



Mbugua v Standard Chartered Bank Ltd (Employment and Labour Relations Cause E298 of 2022) [2024] KEELRC 2011 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 2011 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E298 OF 2022**

K OCHARO, J

JUNE 28, 2024

BETWEEN

DOUGLAS MUIRURI MBUGUA CLAIMANT

AND

STANDARD CHARTERED BANK LTD RESPONDENT

RULING

Background

1. The Applicant filed a Notice of Motion dated 13th June 2023 brought under Certificate of Urgency seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with land parcel known as Juja/Kalimoni Block 45/9 – Baraka Estate, Kenya Road.
 - d. Costs be provided for.
2. The Respondent opposed the Notice of Motion through a Replying Affidavit sworn on 10th July 2023.



3. With the leave of the Court, the Claimant/Applicant filed a Supplementary Affidavit sworn on 1st August 2023, and submissions dated 31st July 2023 in support of their Notice of Motion. The Respondent filed submissions dated 19th September 2023.
4. The grounds upon which the Applicant premises his application are that he was wrongfully terminated from employment on 10th March 2022, but by the time of termination the Claimant/Applicant was servicing a staff loan, a further staff loan and a credit card advance, which were all subject to the staff interest rates. After the termination of employment, the Respondent purported to subject his loans to the market prevailing interest rates, after they took the position that the staff interest rate was no longer applicable to his facilities. The claimant/Applicant sought the assistance of the Court and obtained an injunction preventing the Respondent from levying any other charges or interest on his loan facilities save at the staff interest rate of 6% per annum, pending the hearing and determination of the suit. The Claimant/Applicant continued faithfully servicing his loan facilities as ordered by the Court at staff rates from the date of the ruling.
5. The Claimant/Applicant complains that he was served by the Respondent with a 45-day notice for redemption of his security, failure to which the subject property was to be auctioned on 15th August 2023, but the notice and process of redeeming the subject property is erroneous as it is expressed to be anchored on an alleged mortgage balance of Kshs. 10,834,654.03, rather than the actual mortgage balance of Kshs. 7,628,730 per the statement obtained from the Respondent's Thika Branch. This discrepancy was brought to the attention of the Respondent and the Regulator, but attracted no positive action or any action at all from them.
6. It is the Claimant/Applicant's contention that if the orders sought are not granted, the Respondent will dispose of the subject property causing him to suffer irreparable loss, emanating from the exercise of the statutory power of sale by the Respondent marred by numerous irregularities. The loss that shall be suffered by the Claimant/Applicant in the event the sale goes ahead will not be capable of compensation by way of damages, since the subject property is the Claimant/Applicant's matrimonial property.
7. The Claimant/Applicant concludes that he has met the conditions necessary for grant of the orders sought. He has sufficiently; established a prima facie case; demonstrated that he will suffer irreparable loss if the orders sought are not granted; demonstrated that the Respondent will not suffer any prejudice if the orders are granted; and showing that the balance of convenience tilts in his favour.
8. In response to the application, the Respondent confirms that the Court did indeed render itself on the issue of the interest rate applicable to the Claimant/Applicant's loan facilities in its ruling delivered on 9th February 2023. It enjoined the Respondent from applying interest on outstanding staff loans in excess of the preferential staff rates of 6%.
9. The Respondent argued that the Ruling that related to the injunction application dated 10th May 2022 filed by the Claimant/Applicant, didn't have a retrospective effect. The staff interest rate of 6% could only apply post the date of the ruling. From the date of termination of the Claimant's employment to the date of the ruling interest at commercial rates had rightfully applied. Following the Court Order, the Claimant/Applicant's expected monthly instalment to cover the mortgage loan is Kshs. 60,226.91 (inclusive of insurance) while the expected monthly instalment for his personal loan is Kshs. 53,540.38.
10. The Respondent postulates that the Claimant/Applicant has failed to dutifully make his monthly repayment instalments. Further, he has failed to pay any amounts towards the accumulated outstanding loan facilities prior to the ruling of 9th February 2023. Instead, he services the loans as he deems fit.



11. The Respondent contends that it not true that the Ruling of 9th February 2023 prevented the bank from imposing any bank charges on the Claimant/Applicant's loan accounts. As at 5th July 2023, the Claimant/Applicant's outstanding mortgage and personal loan amounts stood at Kshs. 8,105,872.51 and 2,683,764.35, respectively. To illustrate the Claimant/Applicant's failure to consistently and faithfully service his outstanding loans, the Respondent points out that in March 2023, the Claimant/Applicant only remitted Kshs. 12,000/- towards his personal loan, against an expected monthly instalment of Kshs. 53,540.38. In June 2023, he only remitted Kshs. 10,000/- towards repayment of the same loan. For the mortgage loan, against an expected monthly payment of Kshs. 60,221.91, the Claimant/Applicant remitted Kshs. 59,377/- in March 2023, Kshs. 30,000/- in April 2023, skipped May 2023 entirely and paid Kshs. 59,377/- for June and July 2023.
12. The Claimant/Applicant's claim that his total obligations to the Respondent bank amount to Kshs. 7,623,730 is false since his actual outstanding balance is Kshs. 10,789,639.86. However, it should be noted that counter to the assertion, the bank statement that he has produced shows the gross loan balance as of 12th June 2023 as Kshs. 8,127,760.78. The Respondent states that it moved to exercise its statutory power of sale on the Claimant/Applicant's security, property Title Number Juja/Kalimoni Block 45/8, Baraka Estate Kenyatta Road, due to his failure to meet his obligations. They issued the Claimant/Applicant with ant a letter dated 17th June 2023 containing the 45-day notice and also issued the Claimant/Applicant a redemption notice. This was in accord with the charger-chargee contractual relationship between them.
13. The Court is reminded that it cannot re-write the contract. The Applicant should not be allowed to use the court process to sidestep his obligations arising from the facilities lent to him by the Respondent. Additionally, the Claimant is in contempt of the orders of the Court issued on 9th February 2023. He has not come to court with clean hands. He is therefore undeserving of the orders sought.
14. Finally, the Respondent argues that the present application is *res judicata* as it is substantially the same, word for word, as the application dated 10th May 2022.
15. The Applicant counters the matters raised by the Respondent. He asserts that according to a communication from his Relationship Manager, his monthly repayment instalment was Kshs. 59,377/- for the mortgage loan. The upward review thereof to Kshs.60,221.91 was not communicated to him.
16. The Claimant/Applicant states that he has made all efforts to continue servicing the loans by seeking facilities with other banks to enable him to repay the facilities with the Respondent, however, his efforts have been thwarted as the Respondent has caused him to be listed as a defaulter with the Credit Reference Bureau.
17. The Applicant contended further that before resorting to exercising the Chargor's statutory power of sale, the Respondent did not explore all other options such as restructuring his loans. When taking the facilities, he had a legitimate expectation that he would service them through his salary, however, the unfair termination of his employment defeated the expectation.

Analysis and Determination

18. I have considered the Notice of Motion dated 13th February 2023, the Grounds thereof, the Supporting Affidavit sworn on 13th February 2023, the Respondent's Replying Affidavit sworn on 10th July 2023, the respective submissions filed by both parties and authorities relied on. I return that the issues for determination are as follows:



- a. Whether the Court should grant the orders sought in the Notice of Motion dated 13th February 2023;
- b. Whether the present application is *res judicata*.

Whether the Court should grant the orders sought in the Notice of Motion dated 13th February 2023

19. The instant application seeks an injunction and is brought under Order 40 Rule 7 of the [Civil Procedure Rules](#) 2010; Section 12 of the [Employment Act](#); Article 53 of the [Constitution](#) of Kenya; Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), and all other enabling provisions of law.
20. The law on injunctions is well established. The threshold for the grant of injunctions is set out in the locus classicus of *Giella v Cassman Brown & Company Limited* 1973] E A 358, where the court expressed itself as follows: -

First, 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. [emphasis mine]
21. The first condition that an Applicant must meet is, therefore, to establish that they have a prima facie case before an order of injunction can be issued.
22. In [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#), the Honourable Court of Appeal defined a prima facie case with a probability of success. It stated:

“A prima facie case in a civil application includes but is 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 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.”
23. However, this Court must be extremely cautious not to appear as adjudging the main suit between parties in the process of considering whether a *prima facie* case has been established as was stated in [Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others](#) [2015] eKLR while citing *Habib Bank Ag Zurich v Eugene Marion Yakub*, Ca No. 43 Of 1982 and In *National Bank Of Kenya v Duncan Owour Shakali & Another*, Ca No. 9 Of 1997.
24. To benefit from the equitable relief of an injunction, the applicant must make full candid disclosure of all material facts as was held in the case of [Kenleb Cons Ltd v New Gatitu Service Station Ltd & another](#) [1990] K.L.R 557] where Bosire, J [as he then was] held that”

“To succeed in an application for an 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 also show he has a right legal or equitable, which requires protection by injunction.”
25. In the present application, the Claimant/Applicant admits that he was under an obligation to make monthly repayment instalments of Kshs. 59,377/- on his mortgage facility. He alleges that he dutifully did so. However, the attached Mpesa statement, the Claimant/Applicant’s exhibit marked “DMM1” attached to the Affidavit in Support of Motion, clearly shows that the Claimant/Applicant paid Kshs. 59,377/- on 27th March 2023; Kshs. 12,000/- on 31st March 2023; Kshs. 30,000/- on 29th April 2023;



KShs. 59,377/- on 5th May 2023; and KShs. 5,300/- on 12th June 2023. It is clear, therefore, that in several months, he remitted far less than the expected monthly instalment. This is consistent with the Respondent's narrative that the Claimant has defaulted in paying back his facilities, but runs counter to his assertion that he has been dutiful in making the monthly repayment.

26. Additionally, the Court notes that the Claimant deliberately didn't disclose the state of the personal loan. He didn't tender any evidence as regards payments towards liquidating the same. The Loan Statement, produced as exhibit "DMM3" appears to relate only to the Claimant/Applicant's mortgage facility. He contends not, that he has been repaying the loan. In my view, this amounts to concealing material facts from the court. I affirm that he who comes to equity must come with clean hands. This disentitles him from being availed a favourable exercise of this Court's discretion.
27. The controversy in the instant application relates to the outstanding amount on the Claimant's facilities. Regrettably, none of the parties addressed me on this. It is trite law that a dispute on amounts cannot be a basis for granting an injunction against a charger moving to exercise its statutory power of sale. In the case of *Pricillah Krobought Grant v Kenya Commercial Finance Co. Ltd and 2 others*, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 [108/95 V.R.], the Court stated;

"Finally, it will bear repetition, we think if we were to state that a court does normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage- see *Barmel Kanji Shah & another v Shah Depar Devji* [1965] E. A 91, 32 Halsbry's Laws of England [14th Edition] paragraph 725 and *Uburu Highways Development Ltd v Central Bank of Kenya and 2 Others*, Civil Application No. Nai. 140 of 1995 [unreported]....."

28. Having made the above finding, I hold that it is unnecessary to delve into the remaining two conditions set out in the *Giella vs Cassman Brown* case. This aligns with the Court of Appeal decision in *Nguruman Limited vs- Jan Blonde Neilsen and 2 Others* [2014] eKLR. The Applicant's Prayers (c) is therefore denied.

READ, DELIVERED AND SIGNED THIS 28TH DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Kariuki for the Claimant

Mr. Sewe for Bongo for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*,



to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA
JUDGE

