not made any attempts to settle the same.
24. From the material placed before me, there is no valuation presented in respect of the suit properties so that I am in a position to ascertain who stands to suffer irreparable loss. In the premise, I am guided by the balance of convenience. I am of the view that the balance of convenience favors the applicant. In any case, there is no loss that would be suffered by the Respondent that cannot be compensated by way of costs.
25. I therefore grant the application dated 11th August 2023 in terms of prayers nos 3 and 4 as prayed. Prayer no 5 is granted only to the extent that the 1st defendant shall supply to the plaintiff within 21 days of this order the account statements in respect of the plaintiff’s indebtedness dating from the date of the earliest charge document, and all charge documents and variations thereof. The costs of the present application shall be in the cause. The parties shall comply with the *Civil Procedure Rules*, the plaintiff within the first 30 days from today and the defendant within the 30 days following after that period and this suit shall be listed on 24/9/24 for fixing of a mutually convenient hearing date.



**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 29TH DAY OF MAY 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI

